

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In Re Wells Fargo & Company
Consolidated Derivative Shareholder
Litigation

Case No. [22-cv-05173-TLT](#)

**ORDER APPOINTING LEAD AND CO-
LEAD PLAINTIFFS AND COUNSEL**

Re: ECF Nos. 97, 99, 101, 106

INTRODUCTION

Two teams of plaintiffs and their respective counsels seek appointment as lead-plaintiff and lead-counsel in the overarching shareholder derivative action against Wells Fargo & Company and several of its officers and directors (“Defendants”).

The City of Pontiac Reestablished General Employees’ Retirement System, City of Plantation Police Officers’ Retirement Fund, and Amy J. Cook are represented by the law firms Bleichmar, Fonti & Auld LLP (“BFA”), Motley Rice LLC (“MR”), and Cotchett, Pitre & McCarthy LLP (“CPM”) (collectively, the “PPC Team”).

The Asbestos Workers Philadelphia Welfare and Pension Fund and Jose F. Isais are represented by the law firm of Scott+Scott (“SS”).

PROCEDURAL HISTORY

On September 9, 2022, Hughes Gervat filed a derivative shareholder complaint. (ECF No. 1). Cases opened by Charles Rogers and Khosrow Ardanian were deemed related. On October 27,

1 2022, the related cases were reassigned to the Honorable Trina L. Thompson. (ECF No. 12). On
2 October 31, 2022, the Gervat and Rogers actions were consolidated. (ECF No. 15). On February
3 24, 2023, Gervat and Rogers filed an amended complaint together. (ECF No. 37).

4 On March 2, 2023, Amy J. Cook filed a motion to intervene and stay the action. (ECF No.
5 38). On March 30, 2023, a case filed by Asbestos Workers Philadelphia Welfare and Pension
6 Fund was related. (ECF No. 52). On July 5, 2023, City of Pontiac Reestablished General
7 Employees' Retirement System and City of Plantation Police Officers' Retirement Fund filed a
8 complaint and motion to intervene. (ECF No. 66). On July 13, 2023, the motion was granted.
9 (ECF No. 68). On August 2, 2023, the City of Pontiac Reestablished General Employees'
10 Retirement System and City of Plantation Police Officers' Retirement Fund claims were
11 consolidated. On September 28, 2023, the Asbestos Workers Philadelphia Welfare and Pension
12 Fund claim was consolidated. (ECF Nos. 73, 78). On October 12, 2023, Cook's claims were
13 related, then consolidated. (ECF No. 93).

14 On October 23, 2023, the parties filed motions for appointment of lead-plaintiff and lead-
15 counsel. (ECF Nos. 97, 99, 101, 106). Gervat and Rogers dropped out, and on October 23, 2023,
16 filed a motion in support of City of Pontiac Reestablished General Employees' Retirement System
17 and City of Plantation Police Officers' Retirement Fund (ECF No. 98). On November 20, 2023,
18 parties filed oppositions. (ECF Nos. 108–110). On December 4, 2023, parties filed reply briefs
19 with Amy J. Cook joining City of Pontiac Reestablished General Employees' Retirement System
20 and City of Plantation Police Officers' Retirement Fund (ECF Nos. 113–14). Motion hearing was
21 held on January 9, 2023. (ECF No. 117).

22 After review of the record considering relevant legal authorities, the Court assigns the title
23 of co-lead plaintiffs to **City of Plantation Police Officers' Retirement Fund, City of Pontiac**
24 **Reestablished General Employees' Retirement System, and Amy J. Cook** represented by co-
25 lead counsel **Bleichmar, Fonti & Auld LLP, Motley Rice LLC, and Cotchett, Pitre &**
26 **McCarthy LLP.**

27 //

28

1 **FACTS**

2 In Spring 2020, under the leadership of Defendant Charles Scharf (Chief Executive
3 Officer), Wells Fargo implemented a “Diverse Search Requirement” to ameliorate diversity in its
4 workforce. (*Asbestos/Isais Compl.* ¶ 112). This program required that 50% of candidates
5 interviewing for positions with compensation of \$100,000 or more had to be “diverse with respect
6 to at least one diversity dimension,” including “race/ethnicity, gender, LGBTQ, veterans, and
7 people with disabilities.” (*Asbestos/Isais Compl.* ¶¶ 4, 112).

