

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SANDRA RYAN PARENT and WILLIE
E. RYAN, JR.,

Plaintiffs,

vs.

TENNESSEE CEMETERIES, INC., et
al.,

Defendants.

Civil No. 06-2612-M1/P

WILLIAM LAPRADD,

Plaintiffs,

vs.

TENNESSEE CEMETERIES, INC.,
et al.,

Defendants.

Civil No. 06-2617-M1/V

DONALD R. FOSHEE, et al.,

Plaintiffs,

vs.

FOREST HILL FUNERAL HOME,
et al.,

Defendants.

Civil No. 06-2619-D/P

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|---------------------------|---|-------------------------------|
| |) | |
| ELIZABETH HARRIS, |) | |
| |) | |
| Plaintiff, |) | |
| |) | Civil No. <u>07-2003-M1/P</u> |
| vs. |) | |
| |) | |
| FOREST HILL FUNERAL HOME, |) | |
| et al., |) | |
| |) | |
| Defendants. |) | |
| _____ |) | _____ |

REPORT AND RECOMMENDATION

Before the court are the Parent Plaintiffs' Motion to Consolidate and Coordinate Related Actions and Appoint Interim Lead Counsel and Liaison Counsel, filed December 6, 2006 (D.E. 45) and the Foshee Plaintiffs' Motion in Support of Appointment of Lewis & Smyth, LLC and Fargarson & Brooke as Interim Lead and Interim Liaison Counsel, filed January 10, 2007 (D.E. 57). On February 2, 2007, the District Judge referred only the portions of these motions relating to appointment of interim lead and liaison counsel to the Magistrate Judge for a report and recommendation. Pursuant to the order of reference, the parties appeared before the undersigned Magistrate Judge for a hearing on February 12, 2007. All parties were present and heard. For the reasons below, the court recommends that the Parent Plaintiffs' motion be granted, that Scott R. Shepherd and the law firm of Shepherd, Finkelman, Miller & Shah, LLC, be appointed Interim Class Counsel, and that

John D. Richardson and the Richardson Law Firm be appointed as Interim Liaison Counsel. The court further recommends that the Foshee Plaintiffs' motion be denied.

I. PROPOSED FINDINGS OF FACT

The two motions presently before the court relate to four class action complaints pending in this district: Sandra Ryan Parent and Willie E. Ryan, Jr., et al. v. Tennessee Cemeteries, Inc., et al., Case No. 06-cv-2612 Ml/P, filed September 19, 2006 ("Parent"); William LaPradd, et al. v. Tennessee Cemeteries, Inc., et al., Case No. 06-cv-2617 Ml/V, filed September 20, 2006 ("LaPradd"); Donald R. Foshee and Carolyn L. Foshee, et al. v. Forest Hill, et al., 06-cv-2619 Ml/V, which was removed to this court from Chancery Court of Shelby County on September 20, 2006 ("Foshee"); and Elizabeth Harris, et al. v. Forest Hill, et al., 07-cv-2003 Ml/P, filed January 5, 2007 ("Harris"). Generally, these complaints allege that the plaintiffs purchased Pre-Need Funeral Services Contracts, that the defendants raided funds which had been set aside in trust to fund obligations under the Pre-Need contracts, and that, as a result, the defendants did not fulfill their obligations under the contracts. By orders entered January 30 and February 2, 2007, these cases were consolidated for pre-trial purposes only.

The Parent action is brought on behalf of all purchasers of Pre-Need contracts and asserts claims against Forest Hill Funeral Home and Memorial Park-East ("Forest Hill"), Tennessee Cemeteries, Inc. ("TCI"), Forethought Federal Savings Bank ("Forethought

