SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RICHARD B. LOWE III Justice

PART 56

Index Number : 601272/2006

SOLLINS, LEONARD

vs

ALEXANDER, KOBI

Sequence Number : 001

CONSOLIDATION/JOINT TRIAL

C

INDEX NO. _____

MOTION DATE 6/20/2006

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/13/2006

RICHARD B. LOWE III J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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LEONARD SOLLINS, Derivatively on Behalf of COMVERSE TECHNOLOGY, INC.,

Index No. 601272/2006

Plaintiff,

- against -

KOBI ALEXANDER, JOHN H. FRIEDMAN, WILLIAM F. SORIN, RAZ ALON, RON HIRAM, ITSIK DANZIGER, SAM OOLIE, CARMEL VERNIA, IGAL NISSIM, FRANCIS GIRARD, DAVID KREINBERG, ZEEV BREGMAN, DAVID BODNER, ZVI ALEXANDER, SHAULA A. YEMINI, and YECHIAM YEMINI,

DECISION AND ORDER

Defendants,

- and -

COMVERSE TECHNOLOGY, INC.,

Nominal Defendant.

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RICHARD B. LOWE, III, J.:

Before the court is a motion by plaintiff Leonard Sollins (Sollins), derivatively on behalf of Comverse Technology, Inc. (Comverse), and by Timothy Hill (Hill), a plaintiff in a related action (*see Hill v Alexander*, Index No. 105492/2006), to consolidate a number of related actions into this action pursuant to CPLR 602 and to designate the caption of the new consolidated action as *In re Comverse Technology, Inc. Derivative Litigation* with Index No. 601272/2006. The plaintiffs further move to be designated as co-lead plaintiffs and to appoint the law firms of Milberg Weiss Bershad & Schulman LLP (Milberg Weiss) and Schiffrin & Barroway (the "Schiffrin Firm") as co-lead counsel of the resulting consolidated action.

BACKGROUND

The various actions to be consolidated allege that Comverse's officers and/or directors wrongfully backdated or otherwise manipulated the issuance of employee stock options to benefit certain defendants at the expense of Comverse and its shareholders.

The various plaintiffs aver that Comverse's officers and/or directors represented in Comverse's filings with the US Securities and Exchange Commission that employee stock options were granted with an exercise price that was no less than the fair market share of a share of Comverse common stock on the date of the grant. During the relevant period, the plaintiffs allege, defendants caused Comverse to engage in an undisclosed and illicit scheme to backdate the grant dates of the stock options to a date on which the price of Comverse stock was lower than it was on the actual grant date, thereby increasing the value of the options to the grantees. The plaintiffs also allege that when certain options became worthless because their exercise price was above the then-current market price of Comverse stock, the defendants repriced millions of dollars' worth of options by cancelling them and granting the option holders new options with significantly lower exercise prices so that the new options could be exercised for substantial profits. The plaintiffs aver that the defendants, based on these allegations, sold more than $393 million in Comverse stock to themselves at the expense of Comverse and the plaintiffs.

On March 14, 2006, Comverse announced that it had created a special committee of its Board of Directors to investigate its stock option grants, as well as the accuracy of the stated dates of option grants and whether all proper corporate procedures were followed. Soon after this announcement was made public, plaintiff shareholders began bringing action against the defendants.

Plaintiff Sollins filed by Summons and Complaint this action on April 11, 2006. Other

actions soon followed: *Hill v Alexander* (Index No. 105492/2006) was filed on April 21, 2006; *Cinquemani v Alexander* (Index No. 601410/2006) was filed on April 24, 2006; *Gross v Alexander* (Index No. 601411/2006) was filed on April 24, 2006; *Brody v Alexander* (Index No. 601610/2006) was filed on May 8, 2006; *Burrafato v Alexander* (Index No. 650125/2006) was filed on June 1, 2006; *Mullin v Alexander* (Index No. 650126/2006) was filed on June 1, 2006; and *Louisiana School Employees' Retirement System v Alexander* (Index No. 602106/2006) was filed on June 15, 2006. Another action, *Sykes v Alexander*, will also soon be filed (*see* June 20, 2006 Minutes).[1] All of the above mentioned actions involve the same underlying facts and circumstances, and all of these actions allege at least a breach of fiduciary duty cause of action, a misappropriation cause of action, a gross and reckless mismanagement cause of action, a waste of corporate assets cause of action, and an unjust enrichment cause of action.

DISCUSSION

Sollins and Hill move under CPLR 602 to consolidate all outstanding actions against the defendants, as well as any actions to be filed, into this action because these actions present common questions of law and facts and would otherwise conserve judicial resources. Further, Sollins and Hill move to rename the litigation as *In re Comverse Technology, Inc. Derivative Litigation*. Finally, the plaintiffs move to be designated as lead plaintiffs and to appoint Milberg Weiss, attorneys for Sollins, and the Schiffrin Firm, attorneys for Hill, as co-lead counsel for the consolidated action.

