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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

GEORGE PAPPAS, On Behalf of Himself
and All Others Similarly Situated,

Plaintiff,

v.

COUNTRYWIDE FINANCIAL CORP.,
ANGELO MOZILO and ERIC P. SIERACKI,

Defendants.

Case No.: CV-07-05295-MRP (MANx) ✓

ORDER CONSOLIDATING CASES AND
APPOINTING LEAD PLAINTIFF AND
LEAD COUNSEL

NORFOLK COUNTY RETIREMENT
SYSTEM, Individually and On Behalf of All
Others Similarly Situated,

Plaintiff,

v.

COUNTRYWIDE FINANCIAL
CORPORATION, ANGELO R. MOZILO,
DAVID SAMBOL, ERIC P. SIERACKI, and
STANFORD L. KURLAND,

Defendants.

Case No.: CV-07-05727-MRP

(Additional Captions Follow)

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JACK MCBRIDE, Individually and On Behalf
of All Others Similarly Situated,

Plaintiff,

v.

COUNTRYWIDE FINANCIAL
CORPORATION, COUNTRYWIDE HOME
LOANS, INC., COUNTRYWIDE CAPITAL
V., CITIGROUP GLOBAL MARKETS INC.,
JP MORGAN SECURITIES INC., MERRILL
LYNCH, PIERCE, FENNER & SMITH
INCORPORATED, MORGAN STANLEY &
CO. INCORPORATED, UBS SECURITIES
LLC, WACHOVIA CAPITAL MARKETS
LLC, ANGELO R. MOZILO, KATHLEEN
BROWN, HENRY G. CISNEROS, JEFFREY
M. CUNNINGHAM, ROBERT J. DONATO,
MICHAEL E. DOUGHERTY, MARTIN R.
MELONE, ROBERT T. PARRY, OSCAR P.
ROBERTSON, KEITH P. RUSSELL,
HARLEY W. SNYDER, DAVID SAMBOL,
ERIC P. SIERACKI, ANDREW GISSENGER,
III, and CARLOS M. GARCIA.

Defendants.

Case No. CV-07-06083-MRP

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SARATOGA ADVANTAGE TRUST On
Behalf of Themselves and All Others
Similarly Situated,

Plaintiff,

v.

COUNTRYWIDE FINANCIAL
CORPORATION, ANGELO R. MOZILO,
DAVID SAMBOL, ERIC P. SIERACKI, and
STANFORD L. KURLAND,

Defendants.

Case No. CV-07-06635-MRP

ARGENT CLASSIC CONVERTIBLE
ARBITRAGE FUND L.P., Individually and
On Behalf of All Others Similarly Situated,

Plaintiff,

v.

COUNTRYWIDE FINANCIAL
CORPORATION, ANGELO R. MOZILO,
DAVID SAMBOL, and ERIC P. SIERACKI,

Defendants.

Case No. CV-07-07097-MRP

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BARRY BRAHN, Individually and on Behalf
of Himself and All Others Similarly Situated,

Case No. CV-07-07259-MRP

Plaintiff,

v.

COUNTRYWIDE CAPITAL V.,
COUNTRYWIDE FINANCIAL
CORPORATION, ANGELO R. MOZILO,
ERIC P. SIERACKI, and STANFORD L.
KURLAND,

Defendants.

I.

INTRODUCTION

Before the Court are six securities class action cases brought on behalf of investors of Countrywide Financial Corporation (“Countrywide”) and asserting claims against Countrywide, its subsidiaries, a variety of current and former officers and directors, and underwriters of public offerings of Countrywide securities. Several Plaintiffs from these cases have moved to consolidate some or all of the claims. Further, multiple parties have filed motions to be appointed as lead plaintiff of either a consolidated case or a case not treated as part of the consolidated case. The Court heard oral argument on the issues of consolidation and appointment of lead plaintiff on November 19, 2007.

II.**BACKGROUND****A. Defendants in all cases**

Countrywide is a Delaware corporation with its principal place of business in Calabasas, California. With its subsidiaries, Countrywide operates in five business areas: Mortgage Banking, Banking, Capital Markets, Insurance, and Global Operations. The Mortgage Banking component originates and sells residential loans, and the Global Operations component provides ancillary services for those loans. The Banking component operates a federally chartered bank that invests in mortgages and home equity loans that originated in Mortgage Banking. The Capital Markets component underwrites and trades in mortgage-backed securities.

One complaint, *Jack McBride, et al., v. Countrywide Financial Corp., et al.* (“*McBride*”), also includes as defendants Citigroup Global Markets, J.P. Morgan Securities, Merrill Lynch, Morgan Stanley, UBS Securities LLC, Wachovia Capital Markets LLC (collectively the “underwriters”) as defendants. These companies served as underwriters of a November 1, 2006 public stock offering.