Federal"), Forethought Life Insurance Company ("Forethought Life"), Community Trust & Investment Co., Inc. ("Community Trust"), Indian Nation, LLC ("Indian Nation"), Clayton Smart ("Smart"), Stephen W. Smith ("Smith"), Quest Minerals & Exploration, Inc. ("Quest Materials"), and Doe defendants. The Parent complaint contains twelve counts alleging claims for breach of contract, breach of contractual duty of good faith and fair dealing, breach of fiduciary duty, conspiracy to breach fiduciary duties, conversion, civil conspiracy, violation of the Tennessee Consumer Protection Act, T.C.A. §§ 47-18-101 et seq. ("TCPA"), violation of the Tennessee Pre-Need Funeral Services Contract statute, T.C.A. §§ 62-5-401 et seq. ("TPNFSC"), and unlawful purchase of insurance contracts. Among the four pending actions, the Parent complaint appears to contain the broadest class, claims, and defendants. The Parent Plaintiffs are represented by Scott R. Shepherd and the law firm of Shepherd, Finkelman, Miller & Shah, LLC, ("SFMS") located in Media, Pennsylvania, and John D. Richardson and the Richardson Law Firm, located in Memphis, Tennessee. On January 25, 2007, attorneys B.J. Wade and Tom Clary with the law firm of Glassman, Edwards, Wade & Wyatt, P.C., in Memphis and Martin Zummach of the law firm of Sparkman Zummach P.C., in Southaven, Mississippi, filed a notice of appearance on behalf of the Parent Plaintiffs.¹

¹Prior to the filing of these federal actions, Wade had filed a similar Pre-Need contracts state class action complaint, styled Dianne and David Camp, et al. v. Forest Hill, (CT-003589-06), against defendant Forest Hill on July 11, 2006, in Shelby County Chancery Court. Three days later, on July 14, 2006, attorney Kevin A. Snider also filed a Pre-Need contracts state class action

The LaPradd action is also brought on behalf of purchasers of Pre-Need contracts and asserts claims against defendants Forest Hill, TCI, Forethought Federal, Forethought Life, and Community Trust, for breach of contract, breach of contractual duty of good faith and fair dealing, breach of fiduciary duty, conversion, civil conspiracy, violations of the TCPA and TPNFSC, and unlawful purchase of life insurance. The LaPradd Plaintiffs are represented by William M. Jeter of the Law Office of William Jeter, in Memphis. Jeter submitted a declaration (attached to the Parent Plaintiffs' reply brief) stating that he supports the Parent Plaintiffs' motion and the appointment of Shepherd and Richardson as interim lead and liaison class counsel, respectively.

The Foshee action, which was originally filed in Chancery Court in Shelby County on August 18, 2006 and removed to federal court on September 20, 2006, asserts claims on behalf of a Tennessee-only class against the same defendants named in the LaPradd action, alleging causes of action based on breach of contract, tortious interference with contractual relations, breach of fiduciary duty, conspiracy, negligence, fraudulent concealment,

complaint against Forest Hill in Chancery Court, styled Elizabeth Harris, et al. v. Forest Hill (CT-003664-06). On January 2, 2007, the Chancery Court consolidated these two state class actions and appointed Wade as lead class counsel. Snider voluntarily dismissed his state complaint and, on January 5, 2007, filed his complaint in this district court. The Camp case is stayed at this time in light of a bankruptcy petition filed by defendant Forest Hill in the United States Bankruptcy Court for the Eastern District of Oklahoma (docket no. 07-80056). At the February 12, 2007 hearing, Wade stated that he will move to voluntarily dismiss the Camp case once the bankruptcy stay is lifted, and anticipates that the Camp class will be merged with the Parent class.

conversion, and violations of the TCPA and TPNFSC. The Foshee Plaintiffs are represented by Bruce D. Burke of Fargarson & Brooke, in Memphis and Albert G. Lewis, III of Lewis & Smyth, LLC, in Tuscaloosa, Alabama.

Finally, the Harris action, which was originally filed in Shelby County Chancery Court on July 14, 2006, and as discussed above, was voluntarily dismissed and later filed in federal court on January 5, 2007, asserts claims on behalf of over 200 named class representatives against the same defendants named in the Parent action for fraud and misrepresentation, breach of contract, anticipatory breach of contract, intentional infliction of emotional distress, breach of fiduciary duty, and violations of the TCPA and TPNFSC. These plaintiffs are represented by Kevin A. Snider of the law firm of Snider & Horner, PLLC, in Germantown, Tennessee. Snider, as set forth in his brief filed on February 8, 2007, supports the interim appointment of the Foshee Plaintiffs' counsel and opposes the appointment of the Parent Plaintiffs' counsel as interim lead and liaison counsel.