[1] After the submission of this motion, the plaintiff in *Sykes v Alexander* filed her Summons and Complaint against the defendants on June 22, 2006 (Index No. 602206/2006) (*see* Kammerman Aff, Ex. C).

I. Consolidation

When actions "involving a common question of law or fact are pending before a court, the court . . . may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay"(CPLR 602). Unless a party opposes the motion to consolidate and that party "demonstrates that consolidation will prejudice a substantial right" *(Amtorg Trading Corp. V Broadway & 56th St. Assoc.*, 191 AD2d 212, 213 [1st Dept 1993]), consolidation is preferred in order to "avoid unnecessary duplication of trials, save unnecessary costs and expense and prevent the injustice which would result from divergent decisions based on the same facts" (*Chinatown Apartments, Inc. v New York City Transit Authority*, 100 AD2d 824, 825 [1st Dept 1984]; *see also Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 334 [1st Dept 2005]).

Here, there is no doubt that the consolidation of these various actions are preferable. For one, in reading the Complaint in this action, as well as in the other pending actions, the underlying facts and circumstances are similar and all the complaints allege the same basic causes of action against the defendants, namely, that the defendants breached their fiduciary duties to the shareholders and were unjustly enriched by their manipulation of the grant dates of Comverse's stock options. Further, the defendants in this action, who are also the named defendants in the other aforementioned actions, do not object to consolidation. Indeed, they agree that consolidation is appropriate in light of the common questions of law and facts underlying these actions (*see* June 20, 2006 Minutes). Finally, none of the plaintiffs oppose consolidation. Apparently, counsel for the various individual plaintiffs, save counsel for plaintiff Louisiana School Employees' Retirement System (LSERS), have begun coordinating their actions together in some type of litigation committee and see no reason to

oppose consolidation (*id.*).

Accordingly, the court grants the plaintiff's motion to consolidate. All actions related to this action, including all future actions, shall be consolidated into this action, which is forthwith designated under the new caption *In re Comverse Technology, Inc. Derivative Litigation* and with its index designation as 601272/2006.

II. Appointment of Lead Plaintiffs and Lead Counsel

The only other issue is the designation of lead plaintiff and lead counsel. Milberg Weiss, attorneys for Sollins, and the Schiffrin Firm, attorneys for Hill, jointly move to designate Sollins and Hill as co-lead plaintiffs and, as well, be appointed as co-lead counsel for the consolidated action. Sollins and Hill aver that because their actions were the first filed, priority dictates their designation as lead plaintiffs. They also aver that Milberg Weiss and the Schiffrin Firm have experience in prosecuting these actions and would give this action the "highest level of representation" (*see* Sollins and Hill Joint Memo of Law in Support of Consolidation at 5). For these reasons, Sollins and Hill argue they should be designated as lead plaintiffs and Milberg Weiss and the Schiffrin Firm as co-lead counsel of a committee involving the lawyers of the individual plaintiffs.

Plaintiff LSERS of *Louisiana State Employees Retirement System v Alexander* (Index No. 602106/2006) opposes the designation of Sollins and Hill as co-lead plaintiffs and the selection of Milberg Weiss and the Schiffrin Firm as co-lead counsel, and moves in this action as well as in its own action to be designated lead plaintiff and to appoint its attorneys as lead counsel. LSERS avers that it is more qualified to lead this consolidated action because it is an institutional investor that could more vigorously prosecute this action, has experience supervising counsel and monitoring work efficiency, and is in the "unique position to coordinate the state court litigation with the federal

court litigation" (*see* LSERS Memo of Law at 9). In addition, LSERS asserts that the firms of Bernstein Litowitz Berger & Grossman LLP (Bernstein Litowitz) and Berman DeValerio Pease Tabacco Burt & Pucillo (Berman DeValerio) are better equipped to be counsel of this litigation since these firms have worked well with LSERS in prior litigation. Finally, LSERS questions Milberg Weiss' ability to devote resources to the effective and efficient prosecution of this matter, as problems currently plague the law firm.

As the First Department provides in *Katz v Clitter*, in a consolidated action on behalf of all plaintiffs and prospective plaintiffs, "[a]lthough priority in instituting suit is a factor to be considered in the appointment of general counsel, nevertheless, the principal factor to be considered in making such selection is whether the appointment will serve the best interests of the shareholders" (58 AD2d 777 [1977], citing *Rich v Reisini*, 25 AD2d 32, 34 [1st Dept 1966]). "In this latter connection, the *credentials* of proposed counsel are of the utmost importance" (*id.* [emphasis added]).

