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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KIRK HIMMELBERG, Individually and On Behalf of All Other Similarly Situated,

Plaintiff,

v.

VAXART, INC., CEZAR ANDREI FLOROIU, WOUTER W. LATOUR, M.D., STEVEN J. BOYD, KEITH MAHER, M.D., and ARMISTICE CAPITAL LLC,

Defendants.

Case No.: 3:20-cv-05949-VC

TRUDY YORK'S OPPOSITION TO COMPETING MOTIONS FOR LEAD PLAINTIFF AND APPROVAL OF SELECTION OF LEAD COUNSEL

CLASS ACTION

DATE: December 3, 2020
TIME: 10:00 a.m.
CTRM: 4, 17th Floor
JUDGE: Hon. Vince Chhabria

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I. INTRODUCTION

Of the six motions that were originally filed on October 23, 2020 by individuals seeking appointment as lead plaintiff pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), four remain pending: (i) Jiri Kubanek, Zayn Lim, Najaf Zaidi, and Syed Nabi, a group of unrelated individuals (collectively the "Scott+Scott Group") (ECF No. 51); (ii) Wei Huang and Langdon Elliott, a group of unrelated individuals (collectively the "Hagens Berman Group") (ECF No. 47); (iii) Trudy York, an individual investor ("York") (ECF Nos. 38, 39); and (iv) Pierce Parker, an individual investor (ECF No. 34). While the Scott+Scott Group and the Hagens Berman Group claim to have suffered a greater loss, Ms. York is the only movant with the greatest financial loss that satisfies all of the PSLRA's requirements. In fact, despite claiming larger losses, neither the Scott+Scott Group nor the Klin Group can be appointed because they each failed to make the required prima facie showing of adequacy required by Rule 23 of the Federal Rules of Civil Procedure.

The Scott+Scott Group and the Hagens Berman Group are both inadequate and fail to satisfy Federal Rule of Civil Procedure 23(a) because they are composed of unrelated investors with no workable decision-making structure and no connection other than counsel. Recently, the Hon. Lucy H. Koh appointed a single individual investor with less financial losses over a group of two unrelated institutions and noted that for plaintiff groups "courts consider as part of the adequacy analysis whether the group will be able to function cohesively to monitor counsel and make critical litigation decisions as a group." *In re Cloudera, Inc. Sec. Litig.*, 2019 WL 6842021, at *6 (N.D. Cal. Dec. 16, 2019) citing *Eichenholtz v. Verifone Holdings, Inc.*, 2008 WL 3925289, at *7–9 (N.D. Cal. Aug. 22, 2008). And, the Scott+Scott Group's "Joint Declaration" and the Hagens Berman Group's "Joint Declaration" do nothing to remedy their respective inadequacies. Compare ECF Nos. 51-4 and 47-5 with *Eichenholtz*, 2008 WL 3925289, at *9 (holding the submitted declaration did not "clarify how the group will tackle the massive coordination and strategic issues that are certain to arise in this litigation."). Instead, their Joint Declarations confirm that counsel brought the members together, and the conclusory statements by both the Scott+Scott Group and the Hagens Berman Group and assurances about

its members' ability to work together fail to meet the evidentiary showing required of a lead plaintiff group under the PSLRA. *See In re Stitch Fix, Inc. Sec. Litig.*, 393 F. Supp. 3d 833, 835–37 (N.D. Cal. 2019) (ECF No. 80) (Judge Donato appointing individual investor with fourth greatest losses as lead plaintiff because three other competing movants with greater claimed losses, including a group of unrelated investors, were inadequate under the PSLRA); *Isaacs v. Musk*, 2018 WL 6182753, at *3 (N.D. Cal. Nov. 27, 2018) by artificial grouping of individuals).

Ms. York, as the movant with the next largest financial interest after the disqualified movants described above, satisfies all of the PSLRA's requirements, and is not subject to any unique defenses or challenges to her adequacy. Indeed, Ms. York is highly interested in serving as lead plaintiff here as her losses in Vaxart common stock compromise a significant portion of her total retirement portfolio. ECF No. 39-4. Thus, Ms. York's motion should be granted. *See In re Cavanaugh*, 306 F.3d 726, 730–31 (9th Cir. 2002) (court should consider motion of movant with smaller financial interest when movant with larger losses fails to meet PSLRA requirements).

