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DOES AN ASSET MANAGER HAVE STANDING UNDER THE FEDERAL SECURITIES LAWS?

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INTRODUCTION

In 1995, amidst much fanfare and after millions of dollars in campaign contributions, Congress enacted the first substantive amendments to the two cornerstone acts of the federal securities laws since they were passed in the 1930s.[1] Entitled the Private Securities Litigation Reform Act of 1995 (the "PSLRA"),[2] one of its purposes is to attract large investors to serve as class representative and fill the newly created position of "lead plaintiff,"[3] whose job it is to choose lead counsel and fulfill the other responsibilities of a class representative.[4] The theory behind the lead plaintiff provision is that a plaintiff with a greater economic stake in the litigation would more effectively monitor and control lead counsel.[5]

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[1] *See* Securities Act of 1933, 15 U.S.C. §§ 77a–77bbbb (2000) [hereinafter the Securities Act]; Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78mm (2000) [hereinafter the Exchange Act]. The Securities Act was enacted in 1933 with the primary intent of regulating stock offerings. Congress enacted the Exchange Act in 1934 with the primary intent of regulating stock exchanges. The Exchange Act established the Securities and Exchange Commission to oversee the implementation of the two acts.

[2] Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.). The PSLRA is codified mainly in two new sections in the Securities and Exchange Acts. The PSLRA established section 27 of the Securities Act and section 21D of the Exchange Act.

[3] The only task specifically assigned to the lead plaintiff by statute is to choose lead counsel. 15 U.S.C. §§ 77z-1(a)(3)(B)(v), 78u-4(a)(3)(B)(v). A "lead plaintiff" and a "class representative" are not synonymous, as there can be only one lead plaintiff (which can be comprised of a group) and many more class representatives named in a complaint. *In re* Initial Pub. Offering Sec. Litig., 214 F.R.D. 117, 123 (S.D.N.Y. 2002). Usually additional class representatives are named to ensure that the class has standing to pursue all claims.

[4] *See* 15 U.S.C. §§ 77z-1(a)(3)(B), 78u-4(a)(3)(B).

[5] *See In re* Enron Corp. Sec. Litig., 206 F.R.D. 427, 442 (S.D. Tex. 2002).

What was left unclear in the PSLRA was exactly who would qualify as the large-investor plaintiff.[6] Many people, and institutions, delegate responsibility for managing their money to asset managers or investment advisors.[7] While title to the account remains in the name of the owner, the decisions concerning which securities to buy and sell and the actual execution of the orders is handled by the asset manager. Further complicating matters, an asset manager will sometimes have purchased the stock for the accounts of multiple clients, so that an issue arises as to whether the plaintiff is one person (the asset manager) or a group of persons (the asset manager's clients).

This Article will discuss the rationale behind including or excluding asset managers as lead plaintiffs or class representatives and the various approaches taken by courts in dealing with the issue.

I. THE PSLRA WAS INTENDED TO ENCOURAGE INSTITUTIONAL PLAINTIFFS TO STEP FORWARD

The legislative history of the PSLRA demonstrates that Congress intended to encourage large investors and institutions to serve as lead plaintiff.[8] As the Statement of Managers in the

[6] The PSLRA is also conspicuously silent regarding how to determine who has the largest financial interest. Courts look to a number of factors, including the number of shares purchased, the number of net shares purchased, total net funds expended during the class period on the securities, and approximate losses. *See* Perkins v. Waste Mgmt., Inc. (*In re* Waste Mgmt., Inc. Sec. Litig.), 128 F. Supp. 2d 401, 409 (S.D. Tex. 2000); Laney v. Landry's Seafood Rests., Inc. (*In re* Landry's Seafood Rest., Inc. Sec. Litig.), No. H-99-1948, 2000 U.S. Dist. LEXIS 7005, at *5 n.3 (S.D. Tex. Mar. 30, 2000); *In re* Nice Sys. Sec. Litig., 188 F.R.D. 206, 217 (D.N.J. 1999); *In re* Olsten Corp. Sec. Litig., 3 F. Supp. 2d 286, 295 (E.D.N.Y. 1998); Lax v. First Merchs. Acceptance Corp., No. 97-C-2715, 1997 WL 461036, at *5 (N.D. Ill. Aug. 11, 1997).

