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United States District Court,
S.D. New York.

Christine Asia Co., Ltd., et al., Plaintiffs,
v.
Alibaba Group Holding Limited, et al., Defendants.

No. 15-md-02631 (CM)

Signed June 24, 2016

Synopsis

Background: Shareholders brought putative consolidated class action against Chinese e-commerce corporation and several of its officers, alleging securities fraud and control person liability under Securities Exchange Act. Defendants moved to dismiss for **failure** to state a claim.

Holdings: The District Court, McMahon, C.J., held that:
1 allegation that corporation failed to disclose that it met with and received non-binding administrative guidance from Chinese regulatory agency was insufficient to state § 10(b) securities fraud claim;
2 corporation's statements about its ethical culture or reputation for integrity were mere puffery, and thus did not give rise to securities violations; and
3 shareholders failed to sufficiently plead scienter.

Motion granted.

West Headnotes (21)

Change View

1 **Federal Civil Procedure** Fraud, mistake and condition of mind
Securities fraud claims are subject to heightened pleading requirements that the plaintiff must meet to survive a motion to dismiss; a complaint alleging securities fraud must meet the pleading requirements of rule requiring circumstances constituting fraud or mistake be pled with particularity. Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b); Fed. R. Civ. P. 9(b), 12(b)(6).

2 **Securities Regulation** Scienter
For an inference of scienter to be strong in a securities fraud action, a reasonable person must deem it cogent and at least as compelling as any opposing inference one could draw from the facts alleged. Securities Exchange Act of 1934 § 21D, 15 U.S.C.A. § 78u-4(b).

material effects on a corporation's financial conditions or results of operation can give rise to liability under Rule 10b-5, so long as the omission is material and the other elements of Rule 10b-5 have been established. 17 C.F.R. §§ 229.303(a)(3)(ii), 240.10b-5.

10 **Securities Regulation** Facts or opinions

Chinese e-commerce corporation's statements about its ethical culture or reputation for integrity were mere puffery, and thus did not give rise to securities violations. Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

11 **Securities Regulation** Scienter

To plead scienter under Section 10(b) and Rule 10b-5, plaintiffs must state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind. Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

12 **Securities Regulation** Scienter, Intent, Knowledge, Negligence or Recklessness

A complaint alleges scienter under § 10(b) and Rule 10b-5 when a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged. Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

13 **Securities Regulation** Scienter

Courts in § 10(b) securities fraud actions must determine whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation meets that standard. Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

14 **Securities Regulation** Scienter

A strong inference of fraudulent intent required to plead scienter may be established in a securities fraud action either (1) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (2) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness. Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

15 **Securities Regulation** Scienter, Intent, Knowledge, Negligence or Recklessness

To plead scienter through motive and opportunity, plaintiffs alleging securities fraud must allege that defendants benefited in some concrete way and personal way from the purported fraud; however, motives that are common to most corporate offices, such as the desire for the corporation to appear profitable and the desire to keep stock prices high to increase officer compensation, do not constitute "motive" required to establish scienter. Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

16 **Securities Regulation** Scienter, Intent, Knowledge, Negligence or Recklessness

Motive required to plead scienter in a securities fraud action is generally shown by alleging that corporate insiders sought to sell their own shares at an artificially inflated price. Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b); 17

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George S. Wang, Jonathan K. Youngwood, Simpson Thacher & Bartlett LLP, New York, NY, James Glenn Kreissman, Simona Gurevich Strauss, Stephen Patrick Blake, James G. Kreissman, Simpson Thacher & Bartlett LLP, Palo Alto, CA, for Defendants.

AMENDED MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

McMahon, C.J.:

*1 The issue raised by this garden-variety securities fraud complaint is simple: is an offering document that fully discloses all substantive investment risks materially misleading if it fails to disclose that a government agency, in a country very different than ours, met with the issuer to underscore the issuer's obligation to ameliorate those risks?

Plaintiffs assert that the Chinese e-commerce giant **Alibaba** Group Holding Limited ("**Alibaba**" or "the Company") and several of its officers and directors knowingly or recklessly concealed that the Company was the subject of what Plaintiffs describe as an "administrative proceeding." At this proceeding, the State Administration for Industry and Commerce ("SAIC")—a powerful Chinese regulatory agency—warned the Company that it lacked appropriate internal controls, was operating in contravention of Chinese laws and regulations, and could be subject to substantial financial fines. According to Plaintiffs, failing to disclose the pendency of the "administrative proceeding" rendered the Company's registration statement, filed by the Company in connection with its initial public offering ("IPO"), misleading, despite its extensive cautionary **disclosures**.

Plaintiffs purchased either **Alibaba** American Depository Shares ("ADSs") or call options to purchase **Alibaba** ADSs between September 19, 2014 and January 29, 2015. On behalf of themselves and a putative class of other similarly situated investors, Plaintiffs sued **Alibaba**, its founder and the Executive Chairman of its Board of Directors, Jack Ma ("Ma"), its co-founder and Executive Vice Chairman, Joseph Tsai ("Tsai"), its Chief Executive Officer ("CEO") and director, Jonathan Zhaoxi Lu ("Lu"), and its Chief Financial Officer ("CFO"), Maggie Wei Wu ("Wu") ("Individual Defendants," and collectively with **Alibaba**, "Defendants") for securities fraud in violation of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78j(b), 78t(a), and Rule 10b-5, 17 C.F.R. § 240.10b–5, promulgated thereunder.

Defendants now move, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to dismiss Plaintiffs' claims. Defendants assert that Plaintiffs' Consolidated Class Action Complaint (the "Consolidated Complaint") fails to allege facts showing that Defendants made any materially false or misleading statements or omissions, giving rise to a strong inference that Defendants acted with scienter, and establishing loss causation for many of the alleged misstatements and omissions.

For the reasons stated below, Defendants' motion to dismiss the Consolidated Complaint is granted.

BACKGROUND

The following facts—taken from the Consolidated Complaint, documents referenced therein, and matters of which the Court can take judicial notice—are assumed to be true for purposes of this motion, and are viewed in the light most favorable to Plaintiffs as the non-moving parties. *See, e.g., Kleinman v. Elan Corp.*, 706 F.3d 145, 152 (2d Cir.2013); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir.2002).

*2 **Alibaba** is an e-commerce company based in the People's Republic of China ("China" or the "PRC"). It operates several highly popular online marketplaces. (Consolidated Compl. ("CC") ¶¶ 35-38.) On these marketplaces, independent third party merchants sell products to wholesale and retail buyers around the world. (*Id.* ¶ 35.) **Alibaba's** two largest marketplaces, Taobao and Tmall, account for over 80% of the products sold on **Alibaba's** websites. (*Id.* ¶ 38.)

> the act of an AIC agency, within the scope of its legal authority and by way of *non-compulsory* measures such as advising, tutoring, reminding, admonishing, demonstrating by examples, publishing, summoning for meeting, etc., to lead citizens, legal persons and other entities (hereinafter 'Administrative Counterparty') *to willingly perform or not perform certain acts,* in order to achieve certain administrative objectives.

(CC Exh. 3 at 14 (emphasis added).) It is designed to "guide and help administrative counterparties to improve their operational management, prevent or avoid their violation of any administrative laws, regulations and rules." (*Id.* at 16.)

Administrative guidance is not designed to compel. The Rules stress that "The implementation of administrative guidance shall be based on the free will of the administrative counterparty," and that "No compulsory measures, compulsory measures in a disguised form[,] or administrative measure against the administrative counterparty to accept administrative guidance" shall be taken. (*Id.* at 14.) Indeed, the Rules state that administrative guidance "shall be terminated ... [w]here the administrative counterpart expressly refused to accept the administrative guidance ...." (*Id.* at 19.)

The SAIC's administrative guidance to **Alibaba** consisted of a list of concerns it identified when reviewing **Alibaba's** operations. The concerns related to: (i) unlicensed vendors, (ii) the sale of counterfeit and other prohibited items, (iii) consumer protection issues concerning advertising, sales, and promotional activities, (iv) flawed ratings of merchants and products, and (v) lax internal controls that may have led to certain merchants receiving preferential treatment. (*Id.*; see also CC Exh. 1 at 13.)

A senior manager from each of **Alibaba's** core departments attended the meeting and accepted the Administrative Guidance. None of the Individual Defendants attended. (CC ¶¶ 64.)

The SAIC did not make any formal findings at the July 16 Meeting. The SAIC also did not direct the Company to address its concerns in any particular manner or by a certain date.

Plaintiffs have not alleged that **Alibaba** was ever investigated, fined, or penalized as part of the Red Shield Program, or otherwise. One Chinese blogger, who is not alleged to be affiliated with the Chinese government or Chinese mainstream media, reported, without identifying a source, that "some participants of the [July 16] meeting revealed" that the SAIC's Director General warned **Alibaba** during the meeting that the SAIC was prepared to "penalize **Alibaba** 1,000 times or even several thousand times a year," with each fine amounting to 1% of **Alibaba's** daily sales amounts." (CC ¶ 72; *see also* CC Exh. 7 at 8.)