8 During the active policy, Defendant’s issued public statements emphasizing the Diverse
9 Search Requirement, for example, in the 2020 Proxy and Annual Report, the 2021 Proxy and 2020
10 *Social Impact and Sustainability Highlights* paper, a 2021 ESG report, the 2022 Proxy, a DEI
11 Report, and during Congressional testimony. (*Asbestos/Isais Compl.* ¶¶ 116–17, 121;
12 *Pontiac/Plantation Compl.* ¶¶ 121–24; *Cook Compl.* §§ D., F., G.). However, the pleadings assert
13 that these representations were made fraudulently because several “non-diverse” candidates for
14 positions with compensation over \$100,000 had been selected internally prior to interviews of
15 diverse candidates. (*Asbestos/Isais Compl.* ¶ 5). This meant that many of the interviews pursuant
16 to the Diverse Search Requirement were “sham interviews” made to meet the “diverse slate”
17 requirement. (*Asbestos/Isais Compl.* ¶ 112; *Pontiac/Plantation Compl.* ¶ 123).

18 Following public reveal of the “sham interview” practice by a *New York Times* article in
19 May 2022, federal investigations were launched, and the Company’s stock price tanked from
20 \$44.63 on June 8, 2022, to \$40.08 on June 10, 2022, totaling an approximately \$17B loss.
21 (*Asbestos/Isais Compl.* ¶¶ 6–10). It is also speculated that ongoing federal investigations will
22 prevent the Company’s asset cap from being lifted by federal authorities, further limiting share
23 price.¹ (*Cook Compl.* § D.).

24
25 //

26
27 ¹ In 2018, the Consumer Financial Protection Bureau (“CFPB”), the Office of the Comptroller of the Currency
28 (“OCC”), and the Federal Reserve placed a \$1.95T asset cap on Wells Fargo until it bolsters its firm-wide risk
management and compliance standards. (*Asbestos/Isais* ¶ 80; *Pontiac/Plantation* ¶ 129).

LEGAL STANDARD

A plaintiff in a derivative action must “fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.” Fed. Rule Civ. Pro. 23.1(a). To be an adequate representative, plaintiff “must have the capacity to vigorously and conscientiously prosecute a derivative suit and be free from economic interests that are antagonistic to the interests of the class.” *Larson v. Dumke*, 900 F.2d 1363, 1367 (9th Cir. 1990) (holding plaintiffs did not adequately represent similarly situated shareholders for using suit as leverage in individual suits against same defendants). The adequacy of representation may be determined by an evaluation of: (1) indications that plaintiff is not true party of interest, (2) plaintiff’s unfamiliarity with the litigation and unwillingness to learn about the suit, (3) degree of control exercised by attorneys over the litigation, (5) lack of any personal commitment to the action on the part of representative plaintiff, (6) remedy sought by plaintiff in derivative action, (7) relative magnitude of plaintiff’s personal interests as compared to interest in derivative action, and (8) plaintiff’s vindictiveness towards defendants. *Id.* Whether the plaintiff’s interests are antagonistic to the class is “the most important element.” *Puri v. Khalsa*, 674 Fed.Appx. 679, 682 (9th Cir. 2017) (finding antagonistic personal interests of plaintiffs seeking large personal damages from defendants, actively litigating against defendants in multiple jurisdictions, and where defendant’s board comprised entirely of plaintiffs).

In line with Federal Rule of Civil Procedure 23.1, the recently amended Delaware Court of Chancery Rule 23.1 requires a derivative plaintiff to have standing and “fairly and adequately” represent the corporation’s interest. Del. Ct. Ch. R. 23.1(c)(1)(A). Similarly, the plaintiff’s counsel must also “fairly and adequately” represent the corporation’s interests in pursuing the derivative action. Del. Ct. Ch. R. 23.1(c)(2). *See Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991) (“[In corporation law], the presumption that state law should be incorporated into federal common law is particularly strong”); *Lee v. Fisher*, 70 F.4th 1129, 1139 n.6 (9th Cir. 2023) (defining terms in forum-selection clause by Delaware rules of contract interpretation); *Meland v. WEBER*, 2 F.4th 838 (9th Cir. 2021) (applying Delaware Corporate Law, the state of incorporation,

1 to determine if plaintiff's claim is direct or derivative). Between multiple plaintiffs and counsel,
2 the court may consider: (1) counsel's competence and experience, (2) counsel's access to the
3 resources necessary to prosecute the litigation, (3) the quality of the pleading, (4) counsel's
4 performance in the litigation to date, (5) the proposed leadership structure, (6) the derivative
5 plaintiff's relationship to and interest in the entity, (7) any conflicts between counsel or the
6 derivative plaintiff and the entity, and (8) any other matter pertinent to ability of counsel or
7 derivative plaintiff to fairly and adequately represent the interests of the entity in the derivative
8 action. Del. Ch. Ct. R. 23.1(c)(3)(B).