[7] Asset managers and investment advisors will be referred to as "asset managers" for the sake of brevity.

[8] *See In re Enron Corp. Sec. Litig.*, 206 F.R.D. at 442 (noting that one purpose of the PSLRA is to encourage institutional investors to serve as lead plaintiff); Bowman v. Legato Sys., Inc., 195 F.R.D. 655, 657 (N.D. Cal. 2000) ("[The] large institutional investor with significant monetary losses . . . is exactly the type of lead plaintiff envisioned by Congress . . . ."); *In re Waste Mgmt, Inc. Sec. Litig.*, 128 F. Supp. 2d at 411 (stating that one purpose of PSLRA is to encourage institutional investors to serve as lead plaintiff); *In re Landry's Seafood Rest., Inc. Sec. Litig.*, 2000 U.S. Dist. LEXIS 7005, at *9 (noting that the PSLRA expresses preference for large institutional investors to act as lead plaintiff); Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d 1146, 1152 (N.D. Cal. 1999) ("[F]ramers of the Reform Act envisioned that established institutional investors would take control of securities

Joint Explanatory Statement on the Committee of Conference for the PSLRA stated:

> [The PSLRA] protects investors who join class actions against lawyer-driven lawsuits by giving control of the litigation to lead plaintiffs with substantial holdings of the securities of the issuer . . . .
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> . . . These provisions are intended to increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel.[9]
>
> . . . .
>
> . . . The Conference Committee seeks to increase the likelihood that institutional investors will serve as lead plaintiffs by requiring courts to presume that the member of the purported class with the largest financial stake in the relief sought is the "most adequate plaintiff."
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> . . . .
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> . . . Institutional investors and other class members with large amounts at stake will represent the interests of the plaintiff class more effectively than class members with small amounts at stake.[10]

Similarly, the Senate report on the PSLRA states: "The Committee believes that increasing the role of institutional investors in class actions will ultimately benefit the class and assist the courts."[11] An influential law review article cited

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litigation."); Sakhrani v. Brightpoint, Inc., 78 F. Supp. 2d 845, 850 (S.D. Ind. 1999) (commenting that the PSLRA was enacted with the "explicit hope" that institutional investors would step forward as lead plaintiffs); Gluck v. Cellstar Corp., 976 F. Supp. 542, 548 (N.D. Tex. 1997) (stating that the PSLRA expresses preference for large institutional investors to act as lead plaintiff).

[9] H.R. REP. NO. 104-369, at 32 (1995).

[10] *Id.* at 34.

[11] COMM. ON BANKING, HOUS. & URBAN AFFAIRS, PRIVATE SEC. LITIG. REFORM ACT OF 1995, S. REP. NO. 104-98, at 11 (1995); *see also In re* Razorfish, Inc. Sec. Litig., 143 F. Supp. 2d 304, 307 (S.D.N.Y. 2001) (noting that the PSLRA was designed to attract institutions or other sophisticated investors to act as lead plaintiff); *In re* Party City Sec. Litig., 189 F.R.D. 91, 104 (D.N.J. 1999) ("[T]he PSLRA 'ensure[s] that institutional plaintiffs with expertise in the securities market and real financial interests in the integrity of the market would control the litigation, not lawyers.'") (alteration in original) (quoting *In re* Donnkenny Inc. Sec. Litig., 171 F.R.D. 156, 157 (S.D.N.Y. 1997)); H.R. REP. NO. 104-369, at 32 ("These provisions are intended to encourage the most capable representatives of the plaintiff class to participate in class action litigation and to exercise supervision and control of the lawyers for the class.").

frequently in the legislative history of the PSLRA makes the same points: "Institutional investors with large stakes in class actions surely are more capable than typical figurehead plaintiffs of effectively monitoring how plaintiffs' attorneys conduct such litigation."[12] The article further states that "[i]nstitutions with the largest stakes in class actions are better situated than plaintiffs' attorneys or courts to protect class members' interests."[13]

The congressional goal in enacting the PSLRA was to encourage investors with a substantial stake in the litigation to serve as lead plaintiff and to provide input to the lawyers serving the class.[14] When analyzing the question under section 10(b) of the Exchange Act, one court has held that "the rule in Blue Chip Stamps [requiring a plaintiff to be a purchaser] is not meant to exclude institutional investors and money managers, but rather should be interpreted broadly to include them as they are often the parties who make investment decisions."[15]