On December 6, 2006, the Parent Plaintiffs filed a Motion and Memorandum of Law in Support of Parent Plaintiffs' Motion for Consolidation and for Appointment of Interim Class Counsel. In their motion, the Parent Plaintiffs ask the court to consolidate these related cases and any subsequently filed related actions for pre-trial purposes only, pursuant to Fed. R. Civ. P. 42(a).² In

²The Parent Plaintiffs initially asked the court to consolidate these cases for all purposes, including trial. However, in their

addition, the plaintiffs move pursuant to Fed. R. Civ. P. 23(g)(2)(A) to appoint Scott R. Shepherd and SFMS as interim lead counsel, and John D. Richardson and the Richardson Law Firm as interim liaison counsel. In support of their motion, the Parent Plaintiffs attach the declaration of Shepherd as well as his law firm's resume, which set forth Shepherd's and his firm's extensive experience in acting as lead counsel in numerous class actions. The Parent Plaintiffs also attach to their reply brief the declaration of their attorney B.J. Wade, who supports the interim appointments of Shepherd and Richardson.

On January 10, 2007, the Foshee Plaintiffs filed a response to the Parent Plaintiffs' motion, in which the Foshee Plaintiffs set forth various reasons why they believe the Parent Plaintiffs' counsel should not be appointed interim lead and liaison counsel, and why the Foshee Plaintiffs' counsel should instead receive those appointments.³ In support of their motion, the Foshee Plaintiffs cite, among other things, their diligence in conducting an early investigation of the claims and filing a comprehensive complaint against numerous defendants in Chancery Court one month before the Parent and LaPradd complaints were filed in federal court; their efforts in attempting to coordinate early mediation with various defendants; their meetings with the Tennessee Department of

reply brief filed January 31, 2007, they modified their position and agreed that consolidation for pre-trial purposes only would be appropriate at this time.

³The Foshee Plaintiffs took the position that the cases should be consolidated for pretrial purposes only.

Commerce and Insurance and the Board of Funeral Directors and Embalmers/Burial Service; and their efforts in coordinating public community meetings relating to this litigation.⁴ The Foshee Plaintiffs attach to their response the affidavit of plaintiff Donald R. Foshee, Sr.; the affidavit of attorney Brooke; the affidavit of attorney Lewis; the affidavit of Alfred Thomas Tacker, the owner of the Bartlett Funeral Home; correspondence between Foshee Plaintiffs' counsel and the Tennessee Department of Commerce & Insurance discussing counsel's efforts to temporarily stay license revocation procedures while counsel attempted to engage in mediation with certain defendants; and correspondence between Foshee Plaintiffs' counsel and counsel for other parties in this litigation relating to the Foshee Plaintiffs' counsel's attempt to engage in early mediation.

The defendants filed responses to these motions, similarly taking the position that the cases should be consolidated for pre-trial purposes only. However, the defendants (with the exception of Forest Hill) argue that it is premature to appoint interim class counsel at this early stage of the litigation. Forrest Hill states in its response that "appointment of interim counsel would be helpful and appropriate." Although Forest Hill further states that "counsel that has been most active to date has been the Foshee counsel," it does not take a position as to which of the two sets

⁴At the February 12 hearing, the Foshee Plaintiffs admitted an exhibit of photographs which showed the large turnout at these public meetings.

of attorneys should be appointed interim lead and liaison counsel.⁵

II. PROPOSED CONCLUSIONS OF LAW

Federal Rule of Civil Procedure 23 provides that a court "may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action." Fed. R. Civ. P. 23(g)(2)(A); see also Allen v. Stewart Title Guaranty Co., No. 06-cv-2426, 2007 WL 119953, at *1 (E.D. Pa. Jan. 9, 2007). The commentary to Rule 23 states that the rule "authorizes [a] court to designate interim counsel during the pre-certification period if necessary to protect the interests of the putative class." Fed. R. Civ. P. 23 (Advisory Comm. Notes). In addition, the Manual for Complex Litigation (Fourth) provides

If . . . there are a number of overlapping, duplicative, or competing suits pending in other courts, and some or all of those suits may be consolidated, a number of lawyers may compete for class counsel appointment. In such cases, designation of interim counsel clarifies responsibility for protecting the interests of the class during pre-certification activities, such as making and responding to motions, conducting any necessary discovery, moving for class certification, and negotiating settlement.