II. REGARDLESS OF THEIR CLAIMED LOSSES, THE COMPETING MOVANTS DO NOT MEET RULE 23 REQUIREMENTS

The selection of a lead plaintiff in private securities class actions is governed by the PSLRA, 15 U.S.C. § 78u-4. *City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, 2012 WL 78780, at *5 (N.D. Cal. Jan. 9, 2012). According to the "PSLRA's own words, this plaintiff is to be the 'most capable of adequately representing the interests of class members.'" *Id.*, at *2 (quoting 15 U.S.C. § 78u-4(a)(3)(B)(i)). Today, "the 'most capable' plaintiff—and hence the lead plaintiff—is the one who has the greatest financial stake in the outcome of the case, so long as he meets the requirements of Rule 23" of the Federal Rules of Civil Procedure. *See Cavanaugh*, 306 F.3d at 729 (discussing 15 U.S.C. § 78u 4(a)(3)).

In selecting a sole individual investor as lead plaintiff over a group of unrelated institutional investors, the Judge Koh explained:

> As discussed above, the PSLRA itself provides that a lead plaintiff may be a group, as long as the group satisfies the same requirements set forth in the statute. See 15 U.S.C. § 78u-4(a)(3)(B)(iii). Consequently, as with any other movant for

> lead plaintiff, a plaintiff group must be able to establish that it satisfies the adequacy requirement, *i.e.*, that the group will "fairly and adequately protect the interests of the class." *See* Fed. R. Civ. P. 23(a)(4). For plaintiff groups, courts consider as part of the adequacy analysis whether the group will be able to function cohesively to monitor counsel and make critical litigation decisions as a group. *See, e.g., Eichenholtz v. Verifone Holdings, Inc.*, No. C07-06140MHP, 2008 WL 3925289, at *7–9 (N.D. Cal. Aug. 22, 2008). Those courts find that a group of unrelated plaintiffs fails to satisfy the adequacy requirement where the group does not sufficiently demonstrate that it can adequately monitor counsel and make important decisions together. *Id*. at *8.

Cloudera, 2019 WL 6842021, at *6. In so ruling, Judge Koh found it significant that the "members were 'unrelated to each other' until introduced by their lawyers." *Id.* Judge Koh concluded "[o]ther than describing one conference call where the funds discussed their 'strategy for prosecuting this action' and their 'interests in prosecuting the case in a collaborative, like-minded manner,' the Boston Group provided no further information about how it would jointly manage the case or resolve disagreements." *Id.*, at *7.

A. Lawyer Driven Groups Formed To Achieve The Largest Financial Interest Designation Are Inadequate

The Scott+Scott Group and the Hagens Berman Group are both lawyer-driven combinations of unrelated individuals joined for the purpose of aggregating their claims to obtain presumptive lead plaintiff status over other putative class members. As such, these two movants are *inadequate* and cannot meet the extra burden groups face to show that they were properly constituted and can fairly and adequately protect the interest of the class. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 266–67 (3d Cir. 2001) ("[i]f the court determines that the way in which a group seeking to become lead plaintiff was formed or the manner in which it is constituted would preclude it from fulfilling the tasks assigned to a lead plaintiff, the court should disqualify that movant on the grounds that it will not fairly and adequately represent the interests of the class.").

While a group may be appointed under the PSLRA, courts recognize that to "'allow lawyers to designate unrelated plaintiffs as a 'group' and aggregate their financial stakes would allow and encourage lawyers to direct the litigation.'" *In re Network Assocs., Inc., Sec. Litig.*, 76 F. Supp. 2d 1017, 1023, 1025 (N.D. Cal. 1999) ("It seems clear that Congress intended a

single, strong lead plaintiff to control counsel and the litigation.") This contradicts the purpose of the PSLRA – to limit lawyer driven securities class action litigation.

> Consequently, as the *Eichenholtz* court noted: "[C]ourts have uniformly refused to appoint as lead plaintiff groups of unrelated individuals, brought together for the sole purpose of aggregating their claims in an effort to become the presumptive lead plaintiff." *Id*. at *7 (N.D. Cal. Aug. 22, 2008) (quoting *In re Gemstar–TV Guide Int'l, Inc. Sec. Litig.*, 209 F.R.D. 447, 451 (C.D. Cal. 2002)). For example, Chief United States District Judge Phyllis Hamilton found that plaintiff groups could not be "the most adequate plaintiffs" where the members were "unrelated to each other" until introduced by their lawyers. In re Silicon Storage Tech., Inc., No. C 05-0295 PJH, 2006 WL 648683, at *, 2005 U.S. Dist. LEXIS 45246 at *33 (N.D. Cal. May 10, 2005).

Cloudera, 2019 WL 6842021, at *6 (finding that a group of two unrelated institutional investors "does not satisfy the adequacy requirement of Rule 23 because it has not sufficiently justified its composition of unrelated investors with no disclosed decision-making structure").