II. PRECEDENT PRIOR TO THE PSLRA

Section 11 of the Securities Act states that "any person acquiring such security" may sue.[16] There is no requirement under the Securities Act that a plaintiff be an "owner" (i.e., beneficial holder) of the security at issue.[17] A plaintiff need merely be a "purchaser" of the security at issue.[18] Standing under the Exchange Act is a somewhat more complicated matter since, until 1995, the right to a private cause of action under section 10(b) of the Exchange Act was a judicially created cause of action not explicitly provided for in the statute.[19] In 1975, the

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[12] Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2095 (1995).

[13] *Id.* at 2121.

[14] *See* Laney v. Landry's Seafood Rests., Inc. (*In re* Landry's Seafood Rest., Inc. Sec. Litig.), No. H-99-1948, 2000 U.S. Dist. LEXIS 7005, at *10–11 (S.D. Tex. Mar. 30, 2000); Ravens v. Iftikar, 174 F.R.D. 651, 661–62 (N.D. Cal. 1997).

[15] Alfaro v. Caprock Comm. Corp., No. 3:00-CV-1613-R, 2000 U.S. Dist. LEXIS 21743, at *7 (N.D. Tex. Dec. 8, 2000).

[16] 15 U.S.C. § 77k(a) (2000).

[17] *See id.*

[18] *Id.*

[19] *See* Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 173 (1994) ("determining the elements of the 10b-5 private liability scheme, has posed difficulty because Congress did not create a private § 10(b) cause

Supreme Court weighed in on the issue of who would have standing under this private cause of action and held that a plaintiff must be a "purchaser[] [or] seller[] of securities" to have standing under section 10(b) of the Exchange Act.[20] Although much ink has been spilled as to a purchaser versus a "holder" of securities (one who buys before a fraud and continues to hold during a fraud) or a non-purchaser (one who doesn't buy during the fraud),[21] there has been very little discussion as to who is actually the purchaser when an asset manager is involved.

The issue as to whether an asset manager, with delegated authority to make investment decisions for its clients, is a purchaser pre-existed the PSLRA. This issue was addressed in cases prior to 1995. In *Monetary Management Group of St. Louis, Inc. v. Kidder, Peabody & Co.*,[22] an asset manager purchased bonds for its client's account and sought to rescind the purchase upon learning the bonds were not marginable as represented.[23] The defendants moved for summary judgment on the grounds that the asset manager was not the real party in interest.[24] The court began its analysis by looking at the express language of section 12(2) of the Securities Act,[25] requiring a plaintiff to be a "purchaser," rather than an "owner," as another provision of the Exchange Act requires.[26] The court held that "the remedial purpose of [section] 12(2) warrants extension of the term purchaser to one who purchases stock in its own name on behalf of another."[27] Finally, the court held that since the client was in privity with the asset manager, any judgment would be res judicata as to the client, as well as to the asset manager.[28]

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of action").

[20] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730–31 (1975).

[21] The issue of who is actually a "purchaser" dates back to *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952), which held that stockholders who already owned the stock and who received fraudulent mailings from the company did not have standing under SEC Rule 10b-5. *Id.* at 462–63. The Supreme Court, in *Blue Chip Stamps*, adopted the "Birnbaum Rule." 421 U.S. at 749.

[22] 604 F. Supp. 764 (E.D. Mo. 1985).

[23] *Id.* at 765–66.

[24] *Id.* at 766.

[25] Section 12(a)(2) of the Securities Act was known as section 12(2) prior to 1995. SECURITIES PRIMARY LAW SOURCEBOOK E-324 (A. A. Sommer, Jr. ed., 2005).

[26] *See* 15 U.S.C. § 77l (2000); *cf.* 15 U.S.C. § 78p(b) (2000) (requiring a plaintiff to be an "owner" of the stock in question under section 16(b) to sue to recover short swing profits).

[27] *Monetary Mgmt. Group of St. Louis, Inc.*, 604 F.Supp. at 767.