9
10 **DISCUSSION**

11
12 **I. Lead Plaintiffs**

13 A plaintiff in a derivative action must "fairly and adequately represent the interests of
14 shareholders or members who are similarly situated in enforcing the right of the corporation or
15 association." Fed. Rule Civ. Pro. 23.1(a). To be an adequate representative, plaintiff "must have
16 the capacity to vigorously and conscientiously prosecute a derivative suit and be free from
17 economic interests that are antagonistic to the interests of the class." *Larson v. Dumke*, 900 F.2d
18 1363, 1367 (9th Cir. 1990) (holding plaintiffs did not adequately represent similarly situated
19 shareholders for using suit as leverage in individual suits against same defendants).

20 In evaluating lead-plaintiff, Delaware Chancery Rules consider "derivative plaintiff's
21 relationship to and interest in the entity." Del. Ch. Ct. R. 23.1(c)(3)(B)(vi). Each of the proposed
22 plaintiffs here are Wells Fargo shareholders with varying degrees of economic interest. However,
23 "[f]or a stockholder, an important dimension of the relationship is the [absolute and relative] size
24 of the stake." *In Re Fox Corp. Deriv. Litig.*, 2023-0418-JTL, at 20 (Del. Ct. Ch. 2023). The
25 absolute or relative stake size is used as a benchmark to assess the potential level of vigor that a
26 plaintiff will bring to "monitor counsel and play a meaningful role in the case." *Id.*

27 Regarding the absolute and relative stake of the institutional investors here, no one is a
28 clear winner. The City of Plantation Police Officers' Retirement Fund holds the largest number of

1 shares (14,710, 1.05% total holdings), followed by the City of Pontiac Reestablished General
2 Employees' Retirement System (8,120, 0.09% total holdings), and finally the Asbestos Workers
3 Philadelphia Welfare and Pension Fund (5,900, 0.16% total holdings) (ECF No. 120, at 1; ECF
4 No. 122, at 2). The hierarchy is not significant enough to favor any one of the institutional
5 investors over the others.

6 Between individual shareholders, Jose F. Isais has a significantly larger interest than Amy
7 J. Cook. Isais holds 1,546 shares of common stock, 2,869 shares ESOP fund in 401(k) plan
8 (investing exclusively in common stock), and approximately 3,299 units of the Wells Fargo Stable
9 Value Fund in 401(k) plan (amount invested in common stock unknown), totaling 99% of
10 holdings. (ECF No. 120, at 2). On the other hand, Cook holds only eight shares, totaling 5.5% of
11 holdings. (ECF No. 122, at 2). The absolute and relative difference here suggests that Isais has
12 more at stake than Cook, and thus is more compelled to monitor the actions of counsel over the
13 course of prosecution.

14 The Court also looks at “any conflicts between counsel or the derivative plaintiff and the
15 entity.” Del. Ct. Ch. R. 23.1(c)(3)(B)(viii). Here, each set of counsel has represented that neither
16 themselves nor plaintiffs have any conflicts of interest. (Transcript of Hearing on Jan. 9, 2024).
17 Isais is a former employee, however, that does not bear weight considering the relief requested
18 would increase the corporate coffers and benefit Wells Fargo.

19 Finally, the Court may consider “any other matter pertinent to ability of counsel or the
20 derivative plaintiff to fairly and adequately represent the interests of the entity in the derivative
21 action.” Del. Ch. Ct. R. 23.1(c)(3)(B)(viii). Of relevance is Cook’s independent determination to
22 conduct a robust DGCL Section 220 investigation and pursue those books and records for more
23 than one year. (Cook Motion, ECF No. 101, at 14). Additionally, Cook is the only plaintiff to seek
24 records under California law. And on January 12, 2024, the San Francisco Superior Court held
25 that she pled a proper purpose to do so. (Order Overruling and Sustaining In-Part Demurrer and
26 Motion to Strike, ECF No. 122-1, Ex. A, at 3). Initially an underdog, these efforts bode well for
27 Cook.
28

1 **II. Lead Counselors**

2 Plaintiff’s counsel must also “fairly and adequately” represent the corporation’s interests in
3 pursuing the derivative action. Del. Ct. Ch. R. 23.1(c)(2). The Court may assess: (1) competence
4 and experience, (2) access to the resources necessary to prosecute the litigation, (3) quality of
5 pleading, (4) performance in the litigation to date, (5) the proposed leadership structure, (6)
6 [omitted for irrelevance], (7) [omitted for redundancy] and (8) any other matter pertinent to ability
7 of counsel or derivative plaintiff to fairly and adequately represent the interests of the entity in the
8 derivative action. Del. Ch. Ct. R. 23.1(c)(3)(B). Each of these factors impacts the broader question
9 of which leadership team will “best represent the interests of the entity in pursuing the derivative
10 action.” *In Re Fox Corp. Deriv. Litig.*, 2023-0418-JTL, at 8 (Del. Ct. Ch. 2023).