Finally, several complaints name individual directors and officers of Countrywide or its subsidiaries as defendants. Angelo Mozilo, one of the original founders of Countrywide in 1969, served as CEO and Chairman of the Board of Directors of Countrywide during the period in question. Kathleen Brown, Henry Cisneros, Jeffrey Cunningham, Robert Donato, Michael Dougherty, Martin Malone, Robert Parry, Oscar Robertson, Keith Russell, and Harley Snyder were other members of the Board of Directors in late 2006.

Stanford Kurland is a former COO and President of Countrywide, and David Sambol currently holds those positions, as well as Chairman and CEO of CHL. Eric Sieracki is Countrywide’s Executive Managing Director and CFO. Andrew Gissinger, III is Executive Managing Director of Residential Lending, and President and COO of CHL. Carlos Garcia is Executive Managing Director of Banking and Insurance.

B. Individual cases

1. *Jack McBride, et al., v. Countrywide Financial Corp., et al.*, No. CV-07-06083-MRP and *Barry Brahn v. Countrywide Financial Corp., et al.*, No. CV-07-07259-MRP (“*Brahn*”)

1 Plaintiff McBride alleges that Countrywide, its directors and officers, and its underwriters
2 failed to craft a registration statement and prospectus for a Nov. 1, 2006 securities offering
3 (collectively "Prospectus") that fully informed investors of "all material facts and industry
4 trends" affecting Countrywide. Investors purchased Countrywide Capital V preferred stock
5 ("preferred stock") in reliance on the misstatements and omissions in the Prospectus, and
6 ultimately lost money when the stock decreased in value in mid-2007.

7 McBride sues on behalf of the class of all purchasers of preferred stock from the
8 November 1, 2006 offering and purchasers traceable thereto. His action arises under § 11 and §
9 15 of the Securities Act of 1933 ("1933 Act"). 15 U.S.C. §§77k-l. Under these sections, where a
10 registration statement or prospectus contains a misstatement of material fact or omission of
11 material fact, any person acquiring the security may sue (1) every person who signed the
12 registration statement, (2) every director and (3) every underwriter of that security, including the
13 issuer. *Id.* The heightened pleading requirements of the Private Securities Litigation Reform
14 Act ("PSLRA") do *not* apply to 1933 Act claims unless the complaint "sounds in fraud." *See*
15 *Anderson v. Clow (In re Stac Elecs. Sec. Litig.)*, 89 F.3d 1399, 1405 n.3 (9th Cir. 1996); *In re*
16 *Portal Software*, No C-03-5138 VRW, 2006 U.S. Dist. LEXIS 61589, at *7 (N.D. Cal. Aug. 17,
17 2006).

18 The *Brahn* case is similar to McBride in that it asserts § 11 and § 15 of the 1933 Act
19 based on the Prospectus associated with the Nov. 1, 2006 offering of preferred securities. It also
20 asserts a violation of § 12(a)(2) of the 1933 Act, which creates liability for sellers of securities,
21 against Countrywide Capital V.

22 2. *George Pappas v. Countrywide Financial Corp., et al.*, No. CV-07-05295-MRP
23 ("Pappas")

24 Plaintiff Pappas alleges that Countrywide and its directors issued false and misleading
25 statements during the class period of in violation of § 10(b) and § 20(a) of the Securities and
26 Exchange Act of 1934 ("1934 Act") and SEC Rule 10b-5. The complaint references a series of
27 press releases and public statements that contain the alleged misrepresentations and omissions.
28 Pappas highlights the positive and optimistic statements contained in those press releases and
characterizes them as misleading in light of the position of the Company. Pappas contends that
the defendants should have disclosed some information about the risk of the impairment charge
and loan loss provision that resulted in a surprise to investors on July 24, 2007.

1 Pappas pleads the reliance requirement of the relevant sections by alleging “fraud on the
2 market” and alleges that the alleged misrepresentations and omissions resulted in purchasers of
3 Countrywide public securities paying artificially inflated prices during the class period of Oct.
4 24, 2006 to Aug. 9, 2007.