[28] *Id.*

A few years after *Monetary Management Group* was decided, the same issue arose again when a wife, who had been given stock by her husband (purchased solely with the husband's money), sued for securities fraud.[29] The defendants moved to dismiss, alleging that the wife was not a purchaser and thus had no standing to sue.[30] The court held that the "[d]efendant's emphasis on the source of the funds and the name on the account, however, [was] misplaced and did not resolve this issue. The actual source of funds [was] not determinative of 10b-5 standing."[31] The court further held that the determinative factor for standing was the wife's level of involvement in the purchase decision, and some involvement in the decision making, even if de minimis, was required to qualify as a purchaser.[32] "Investors who only passively participate in an investment by transferring full authority to make purchase decisions to an agent are not purchasers."[33] However, investors do not have to actually perform the mechanics of the sale to be a purchaser, and the court pointed out that trust beneficiaries can qualify as purchasers, because the purchase requires their approval.[34]

In 1989, a magistrate judge in the Southern District of New York held that an asset manager had standing to sue as a "real party in interest" under the Securities Act.[35] The court gave the matter very little discussion, merely holding that the test was whether the defendants would be afforded the protection of res judicata when the case was over regardless of whether the asset manager was acting for its own account or its clients' accounts when it made the purchase.[36]

These decisions reflect adherence to the strict language of

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[29] Medline Indus., Inc. Employee Profit Sharing & Ret. Trust v. Blunt, Ellis & Loewi, Inc., No. 89 C 4851, 1993 WL 13436, at *1 (N.D. Ill. Jan. 21, 1993).

[30] *Id.* at *2.

[31] *Id.*

[32] *Id.*

[33] *Id.*; *see also* Davidson v. Belcor, Inc., 933 F.2d 603, 607–08 (7th Cir. 1991) (noting that a wife, who only had an interest in the proceeds of a sale of stock as the result of a divorce agreement, was not a purchaser or seller since she had no input into the sale of stock because her husband had sole authority to make decisions concerning shares).

[34] *Medline Indus.*, 1993 WL 13436, at *2; *see also* Fin. Programs, Inc. v. Foss Fin.., Inc., No. 72-848, 1973 WL 458 (D. Or. June 6, 1973) (holding that a broker who merely acts as a conduit has no standing as a purchaser).

[35] Lemanik, S.A. v. McKinley Allsopp, Inc., 125 F.R.D. 602, 604, 607 (S.D.N.Y. 1989).

[36] *Id.* at 607.

the statute in the case of sections 11 or 12 ("any person acquiring")[37] or rule in the case of Rule 10b-5 ("in connection with purchase or sale"),[38] as well as the prudent policy determination that an asset manager advisor is likely to be a good class representative. These cases also demonstrate the practical consideration that if the investment advisor is found to lack standing, perhaps no one has standing.

III. POST-PSLRA DECISIONS

A. *Cases Holding Asset Managers Can Be Lead Plaintiffs or Class Representatives*

An asset manager who purchases for a client's account often has some, if not all, of the attributes viewed as desirable in a lead plaintiff: sophistication, wealth, experience, and incentive to achieve a large recovery. Although the purchase is not made with the manager's own money, the asset manager's reputation and credibility are on the line with the client, and an asset manager has every incentive to achieve a recovery and get back in its client's good graces. In addition, it is almost impossible to get in a position to manage someone else's money without having achieved a certain level of sophistication and experience in financial matters.

In *Ezra Charitable Trust v. Rent-Way, Inc.*[39] ("*Rent-Way I*"), the court held that barring such desirable class representatives would be a bad idea:

> The restriction FSBA urges us to adopt would, in our view, eliminate a number of potentially highly capable lead plaintiffs based on an unduly narrow interpretation of "financial interest" under the PSLRA. In this instance, we are satisfied that Cramer has the requisite experience and incentive to serve as lead plaintiff. Cramer has a significant financial interest in attempting to recover the $10.1 million allegedly lost by its clients in order to maintain their goodwill and future business. Thus, Cramer's incentives to vigorously litigate this case include business considerations not shared by the non-management proposed lead plaintiffs.[40]

[37] 15 U.S.C. § 77k–l (2000).
[38] 15 U.S.C. § 78j (2000).
[39] 136 F. Supp. 2d 435 (W.D. Pa. 2001) [hereinafter *Rent-Way I*].
[40] *Id.* at 443; *see also In re* Royal Ahold N.V. Sec. & ERISA Litig., 219 F.R.D.