B. Alibaba's IPO Disclosures

Alibaba's initial public offering ("IPO") on the New York Stock Exchange took place on September 19, 2014—just two months after the July 16 Meeting. (*Id.* ¶¶ 98-101.)

Ahead of its IPO, **Alibaba** filed a registration statement with the Securities and Exchange Commission ("SEC") for the sale of **Alibaba** ADSs. The SEC declared an amended version of the registration statement (the "Registration Statement") effective on September 18, 2014. **Alibaba** filed the final Prospectus for the IPO, which forms part of the Registration Statement, on September 22, 2014. (*Id.* ¶¶ 100-101, 235.)

*4 The Registration Statement contained a litany of **disclosures** about the pitfalls of e-commerce, the Chinese regulatory environment, and the attendant risks to **Alibaba's** business. (*See, e.g.,* Decl. of Laurence M. Rosen ISO Pls.' Opp'n to Defs.' Mot. to Dismiss Cons. Class Action Compl. ("Rosen Decl.") Exhs. C-1 at 47-70, C-3 at 24-36.) This included **disclosures** addressing the likelihood that China would continue to issue new laws and regulations that could adversely affect **Alibaba** and the rest of the Chinese e-commerce industry. For instance, **Alibaba** disclosed:

- "The PRC government authorities are likely to continue to issue new laws, rules and regulations governing [the industries in which **Alibaba** operates, which] could also

Alibaba did not disclose the existence of the July 16 Meeting or reveal that it had received administrative guidance from the SAIC. In fact, **Alibaba** did not specifically disclose the existence of the Red Shield Program; it said, however, that the SAIC had, in recent years, "strengthened enforcement actions, including levying significant fines" in the context of the new Anti-Monopoly law, and emphasized that it expected to face "increased scrutiny from regulators" as it grew. (Rosen Decl. Exh. C-1 at 48, 49.)

Moreover, **Alibaba** disclosed that it had been criticized in the past due to the sale of pirated, counterfeit and illegal products on its sites—including that **Alibaba** and Taobao had been designated "Notorious Markets" by the U.S. Trade Representative—and that it faced legal, regulatory, and financial exposure both if it attempted to reduce the sales of such products and failed to do so. Specifically, **Alibaba** disclosed:

- "Although we have adopted measures to verify the authenticity of products sold on our marketplaces and minimize potential infringement of third-party intellectual property rights through our intellectual property infringement complaint and take-down procedures, these measures may not always be successful. We have been and may continue to be subject to allegations of civil or criminal liability based on allegedly unlawful activities carried out by third parties through our online marketplaces. We also have been and may continue to be subject to allegations that we were participants in or facilitators of such allegedly unlawful activities." (*Id.* at 37.)

- "In the event that alleged counterfeit or infringing products are listed or sold on our marketplaces or our other services, we could face claims relating to such listings or sales or for our alleged **failure** to act in a timely or effective manner in response to infringement or to otherwise restrict or limit such sales or infringement." (*Id.*)

- "We may implement further measures in an effort to strengthen our protection against these potential liabilities that could require us to spend substantial additional resources and/or experience reduced revenues by discontinuing certain service offerings. In addition, these changes may reduce the attractiveness of our marketplaces and other services to buyers, sellers or other users." (*Id.* at 38.)

- "Additional measures that we take to address fraud could also negatively affect the attractiveness of our marketplaces to buyers or sellers." (*Id.*)

***6** Other practices **Alibaba** disclosed were sellers' use of "fictitious or 'phantom' transactions" to "artificially inflate their own ratings on our marketplaces, reputation and search results rankings," and the risk posed by employees' "illegal, fraudulent or collusive activities," specifically employees' acceptance of payments in return for preferential treatment on **Alibaba** marketplaces. (*Id.* at 38.)

Finally, **Alibaba** disclosed that it could be the subject of regulatory investigations and enforcement actions, and stated that it expected to be the target of regulatory scrutiny in the future. Specifically, **Alibaba** disclosed:

- **Alibaba** had "from time to time been subject to PRC and other foreign government inquiries and investigations, including those relating to website content and alleged third-party intellectual property infringement," but that "None of these inquiries and investigations has resulted in significant restrictions on our business operations." (*Id.* at 47-48.) However, as it "continue[s] to grow in scale and significance," it "expect[s] to face increased scrutiny, *which will, at a minimum, result in our having to increase our investment in compliance and related capabilities and systems.*" (Rosen Decl. Exh. C-3 at 47 (emphasis added).)

- "[T]wo of the three PRC anti-monopoly enforcement agencies, the National Development and Reform Commission, or the NDRC, and the State Administration for Industry and Commerce, or the SAIC, have in recent years strengthened enforcement actions, including levying significant fines, with respect to cartel activity as well as abusive behavior of companies having market dominance." (*Id.* at 48.)

C. Disclosure of the July 16 Meeting and the Administrative Guidance

[but] like all global companies in our industry, we must continue to do everything we can to stop these activities." (*Id.*)

Immediately after the release of the White Paper, the SEC launched an investigation into whether **Alibaba** had violated federal securities laws by failing to disclose the July 16 Meeting in its public filings. (*Id.* ¶ 1219.) There is no allegation in the Consolidated Complaint that the SEC ever concluded that **Alibaba** had violated the law, brought suit, or commenced any sort of administrative proceeding against **Alibaba** on the ground that its IPO **disclosures** were misleading. [1]

*8 **Alibaba's** stock price fell on January 28 and January 29. **Alibaba's** ADS price fell $4.49 on January 28, 2015, to close at $98.45 (a 4.4% decrease), and $8.64 on January 29, 2015, to close at $89.81 (a decrease of almost 9%). (*Id.* ¶¶ 207, 213.) The two-day decline in the price of **Alibaba** ADSs eliminated approximately $33 billion in **Alibaba's** market capitalization. (*Id.* ¶ 216.)

D. Plaintiffs' Allegations of Wrongdoing

In the weeks following **Alibaba's** January 29 press release and earnings call, six class action lawsuits were filed against **Alibaba** and the Individual Defendants in the Southern District of New York and the Central District of California. The United States Judicial Panel on Multidistrict Litigation consolidated the six actions and assigned them to this Court. (Transfer Order (Dkt. No. 1).) A seventh action filed in the Northern District of California was later added. (*See* Dkt. No. 2.)

On July 1, 2015, Plaintiffs filed the Consolidated Complaint, which alleged that Defendants knowingly or recklessly concealed the information contained in the White Paper so as to artificially inflate the price of **Alibaba** ADSs sold in the IPO. (*See* Dkt. No. 6.)

The Consolidated Complaint alleges that **Alibaba's** Registration Statement failed to disclose that **Alibaba** had been visited by, and received administrative guidance from, the SAIC on July 16, 2014. (CC ¶ 102.) The Consolidated Complaint also alleges that the Registration Statement omitted that **Alibaba** was a "target" of the Red Shield Program, and that a material portion of **Alibaba's** earnings were derived from counterfeit goods. According to Plaintiffs, "the effects on **Alibaba** of Red Shield, the July 16 Meeting, and the Administrative Guidance must be evaluated together and considered in the context of the business climate in China;" the Red Shield Program allegations, in particular, exist to "underscore the materiality of the July 16 Meeting and Administrative Guidance, adding context to Defendants' duty to disclose." (Pls.' Br. at 33). Plaintiffs make clear, then, that their allegations about the Red Shield Program and **Alibaba's** reliance on counterfeit goods are not independent violations of Section 10(b) and Rule 10b-5. (Pls.' Br. at 33, 39; Reply Mem. of Law in Further Support of Defs.' Mot. to Dismiss Pls.' Cons. Class Action Compl. (Dkt. No. 25) ("Reply Br.") at 13.) Rather, they are part and parcel of a single, unified allegation that the **failure** to disclose the fact of the July 16 Meeting and the delivery of administrative guidance by the SAIC violated the federal securities laws. (*Id.*)

The Consolidated Complaint also alleges that these omissions rendered materially false or misleading several other statements made by Defendants in advance of and following the IPO. The vast majority of these allegedly false or misleading statements are risk **disclosures** contained in the Registration Statement. But Plaintiffs also identify post-IPO statements made by Defendants in a "60 Minutes" interview, two speeches, a press release, and two post-IPO SEC filings that they allege are misleading. (*Id.* ¶¶ 105-153, 178-189.)

As to all of these misstatements and omissions, Plaintiffs assert that Defendants had actual knowledge of, or acted recklessly toward, the falsity of their public statements. (*Id.* ¶ 291.) Plaintiffs also assert that, by virtue of Individual Defendants' positions at **Alibaba**, the Individual Defendants are liable as controlling persons under Section 20(a) of the Exchange Act.

DISCUSSION

have failed to plead that Defendants made actionable misstatements or omissions and that they acted with scienter. Because these grounds are sufficient to find that Plaintiffs failed to state a claim, the Court does not address Defendants' argument that Plaintiffs have not alleged loss causation as to some of the alleged misstatements and omissions.