- 5 3. *Norfolk County Retirement System, et al., v. Countrywide Financial Corp., et al.*,
6 No. CV-07-05727-MRP (“*Norfolk*”) and *Saratoga Advantage Trust, et al., v.*
7 *Countrywide Financial Corp., et al.*, No. CV-07-06635-MRP (“*Saratoga*”)

8 Plaintiffs in these cases allege that during the class period Countrywide falsely
9 represented that it had strict and selective underwriting and loan origination processes, and ample
10 liquidity that would insulate the company in a market downturn. According to Plaintiffs,
11 Countrywide and its executives repeatedly assured investors and the public that its disciplined
12 and conservative strategy set it apart from other “irrational” mortgages lenders. These
13 assurances came in the form of press releases, conference calls with investors where executives
14 answered questions, SEC filings such as quarterly and annual reports, and presentations to
15 investors. Plaintiffs allege that in fact Countrywide engaged in practices that limited the ability
16 of the Company to weather any deterioration of the housing and mortgage markets.

17 As with *Pappas*, the Plaintiffs seek relief under the 1934 Act and SEC Rule 10b-5, and
18 rely on the “fraud on the market” doctrine to show that purchasers of common stock in the period
19 of April 24, 2004 to August 9, 2007 relied on the alleged misrepresentations by paying the
20 inflated prices that resulted from them.

- 21 4. *Argent Classic Convertible Arbitrage Fund L.P. v. Countrywide, et al.*, No. CV-
22 07-07097-MRP (“*Argent*”)

23 Plaintiff Argent Classic Convertible Arbitrage Fund L.P. (“*Argent*”) sues on behalf of
24 itself and the class of qualified institutional buyers who purchased Countrywide Series A and
25 Series B Floating Rate Convertible Senior Debentures due 2037 (“*debentures*”) in a private
26 placement pursuant to SEC Rule 144A during a class period of May 17, 2007 to August 9, 2007.
27 Plaintiff alleges that Defendants made false and misleading statements in press releases, SEC
28 filings, and other public statements that concealed the Company’s financial condition. These
misrepresentations inflated the price of Countrywide common stock, which in turn inflated the
price of debentures because they are convertible to common stock. As in *Pappas*, *Norfolk*, and

1 *Saratoga*, the *Argent* action alleges violations of § 10(b) and § 20(a) the 1934 Act, and SEC Rule
2 10b-5. The complaint also alleges violations of several sections of the California Corporations
3 Code.

4 III. 5 CONSOLIDATION

6 A. Legal Standard

7 Under the PSLRA, the court must decide whether to consolidate claims before it appoints
8 a lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(ii). Federal Rule of Civil Procedure 42(a) (“Rule
9 42”) grants the district court broad discretion to consolidate cases involving common issues of
10 law or fact in the interests of judicial economy and convenience. *Huane v. United States*, 743
11 F.2d 703, 704 (9th Cir. 1984). The court must weigh the saving of time and effort consolidation
12 would produce against any inconvenience, delay, or expense it would cause. *Id.*

13 Although district courts generally take a favorable view towards consolidation, the mere
14 existence of a common issue should not lead to the conclusion that the district judge must order
15 consolidation – to the contrary, a district judge “always has discretion to deny consolidation.” 9
16 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2383.

17 In considering whether to consolidate securities class actions, courts have considered
18 whether the actions involved the same “core of defendants,” the same law under the various
19 Securities Acts (and Rule 10b-5), and the same factual events. *See, e.g., Garber v. Juniper*
20 *Networks, Inc.*, No. 06-04327 JW, 2006 U.S. Dist. LEXIS 86721 (N.D. Cal. Nov. 20, 2006);
21 *Averdick v. Hutchinson Tech., Inc.*, No. 05-2095 MJD/SRN, 2006 U.S. Dist. LEXIS 47445 (D.
22 Minn. Feb. 9, 2006); *Meeuwenberg v. Best Buy Co.*, No. 03-6193 ADM/AJB, 2004 U.S. Dist.
23 LEXIS 7686 (D. Minn. Apr. 29, 2004).

24 Also instructive is *Aronson v. McKesson HBOC, Inc.*, in which a series of 54 securities
25 fraud class actions were brought in the Northern District of California. 79 F. Supp. 2d 1146
26 (N.D. Cal. 1999). In that case, the court consolidated several cases even though some arose from
27 10b-5 and others from the Securities Act of 1933, and the cases involved overlapping, but
28 different, sets of defendants and securities. *Id.* The court appointed a single lead plaintiff for all
the class actions despite the differences in the cases. *Id.*

Other cases have held that a single lead plaintiff can represent a class of plaintiffs even if
that party does not have standing to sue under all claims so long as one named plaintiff does have

1 standing. *See, e.g., Tanne v. Autobytel, Inc.*, 226 F.R.D. 659, 669-70 (C.D. Cal. 2005); *In re*
2 *Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 458 F. Supp. 2d 455, 462 (E.D. Mich. 2006).