11 **A. Counsel’s Competence and Experience**

12 The Court may consider counsel’s “competence and experience.” Del. Ch. Ct. R.
13 23.1(c)(3)(B)(i). “A court should consider the factors that a client would weigh when hiring a
14 lawyer.” *In Re Fox Corp. Deriv. Litig.*, 2023-0418-JTL, at 8 (Del. Ct. Ch. 2023). Here, there is no
15 clear distinction in competence and experience of the four law firms. They all demonstrate
16 competence in performance throughout this litigation as well as robust histories of prosecuting
17 impactful securities litigation, including derivative cases, under Delaware Corporate Law and in
18 the Northern District of California. Cotchett, Pitre & McCarthy LLP served as lead counsel in two
19 derivative actions against nominal defendant Wells Fargo. (Cook Decl., Ex. B., ECF No. 101-1, at
20 12). While noteworthy, it is de minimis here because each of the firms have experience
21 prosecuting derivative shareholder actions and securities class actions against large financial
22 institutions. None of the firms receive an advantage in this category.

23 **B. Counsel’s Access to the Resources Necessary to Prosecute the Litigation**

24 The Court may consider “access to resources necessary to prosecute the litigation.” Del.
25 Ch. Ct. R. 23.1(c)(3)(B)(ii). It is undisputed that each firm has the necessary resources to
26 vigorously prosecute this litigation. Scott +Scott (“SS”) has a team devoted to derivative
27
28

1 shareholder actions and fiduciary duty claims. (Transcript of Hearing on Jan. 9, 2024). Cotchett,
2 Pitre & McCarthy LLP (“CPM”) also specialize in derivative shareholder actions. (Transcript of
3 Hearing on Jan. 9, 2024). Motley Rice LLC (“MR”) and Bleichmar, Fonti & Auld LLP (“BFA”)
4 each have decorated counsel who have demonstrated the capacity to settle very large derivative
5 shareholder actions and securities class actions. (ECF No. 106-2, Exs. A & B). This factor is
6 neutral.

7 8 **C. Quality of the Pleading**

9 Perhaps the most influential factor the Court considers here is the relative “quality of the
10 pleadings.” Del. Ch. Ct. R. 23.1(c)(3)(B)(iii). Each party’s complaint asserts that the individually
11 named defendants breached their fiduciary duty. The allegations are based on some of the same
12 publicly available information but are distinguished by the idiosyncratic facts privately uncovered
13 through independent books and records investigations and interviews. In evaluating the relative
14 strength of the pleadings, the Court focuses on two important distinctions here: (1) demand futility
15 allegations, and (2) violations of the Securities and Exchange Act of 1934.

16 First, the Court addresses the relative strength of the demand futility allegations. In
17 derivative actions, a plaintiff must plead demand futility *with particularity*. Fed. R. Civ. Pro.
18 23.1(b)(3). Conclusory demand futility allegations are not entitled to the same reasonable factual
19 inferences as those which arise out of particularized facts. *Rosenbloom v. Pyott*, 765 F.3d 1137,
20 1148 (9th Cir. 2014). The BFA and MR amended complaint appears to plead demand futility with
21 particularity. (Ver. Amend. S’holder Deriv. Compl. § X, ECF No. 105, at 91-98). CPM also pleads
22 demand futility allegations on a director-by-director basis. (Ver. S’holder Deriv. Compl. § X., 23-
23 cv-04934, ECF No. 5, at 86-93). To pass muster at the motion to dismiss stage, it is paramount
24 that demand futility is plead with the requisite particularity and on a director-by-director basis.
25 The SS pleading falls short in this regard, merely alleging that all fourteen directors are neither
26 independent nor disinterested, and that they all face a substantial likelihood of liability in a
27 conclusory manner. (Ver. S’holder Der. Compl. § X., 23-cv-01168, ECF No. 52, at 48).

28 Second, the Court analyzes the causes of action brought under the Securities Act. SS

1 argues that the 14(a) claims brought by BFA, MR, and CPM are barred by a one-year statute of
2 limitations. However, SS does not acknowledge that the BFA and MR complaint also includes
3 10(b) and 20(a) claims; and CPM asserts a 29(b) claim. These additional allegations provide
4 assurance that these firms have Federal Question Jurisdiction to remain federal court. The Court
5 further considers SS' and CPM's omission of 10(b) and 20(a) claims; equally, that BFA and MR
6 omitted a 29(b) allegation. Despite these relative omissions, each of the parties allege Securities
7 Act violations which rely on many of the same underlying facts.