⁵The Parent and Foshee Plaintiffs, at the court's request, submitted supplemental briefs on February 15, 2007, addressing a conflict of interest issue raised by the Foshee and Harris Plaintiffs at the February 12 hearing. Specifically, Foshee and Harris Plaintiffs contend that because attorney Wade is lead class counsel in the pending state case of Camp v. Forest Hill, his simultaneous representation of the Parent Plaintiffs and association with Shepherd and Richardson in the federal action creates either an actual or potential conflict of interest, or at minimum, an appearance of a conflict that renders the Parent Plaintiffs' counsel and the Parent Plaintiffs themselves inadequate to represent the class.

Manual for Complex Litigation (Fourth) § 21.11 (2004); see also Parkinson v. Hyundai Motor America, No. CV 06-345AHS(MLGX), 2006 WL 2289801, at *2 (C.D. Cal. Aug. 7, 2006). "Selection of lead counsel is a duty often left to the court if the parties cannot decide among themselves." Nowak v. Ford Motor Co., No. 06-11718, 2006 WL 3870399, at *3 (E.D. Mich. Dec. 22, 2006) (citing Howard B. Newberg and Alba Conte, Newberg on Class Actions, § 9.31, at 9-82 (3d ed. 1992)).

Rule 23(g) provides the criteria that the court should consider in appointing interim class counsel:

the work counsel has done in identifying or investigating potential claims in the action, counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, counsel's knowledge of the applicable law, and the resources counsel will commit to representing the class

Fed. R. Civ. P. 23(g)(1)(C); see Allen, 2007 WL 119953, at *1 (applying factors under Rule 23(g)(1)(C) in deciding competing motions for appointment of interim class counsel); Nowak, 2006 WL 3870399, at *3 (same); Parkinson, 2006 WL 2289801, at *2 (same); Hill v. The Tribune Co., No. 05 C 2602, 2005 WL 3299144, at *3 (N.D. Ill. Oct. 13, 2005) (same). The Rule further provides that "[i]f more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class." Fed. R. Civ. P. 23(g)(2)(B); see also Parkinson, 2006 WL 2289801, at *2. Moreover, "counsel must be free of conflicts of interest that may arise from

their involvement in multiple lawsuits for the named representative or against the same Defendant." Allen, 2007 WL 119953, at *1 (citing Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1465 (9th Cir. 1995); Sullivan v. Chase Inv. Servs. of Boston, Inc., 79 F.R.D. 246, 258 (N.D. Cal. 1978)).

As an initial matter, defendants Community Trust, Forethought Federal, and Forethought life argue that appointment of interim counsel under Fed. R. Civ. P. 23(g)(2) is premature at this time. Citing the Advisory Committee Notes to the 2003 amendments to Rule 23, these defendants contend that reasons for deferring appointment of interim counsel include "instances in which more than one class action has been filed, or in which other attorneys have filed individual actions on behalf of putative class members." Fed. R. Civ. P. 23(g)(2)(A) (Advisory Comm. Notes).

The defendants' reliance on the committee notes, however, is misplaced. The relevant text of the committee notes reads in its entirety as follows:

Rule 23(c)(1) provides that the court should decide whether to certify the class "at an early practicable time," and directs that class counsel should be appointed in the order certifying the class. In some cases, it may be appropriate for the court to allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The primary ground for deferring appointment would be that there is reason to anticipate competing applications to serve as class counsel. Examples might include instances in which more than one class action has been filed, or in which other attorneys have filed individual actions on behalf of putative class members. The purpose of facilitating competing applications in such a case is to afford the best possible representation for the class. Another

possible reason for deferring appointment would be that the initial applicant was found inadequate, but it seems appropriate to permit additional applications rather than deny class certification.