3 Finally, in *In re Enron Corp. Securities Litigation*, 206 F.R.D. 427, 438 (S.D. Tex. 2002),
4 the district court consolidated a preferred stock claim with a common stock claim, noting that
5 objections to consolidation because of distinct issues surrounding preferred stock can effectively
6 be handled by dividing the class during class certification. *Id.*

7 **B. Arguments**

8 Plaintiff New York Funds¹ seeks to consolidate all claims primarily because the actions
9 involve numerous common questions of law and fact, and because splintering the litigation could
10 interfere with the ability of a lead plaintiff to run the litigation smoothly. Plaintiff Brahn
11 supports consolidation of the preferred stock claims with the other public securities claims, and
12 supports appointment of New York Funds as lead plaintiff for the consolidated class.

13 Plaintiff McBride opposes grouping the preferred stock claims with common stock or
14 private placement securities because they are subject to a different pleading standard. In
15 addition, New York Funds has not suggested that it holds any preferred stock, which raises
16 questions about its ability to represent the preferred stock purchasers fairly.

17 Plaintiff Argent Classic Convertible Fund L.P. ("Argent") opposes grouping the claims
18 involving private debentures with claims involving publicly traded securities primarily because
19 the debentures were offered *only* to "qualified institutional buyers," which by definition cannot
20 include pension funds such as those comprising the New York Funds conglomerate. The private
21 debentures, according to Argent, raise factual and legal distinctions not at issue in any of the
22 other cases and demands separate treatment from those cases.

23 **C. Analysis**

24 Resolving the question of consolidation requires a close examination at the similarities
25 and differences in the cases before the court, and grouping cases together only when satisfied
26 that the requirements of Rule 42 are met. Some of the cases are so similar that they can be
27 consolidated without further discussion. The *Brahn* case and *McBride* case involve identical

28 ¹ "New York Funds" refers to Thomas P. DiNapoli, Comptroller of the State of New York, as Administrative Head of the New York State and Local Retirement Systems, and as Trustee of the New York State Common Retirement Fund, and of the New York City Pension Funds.

1 securities (preferred stock) and an identical class (purchasers who can trace their purchase to the
2 Nov. 1, 2006 offering), and both allege violations of nearly identical sections of law (§ 11, §
3 12(a) and § 15 of the 1933 Act) based on the same statements (the Prospectus). Thus, they are
4 ordered grouped together. Likewise, *Norfolk* and *Saratoga* both allege violations of § 10(b), §
5 20(a) and SEC Rule 10b-5 and contemplate a class of public stock purchasers dating back to
6 April 24, 2004. Indeed, the complaints in the two cases are identical in parts of their allegations.
7 Therefore, they too are ordered to be grouped together.

8 1. *Pappas* and *Norfolk/Saratoga*

9 The Court next determines whether to group the *Pappas* claims with *Norfolk/Saratoga*.
10 These three, the broadest complaints, allege violations of the same sections of law, and cite
11 essentially the same public statements made by Countrywide in the period of October 2006 to
12 November 2007 as being materially misleading. The difference is the starting date of the class
13 period (April 2004 in *Norfolk/Saratoga* compared to October 2006 in *Pappas*), and the precise
14 definition of the class (common stock purchasers in *Norfolk* compared to public securities
15 purchasers in *Pappas*). At least in the period of October 2006 to the end of the class period in
16 August 2007, the Court expects very similar theories and evidence to be presented. The overlap
17 is sufficient to support consolidation to effectuate case management and discovery, and no party
18 opposes this conclusion for these cases. Accordingly, the *Pappas*, *Norfolk*, and *Saratoga* claims
19 are ordered consolidated.

20 2. *McBride/Brahn* and *Pappas/Norfolk/Saratoga*

21 The parties vigorously contest whether the preferred stock claims from *McBride/Brahn*
22 should be grouped with the common stock claims from the other cases. The Court acknowledges
23 that there are several important differences between the cases. For example, the preferred stock
24 claims in *McBride/Brahn* do not face the heightened pleading requirements of the PSLRA unless
25 they “sound in fraud” and do not require proof of scienter. Moreover, the claims involve a
26 narrower class because they deal solely with purchasers from a particular public offering, and
27 include several underwriters that are not involved in any other case.

28 However, the similarities between the claims compel the Court to consolidate them, at
least at this stage. *See In re Enron Corp. Sec. Litig.*, 206 F.R.D. at 451 (explaining that
“consolidation, at least pretrial, serves to promote an orderly progression of this very complex

1 litigation, especially since discovery necessarily involves overlapping Defendants and a common
2 core of facts and legal issues”). From a factual perspective, the claims concern overlapping
3 public statements: the Prospectus is one document that the 1934 Act claimants could very well
4 include in their case. Indeed, the *Pappas* complaint is brought “on behalf of all persons who
5 purchased Countrywide Financial *publicly traded securities* on the open market during the Class
6 Period,” a definition which includes both preferred and common stock.² Thus, *Pappas* arguably
7 contemplates the Prospectus as one public statement that violates the 1934 Act with respect to
8 preferred stock. Moreover, the class periods in all the public securities cases overlap
9 significantly: their end date of Aug. 9, 2007 is identical, and their start date varies from late 2006
10 to early 2004.