A. The Consolidated Complaint Does Not Allege Material Misstatements or Omissions

Alibaba's Registration Statement is unusually comprehensive. **Alibaba** disclosed that counterfeit and defective goods are sold on its marketplaces; that the United States Trade Representative had designated two of its marketplaces as "notorious markets"; that such sales exposed the Company to litigation and regulatory risks; that China was increasing its regulatory oversight of e-commerce companies; and that, while **Alibaba** was trying to reduce sales of counterfeit and defective goods, its efforts might not be successful. (*See, e.g.,* Rosen Decl. Exh. C-1 at 37-39, 46-47.) It also disclosed that it had been the subject of regulatory inquiries and investigations; that it expected to face scrutiny from regulators as it continued to grow; that China had recently issued new laws and regulations aimed at e-commerce companies, like itself; that it was uncertain how the SAIC would interpret and enforce these new laws and regulations; and that **Alibaba** could be found liable under Chinese law and subject to administrative sanctions for failing to police the sale of counterfeit and defective goods on its sites. (*Id.* at 47–48.)

The only thing allegedly missing from this lengthy list of **disclosures** is that **Alibaba** met with the SAIC on July 16 and received non-binding Administrative Guidance—in essence, a reminder to **Alibaba** that the authorities, in a country far different from ours, were looking over its shoulder—and the name of the particular regulatory program. There is no allegation that **Alibaba** failed to disclose the pendency of any actual administrative proceeding or government sanction, and, in fact, Plaintiffs have not alleged that there is any such proceeding or sanction to disclose.

The only substantive question in this case is whether the fact of that meeting and the administrative guidance **Alibaba** received had to be disclosed in order to make the Registration Statement's general **disclosures** about heightened regulatory interest and the possibility of increased cost for compliance and related activities not misleading.

1. Omission of the July 16 Meeting and the Administrative Guidance

5 An alleged omission of fact is material if there is a "substantial likelihood that the **disclosure** of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic, Inc. v. Levinson,* 485 U.S. 224, 231–32, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988) (internal citations omitted.) "Put another way, a fact is to be considered material if there is a substantial likelihood that a reasonable person would consider it important in deciding whether to buy or sell shares of stock." *Operating Local 649 Annuity Tr. Fund v. Smith Barney Fund Mgmt. LLC,* 595 F.3d 86, 92–93 (2d Cir.2010) (internal citation and quotation marks omitted).

6 **11* However, a corporation is not required to disclose a fact merely because it would be of interest to a reasonable investor. *See In re Time Warner Inc. Sec. Litig.,* 9 F.3d 259, 267 (2d Cir.1993). For instance, courts have held repeatedly that a company is not compelled to disclose every communication it has with a regulator—even where, as here, a regulator has informed a company of deficiencies in its operations. *See In re Sanofi Sec. Litig.,* 87 F.Supp.3d 510, 542 (S.D.N.Y.2015) (collecting cases), *aff'd sub nom. Tongue v. Sanofi,* 816 F.3d 199 (2d Cir.2016). In *Acito v. IMCERA Grp.,* 47 F.3d 47, 50, 52–53 (2d Cir.1995), for example, the Second Circuit held that a manufacturer of animal health products did not need to disclose that as part of an application process, the Federal Drug Administration ("FDA") had inspected a subsidiary's manufacturing plant and twice reported numerous deficiencies. Among the reasons why the court held that the inspections did not need to be disclosed was that the two inspections had not resulted in any adverse action that affected earnings—even though a third inspection ultimately resulted in the company shutting down the facility. *Id.* at 52–53. Similarly, a court in *In re Sanofi* rejected claims that a pharmaceutical company had a duty to disclose "ongoing discussions with the FDA" in which the FDA expressed concerns about the company's testing methodology during the

The Registration Statement did not specifically mention the "Red Shield Program," but Plaintiffs allege that the program was widely publicized, which put the public on notice that the SAIC was targeting sellers of counterfeit and defective goods. (*See* CC ¶ 50.) Because "the securities laws do not require **disclosure** of information that is publicly known," *Garber v. Legg Mason, Inc.*, 537 F.Supp.2d 597, 611 (S.D.N.Y.2008), Aff'd, 347 Fed.Appx. 665 (2d Cir.2009), **Alibaba's failure** to disclose the name of the particular program is not actionable.

In any event, **Alibaba** did disclose that Chinese regulators—including the SAIC—had increasingly turned their attention to market dominant companies, like itself. (*Id.* at 47–48.) It also disclosed that **Alibaba** "expect[s] to face increased scrutiny" from those regulators as it continues to grow "in scale and significance" (*Id.* at 41, 47–49, 52)—and that the mere perception that counterfeit and defective goods are commonplace on its platforms could pressure regulators to investigate further and that there could be increased compliance costs (*Id.* at 46–48). These **disclosures** make clear that the Company had faced significant litigation exposure in the past and was likely to continue to do so in the future—perhaps at an enhanced level. That **Alibaba** met with regulations and received what, under the SAIC's own rules, was informal and non-binding guidance, does not render inaccurate any statement about the likelihood of an actual inquiry or investigation taking place.

Even if these **disclosures** were not themselves sufficient, they must be read in the context of the entire Registration Statement, which makes clear that Chinese companies are subject to a rapidly evolving and often erratic legal and regulatory system. (*See, e.g.*, Rosen Decl. Exh. C-1 at 47.) According to the Registration Statement, China's economic system is relatively young, the country "has not developed a fully integrated legal system," and the laws, rules, and regulations that are on the books "may be subject to significant degrees of interpretation by PRC regulatory agencies." (*Id.* at 61.)

> In particular, because [Chinese] laws, rules and regulations [affecting economic matters] are relatively new, and because of the limited number of published decisions and the nonbinding nature of such decisions, and because the laws, rules and regulations often give the relevant regulator significant discretion in how to enforce them, the interpretation and enforcement of these laws, rules and regulations involve uncertainties and can be inconsistent and unpredictable. In addition, the PRC legal system is based in part on government policies and internal rules, some of which are not published on a timely basis or at all, and which may have a retroactive effect. As a result, we may not be aware of our violation of these policies and rules until after the occurrence of the violation.

(*Id.*) These **disclosures** clearly articulate the fact that investors in Chinese companies are exposed to substantial risk and uncertainty—more, mostly likely, than if they were to invest in a company located in a more mature regulatory environment. Indeed, this Court would be shocked if investors did not take the fact that China is not the United States into account when making an investment. [2]

13* Collectively, these **disclosures are more than sufficient to warn investors that **Alibaba** faced continuing risks related to the sale of counterfeit goods in its marketplaces, and that it could face enforcement actions and substantial fines should it fail to properly police its marketplaces for defective and illegal goods. They make clear that China's legal and regulatory environment make investing in a Chinese company, like **Alibaba**, risky. None of these statements, or any of the other identified by Plaintiffs, is misleading absent **disclosure** of the July 16 Meeting.

Plaintiffs' attempts to support their argument are unavailing. While certain statements in the Registration Statement—particularly that no inquiry or investigation "... has resulted in significant restrictions on our business operations"—could, under different circumstances, need to be disclosed, *see e.g., Menaldi v. Och–Ziff Capital Management Group LLC,* No. 14–cv–3251 (JPO), —— F.Supp.3d ——, 2016 WL 634079 (S.D.N.Y. Feb. 17, 2016); *In re BioScrip, Inc., Sec. Litig.*, 95 F.Supp.3d 711, 727 (S.D.N.Y.2015), they do not do so here,

and prompting it to pay attention to problems it had plainly disclosed is not tantamount to the institution of a formal regulatory proceeding. *See generally Acito,* 47 F.3d at 54.

The Court also cannot put much weight on Plaintiffs' allegation that the SAIC threatened to penalize **Alibaba** "1% of daily sales amounts" and "several thousand times a year," because this allegation is supported by a single blogger who is not affiliated with the government and who cites an anonymous source. (*See* CC ¶¶ 72, 91, 97; *see also* CC Ex. 7.) For Plaintiffs to rely on an unnamed confidential source, they must allege sufficient facts "to support the probability that a person in the position occupied by the source would possess the information alleged." *Novak v. Kasaks,* 216 F.3d 300, 314 (2d Cir.2000); *see also In re AOL, Inc. Repurchase Offer Litig.*, 966 F.Supp.2d 307, 314 (S.D.N.Y.2013) (applying *Novak* to blog post citing unnamed sources). They have alleged no such facts. Since the White Paper contains no mention of any penalties, the let alone this particular penalty, Plaintiffs' allegation is simply not as credible as the competing inference that the anonymous source was merely speculating. And **Alibaba** did disclose that Chinese regulators, including the SAIC, were "strengthen[ing] enforcement actions, including levying significant fines" with respect to "abusive behavior of companies having market dominance." (Rosen Decl. Exh. C-1 at 49; *see also* Rosen Decl. Exh. C-3 at 29.)