Fed. R. Civ. P. 23 (Advisory Comm. Notes). In addition to the fact that the committee comments cited by the defendants appear to relate to appointment of lead class counsel, as opposed to interim class counsel, these comments support the appointment of class counsel after competing applications have been filed, which has happened here. See Donaldson v. Pharmacia Pension Plan, No. 06-3-GPM, 2006 WL 1308582, at *1-2 (S.D. Ill. May 10, 2006) (“[T]he kind of matter in which interim counsel is appointed is one where a large number of putative class actions have been consolidated or otherwise are pending in a single court.”). Moreover, given the prior history of disputes between the plaintiffs’ attorneys, the court submits that a leadership structure is necessary at this time to protect the interests of the putative class.

Turning now to the criteria under Rule 23, the court submits that counsel for both the Parent and Foshee Plaintiffs have done considerable work in identifying and investigating potential claims in the action, are knowledgeable of the applicable law, and have demonstrated to the court that they will commit sufficient resources to representing the class.⁶ Between these two groups, it appears that the Foshee Plaintiffs and their counsel were more active than the Parent Plaintiffs and their counsel in conducting

⁶The Foshee Plaintiffs’ complaint was also filed in state court one month before the Parent complaint was filed in federal court.

the preliminary investigation of the claims. For example, the Foshee Plaintiffs and their counsel coordinated well-attended public meetings to inform and educate potential class members, and worked with the Tennessee Department of Commerce and Insurance and the Board of Funeral Directors and Embalmers/Burial Service to postpone license revocation proceedings against various defendants so that the plaintiffs could try to engage in expedited mediation with these defendants. Although their efforts in engaging in early mediation ultimately proved unsuccessful, Foshee Plaintiffs and their counsel through their actions exhibited considerable initiative and an intent to act in the best interest of the class.

On balance, however, and despite the Foshee Plaintiffs' counsel's considerable work in investigating the claims and pursuing mediation, the court submits that based on the Foshee Plaintiffs' counsel's lack of prior leadership experience in complex litigation matters, coupled with the Parent Plaintiffs' counsel's substantial leadership experience, the Parent Plaintiffs' counsel should be appointed interim lead and liaison counsel. According to the Foshee Plaintiffs' briefs, although their counsel have been involved in numerous class actions, they have no prior experience as lead or co-lead counsel in class actions, nor do they have any prior experience in a leadership role in other complex litigation, such as membership on a committee. At the February 12 hearing, the court asked Foshee Plaintiffs' counsel whether they

had any complex litigation experience other than those identified in their briefs. Candidly, counsel stated they could not provide the court with any additional information.

Parent Plaintiffs' attorney, on the other hand, has vast experience as lead and co-lead counsel in class actions. For example, with respect to Tennessee federal and state court class actions within the past several years, Shepherd has served as lead or co-lead counsel in Ferguson, et al. v. Columbia/HCA Healthcare Corp., et al., No. 18679 (co-lead counsel in state court action in Washington County); Boysen, et al. v. Columbia/HCA Healthcare Corp., Inc., et al., MDL No. 1227 (co-lead counsel in federal court action in the Middle District of Tennessee); Russell, et al. v. National Seating Company, et al., No. 3:00-CV-386 (E.D. Tenn.) (lead counsel in ERISA class action on behalf of employees who participated in company-run Employees Stock Option Plan); In re Allstate Fair Credit Reporting Act Litig., MDL Nos. 3:0 and 145 (M.D. Tenn.) (member of Executive Committee in action concerning improper use of credit reports); and Bell v. Infinity, No. 05-CV-2361 (W.D. Tenn.) (co-lead counsel in contract action on behalf of class of merchant processors of credit cards).

In addition, Shepherd's other leadership roles in complex litigation include In re Allstate Fair Credit Reporting Act Litigation, MDL Nos. 3:02 and 145 (M.D. Tenn.) (member of Executive Committee in class action challenging insurer's improper use of