11 The different pleading standards and evidentiary burdens in a 1933 Act claim are not so
12 difficult to manage that multiple lead plaintiffs of distinct classes are necessary at this stage.
13 “Speculations about possible conflicts do not rebut the statutory presumption that one lead
14 plaintiff can vigorously pursue all available causes of action against all possible defendants
15 under all available legal theories.” *Aronson v. McKesson HBOC, Inc.*, 79 F. Supp. 2d 1146, 1151
16 (N.D. Cal. 1999). The Court is not persuaded by the speculative arguments made by McBride
17 that combining fraud claims with 1933 Act claims will delay and prejudice the claimants.³ A
18 single lead plaintiff, with adequate counsel, could very easily manage both types of claims,
19 particularly given the overlap in facts, defendants, and time periods at issue, and because the
20 requirements for each cause of action are well-established.

21 At this time, the Court is satisfied that economy and efficiency would be promoted by
22 having a single lead plaintiff bring all claims involving publicly traded securities, whether they
23 arise under the 1933 Act or 1934 Act, and whether they concern common or preferred stock. For
24 these reasons, the Court consolidates claims involving purchases of public securities under a
25 single lead plaintiff.
26

27 ² New York Funds mentions that it intends to amend its complaint to include all securities, public and private. It
28 may further bring claims under § 11 for other securities that it holds. The Court, however, will only decide the
issues of consolidation and lead plaintiff with the motions and complaints it has before it at this time.

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3. *Argent* and the other cases

The Court has good reason to consolidate *Argent* and to treat it separately with a separate lead plaintiff. As has been well briefed by New York Funds, Plaintiff *Argent* offers two seemingly inconsistent perspectives on the litigation. On the one hand, *Argent*'s SUPPLEMENTAL STATEMENT REGARDING LEAD PLAINTIFF MOTIONS asserts that the fact that private debentures are involved requires that the case be kept separate because there are no common questions of law or fact. *Argent* states that the debentures are "fundamentally different" types of securities with "different characteristics", which makes it clear "none of the plaintiffs or movants can adequately represent the *unique* interests of the Debenture class." ARGENT'S SUPPLEMENTAL STATEMENT REGARDING LEAD PLAINTIFF MOTIONS, at 6-8 (emphasis added).

On the other hand, *Argent*'s complaint alleges "fraud on the market" under § 10(b), § 20(a), and Rule 10b-5 and discusses extensively the effect of the misrepresentations on the price of the common stock. See *Argent*'s CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE FEDERAL SECURITIES LAWS AND CALIFORNIA STATE LAW ("Argent Complaint"). Factually and legally this is nearly identical to *Pappas*, *Norfolk*, and *Saratoga*, at least during the short *Argent* class period of May 24, 2007 to August 9, 2007. The only additional wrinkle is the contention that the price of the debentures is tied to the common stock due to the convertible nature of the private debentures. In this regard, the Court observes that the *Argent* complaint raises several common questions of *both* law and fact with the other 1934 Act cases, meeting the Rule 42 threshold for consolidation.

Nonetheless, the Court exercises its discretion to separate the *Argent* case under a distinct lead plaintiff because, as has become evident in the briefs and at oral argument, there are important and complex legal and factual issues which are unique to the private placement scenario, and there is reason to believe these issues could be lost in the fray of the public securities litigation. Plaintiff *Argent* makes an unusual legal argument that "fraud on the market" is available to prove reliance in a SEC Rule 144A private placement case, and in the alternative, that a private placement memorandum issued to qualified institutional investors can support common law reliance. Whether these arguments have merit depends on facts and law not involved in any other case, and concerns only qualified institutional investors who traded in a private market. Class certification for the *Argent* class may hinge on these issues in the private placement case, whereas in the public securities fraud cases, "fraud on the market" is largely straightforward if the securities trade on national exchanges. Moreover, of less importance in the

1 *Argent* case are the voluminous facts and legal analysis relevant to the class period of 1-3 years
2 asserted by the other cases because the class start date of May 24, 2007 is so very recent.

3 Thus, although there is some overlap in facts and law with the public securities claims,
4 the Court anticipates at the outset that the focus of the private placement claims will be different
5 from the public securities claims, and the difference is sufficient to merit separation for case
6 management purposes. The Court is convinced that in the *Argent* case a lead plaintiff should be
7 appointed who is a qualified institutional investor so that this focus is not lost by a lead plaintiff
8 coordinating claims involving both public and private securities and markets. The coordination
9 of discovery can be managed by later orders of the Court.