The *Rent-Way I* court continued, holding that "eliminating an entire class of potential lead plaintiffs that may often be strongly aligned with plaintiff classes as well as competent to adequately oversee the efforts of counsel would not best serve the purposes of the [PSLRA]."[41] The court appointed the asset manager as lead plaintiff, concluding that "Cramer's financial interest is so aligned with its clients' financial interests that the two are synonymous."[42]

The opinion in *Rent-Way I* presages every argument and issue raised concerning asset managers over the following three years. First, the court noted, almost as an aside, that the asset manager had submitted a declaration stating it was attorney-in-fact for its clients and was authorized to bring suit on their behalf.[43] Although reliance on this fact was later disavowed by the same court in *In re Rent-Way Securities Litigation*[44] ("*Rent-Way II*"), this statement would play a prominent role in two decisions denying an asset manager the right to sue on its clients' behalf.[45] The court also noted that the asset manager made an independent determination of which stocks to buy and sell for its clients, and "[b]ecause of this unrestricted decision-making authority, we conclude that Cramer is a 'purchaser' under the federal securities laws with standing to sue in its own name."[46]

343, 350–51 (D. Md. 2003) (stating that an asset manager is a sophisticated institution with resources to support "a long and complex litigation"); Takeda v. Turbodyne Tech, Inc., 67 F. Supp. 2d 1129, 1136 n.18 (C.D. Cal. 1999) (noting that an investment advisor's inclusion as lead plaintiff "will add sophistication to the group's oversight of counsel, and will further the goals of the Reform Act"); Gluck v. Cellstar Corp., 976 F. Supp. 542, 546 (N.D. Tex. 1997) (stating that an institutional plaintiff is accustomed to acting in the role of fiduciary and its experience in investing and financial matters will benefit the class).

[41] *Rent-Way I*, 136 F. Supp. 2d at 444. The *Rent-Way I* court noted that one movant relied on *Competitive Assocs., Inc. v. Int'l Health Sci., Inc.*, No. Civ. A. 72-1848, 1972 WL 350 (S.D.N.Y. Oct. 10, 1972), for the proposition that an advisor who acquires securities for a client is not a "purchaser." *Rent-Way I*, 136 F. Supp. 2d at 442. However, in *Competitive Associates.*, the advisor didn't make the purchases in question, which were made by other broker-dealers. 1972 WL 350, at *1. The advisor's claim was based on a claim that its client had suffered a loss of assets, and therefore, the advisor's asset-based management fee would be lower. *Id.* at *1–3.

[42] *Rent-Way I*, 136 F. Supp. 2d at 444.

[43] *Id.* at 441.

[44] 218 F.R.D. 101 (W.D. Pa. 2003) [hereinafter *Rent-Way II*].

[45] *See infra* notes 72–83 and accompanying text.

[46] *Rent-Way I*, 136 F. Supp. 2d at 442; *see also In re* Northwestern Corp. Sec. Litig., 299 F. Supp. 2d 997, 1006–07 (D.S.D. 2003) (holding that a manager had complete discretion and a significant financial and business interest in attempting a

The court also noted the asset manager "has a significant financial interest in attempting to recover the $10.1 million allegedly lost by its clients in order to maintain their goodwill and future business."[47] Finally, the court rejected the contention that a judgment against the asset manager would not afford defendants the protection of res judicata against the client, holding that the asset manager was in privity with the client and that res judicata would apply as to the client.[48] One of these issues—attorney-in-fact, ability to independently choose which stocks to buy, financial interest and goodwill, or res judicata—would play a role in every decision to follow.