credit report in setting premiums); Rudin, et al. v. Monumental Life Ins. Co., et al., No. 03-cv-00255 (Circuit Court, Kenton County, Kentucky) (co-lead counsel in class action challenging insurer's failure to honor burial insurance contracts); Gagliano v. Medial Staffing Network, Inc., No. 06-80642 (S.D. Fla.)(lead counsel in action alleging that insurance benefits were improperly denied to temporary workers under COBRA); Sadowsky v. Manufacturers Life Insurance Company, et al., No. CL 95-10197AD (Circuit Court for the Fifteenth Judicial Circuit in and for Palm Beach County, Fla.)(lead counsel in Florida class action concerning marketing of "vanishing premium" life insurance policies); Hurkes Harris Design Associates, et al. v. Fujitsu Computer Products of America, Inc., et al., No. CV812127 (Superior Court, Santa Clara County, Cal.)(lead counsel for class of hard disk drive consumers); Allen, et al. v. Apple Computer, Inc., No. BC 328000 (Superior Court, Los Angeles County, Cal.)(co-lead counsel in class action involving consumers of defective computer monitors); Levine, et al. v. Dr. Philip C. McGraw, et al., No. BC 312830 (Superior County, Los Angeles County, Cal.)(co-lead counsel in action against national distributor and celebrity sponsor of dietary supplements). In addition, Shepherd has for the past three years served on the Executive Committee of the National Association of Shareholder and

Consumer Attorneys (NASCATU).⁷ Thus, based on Shepherd's extensive leadership experience in complex litigation matters - experience which will be needed in managing a potential class of over 13,000 members - and given the Foshee Plaintiffs' counsel's lack of similar experience, the court concludes that Shepherd and SFMS should be appointed interim lead counsel. See Parkinson, 2006 WL 2289801, at *3 (appointing attorneys with more experience and greater resources to commit to potential class that may be certified as interim class counsel); Hill, 2005 WL 3299144, at *5 (same).

As an aside, the court notes that Shepherd and his law firm will be assisted by attorney B.J. Wade, who recently filed a notice of appearance on behalf of the Parent Plaintiffs. Wade also has considerable leadership experience in complex litigation, including, for example, Morris v. Life Insurance Company of Georgia, No. CT-004246-00-4 (Circuit Court of Shelby County) (co-lead counsel in class action involving the sale of burial insurance); Semerski v. Kia Motors America, Inc., No. C0001-48-05 (Circuit Court of Shelby County) (co-lead counsel for nationwide consumer class action); Bell v. Infinity Data Corporation, et al.,

⁷Douglas P. Dehler, a partner from SFMS's Milwaukee, Wisconsin office who will assist Shepherd in this litigation, also handles consumer class actions outside the insurance industry and, along with his partners James E. Miller and James C. Shah, is co-lead counsel in Shorewest Realtors, Inc. v. Journal Sentinel, Inc., No. 05-cv-3716 (Circuit Court for Milwaukee County, Wisc.), a class action on behalf of commercial and classified advertisers alleging inflated circulation numbers tied to advertising rates.

No.: 05-2361-Ma (W.D. Tenn.) (co-lead counsel in nationwide settlement of a class action involving credit cards); In re: Accredo Securities Litig., No. 03-2216-BP (W.D. Tenn.) (court appointed liaison counsel in a certified federal securities fraud class action); In re: Hyundai and Kia Horsepower Litig., No. 02CC00287 (Santa Clara County, Cal.) (member of steering committee in a nationwide class action); In re: Reciprocal of America (ROA), MDL Master No.: 1551. (W.D. Tenn.) (co-liaison counsel); In re: Copper Tubing Litig., No. 04-2771-DV (W.D. Tenn.) (co-liaison counsel in Sherman antitrust case). Wade also has litigation experience in other Tennessee class actions involving burial insurance, namely, Cash v. Monumental Life Insurance Company, No. CT-004498-00-9 (Circuit Court of Shelby County), and Nicholson v. United Life Insurance Company, No. CT-0004540-00-4 (Circuit Court of Shelby County).