10 4. Conclusion

11 For the foregoing reasons, the Court consolidates the *McBride, Brahn, Pappas, Norfolk,*
12 *and Saratoga* cases (“Public securities cases”), but orders that the *Argent* case remain separate.

13 **IV.**

14 **APPOINTMENT OF LEAD PLAINTIFF**

15 **A. Legal Standard**

16 The PSLRA provides a three-step process for identifying the lead plaintiff in securities
17 cases. *See In re Cavanaugh*, 306 F.3d 726, 729 (9th Cir. 2002). The first step requires that the
18 plaintiff who files the initial action must publish, “in a widely circulated national business-
19 oriented publication or wire service,” notice of the pendency of the action and a statement that
20 “any member of the purported class may move the court to serve as lead plaintiff.” 15 U.S.C. §
21 78u-4(a)(3)(A). Movants have 60 days from when notice is published to provide their motions to
22 the court. 15 U.S.C. § 78u-4(a)(3)(A)(II).

23 Once notice is established, the district court must select the “presumptively most
24 adequate plaintiff” by identifying the movant that has shown “the largest financial interest in the
25 relief sought by the class” and that it satisfies the adequacy and typicality requirements of Rule
26 23(a) of the Federal Rules of Civil Procedure (“Rule 23”). *In re Cavanaugh*, 306 F.3d at 729-30.

27 In the third step, other plaintiffs have the opportunity to rebut the presumptive lead
28 plaintiff’s showing of typicality and adequacy. *Id.* at 730. The Court must examine potential
lead plaintiffs one at a time, starting with the one with the greatest financial interest, and

1 continuing in descending order “if and only if the presumptive lead plaintiff is found inadequate
2 or atypical [under Rule 23 standards].” *Id.* at 732.

3
4 1. Largest Financial Interest

5 Courts typically look to four factors as being determinative of the “largest financial
6 interest”: (1) the numbers of shares of the subject securities purchased; (2) the number of net
7 shares purchased; (3) the total net funds expended by the plaintiffs during the class period; and
8 (4) the approximate losses suffered by the plaintiffs. *Lax v. First Merch. Acceptance Corp.*, No.
9 97 C 2715, 1997 U.S. Dist. LEXIS 11866, at *5 (N.D. Ill. Aug 11, 1997); *In re Cendant*, 264
10 F.3d 201, 262 (3d. Cir. 2001) (citing with approval the Lax court and others that utilized these
11 factors). While these factors are widely recognized by the courts, the Ninth Circuit does not
12 require them; it demands only that district courts select “accounting methods that are both
13 rational and consistently applied.” *In re Cavanaugh*, 306 F.3d at 730 n.4.

14 2. LIFO vs. FIFO

15 The two most common accounting techniques in calculating losses suffered by plaintiffs
16 are FIFO and LIFO. FIFO stands for “first-in, first-out”; LIFO stands for “last-in, first-out.” *See*
17 *In re eSpeed, Inc. Sec. Litig.*, 232 F.R.D. 95, 100 (S.D.N.Y. 2005). They represent different
18 methods for matching specific sales of stock with specific purchases. *See generally Johnson v.*
19 *Dana Corp.*, 236 F.R.D. 349, 352 (N.D. Ohio 2006) (explaining the FIFO and LIFO concepts in
20 the approximate losses context). The choice of which accounting methodology applies is a
21 question of law. *Arenson v. Broadcom Corp.* No. CV-02-301-GLT, 2004 U.S. Dist. LEXIS
22 27522 (C.D. Cal. Dec. 6, 2004) (citing *Crow Tribe v. Racicot*, 87 F.3d 1039, 1045 (9th
23 Cir.1996)).

24 While the New York Funds characterize FIFO as the “predominant” method of matching
25 purchases and sales, it appears that district courts have “generally rejected FIFO as an
26 appropriate means of calculating losses in securities fraud cases.” *eSpeed*, 232 F.R.D. at 101
27 (citing *In re Cable & Wireless, PLC Sec. Litig.*, 217 F.R.D. 372, 378-79 (E.D. Va. 2003))
28 (emphasis added). *See also Arenson*, 2004 U.S. Dist. LEXIS, at *5-7. FIFO is disfavored
because it “encompasses purchases made outside the class period,” *Weisz v. Calpine Corp.*, No.
C 02-1200 SBA, 2002 U.S. Dist. LEXIS 27831, at *26 (N.D. Cal. Aug. 19, 2002), and thus in

1 some cases “will identify damages where in reality there is none.” *In re Clearly Canadian Sec.*
2 *Litig.*, No. C-93-1037-VRW, 1999 U.S. Dist. LEXIS 14273, at *13 (N.D.Cal. Sep. 3, 1999).