The *Rent-Way I* court revisited some of these issues on the class certification decision in *Rent-Way II*.[49] Class discovery had revealed that the asset manager was not, in fact, empowered to act as attorney-in-fact for its clients.[50] The court held the power to act as attorney-in-fact was not a "controlling factor."[51] The court stated that its prior decision "was premised not on the existence of such [attorney-in-fact] language but on the undisputed authority Cramer possessed under the putative agreement to 'independently determine[ ] which securities to purchase for its clients' accounts.'"[52]

Other courts have taken varying approaches to the question of standing of asset managers. Some courts allow asset managers to act as lead plaintiffs with little discussion of the issue, while nevertheless acknowledging that it is an issue.[53]

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recovery and therefore had standing); *cf. In re* Caremark Int'l Sec. Litig., No. 94 C 4751, 1996 WL 351182, at *6 (N.D. Ill. June 24, 1996) (holding that a beneficial owner who ceded all decision-making authority to an asset manager is not certified as a class representative because it is not "typical"). When the decision-making authority of the asset manager is not unrestricted, the client may have authority to sue directly. *See In re* Neopharm, Inc. Sec. Litig., No. 02 C 2976, 2004 U.S. Dist. LEXIS 16287, at *13 (N.D. Ill. Aug. 17, 2004).

[47] *Rent-Way I*, 136 F. Supp. 2d at 443.

[48] *Id.*

[49] *Rent-Way II*, 218 F.R.D. 101 (W.D. Pa. 2003).

[50] *Id.* at 106–07.

[51] *Id.* at 107–08.

[52] *Id.* (alteration in original) (quoting *Rent-Way I*, 136 F. Supp. 2d. at 442). "Thus, our inquiry turns not on the presence or absence of specific 'attorney-in-fact' language in the agreements, but on the level of discretion exercised by Cramer in the day-to-day purchase of securities for its clients." *Id.* at 108.

[53] *See In re* DaimlerChrysler AG Sec. Litig., 216 F.R.D. 291, 298–99 (D. Del. 2003) (acknowledging an issue existed but certifying the asset manager); *In re* Razorfish, Inc. Sec. Litig., 143 F. Supp. 2d 304, 311 (S.D.N.Y. 2001) (appointing an asset manager as lead plaintiff). In *Local 144 Nursing Home Pension Fund v.*

One approach is to ask whether the asset manager has been granted explicit authority to sue on behalf of its clients.[54] One court has held that if an asset manager has been granted authority as attorney-in-fact to sue on behalf of its clients, then the asset manager has standing.[55] The court in *Weinberg v. Atlas Air Worldwide Holdings, Inc.*, noted that mere authority to purchase stock will not automatically confer standing to sue, but relied on *Rent-Way I* in finding that an explicit grant of authority as attorney-in-fact means an asset manager is "considered the 'purchaser' under the federal securities laws with standing to sue in its own name."[56] A New Jersey court also held an asset manager, who had complete investment authority and was attorney-in-fact for the client, had standing to sue under the Exchange Act.[57] In so doing, the court distinguished a previous case before that court[58] (in which it declined to appoint an asset manager) on the basis that there was no evidence in the previous case that the asset manager was authorized to act on behalf of its clients.[59] One of the earliest decisions to treat the issue noted that the manager had "'full and complete discretion and authority to manage the securities of its clients, including the authority to purchase and sell'. . . . Thus [it] has presented sufficient evidence that it actually purchased the securities in question, and had full authority to do so."[60]

Honeywell International, Inc., No. 00-3605, 2000 WL 33173017 (D.N.J. Nov. 16, 2000), one of the lead plaintiffs was Congress Asset Management, but the opinion did not state whether the firm was making purchases for its own or its clients' accounts or discuss the asset manager/standing issue.

[54] *See* Weinberg v. Atlas Air Worldwide Holdings, Inc., 216 F.R.D. 248, 255 (S.D.N.Y. 2003).

[55] *See id.*; *see also In re* Goodyear Tire & Rubber Co. Sec. Litig., No. 5:03CV2166, 2004 U.S. Dist. LEXIS 27043, at *22–26, (N.D. Ohio May 12, 2004).

[56] *Weinberg*, 216 F.R.D. at 255 (citing *Rent-Way I*, 136 F. Supp. 2d at 442); *see also In re* Constar Int'l Inc. Sec Litig., No 03-5020 (E.D. Pa. 2004) (appointing as co-lead plaintiffs an individual and an asset manager that had "implicit, but not explicit authority to institute suit under its customer agreement" because it "appears to be in the best economic interests of the plaintiff class and provides a good resolution of the issues presented by" the competing lead plaintiff motions).

[57] Roth v. Knight Trading Group, Inc., 228 F. Supp. 2d 524, 529–31 (D.N.J. 2002).