8 Ultimately, the BFA, MR, and CPM pleadings are stronger because they are more
9 particularized on their face. This factor weighs in favor of the PPC Team and against SS.

10 **D. Counsel's Performance in Litigation to Date**

11
12 The Court considers "counsel's performance in the litigation to date." Del. Ch. Ct. R.
13 23.1(c)(3)(B)(iv). "If one firm has taken noteworthy steps to advance a case, then that favors that
14 firm's application." *In Re Fox Corp. Deriv. Litig.*, 2023-0418-JTL, at 10 (Del. Ct. Ch. 2023).

15 Here, all the firms base their allegations on information obtained through books and
16 records inspections. However, the Court prioritizes two metrics in evaluating competing counsel's
17 performance to date here: (1) the time between issuing information demands and filing pleadings,
18 and (2) the substance of books and records obtained along with other privately accumulated
19 material. "[B]eing the last holdout for books and records does not automatically equal superior
20 performance. Nor does moving quickly when doing so is not warranted." *In Re Fox Corp. Deriv.*
21 *Litig.*, 2023-0418-JTL, at 10 (Del. Ct. Ch. 2023).

22 The Court addresses SS' seemingly "quick" filing of the initial complaint. The pleadings
23 relied on materials accumulated by Isais' DGCL Section 220 demand on August 5, 2022. Through
24 the inspection, SS had access to more than 400 documents to base its initial complaint, filed on
25 March 15, 2023. (Transcript of Hearing on January 9, 2024). BFA, MR, and CPM argue that SS
26 rushed to file after Asbestos Workers Philadelphia Welfare and Pension Fund made an additional
27 Section 220 demand on March 7, 2023, eight days prior to filing. However, SS maintains that they
28 "struck a balance" between conducting investigations and filing pleadings. (Transcript of Hearing

1 on January 9, 2024). The Court does not find detriment inherent to SS' process, however,
2 information accumulated is necessarily incorporated in the pleadings and reflects on their quality.

3 On the other hand, the PPC team has outperformed in these areas. MR relied on third-party
4 client City of Hartford's August 29, 2022, Section 220 demand and statements of two confidential
5 witnesses to support their pleadings filed on July 5, 2023, and November 1, 2023. MR did not
6 necessarily fail to obtain critically relevant information by relying on City of Hartford's
7 inspection. It further appears that such investigations accumulated enough information for MR to
8 file a lengthy and particularized complaint. The Court finds no fault in MR's process here as it is
9 parable to "working smarter, not harder." Further, CPM represents Amy J. Cook, who has
10 vociferously acquired material information through Section 220 and California law. Similarly, the
11 BFA firm made an additional Section 220 request around the time of filing the initial complaint on
12 July 5, 2023, and continues seeking additional books and records. However, without knowing the
13 material that these additional Section 220 inspections produce, the Court will not comment on the
14 extent to which the extra demands inherently advantage CPM, BFA, or the PPC Team. Ultimately,
15 this factor remains balanced.

16 **E. Proposed Leadership Structure**

17 The Court may consider the "proposed leadership structure." Del. Ch. Ct. R.
18 23.1(c)(3)(B)(v). After months of opposition, the PPC Team appears to have assembled last
19 minute, before filing the replies. Assembling on the fly is antagonistic to deliberate planning.
20 However, "three is not too cumbersome a number." *In Re Fox Corp. Deriv. Litig.*, 2023-0418-JTL,
21 at 16 (Del. Ct. Ch. 2023). BFA and MR have worked together for several months, filing motions
22 together to be appointed co-lead counsel. CPM operated solo before the reply stage. Whereas,
23 during oral argument it was represented that the firm representing Hughes and Gervat stepped
24 down because they recognized that the PPC Team was "superior." The PPC Team's reasoning is
25 well taken and that combining litigants will yield the strongest possible complaint. The Court
26 favors amicability and organized coordination in appointing co-counsel.
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

The Court appoints **City of Plantation Police Officers' Retirement Fund, City of Pontiac Reestablished General Employees' Retirement System, and Amy J. Cook** co-lead plaintiffs, represented by co-lead counsel **Bleichmar, Fonti & Auld LLP, Motley Rice LLC, and Cotchett, Pitre & McCarthy LLP.**

IT IS SO ORDERED.

This Order resolves ECF Nos. 97, 99, 101 & 106.

Dated: February 8, 2024


TRINA L. THOMPSON
United States District Judge

United States District Court
Northern District of California