***15** Plaintiffs next argue that, absent **disclosure** of the July 16 Meeting and **Alibaba's** receipt of Administrative Guidance, the Registration Statement downplays the risk posed by the uncurbed sale of counterfeit goods on its marketplaces. In support of their position, Plaintiffs cite *Meyer v. Jinkosolar Holdings Co., Ltd,* in which the Second Circuit held that a company's description of pollution-preventing equipment and 24-hour environmental monitoring teams could have given false comfort to investors by leading them to believe the company was taking reasonably effective steps to comply with environmental regulations. 761 F.3d at 251. As the court noted, "One cannot, for example, disclose in a securities offering a business's peculiar risk of fire, the installation of a comprehensive sprinkler system to reduce fire danger, and omit the fact that the system has been found to be inoperable, without misleading investors." *Id.*

But if *Jinkosolar* were relevant here, it would only be to illustrate the adequacy of **Alibaba's disclosures**. Unlike the company in *Jinkosolar,* **Alibaba** did not represent that its efforts to comply with the law were particularly effective, let alone foolproof; as discussed above, its **disclosures** were not likely to "cause a reasonable investor to make an overly optimistic assessment of the risk." (*See* Rosen Decl. Exh. C-3 at 37.) *See Jinkosolar,* 761 F.3d at 251. **Alibaba's disclosure** about "illegal, fraudulent or collusive activities by our employees"—namely, that employees had "accepted payments from sellers in order to receive preferential treatment"—was even more explicit in stating that the Company's efforts to address the issue did not guarantee success. According to the Registration Statement, "Although we dismissed the employees ... [and] further strengthen[ed] our internal controls and policies ... we cannot assure you that such controls and policies will prevent fraud or illegal activity by our employees or that similar incidents will not occur in the future." (CC ¶¶ 118.) **Alibaba** also disclosed that **failure** to correct the situation could subject it to regulatory risks. By comparison, the company in *Jinkosolar* merely disclosed that environmental violations generally posed a financial risk to the company, while not cautioning investors that it knew its efforts to comply with Chinese law were failing and could expose it to penalties. *See* 761 F.3d at 251.

Finally, Plaintiffs argue that once, "Defendants ventured to speak on the topics of counterfeiting, their efforts against it, and their legal compliance ... they had a duty to tell the whole truth, including the Company's receipt of harsh administrative guidance at the July 16 Meeting." (Pls.' Br. at 21.) But this interpretation of the duty to disclose is far too broad. Discussing a topic—like risks related to the sale of illegal and defective products on **Alibaba's** websites—does not trigger a duty to reveal every fact that might be relevant to that subject. *See, e.g., Richman,* 868 F.Supp.2d at 274.

Considering in context all of **Alibaba's** statements on "the topics of counterfeiting," **Alibaba's** "efforts against it," the domestic and foreign regulatory environment, the increased scrutiny it was receiving in China, and its "legal compliance"—as the Court must

employees had committed fraud well before it publicly disclosed that the United States Department of Justice and the New York City Department of Investigation were conducting a joint criminal investigation. Though the company was uncertain about the effect on its current and future revenues, the court held that Item 303 obligated it "to disclose the manner in which that then-known trend, event, or uncertainty might reasonably be expected to materially impact [its] future revenues." *Id.* at 96.

***17** Unlike here, the likelihood of harm in *Indiana Public Retirement System* was not merely potential—it was probable and, indeed, imminent. The joint government investigation signified that the company's overbilling practices would come to light, and because the company's customers were predominantly government agencies, the fallout from the investigations already underway was almost guaranteed to have a significant and adverse effect on the company's business. Here, for the reasons already stated, there is far less reason to believe that the July 16 Meeting "might reasonably be expected" to have a material effect on **Alibaba's** business, or even that the July 16 Meeting necessarily set off any same red flags at **Alibaba**. *See id.* Furthermore, **Alibaba** did disclose that increased and new laws might reasonably be expected to affect its operations. For instance, **Alibaba** disclosed that the new Administrative Measures "impose more stringent requirements and obligations on the online trading or service operators as well as the marketplace platform providers;" that the new measures require it to "adopt measures to ensure safe online transactions, protect consumers' rights and prevent trademark infringement;" and that the SAIC, and other regulators, "have in recent years strengthened enforcement actions, including levying significant fines, with respect to cartel activity as well as abusive behavior of companies having market dominance." (Rosen Decl. Exh. C-3 at 26, 30, 48.)

Plaintiffs have not convinced the Court that Item 503 compels **disclosure**, either. Item 503 requires that Registration Statements and other filings "provide under the caption 'Risk Factors' a discussion of the most significant factors that make the offering speculative or risky." 17 C.F.R. § 229.503(c). "Although there is scant caselaw on Item 503," the inquiry can be boiled down to "whether the Offering Documents were accurate and sufficiently candid." *City of Roseville Employees' Ret. Sys. v. EnergySolutions, Inc.*, 814 F.Supp.2d 395, 426 (S.D.N.Y.2011) (quoting, in part, *Lin v. Interactive Brokers Grp., Inc.*, 574 F.Supp.2d 408, 417 (S.D.N.Y.2008)).

The Consolidated Complaint alleges that the Registration Statement failed to disclose, in violation of Item 503, that (1) the SAIC cracked down on the sale of defective and illegal goods on e-commerce sites like **Alibaba's**, (2) **Alibaba** lacked internal controls to ensure compliance with Chinese laws, and (3) **Alibaba** was notorious for being unresponsive to consumer and brand complaints and for selling defective and illegal goods.

Plaintiffs' argument regarding the SAIC crack-down is easily refuted. **Alibaba's** Registration Statement disclosed that "platform service providers may be jointly and severally liable with sellers and manufactures if they are aware or should be aware that the seller or manufacturer is using the online platform to infringe upon the lawful rights and interests of consumers and fail to take measures necessary to prevent or stop such activity" (Rosen Decl. Exh. C-3 at 29); that "**Failure** to comply with these consumer protection laws could subject us to administrative sanction" (*Id.*); that "two of the three PRC anti-monopoly enforcement agencies," including the SAIC, "have in recent years strengthened enforcement actions, including levying significant fines, with respect to cartel activity as well as abusive behavior of companies having market dominance" (*Id.* at 48); and that as **Alibaba** "continue[s] to grow in scale and significance," it "expect[s] to face increased scrutiny, which will, at a minimum, result in our having to increase our investment in compliance and related capabilities and systems." (*Id.*) These **disclosures** render the Registration Statement "accurate and sufficiently candid" with regard to the SAIC's crackdown on violations of PRC Laws on e-commerce sites like **Alibaba**.

As for Plaintiffs' argument that **Alibaba** actually lacked internal controls to ensure compliance with Chinese laws and was unresponsive to consumer and brand complaints about defective and illegal goods, Plaintiffs' argument is essentially that **Alibaba** was obligated to admit that it was engaged in conduct that violated Chinese and American laws

Pub. Ret. Sys., 818 F.3d at 98.

*19 Plaintiffs claim that these statements are nonetheless actionable because Defendants were aware of facts that rendered them materially false or misleading. However, "Plaintiffs' claim that these statements were knowingly and verifiably false when made does not cure their generality, which is what prevents them from rising to the level of materiality required to form the basis for assessing a potential investment." *Id.* at 97–98 (quoting *City of Pontiac Policemen's & Firemen's Ret. Sys.,* 752 F.3d at 183).

Accordingly, Plaintiffs have failed to allege the existence of a material misstatement under Section 10(b).

B. The Consolidated Complaint Also Does Not Contain Particularized Allegations Giving Rise to a Strong Inference of Scienter

Plaintiffs' Section 10(b) claims fail for the additional reason that they have not pleaded facts giving rise to a strong inference that either the Individual Defendants or the Company acted with the requisite scienter.

11 12 13 To plead scienter under Section 10(b) and Rule 10b-5, Plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Tellabs,* 551 U.S. at 321, 127 S.Ct. 2499. A complaint alleges scienter when "a reasonably person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs,* 551 U.S. at 324, 127 S.Ct. 2499. Courts must determine whether "all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation meets that standard." *Id.* at 322–23, 127 S.Ct. 2499.

14 15 16 "A strong inference of fraudulent intent may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *IKB Int'l S.A. v. Bank of Am. Corp.,* 584 Fed.Appx. 26, 27–28 (2d Cir.2014). To plead scienter through motive and opportunity, Plaintiffs must allege that Defendants "benefitted in some concrete way and personal way from the purported fraud." *ECA Local,* 553 F.3d at 198 (quoting *Novak v. Kasaks,* 216 F.3d 300, 307–08 (2d Cir.2000)). However, "Motives that are common to most corporate offices, such as the desire for the corporation to appear profitable and the desire to keep stock prices high to increase officer compensation, do not constitute 'motive.' " *Id.* Motive is generally shown by alleging that corporate insiders sought to sell their own shares at an artificially inflated price. *Id.*

17 Allegations that a defendant conscious misbehavior or recklessness can also suffice, but where the defendants' motive to commit fraud is not apparent, "the strength of the circumstantial allegations must be correspondingly greater." *Kalnit v. Eichler,* 264 F.3d 131, 142 (2d Cir.2001). "Reckless conduct is, at the least, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care ... to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." *Chill v. Gen. Elec. Co.,* 101 F.3d 263, 269 (2d Cir.1996). "[S]ecurities fraud claims typically have sufficed to state a claim based on recklessness when they have specifically alleged defendants' knowledge of facts or access to information contradicting their public statements," because under such circumstances, "defendants knew or, more importantly, should have known that they were misrepresenting material facts related to the corporation." *Kalnit v. Eichler,* 264 F.3d 131, 142 (2d Cir.2001) (quoting *Novak v. Kasaks,* 216 F.3d 300, 308 (2d Cir.2000)).