[58] Smith v. Suprema Specialties, Inc., 206 F. Supp. 2d 627 (D.N.J. 2002); *see infra* notes 76–83 and accompanying text.

[59] *Roth*, 228 F. Supp. 2d at 529.

[60] Alfaro v. Caprock Comm. Corp., No. 3:00-CV-1613-R, 2000 U.S. Dist. LEXIS 21743, at *7 (N.D. Tex. Dec. 8, 2000) (first alteration in original); *see also* Sofran v. Labranche & Co., 220 F.R.D. 398, 403–04 (S.D.N.Y. 2004) (rejecting the argument

Another approach is to focus not on an explicit grant of authority from the client, but on the asset manager's demonstrated interest in pursuing the case.[61] In the case of *Newman v. Eagle Building Technologies*, two members of a proposed lead plaintiff group were banks that had "bought Eagle securities on behalf of clients as opposed to buying the securities for themselves."[62] Relying in part on *Rent-Way I*, the court held that "[t]he fact that the banks bought the securities on behalf of clients does not mean that the banks are inadequate lead plaintiffs."[63] The court continued:

> There is sufficient evidence in the record that the banks do . . . take this litigation seriously. The banks have knowingly decided to participate in the prosecution of this action, have declared their intent to actively participate in the litigation, and have agreed to provide testimony at a deposition or at a trial.[64]

The *Newman* court did not discuss whether there had been an explicit grant of authority, choosing to focus instead, as the *Rent-Way I* court did, on issues of demonstrable interest and adequacy.[65] The entire discussion of the issue, however, consists of a single paragraph.

One of the more recent opinions touches on all the factors discussed above. In *Casden v. HPL Technologies, Inc.*,[66] the court focused on the sophistication and investment discretion of the asset manager.[67] Three parties moved for appointment as lead plaintiff, one of whom was an asset manager who purchased the shares for the accounts of five clients.[68] Record title was held by the asset manager and beneficial ownership was held by the client.[69] The court noted the experience and sophistication of the asset manager in investment matters and also noted that it had served as lead plaintiff in four other actions.[70] "Thus, it is

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that there was no evidence of actual authority to sue on behalf of clients because Congress expressed a preference "for having institutional investors as lead plaintiffs").

[61] Newman v. Eagle Bldg. Tech., 209 F.R.D. 499, 506 (S.D. Fla. 2002).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 504–06.

[66] No. C-02-3510 VRW, 2003 U.S. Dist. LEXIS 19606 (N.D. Cal. Sept. 29, 2003).

[67] *Id.* at *23–25, *27.

[68] *Id.* at *9.

[69] *Id.* at *21–22.

[70] *Id.* at *24–25.

apparent that Fuller & Thaler has both professional experience and sophistication in the realms of securities and securities litigation."[71] The court discussed the issue of record versus beneficial ownership and concluded that "despite its lack of beneficial ownership, Fuller & Thaler retains a great deal of control over the securities it purchased. It has 'full and complete investment discretion and decision-making authority with respect to the securities it purchases for its clients' accounts.'"[72] Finally, the court held that the asset manager qualified as the real party interest in the action, because it actually consummated the purchase of the securities and made the actual investment decisions.[73]

B. Courts Holding Asset Managers Can't Act as Lead Plaintiffs

Courts that deny asset managers standing to sue will often focus on the literal standing of the plaintiff. Noting that the asset manager did not purchase the stock with its own funds but instead with its clients' funds, a court in the Southern District of New York held that the fact that the asset manager was not the legal purchaser of the stock precluded it from serving as a plaintiff.[74] In *In re Turkcell Iletisim Hizmetler, A.S. Securities Litigation*, the court relied on the finding in *Rent-Way I* that the asset manager was attorney-in-fact for the investors in reaching its holding, and also cited to *Smith v. Suprema Specialties, Inc.* (which relied on *Rent-Way I* as well).[75] For the *Turkcell* court, "[t]he fact that BPI was not the legal purchaser of Turkcell stock

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[71] *Id.* at *25.

[72] *Id.* at *27 (quoting a declaration by the asset manager).

[73] *Id.* at *31.