3
4 3. Rule 23 Requirements

5 As noted above, a movant must also satisfy the requirements of Rule 23 in order to
6 invoke the presumption of being the “most adequate” plaintiff. In particular, the potential lead
7 plaintiff must make a prima facie showing of the “typicality” and “adequacy” requirements of
8 Rule 23 class certification. *In re Cavanaugh*, 306 F.3d at 730. “Numerosity” and
9 “commonality” need not be shown because they are class requirements more properly directed
10 towards the class as a whole. *Id.* at 730 n.5 (noting that the absence of this factor “would
11 preclude certifying a class action at all”). The district court has latitude as to what information it
12 will consider in determining typicality and adequacy. *Id.* at 732. In making these
13 determinations, the Court reviews the plaintiffs’ pleadings and declarations, *id.* at 730, and
14 applies established Rule 23 principles. *In re Cendant*, 264 F.3d at 264-265.

15 a. Typicality

16 The court assesses typicality by determining whether “the circumstances of the movant ...
17 are markedly different or the legal theory upon which the claims [of that movant] are based differ
18 from the theories of the claims of the other class members.” *In re Cendant*, 264 F.3d at 265
19 (internal quotations omitted). *See also* (a)(3)(B)(iii)(II)(bb) (allowing statutory presumption to
20 be rebutted where the presumptively most adequate plaintiff is “subject to unique defenses that
21 render such plaintiff incapable of adequately representing the class”).

22 b. Adequacy

23 In determining adequacy, the court must consider whether the movant has the ability and
24 incentive to represent the claims of the class vigorously, whether it has obtained adequate
25 counsel, and whether there is a conflict between the movant’s claims and those asserted on
26 behalf of the class. *In re Cendant*, 264 F.3d at 265.

27 **B. Arguments**

28 Remaining before the Court are several motions for appointment as lead plaintiff.
Plaintiff New York Funds seeks to be appointed as lead plaintiff of the consolidated case.

1 Saratoga Advantage Trust contends that it should be appointed as co-lead plaintiff with New
2 York Funds, though it concedes that New York Funds' losses "far exceed" their own in this
3 matter.

4 Plaintiff McBride seeks appointment as lead plaintiff for claims involving preferred stock
5 purchasers, and Argent seeks appointment as lead plaintiff for claims involving purchasers of the
6 private debentures at issue in that case.

7 **C. Analysis**

8 1. Notice

9 The movants expend significant energy debating the time-bar effect of the various public
10 notices provided by plaintiffs and others in the several cases. The court declines to rule on these
11 issues, except to find that the Aug. 14, 2007 notice published by Scott and Scott LLP in *Prime*
12 *Newswire* and the Sept. 20, 2007 notice published by Wolf Hadenstein Adler Freeman & Herz
13 LLP in *Business Wire* meet the requirements of the PSLRA in announcing the pendency of the
14 public securities cases. The notices were published in widely-distributed news services and
15 properly inform class members of their right to move for appointment as lead plaintiff.

16 Further, the notices that were filed do not explicitly or implicitly cover private placement
17 securities as are at issue in *Argent* and therefore do not bar Argent's later filed motion for
18 appointment as lead plaintiff. Argent's counsel provided notice of the pendency of the *Argent*
19 action pursuant to the PSLRA in *Business Wire* on Oct. 31, 2007. The notice adequately
20 informed debenture purchasers of their right to file motion for appointment as lead plaintiff.
21 Thus, the notice requirement of the PSLRA is met for Argent as well.

22 2. The *Argent* Case

23 Because the time period for movants to file motions for appointment as lead plaintiff has
24 not yet expired, the Court declines to appoint a lead plaintiff for the *Argent* case at this time.

25 3. The Public Securities Cases

26 New York Funds, with a LIFO loss of over \$40 million and a FIFO loss of over \$100
27 million, clearly has the largest financial stake of any movant in the consolidated case under the
28 four factors used by the Third Circuit, and likely under any other rational accounting method.

1 New York Funds also has made a prima facie showing of typicality and adequacy.
2 Typical of plaintiffs in all the cases, New York Funds purchased public securities in
3 Countrywide at prices it alleges were inflated by false and misleading statements by defendants,
4 and damages were incurred by alleged violations of federal securities laws.