1. Motive and Opportunity

18 *20 Plaintiffs first attempt to plead scienter by arguing that Defendants Ma, Tsai, and the Company had a motive to commit fraud, since they each benefited from an inflated value of Alibaba shares when selling stock and obtaining favorable rates in a bond offering.

on SEC filings—do nothing to strengthen its case. Under the core operations doctrine, a party can establish scienter where "a defendant made false or misleading statements when contradictory facts of critical importance to the company either were apparent, or should have been apparent." *See Shemian v. Research In Motion Ltd.*, No. 11 CIV. 4068 RJS, 2013 WL 1285779, at *17 (S.D.N.Y. Mar. 29, 2013). As discussed, Plaintiffs have not established that the July 16 Meeting or the receipt of the Administrative Guidance so obviously triggered a need to disclose that it must have been apparent to Defendants that the Registration Statement was false or misleading.

Finally, the Individual Defendants' signatures on SEC filings contribute, at most, a weak inference of scienter. As courts have acknowledged, "To hold otherwise would allow plaintiffs to plead the scienter of whole classes of defendants solely by alleging a misstatement." *In re Marsh & McLennan Cos. Sec. Litig.*, 501 F.Supp.2d 452, 485 (S.D.N.Y.2006).

Even when considered collectively with Ma's and Tsai's possible motives to commit fraud, these allegations fall short of what is required to plead scienter under the PSLRA. While Plaintiffs have alleged some facts that would suggest a motive to commit fraud on the part of Ma and Tsai (but not the Company), the allegations in the Consolidated Complaint, considered holistically, do not support a strong inference that any of the Defendants acted with scienter.

III. Plaintiffs Fail to State a Claim Under Section 20(a)

Section 20(a) holds liable any persons who "control" those found primarily liable under the Exchange Act. *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 207 (1st Cir.1999). Here, the Consolidated Complaint fails to allege an underlying violation of the securities laws. Accordingly, Plaintiffs' Section 20(a) claims must also be dismissed. *Id.*

IV. Leave to Amend

20 ***22** Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend a complaint shall be "freely" given when "justice so requires," although "a district court has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir.2007). Granting leave to amend is "futile" if a revised claim still "could not withstand a motion to dismiss pursuant to Rule 12(b)(6)." *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir.2002).

21 Here, the problems with Plaintiffs' claims are "substantive" rather than the result of an "inadequately or inartfully pleaded" complaint. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir.2000). I have concluded that Defendants were under no duty to disclose the July 16 Meeting and the receipt of the administrative guidance, because the July 16 Meeting cannot be construed as anything more than an informal meeting with regulators. The **failure** to disclose that meeting and what happened at the meeting is the linchpin of this case. Therefore, an amended complaint would not survive a motion to dismiss, and giving Plaintiffs an opportunity to replead would be "futile" under Second Circuit law and "should be denied." *Id.*; *see also Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 347 Fed.Appx. 617, 622 (2d Cir.2009) (summary order) ("Granting leave to amend is futile if it appears that plaintiff cannot address the deficiencies identified by the court and allege facts sufficient to support the claim.").

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is granted in full. The Clerk of the Court is directed to remove Docket No. 16 from the Court's list of pending motions and to close the file.

All Citations

--- F.Supp.3d ----, 2016 WL 3648965

Footnotes

Khunt v. Alibaba Group Holding Ltd., 102 F. Supp. 3d 523

United States District Court for the Southern District of New York

May 1, 2015, Decided; May 1, 2015, Filed

No. 15 Civ. 00759 (CM); No. 15 Civ. 00811 (CM); No. 15 Civ. 00991 (CM); No. 15 Civ. 01405 (CM)

Reporter

102 F. Supp. 3d 523 * | 2015 U.S. Dist. LEXIS 57580 **

MANISHKUMAR KHUNT, Individually and on Behalf of All Others Similarly Situated, Plaintiff, -against- **ALIBABA** GROUP HOLDING LIMITED, JACK YUN MA, JOSEPH C. TSAI, JONATHAN ZHAOXI LU and MAGGIE WEI WU, Defendants.DEVORAH KLEIN, Individually and on Behalf of All Others Similarly Situated, Plaintiff, -against- **ALIBABA** GROUP HOLDING LIMITED, JACK YUN MA, JOSEPH C. TSAI, JONATHAN ZHAOXI LU and MAGGIE WEI WU, Defendants.CLAIRE RAND, Individually and on Behalf of All Others Similarly Situated, Plaintiff, -against- **ALIBABA** GROUP HOLDING LIMITED, JACK YUN MA, JOSEPH C. TSAI, JONATHAN ZHAOXI LU and MAGGIE WEI WU, Defendants.JAMES AND CHRISTINE ZIOLKOWSKI, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, -against- **ALIBABA** GROUP HOLDING LIMITED, JACK YUN MA, JOSEPH C. TSAI, JONATHAN ZHAOXI LU and MAGGIE WEI WU, Defendants.

Subsequent History: Transferred by In re **Alibaba** Group Holding Secs. Litig., 2015 U.S. Dist. LEXIS 76168 (J.P.M.L., June 9, 2015)

Core Terms

lead plaintiff, movants, losses, appointed, consolidation, certification, largest, motions, investors, adequacy, courts, class period, Securities, calculations, requirements, aggregate, unrelated, subclass, co-lead, cases, financial interest, lead counsel, options, Holdings, purposes, financial stake, law firm, purchasers, typicality, trading

Case Summary

Overview

HOLDINGS: [1]-The court consolidated four putative security class actions and appointed plaintiffs, a company and its sole shareholder, as lead plaintiffs under 15 U.S.C.S. § 78u-4(a)(3)(B)(ii) because they had the largest financial stake in the litigation and made the required showings of adequacy and typicality under Fed. R. Civ. P. 23.

Outcome

Actions consolidated. Lead plaintiffs appointed. Lead counsel appointed.

LexisNexis® Headnotes

Securities Law > ... > Securities Exchange Act of 1934 Actions > Implied Private Rights of Action > Class Actions
Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Lead Plaintiff

HN1 As soon as practicable after consolidation, a court, shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions. 15 U.S.C.S. § 78u-4(a)(3)(B)(ii). The most adequate plaintiff is the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members. § 78u-4(a)(3)(B)(i). The statute creates a rebuttable presumption that the most adequate plaintiff is he who (1) either filed the complaint or moved to be appointed lead plaintiff; (2) has the largest financial interest in the relief sought by the class; and (3) otherwise satisfies the requirements of Fed. R. Civ. P. 23. § 78u-4(a)(3)(B)(iii). *Shepardize* - Narrow by this Headnote

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Lead Plaintiff

HN2 The Private Securities Litigation Reform Act of 1995 provides little guidance in how to assess a party's financial interest. However, courts in the District of New York tend to rely on the Lax/Olsten factors. Those factors are: (1) the number of shares purchased; (2) the number of net shares purchased; (3) the total net funds expended during the class period; and (4) the plaintiffs' approximate losses. The fourth factor is the most important. *Shepardize* - Narrow by this Headnote

typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. *Shepardize* - Narrow by this Headnote

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality
Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN12 Of the four prerequisites to class certification, only two, typicality and adequacy, directly address the personal characteristics of the class representative. *Shepardize* - Narrow by this Headnote

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation
Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality
Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Lead Plaintiff

HN13 In deciding a motion to serve as lead plaintiff, the moving plaintiff must make only a preliminary showing that the adequacy and typicality requirements under Fed. R. Civ. P. 23 have been met. In fact, a wide ranging analysis under Rule 23 is not appropriate at this initial stage of the litigation and should be left for consideration of a motion for class certification. *Shepardize* - Narrow by this Headnote

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN14 The adequacy requirement is satisfied where: (1) class counsel is qualified, experienced, and generally able to conduct the litigation; (2) the class members' interests are not antagonistic to one another; and (3) the plaintiff has sufficient interest in the outcome of the case to ensure vigorous advocacy. *Shepardize* - Narrow by this Headnote

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN15 Honesty and trustworthiness are relevant factors in determining an individual's ability to serve as a class representative. A named plaintiff who has serious credibility problems or who is likely to devote too much attention to rebutting an individual defense may not be an adequate class representative. *Shepardize* - Narrow by this Headnote

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Lead Plaintiff

HN16 The Private Securities Litigation Reform Act of 1995 provides that the lead plaintiff cannot be subject to unique defenses that render such plaintiff incapable of adequately representing the class. 15 U.S.C.S. § 78u-4(a)(3)(B)(iii)(II)(bb). A defense unique to a named plaintiff can bar a finding of adequacy, even if that defense would not ultimately defeat that particular class representative's claim. *Shepardize* - Narrow by this Headnote