[74] *In re* Turkcell Iletisim Hizmetler, A.S. Sec. Litig., 209 F.R.D. 353, 358 (S.D.N.Y. 2002). One earlier case rejected an investment advisor as a lead plaintiff, but the fact that the proposed lead plaintiff did not purchase for its own account was only one of the reasons why the court rejected it. In *In re* Bank One Shareholders Class Actions, 96 F. Supp. 2d 780 (N.D. Ill. 2000), the proposed lead plaintiff was a day-trader and a short-seller, in addition to being an asset manager. *Id.* at 784. The court noted:

> In addition to that trading pattern, of course Thales is not simply a buyer for its own account, standing instead in the place of whatever number of investors are participants in its managed fund. Taken all in all, this Court does not view that posture as qualifying Thales for the 'most adequate plaintiffs' designation . . . .

Id.

[75] *In re Turkcell*, 209 F.R.D. at 358.

prevents them from suing on behalf of its investors."[76] However, the *Turkcell* court seemed to be equating "legal purchaser" with "legal owner." The asset manager in *Turkcell* was the "purchaser" of the stock, as that term has been interpreted by other courts.[77] The asset manager had complete discretionary authority to buy, sell, and make all the investment decisions.

Before the District of New Jersey permitted an asset manager to serve as the lead plaintiff in *Roth v. Knight Trading Group*,[78] it had refused to do so in *Smith v. Suprema Specialties, Inc.*[79] In *Smith*, an asset manager with twenty-two clients, who held the beneficial interest in the stock in question, moved to be appointed lead plaintiff.[80] Although in the aggregate the asset manager had suffered the greatest financial loss and was the presumptive lead plaintiff, another movant for lead plaintiff attempted to rebut the presumption, arguing that the asset manager did not function as a "single investor" and had not submitted evidence that it had its clients' permission to move for lead plaintiff.[81] The court agreed, holding the asset manager's clients were the "actual purchasers" of the stock in question.[82] The court further held that the mere grant of authority to invest does not confer authority to initiate suit, and the asset manager had not provided the court with proof of authority to file the lawsuit.[83] In so holding, the court relied on *Rent-Way I*.[84] In light of the lack of actual authority in *Rent-Way II*, and given the New Jersey court's subsequent holding in *Roth*, which allowed an asset manager to serve as lead plaintiff, *Smith* would seem to be of little or no lasting value.[85]

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[76] *Id.*

[77] *See, e.g.*, *In re* UnumProvident Corp. Sec. Litig., No. 1:03-CV-049, 2003 U.S. Dist LEXIS 24633, at *27–28 (E.D. Tenn. Nov. 6, 2003) ("An investment adviser qualifies as a 'purchaser' under the federal securities laws, and may sue in its own name, if it has been delegated the authority to make investment decisions on behalf of its clients.").

[78] 228 F. Supp. 2d 524 (D.N.J. 2002).

[79] 206 F. Supp. 2d 627 (D.N.J. 2002).

[80] *Id.* at 633.

[81] *Id.* at 634–35.

[82] *Id.* at 634.

[83] *Id.* at 634–35.

[84] *Id.* at 634.

[85] Lasting value or not, it was followed in at least one unreported decision. *See* *In re* Peregrine Sys., Inc. Sec. Litig., No. 02CV870-J, 2002 WL 32769239, at *15 (S.D. Cal. Oct. 11, 2002) (relying on *Smith* and holding lack of evidence of authority to initiate suit on behalf of clients rendered investment advisor inadequate as a lead

CONCLUSION

The trend of authority is to allow asset managers to serve as lead plaintiffs or class representatives. These decisions seem more consonant with the purpose of the federal securities laws, which, as one court noted, is "to protect *decision-makers* in securities transactions."[86] The federal securities laws are premised on a theory of full disclosure to the market. The market is supposed to price the securities accordingly under the theory of full and fair disclosure. An asset manager, who has been granted investment discretion and actually purchases the securities, even if for the account of another, is in the best position to assess whether it is the victim of fraud or misrepresentation and should be accorded standing to sue.

plaintiff despite having full investment authority).

[86] Alfaro v. Caprock Comm. Corp., No. 3:00-CV-1613-R, 2000 U.S. Dist. LEXIS 21743, at *7 (N.D. Tex. Dec. 8, 2000).