5 The party meets the adequacy requirement as well. As a group of large institutional
6 investors who have conducted numerous large securities actions, New York Funds has
7 considerable experience in such cases, and has retained competent counsel also with the
8 necessary experience. The Court accepts the party's statement that it intends to vigorously
9 protect the interests of all plaintiffs. Accordingly, New York Funds is the presumptive lead
10 plaintiff of the consolidated case.

11 As discussed in Section III, McBride challenges the typicality and adequacy of New York
12 Funds as a lead plaintiff of the preferred stock claims because New York Funds does not purport
13 to hold preferred stock. Here, the preferred stock claims under the 1933 Act are sufficiently
14 similar to the allegations in other cases to convince the Court that New York Funds allegations
15 *are* typical of the cases. The typicality requirement is satisfied when the plaintiff's claim arises
16 from the same event or course of conduct that gives rise to the claims of other members and is
17 based on the same legal theory, *In re Enron Corp., Securities Litigation*, 206 F.R.D. at 445
18 (internal citations omitted), and the striking similarity in allegations is evident here despite the
19 different causes of action and securities involved. *See, e.g.*, DECLARATION OF RUSSEL N.
20 JACOBSON IN SUPPORT OF NEW YORK FUNDS' REPLY MEMORANDUM OF POINTS AND
21 AUTHORITIES, Ex. H (chart comparing the similarity of the *Norfolk* and *McBride* complaints,
22 including the use of identical language to describe how Countrywide misled investors).

23 Moreover, McBride's argument that the common stockholders "*cannot* be adequate
24 plaintiffs because they have no financial interest in the relief sought by the class" is without
25 merit. That New York Funds has not purchased preferred stock does not bar consolidation nor
26 does it bar their appointment as lead plaintiff for all claims involving public securities. *See*
27 *Tanne v. Autobytel*, 226 F.R.D. 659, 669 (C.D. Cal. 2005). It is inevitable that, in some cases,
28 the lead plaintiff will not have standing to sue on every claim. *Id.* The Court is persuaded that a
single, large, institutional investor in public Countrywide securities can quite fairly handle claims
under the different causes of action that may be asserted by the various plaintiffs such as
McBride and Brahn.

1 Saratoga Advantage Trust has submitted a brief arguing that it should be appointed co-
2 lead plaintiff with New York Funds because the New York Funds is a “single aggregation of
3 politically influenced parties” and Saratoga would serve as a balance in the leadership and a
4 “check” of the litigation process. Under the case law, there is no question that the Court has the
5 authority to appoint co-lead plaintiffs where such appointment “will enhance, rather than reduce,
6 the efficiency of the litigation.” *In re. Amer. Bus. Fin. Serv. Cit.*, No. 04-0265, 2004 U.S. Dist.
7 LEXIS 10200 (E.D. Pa Jun. 3, 2004). In the situation here, there is also no question that New
8 York Funds is a grouping of public pension funds. However, Saratoga Advantage Trust is
9 merely speculating and has not shown that these vague “political” considerations will have any
10 impact whatsoever on New York Funds ability to represent the Plaintiffs as lead on its own. In
11 fact, New York Funds has done so in prior cases with considerable success. Absent a more fact-
12 based or specific attack on New York Funds ability to represent the class as a sole lead plaintiff,
13 the motion to appoint Saratoga Advantage Trust as co-lead plaintiff is denied.

14 V.

15 APPOINTMENT OF LEAD COUNSEL

16 Once chosen, the lead plaintiff is responsible for choosing the lead counsel in the case.
17 *See* 15 U.S.C. §78u-4(a)(3)(B)(v) (“The most adequate plaintiff shall, subject to the approval of
18 the court, select and retain counsel to represent the class.”). The lead plaintiff’s discretion is not
19 absolute, because the court retains the power and the duty to supervise this process. *In re*
20 *Cendant*, 264 F.3d at 273. However, the court’s role is confined to deciding whether to approve
21 the choice of the lead plaintiff. *Id.*

22 Here, the Court approves New York Funds’ choice of Labaton Sucharow LLP as counsel.
23 The firm has extensive experience in large securities fraud cases and in particular, in managing
24 class actions involving public securities purchasers. At this time, the Court is confident that
25 counsel will be able to properly represent the plaintiffs in the consolidated case.

26 VI.

27 CONCLUSION

28 In accordance with this Order, New York Funds and its counsel of Labaton Sucharow
LLP is appointed lead plaintiff and lead counsel, respectively, for a consolidated case comprising

1 the claims in *Pappas, Norfolk, Saratoga, McBride, and Brahn*. All subsequent filings in any of
2 these five cases should reflect the case number CV-07-05295-MRP.

3 IT IS SO ORDERED.

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5 DATED: November 28, 2007

6 Hon. Mariana R. Pfaelzer
7 United States District Judge

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