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Lead Plaintiff

HN17 The Private Securities Litigation Reform Act of 1995 requires each plaintiff seeking to serve as a representative party on behalf of a class to provide a sworn certification personally signed by such plaintiff and filed with the complaint, that states that the plaintiff has reviewed the complaint and authorized its filing. 15 U.S.C.S. § 78u-4(a)(2)(A). *Shepardize* - Narrow by this Headnote

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Lead Plaintiff
Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN18 Minor or inadvertent mistakes made in a sworn certification do not strike at the heart of Fed. R. Civ. P. 23's adequacy requirement. Relatively minor miscalculations of losses suffered by the presumptive most adequate plaintiff were not a legitimate basis for disqualification for lead plaintiff appointment. The failure to correct obvious or inconsequential clerical errors, like the ones at issue, simply is not the type of adequacy issue that would divert the fact finders' attention from the merits and thus infect the claims of the class as a whole. *Shepardize* - Narrow by this Headnote

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN19 Typicality is satisfied when the moving plaintiff's injuries arose from the same course of conduct of the defendant that injured the other class members. It is important to note, however, that the lead plaintiff's claims do not have to be identical to the other class members' claims. *Shepardize* - Narrow by this Headnote

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > Lead Plaintiff

HN20 The Private Securities Litigation Reform Act of 1995 provides that, for purposes of appointing a lead plaintiff, discovery relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class. 15 U.S.C.S. § 78u-4(a)(3)(B)(iv). *Shepardize* - Narrow by this Headnote

By the close of business on January 29, 2015, **Alibaba** American Depository Shares ("ADSs") had lost 25% of their value as compared with a November 13, 2014 high of $120 per ADS in intraday trading, erasing more than $11 billion in market capitalization.

In the weeks following the Chinese regulators' public accusations, investors filed seven putative security class actions against **Alibaba** and four of its officers (the "Individual Defendants"). The complaints are substantially identical; they seek to certify classes of purchasers of **Alibaba** ADSs between October 21, 2014 and January 28, 2015 (the "Class Period"), and pursue remedies under the Securities Exchange Act of 1934 (the "Exchange Act"). Four of the actions were filed in this Court, two were filed in the Central District of California, and one was filed in the Northern District of California.

A motion to transfer all seven cases to this Court is currently pending before the Judicial Panel on Multidistrict Litigation.

Now before this Court are seven competing motions for the appointment of a lead plaintiff and lead counsel, as well as unopposed motions to consolidate the four cases [**5] that are pending before me.

For the reasons that follow, the motions to consolidate are GRANTED as to the four cases before me. In these consolidated cases, William Tai and Christine Asia Co., Ltd. are appointed as co-lead plaintiffs. The Rosen law firm is appointed as lead counsel.

BACKGROUND

Alibaba is a China-based online and mobile commerce company that engages in retail and wholesale trade, as well as cloud computing and other services. The Company hosts an online sales platform for third parties and does not engage in any direct sales, compete with merchants or hold inventory.

The Company's stock is listed and trades on the New York Stock Exchange under the ticker BABA. The complaints allege that the defendants issued materially false and misleading statements regarding the soundness of the Company's business operations and the strength of its financial prospects, and concealed substantial ongoing regulatory scrutiny during the Class Period. Specifically, **Alibaba** failed to disclose that Company executives had met with China's State Administration of Industry and Commerce ("SAIC") in July 2014, two months before **Alibaba**'s $25 billion IPO. At that meeting, the complaints allege regulators [**6] informed **Alibaba** that they were actively trying to discourage business practices that **Alibaba** allegedly enabled or engaged in directly, including:

- The sale of counterfeit goods such as fake cigarettes, alcohol and branded handbags, by vendors on **Alibaba**'s third-party marketplace platform;

[*528] - The sale of restricted weapons and other forbidden items on **Alibaba**'s third-party marketplace platform;

- **Alibaba** staffers' alleged acceptance of bribes from merchants and others seeking to raise their search rankings and to get advertising space;

- **Alibaba**'s alleged willful ignorance of the practice by some vendors of faking transactions to artificially inflate their sales volumes;

- Company officials' alleged failure to take actions to prevent merchants from using false and misleading advertising; and

- Alleged anticompetitive behavior, such as forbidding merchants to participate in rival sites' promotions.

Before the disclosure of those alleged facts, and from approximately October 2014 through January 27, 2015, **Alibaba** and certain "selling shareholders" sold more than 368 million ADSs in **Alibaba**'s United States IPO, raising more than $25 billion. Through the Class Period, **Alibaba**'s ADSs continued [**7] trading at ever-increasing, allegedly artificially inflated prices, reaching a Class Period high of $120 per ADS in intraday trading on November 13, 2014.

Before the market opened on January 28, 2015, media reported that SAIC had publicly accused **Alibaba** of the illegal practices discussed at the July meeting. On this news, the price of **Alibaba** ADSs declined by $4.49 per ADS on a volume of approximately 42 million shares trading.

The next day, January 29, 2015, before the market opened, **Alibaba** issued a press release announcing revenues of just over $4 billion for the fourth quarter of 2014 (ending on December 31, 2014). This missed the $4.45 billion target defendants led the investment community to expect through "bullish" statements throughout the Class Period concerning **Alibaba**'s ongoing and purportedly strong revenue growth. The Company also disclosed that its profits had fallen to $964 million, a 28% decline from the fourth quarter of 2013. **Alibaba** attributed the decline to expenses from giving shares to employees, and to challenges with its mobile platforms, where advertising is less profitable than on personal computers, and which comprised a larger percentage of sales in the fourth [**8] quarter of 2014 than in the previous quarter.

Allegedly as a result of both of these disclosures, the price of **Alibaba** ADSs dropped another $8.64 per ADS on January 29, 2015, a one-day decline of approximately 9%, on a trading volume of more than 76.3 million shares trading. The two declines collectively reduced the price of **Alibaba** ADSs more than 25% from its Class Period high, eliminating more than $11 billion in market capitalization.

PROCEDURAL HISTORY

Seven substantially identical putative securities class actions have been filed against **Alibaba** and the Individual Defendants in connection with the facts described above. Four are pending in this Court, two were filed in the Central District of California, and one is before the Northern District of California. The Judicial Panel on Mutidistrict Litigation is now considering a motion to transfer all pending matters to this Court. Defendants, together with three of four lead plaintiff movants, take the position that the three California actions against **Alibaba** and the Individual Defendants should be transferred here. The remaining lead plaintiff movant, the BABA group (described in greater detail below), has asked that all actions be [**9] transferred to the Northern District of California.

Beginning on March 31, 2015, aggrieved investors filed seven competing motions to be appointed Lead Plaintiff, with corresponding **[*529]** requests for the appointment of various lead counsel. All asked that the four actions before this Court be consolidated.

The original movants were: (1) Mr. Richard Houlihan (Docket ## 11-13[1]); (2) Christine Asia Co., Ltd. ("CAC") (Docket ## 14-15); (3) Mr. "Tai William," also known as Mr. William Tai (hereinafter "Tai") (Docket ## 16-18); (4) the brothers Yangmin and Yiwei Zhang (Docket ## 19, 22, 24); (5) Mr. Gang Liu (Docket ## 20-21, 23); (6) husband and wife William Yun Cheong Wong and Elke Lai-Hing Lee ("Wong and Lee") (Docket ## 25-27); and (7) a group of six individual purported class members — Mr. Robert Kegley, Mr. John Sorensen, Mr. Marc Phillips, Mr. Thomas Wood, Mr. Daniel Hurt, and Mr. Richard Adray — calling themselves the "BABA Investor Group" (Docket ## 28-30).

Several movants changed their positions after seeing competing movants' papers. Mr. Houlihan [**10] and Mr. Liu withdrew their motions, while "standing ready" to serve as lead plaintiff if a qualified lead plaintiff could not otherwise be located. Liu also proposed a sub-class of options purchasers.

It also became clear that movant Tai wholly owns movant CAC and is its sole director. Each had filed separate motions to become Lead Plaintiff, each swearing to the Court that it had — to its knowledge — the largest losses of any movant, and each proposing different class counsel. In a declaration, Tai swore that he had:

The Zhangs discount *Dura* as a merits decision that should not control at this stage of the litigation, but they mistake its import. If a loss is not *Dura* eligible then it is not redressable through the putative class action the Zhangs seek to lead. If a lead plaintiff movant cannot recover a given loss in the action he seeks to lead, the loss cannot logically contribute to his financial stake in that action. Thus, in ruling on a lead plaintiff application, Judge Gardephe rejected a request to include trading losses realized from sales prior to a corrective disclosure. Salliustro v. CannaVest Corp., No. 14 CIV. 2900 PGG, 93 F. Supp. 3d 265, 2015 U.S. Dist. LEXIS 34549, 2015 WL 1262253, at *13-14 (S.D.N.Y. Mar. 19, 2015). I reject the Zhangs' request that I include in my loss analysis any losses suffered prior to January 28, 2015.