Here, in reviewing the credentials of the various firms, there is no dispute that all counsel are well-credentialed to lead this consolidated action. Milberg Weiss, renowned for its work on behalf of class action plaintiffs, represents Sollins, while the Schiffrin Firm, counsel for Hill, has had nearly twenty years of experience prosecuting complex class action litigations. The two firms have been counsel in such litigations as *In re Exxon Valdez* (270 F3d 1215 [9th Cir 1991]; 296 F Supp 2d 1071 [D Alaska 2002]) and *In re Initial Public Offering Sec Litig* (297 F Supp 2d 668 [SD NY 2003]; *see also Billing v Credit Suisse First Boston Ltd.*, 426 F3d 130 [2d Cir 2005]). Similarly, the firms of Bernstein Litowitz and Berman DeValerio, counsel for LSERS, both have over twenty years of experience in prosecuting and representing plaintiffs in class action lawsuits. These firms have been involved as lead counsel or co-lead counsel in a number of class actions, including *In re: WorldCom,*

Inc Sec Litig (294 F Supp 2d 431 [SD NY 2003]) and *In re: 3Com Sec Litig* (761 F Supp 1411 [ND Cal 1990]). There is no question that the credentials of all proposed counsel are outstanding.[2]

Accordingly, the court does revert back to "priority in instituting suit" as "a factor to be considered in the appointment of general counsel" (*id.*). Because Sollins and Hill are the first plaintiffs to file an action against the defendants, the court duly considers the institution of these suits as factors in the appointment of Milberg Weiss and the Schiffrin Firm. While the court appreciates the fact that LSERS decided to file suit after having reviewed the alleged wrongdoing and having consulted counsel, that does not change the fact that Sollins and Hill are the first to file suit against the defendants. Nor does that change the assertion that Milberg Weiss and the Schiffrin Firm are well equipped to represent the consolidated plaintiffs in this action.

Furthermore, the court foresees the consolidation of these actions as the beginning of a concerted effort to bring a class action lawsuit against the defendants. While the court is obviously not entertaining a motion to certify a class action at this time, in utilizing the class action representative standard pursuant to CPLR 901 (a) (4), the court is reminded that the class representative "acts as principal to the other class members and owes them a fiduciary duty to vigorously protect their interests" (*Rochester v Chiarella*, 65 NY2d 92, 100 [1985], citing

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[2] LSERS' attorneys suggest that Milberg Weiss would be unable to devote resources to the effective and efficient prosecution of this matter due to the indictment of its principals as well as the loss of its attorneys. The court finds this argument unavailing, and, to a certain extent, disingenuous. First of all, the court notes that this argument is disingenuous at best since the attorney representing LSERS in this litigation was himself a partner at Milberg Weiss, a member of its Management Committee, and was at Milberg Weiss when this action was commenced.

More importantly, however, the court points out that while the firm of Milberg Weiss may be under indictment for actions of certain attorneys in the firm, that in and of itself has no effect on this litigation and, indeed, has no bearing on this action or the attorneys who are appointed co-lead counsel. For one, the individual plaintiffs have not opposed Milberg Weiss' leading this action. Moreover, none of the attorneys here for Milberg Weiss have been indicted or have been accused of any wrongdoing. Finally, the court stresses that unless and until Milberg Weiss is found guilty for the actions upon which it has been indicted, the presumption of innocence is binding here.

Sonnenschein v Evans, 21 NY2d 563 [1968]). "That responsibility clearly encompasses the duty to act affirmatively to secure the class members' rights as well as to oppose the adverse interests asserted by others" (*id.*). In reviewing the qualifications of the proposed lead plaintiffs, there is nothing to indicate that Sollins and Hill are unable to act as principals to the other members of this action or to vigorous protect the interests of the plaintiffs. As well, given that LSERS is planning to "coordinate" this action with the federal action, the court wonders how LSERS would be able to better represent members of this consolidated action where, thus far, most of the members of this action are individuals. This is especially the case where LSERS may have adverse interests to the individual plaintiffs, considering the coordination that LSERS hopes will take place between the state action and federal action should its sister system become lead plaintiff in the federal action.

Finally, the court notes that the arguments relied upon by LSERS, including the use of Federal Rule of Civil Procedure 23.1, the selection of a lead plaintiff, and the usage of the federal Private Securities Litigation Reform Act of 1995 (PSLRA), while maybe persuasive, is inapposite to this action. That the plaintiffs are bringing causes of action as derivative actions against the defendants, such suits are not within the scope of the PSLRA and, as such, federal law has no effect in this action.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion to consolidate is granted; it is further

ORDERED that the consolidated action is hereby renamed as *In re Comverse Technology, Inc. Derivative Litigation*, with its index designation as 601272/2006; it is further

ORDERED that plaintiffs Leonard Sollins and Timothy Hill are named as co-lead plaintiffs in this consolidated action; and it is further

ORDERED that the law firms of Milberg Weiss Bershad & Schulman LLP and Schiffrin & Barroway are designated as co-lead counsel in this consolidated action.

SETTLE ORDER.

Dated: July 13, 2006

ENTER:

RICHARD B. LOWE, III, J.S.C.

RICHARD B. LOWE III