The Foshee and Harris Plaintiffs argue that because Wade is lead counsel in the pending state case of Camp, et al. v. Forest Hill, his representation of the Parent Plaintiffs in this federal action creates an actual or potential conflict of interest, or at least creates an appearance of a conflict. The court disagrees. The Foshee Plaintiffs have cited several cases in which courts have found class counsel to be inadequate due to counsel's representation of two or more sets of plaintiffs in parallel

actions against the same defendants.⁸ The concerns expressed by the courts in those cases are not present in this litigation, however, as the Camp action is stayed due to the bankruptcy petition filed by the lone defendant Forest Hill, and based on Wade's representation that the Camp case will be voluntarily dismissed if and when the stay is lifted, the Camp class will eventually merge with the identical Parent class. Thus, at this stage of the litigation, the conflict of interest concerns raised by the Foshee and Harris Plaintiffs are, at most, illusory. See Sheftelman v. Jones, 667 F. Supp. 859, 885 (N.D. Ga. 1987); Anderson v. Bank of the South, N.A., 118 F.R.D. 136, 149 (M.D. Fla. 1987); see also Dietrich v. Bauer, 192 F.R.D. 119, 127 (S.D.N.Y. 2000); In re: Asbestos School Litig., No. 83-0268, 1986 WL 13882, at *2 (E.D. Pa. Dec. 4, 1986). Appointed interim counsel are subject to an on-going duty to advise the court of any conflicts of interests that develop, and thus, the court may, if necessary, later modify its appointed interim leadership structure to address and mitigate any such conflicts.⁹ In re Delphi ERISA Litig., 230

⁸These cases are Kayes v. Pacific Lumber Co., 51 F.3d 1449 (9th Cir. 1995); Allen v. Stewart Title Guaranty Co., No. 06-cv-2426, 2007 WL 119953 (E.D. Pa. Jan. 9, 2007); Krim v. PCORDER.COM, Inc., 210 F.R.D. 581 (W.D. Tex. 2002); Kurczi v. Eli Lilly & Co., 160 F.R.D. 667 (N.D. Ohio 1995); Baker v. Bridgestone/Firestone, Inc., 893 F. Supp. 1349 (N.D. Ohio 1995); Jackshaw Pontiac v. Cleveland Press Publishing Co., 102 F.R.D. 183 (N.D. Ohio 1984); Sullivan v. Chase Investment Servs. of Boston, Inc., 79 F.R.D. 246 (N.D. Cal. 1978).

⁹In light of the court's conclusion, the court does not reach the issue of whether any such conflict would be imputed to the Parent Plaintiffs' other counsel. The court also need not address the

F.R.D. 496, 499 (E.D. Mich. 2005).

Finally, the court submits that John Richardson and the Richardson Law Firm should be appointed interim liaison counsel. Richardson is licensed to practice law in Tennessee, has extensive litigation experience in Tennessee state courts and the Western District of Tennessee, and is familiar with the local rules of this court. Richardson and his law firm are located in Memphis, and by all accounts, he has worked closely with Shepherd and SMFS in this litigation.

III. RECOMMENDATION

For the reasons above, the court recommends that the Parent Plaintiffs' motion be granted, that Scott R. Shepherd and the law firm of Shepherd, Finkelman, Miller & Shah, LLC be appointed Interim Class Counsel, and that John D. Richardson and the Richardson Law Firm be appointed Interim Liaison Counsel. The court further recommends that the Foshee Plaintiffs' motion be denied.

Respectfully Submitted.

Foshee Plaintiffs' argument that the "conflict" calls into question the adequacy of the Parent Plaintiffs to represent the class. In any event, the question of who should be appointed as interim lead class counsel and whether a named plaintiff can adequately represent the class are two separate issues. Hill v. The Tribune Co., No. 05 C 2602, 2005 WL 3299144, at *3 (N.D. Ill. Oct. 13, 2005) (citing In re Initial Public Offering Securities Litig., 214 F.R.D. 117, 123 (S.D.N.Y. 2002); Greater Pa. Carpenters Pension Fund v. Whitehall Jewellers, Inc., 2005 WL 61480, at *7 (N.D. Ill. Jan. 10, 2005)). When the time comes to decide the issue of class certification, the court will at that time determine whether a named plaintiff is an adequate representative. See Fed. R. Civ. P. 23(a)(4) and (c); see also Hill, 2005 WL 3299144, at *3.

s/ Tu M. Pham

TU M. PHAM

United States Magistrate Judge

March 1, 2007

Date

NOTICE

IF ANY PARTY HAS ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT, THAT PART MUST FILE THOSE OBJECTIONS OR EXCEPTIONS WITHIN TEN (10) DAYS AFTER RECEIVING A COPY OF THIS REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.