The Zhangs' alleged losses are also inflated in that they derive from a "first-in, first out" ("FIFO") accounting method. Over the years, courts have endorsed various approaches to calculating a plaintiff's approximate losses. HN4 Usually, a court chooses

> between two distinct [**16] accounting methods: the 'first-in, first out' ('FIFO') and the 'last-in, first out' ('LIFO') techniques. . . . The FIFO method is often used by courts and the Internal Revenue Service to determine losses for tax purposes. Further, FIFO has historically been the preferred method of calculating losses where shares of stock cannot be identified with any particular lots purchased.
>
> But more recently, courts have preferred LIFO and have generally rejected FIFO as an appropriate means of calculating losses in securities fraud cases. Moreover, in a number of instances where courts have used FIFO to calculate financial loss, they have done so reluctantly. LIFO, by contrast, has been used not only for lead plaintiff calculations, but also to determine compensation amounts for stockholders suffering losses due to securities fraud.
>
> The main advantage of LIFO is that, unlike FIFO, it takes into account gains that might have accrued to plaintiffs during the class period due to the inflation of the stock price. FIFO, as applied by the Pension Fund and others, ignores sales occurring during the class period and hence may exaggerate losses.

In re eSpeed, Inc. Sec. Litig., 232 F.R.D. 95, 100-01 (S.D.N.Y. 2005) (internal quotations and citations omitted). Thus, [**17]

> HN5 most courts have adopted LIFO and have 'generally rejected FIFO as an appropriate means of calculating losses in **[*532]** securities fraud cases' because LIFO, unlike FIFO, takes into account any gains that plaintiffs may have realized during the class period through sales of stock when the price allegedly was inflated. LIFO also more accurately reports profits or losses for investors who make identical trades during the class period, but who had different initial holdings.

McLaughlin on Class Actions § 4:34 (11th ed.). I adopt LIFO as the proper approach.

Using the LIFO method to analyze losses the Zhangs suffered prior to January 28, 2015 (i.e., *Dura* eligible losses), yields the result that the Zhangs lost $720,722. (*See* Docket #37 at 19.) That places them within the following hierarchy of loss, as calculated by the BABA group:

Movant	*Dura* Recoverable Losses Using LIFO Accounting
BABA Investor Group in Aggregate	$2,374,037.08
CAC and Tai	$2,234,402.00
CAC	$1,400,000.00
BABA Investor Robert Kegley Individually	$757,292.86
Tai	$834,402.00
The Zhangs	$720,722.00

Id.

Because I reject the FIFO accounting method and adhere to *Dura*, there is no meaningful dispute that the BABA group has the largest collective losses.

There [**18] is, however, a substantial question whether the individuals comprising the BABA group should be permitted to aggregate their losses in order to become the "biggest loser" for purposes of the lead plaintiff analysis.

1. The BABA Group is Plainly a Creation of Counsel; Its Members' Losses Will Not Be Aggregated.

HN6 "One of the principal legislative purposes of the PSLRA was to prevent lawyer-driven litigation." In re Tarragon Corp. Sec. Litig., No. 07 Civ. 7972, 2007 U.S. Dist. LEXIS 91418, at *4 (S.D.N.Y. Dec. 6, 2007). The PSLRA permits multiple putative class members to be appointed as lead plaintiffs. *See* 15 U.S.C. § 78u-4(a)(3)(B)(i). However, "The prevailing position is that unrelated investors may join together, with review 'on a case-by-case basis,' [only] 'if such a grouping would best serve the class.'" In re CMED Sec. Litig., 11 Civ. 9297 (KBF), 2012 U.S. Dist. LEXIS 47785, at *7 (S.D.N.Y. Apr. 2, 2012) (quoting Varghese v. China Shenghuo Pharm. Holdings, Inc., 589 F. Supp. 2d 388, 392 (S.D.N.Y. 2008)). Many courts — including this one — have turned away pastiche plaintiffs whose grouping appears to be solely a product of the litigation, because, "To allow an aggregation of unrelated plaintiffs to serve as lead plaintiffs defeats the purpose of choosing a lead plaintiff." In re Donnkenny Inc. Sec. Litig., 171 F.R.D. 156, 157 (S.D.N.Y. 1997); *see also* Glauser v. EVCI Ctr. Colleges Holding Corp., 236 F.R.D. 184, 188, 190 (S.D.N.Y. 2006) (McMahon, J.) (rejecting a proposed lead plaintiff group that "appear[ed] to be nothing more than a lawyer-created group of unrelated investors who were cobbled together.") (quoting In re Veeco Instruments, Inc., 233 F.R.D. 330, 334 (S.D.N.Y. 2005) (rejecting [**19] "amalgamated" groups of unrelated persons who band together in the hope of thereby becoming the biggest loser for PSLRA purposes)); In re Razorfish Inc., Securities Litig., 143 F. Supp. 2d 304, 309 **[*533]** (S.D.N.Y. 2001) ("In short, under any analysis, the [unrelated group] does not merit appointment as lead plaintiff.").

Judge Marrero's decision in Varghese v. China Shenghuo Pharm. Holdings, Inc., 589 F. Supp. 2d 388, 392 (S.D.N.Y. 2008) is instructive. *See also* In re Bank of Am. Corp. Sec., Derivative & ERISA Litig., 258 F.R.D. 260, 270 (S.D.N.Y. 2009). *Varghese* phrases HN7 the overarching question as whether "the unrelated members of a group will be able to function cohesively and to effectively manage the litigation apart from their lawyers." Id. at 392. The factors courts have recognized as relevant to that analysis include:

> (1) the existence of a pre-litigation relationship between group members; (2) involvement of the group members in the litigation thus far; (3) plans for

2014 U.S. Dist. LEXIS 163135, 2014 WL 6491433, at *7 (S.D.N.Y. Nov. 20, 2014) (collecting cases); *In re XM Satellite Radio Holdings Sec. Litig.*, 237 F.R.D. 13, 20 (D.D.C. 2006) ("in rare circumstances, that movants may combine to achieve the largest financial interests after the 60—day deadline") (citing *In re Able Labs. Sec. Litig.*, 425 F. Supp. 2d 562 (D.N.J. 2006) (same)).

This is the "rare" circumstance justifying such a combination.

3. Tai and CAC Have Made the Requisite Preliminary Showing of Typicality and Adequacy Under Rule 23.

HN9 Once the court "identifies the plaintiff with the largest stake in the litigation, further inquiry must focus on that plaintiff alone and be limited to determining whether he satisfies the other statutory requirements.'" *Sofran v. LaBranche & Co.*, 220 F.R.D. 398, 402 (S.D.N.Y. 2004) (quoting *In re Cavanaugh*, 306 F.3d 726, 732 (9th Cir. 2002)). Indeed, the Ninth Circuit has observed that a district court's belief that "another plaintiff may be 'more typical' or 'more adequate' is of no consequence. **[*536]** So long as the plaintiff with the largest losses satisfies the typicality and adequacy requirements, he is entitled to lead plaintiff status, even if [**27] the district court is convinced that some other plaintiff would do a better job." *In re Cavanaugh*, 306 F.3d at 732; *see also In re Cendant Corp. Litig.*, 264 F.3d 201, 262 (3d Cir. 2001) (***HN10*** "Once the court has identified the movant with 'the largest financial interest in the relief sought by the class,' it should then turn to the question whether that movant 'otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure'...."); *Schulman*, 2003 U.S. Dist. LEXIS 10348, 2003 WL 21415287, at *4-6 (commenting that the Second Circuit "has not ruled whether the requirements of the most adequate plaintiff presumption are to be applied serially in order, or whether each requirement is applied to the motion or complaint despite its inability to satisfy all of the presumption's requirements," but applying the requirements in sequence).

HN11 Rule 23(a) of the Federal Rules of Civil Procedure provides that a party may serve as a class representative only if the following four requirements are satisfied: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

HN12 "Of the four prerequisites to class certification, only two—typicality and adequacy—directly [**28] address the personal characteristics of the class representative." *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. LaBranche & Co.*, 229 F.R.D. 395, 411-12 (S.D.N.Y. 2004).

Thus, ***HN13*** in deciding a motion to serve as lead plaintiff, "The moving plaintiff must make only a preliminary showing that the adequacy and typicality requirements under Rule 23 have been met." *Weinberg v. Atlas Air Worldwide Holdings, Inc.*, 216 F.R.D. 248, 252 (S.D.N.Y. 2003) (citing *In re Crayfish*, 2002 U.S. Dist. LEXIS 10134, 2002 WL 1268013, at *4; *Weltz*, 199 F.R.D. at 133). "In fact, a 'wide ranging analysis under Rule 23 is not appropriate [at this initial stage of the litigation] and should be left for consideration of a motion for class certification.'" *Weinberg*, 216 F.R.D. at 252 (quoting *In re Party City Sec. Litig.*, 189 F.R.D. 91, 106 (D.N.J. 1999)).

Tai and CAC have made the "preliminary showing" of adequacy and typicality required under Rule 23.

HN14 The adequacy requirement is satisfied where: 1) class counsel is qualified, experienced, and generally able to conduct the litigation; 2) the class members' interests are not antagonistic to one another; and 3) the plaintiff has sufficient interest in the outcome of the case to ensure vigorous advocacy. *Weinberg*, 216 F.R.D. at 253 (citing *Weltz*, 199 F.R.D. at 133).

To attack Tai and CAC's adequacy, the competing movants focus on the fact that Tai and CAC are controlled by the same person, who initially retained two separate law firms to file separate motions for lead plaintiff status while failing to tell either of the other bid.

The competing initial filings do raise some questions. Another court [**29] considering a plaintiff who sent his lead-plaintiff certification to the firm of a competing proposed lead plaintiff noted that, "Such a blatant gaffe does not bode well for the adequacy of his group to lead this litigation." *Tsirekidze v. Syntax-Brillian Corp.*, No. CV-07-2204, 2008 U.S. Dist. LEXIS 118562, 2008 WL 942273, at *4 (D. Ariz. Apr. 7, 2008). But I do not think that this was a gaffe; I think it was a strategic miscue.

[*537] The competing movants accuse Tai and CAC of, at the very least, confusion as to the function and purpose of the lead plaintiff. More seriously, they point out that, in Tai's Memorandum of Law in Support of his Lead Plaintiff Motion, he represented that he himself had the largest financial interest in this litigation, with losses of $907,025. *See* ECF No. 17. Yet Tai himself was also behind CAC's assertion in its competing filing that it had the purportedly larger financial interest of $1,442,450. *See* ECF No. 15-3. They argue that this discrepancy, combined with Tai's failure to tell either firm that he had retained two firms, implicates the principle that, ***HN15*** "Honesty and trustworthiness are [ ] relevant factors in determining [an] individual's ability to serve as a class representative." *Xianglin Shi v. SINA Corp.*, 2005 U.S. Dist. LEXIS 13176, at *14 (S.D.N.Y. July 1, 2005); *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 726 (7th Cir. 2011) ("A named plaintiff who has serious credibility problems or who is likely to devote too much attention [**30] to rebutting an individual defense may not be an adequate class representative.").

More broadly, Tai and CAC's competitors argue that Tai and CAC's approach to the litigation thus far undermines his assertion that he wishes to undertake the fiduciary duties of a Lead Plaintiff. Tai admitted that he filed two competing applications in the hopes that it would increase his chance of being appointed lead plaintiff, and, having been caught, now proposes to saddle the class with the bills of not one, but two law firms. *See, e.g.*, *Weltz v. Lee*, 199 F.R.D. 129, 134 (S.D.N.Y. 2001) ("The large and convoluted structure proposed could cause exactly the kind of duplication of effort, increased attorneys' fees, friction or lack of coordination among counsel, and concomitant delay in the litigation which the PSLRA was enacted to combat in the first place.").

Tai answers that, in his zeal to be Lead Plaintiff, he made a regrettable mistake that he will not repeat.

Frankly, I view this as a tempest in a teacup. Another court confronted with such a gaffe did not view it as so serious as to preclude the preliminary finding of adequacy necessary at this stage. *See* Docket Sheet, *In Re Altisource Portfolio Solutions, S.A. Securities Litigation*, 14 Civ. 81156 (WPD) (S.D. Fla.) [**31] (appointing as lead plaintiff a pension fund that filed two competing motions for lead plaintiff status using two separate firms on the same day, but which later corrected its mistake). The competing movants make much of Tai's mistake, but, in the case cited by them, the court found that the movant who had filed competing motions against himself was inadequate for *several* reasons, of which the competing motion gaffe was only one. *See Tsirekidze*, 2008 U.S. Dist. LEXIS 118562, 2008 WL 942273, *passim*.

Tai admits that he made a mistake. He rectified it. He seems to care very much about obtaining relief in light of the substantial losses he and his company suffered. His interests are fully aligned with those of the class. The competing movants insinuate much from Tai's mistake, but show nothing other than that Tai is an eager — if perhaps a little *over*eager — lead plaintiff.

Next, the competing movants object that CAC does not satisfy the adequacy requirement because a unique defense applies to CAC's PSLRA certification, likely diverting its attention from the interests of the class. ***HN16*** The PSLRA provides that the lead plaintiff cannot be "subject to unique defenses that render such plaintiff incapable of adequately representing [**32] the class." 15 U.S.C. §78u-4(a)(3)(B)(iii)(II)(bb); *see also Scott v. N.Y. City Dist. Council of Carpenters Pension Plan*, 224 F.R.D. 353, 357 (S.D.N.Y. 2004) **[*538]** (finding that "a defense unique to a named plaintiff" "can bar a finding of adequacy, even if that defense would not ultimately defeat that particular class representative's claim").

The unique defense to which CAC is purportedly subject relates to its PSLRA certification. 2 ***HN17*** The PSLRA requires "[e]ach plaintiff seeking to serve as a representative

case. Tai individually and on behalf of CAC apparently believed that one law firm was sufficient when the original motions were filed, and — with respect to the interests of the *class* as opposed to the attorneys — there is no reason to disturb that initial assessment. To the contrary, the mushrooming presence of ever-more attorneys in a case more often serves to delay than to expedite the just and efficient administration of justice. It also tends to increase costs. Where, as here, there is no demonstrable need for more than one law firm to represent the class, it is proper to reject a request to appoint co-lead counsel. [**39] *See* *Weltz v. Lee*, 199 F.R.D. 129, 134 (S.D.N.Y. 2001) (citing *In re Baan Co. Sec. Litig.*, 186 F.R.D. 214, 230-1 (D.D.C. 1999) and *In re Oxford Sec. Lit.*, 182 F.R.D.42, 42 (S.D.N.Y. 1998)). I do so now.

The Rosen firm was the counsel initially chosen to represent the entity with the single largest stake in this litigation, CAC. As set forth in its papers and at the April 24, 2015 conference, the Rosen firm has extensive experience navigating the particular complexities of litigation with Chinese companies that may claim a state secrets privilege. Moreover, in contrast to every other firm that appeared before this Court at the April 24, 2015 conference, the Rosen firm employs fluent Chinese speakers.

I appoint the Rosen firm — and it alone — as lead counsel.

IV. The Proposed Options SubClass

There was, amidst the voluminous lead plaintiff briefing, a proposed subclass of options purchasers. However, that request is no longer before the court.

In a motion that has otherwise been withdrawn, movant and putative class member Gang Liu proposed a subclass of options purchasers. In its briefing, the BABA group suggested that, if the Court were to certify an options sub-class, it **[*541]** would be most appropriate to name as lead plaintiff a BABA group investor who purchased options and suffered greater losses than Mr. Liu: Marc Phillips.

Mr. Liu did not appear at the April [**40] 24, 2015 hearing. The BABA Group did appear, and took the position that there was no need to certify a subclass of options purchasers at this time.

I agree. ***HN22*** Under the PSLRA, "The fact that plaintiffs might have different types of securities does not require a separate class or co-lead plaintiffs because lead plaintiffs need not satisfy all elements of standing with respect to the entire lawsuit under the PSLRA." *Averdick v. Hutchinson Tech. Inc.*, 2006 U.S. Dist. LEXIS 47445, at *18 (D. Minn. Feb. 9, 2006) (citing *In re Salomon Analyst Level 3 Litig.*, 350 F. Supp. 2d 477, 498 (S.D.N.Y. 2004)); *In re Cendant Corp. Litig.*, 182 F.R.D. 144, 148 (D.N.J. 1998). If pre-trial discovery reveals rifts within the class that require subclasses, the issue will be addressed at that time. *See* *In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. 42, 51 (S.D.N.Y. 1998); Fed.R.Civ.P. 23(c)(1)(C) (court may alter or amend certification order at any time before final judgment); 23(c)(5) (court may divide certified class into subclasses, each to be treated as a separate class under Rule 23); *also see generally* *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001) ("[T]he district court is often in the best position to assess the propriety of the class and has the ability . . . to alter or modify the class, create subclasses, and decertify the class whenever warranted.").

CONCLUSION

For the foregoing reasons, civil actions 15 Civ. 00759, 15 Civ. 00811, 15 Civ. 00991, and 15 Civ. 01405 are consolidated for all purposes. Movants Tai and CAC are appointed as co-lead plaintiffs [**41] in those actions; and the Rosen firm is appointed as lead counsel. The Clerk of the Court is directed to remove Docket Nos. 11, 14, 16, 19, 20, 25, and 28 from the Court's list of pending motions.

Dated: May 1, 2015

/s/ Colleen McMahon

U.S.D.J.

Footnotes

1 Identical papers have been filed in all four actions. For ease of reference, I use the docket numbering of the first-filed action, 15 Civ. 00759.

2 Wong and Lee originally suggested that Tai himself might have a conflict with the class because of a prior investment, but that suggestion apparently was based on a case of mistaken [**33] identity, in that the movant William Tai is not the same person as the prominent angel investor Bill Tai.