Courts have also ruled that unrelated investor groups can have a dilutive effect on the effective leadership of a class action. *See In re Critical Path, Inc. Sec. Litig.*, 156 F. Supp. 2d 1102, 1112 (N.D. Cal. 2001) (electing not to appoint a co-lead plaintiff so as "not to dilute the fiduciary responsibility of the lead plaintiff"); *In re Cree, Inc., Sec. Litig.*, 219 F.R.D. 369, 372 (M.D.N.C. 2003) ("Plaintiffs have not identified, nor has the court determined, any reason why co-lead plaintiffs would be helpful or appropriate . . . . A single lead plaintiff could reduce expenses and facilitate the control and prosecution of this litigation.").

Moreover, any "relationship" these groups' members may have formed with each other since being introduced by their lawyers for purposes of this lead plaintiff application is irrelevant. As Judge Hamilton explained, "[a]ny subsequent relationship that the members of these groups may have developed, after being introduced to each other by their lawyers, is insufficient in the court's view to qualify them as 'most adequate' lead plaintiff." *In re Silicon Storage Tech., Inc.*, 2005 U.S. Dist. LEXIS 45246, at *6-*8, *33 (N.D. Cal. May 3, 2005) (rejecting three movants with larger losses before appointing movant with fourth largest loss).

The Scott+Scott Group and the Hagens Berman Group, respectively, moved to be appointed lead plaintiff, not the individuals within the groups. *See* ECF Nos. 51 and 47. Accordingly, only the group itself filed a timely motion and should be evaluated as a whole. *See*

Abouzied v. Applied Optoelectronics, Inc, 2018 WL 539362, at *5 (S.D. Tex. Jan. 22, 2018) (considering only "the motion of the collective group" because "[n]either Stephen Rakower nor the Knights has moved for appointment as sole-lead plaintiff"); *Marcus v. J.C. Penney Co.*, 2014 WL 11394911, at *6 (E.D. Tex. Feb. 28, 2014) (because individual "did not individually submit a motion for lead plaintiff, his consideration for appointment as lead plaintiff rises and falls with the group."); *Niederklein v. PCS EdventuresA.com, Inc.*, 2011 WL 759553, at *4 (D. Idaho Feb. 24, 2011) (declining to appoint an unrelated group and to consider the movants individually).[1]

Although both the Scott+Scott Group and the Hagens Berman Group separately claim larger losses than Ms. York, financial interest is just the starting point and these movants failed to make the requisite showing. The joint declarations submitted separately by the Scott+Scott Group and the Hagens Berman Group both fall far short of their evidentiary burden to establish that aggregating the losses suffered by an unrelated group is appropriate. Accordingly, the motions filed by the Scott+Scott Group and the Hagens Berman Group should be denied in their entirety.

1. The Scott+Scott Group Is An Improper Combination of Unrelated Individuals

While the Scott+Scott Group submitted a Joint Declaration (the "Scott+Scott Joint Declaration") (ECF No. 51-4) attempting to demonstrate that the group is adequate and not lawyer-driven, courts require groups to "provide appropriate information about its members, structure, and intended functioning." *Network Assocs.*, 76 F. Supp. 2d at 1026. This information "should include descriptions of its members, including any pre-existing relationships among them; an explanation of how it was formed and how its members would function collectively;

[1] In case their counsel now has second thoughts, any individual member of these groups cannot jettison the other members in an effort to save their motion precisely because they moved together as a group. *See Tsirekidze v. Syntax-Brillian Corp.*, No. CV-07-2204-PHX-FJM, 2008 WL 942273, at *4 (D. Ariz. Apr. 7, 2008) ("The willingness to abandon the group only suggests how loosely it was put together."); *In re Level 3 Commc'ns, Inc. Sec. Litig.*, 2009 WL 10684924, at *5 (D. Colo. May 4, 2009) ("[T]he Level 3 Plaintiffs Group did not request that any of its constituents be appointed as lead plaintiff individually in the event the Court declined to appoint the group.").

and a description of the mechanism that its members and the proposed lead counsel have established to communicate with one another about the litigation." *Id.*

The Scott+Scott Joint Declaration falls far short of the required evidentiary showing necessary to permit aggregating group losses. While the Joint Declaration gives a brief description of the group's four members individually, it completely fails to explain why these four unrelated individuals are moving together with Scott+Scott—as opposed to separately with their own counsel, or with even more individuals. Significantly, this declaration also reveals that the Scott+Scott Group's counsel was the impetus behind the group's decision to jointly seek appointment as lead plaintiff as an unrelated group. *See* ECF No. 51-4, Scott+Scott Joint Declaration ¶ 8 ("We decided to retain Scott+Scott Attorneys at Law LLP ("Scott+Scott") as our counsel after reviewing the complaints, discussing the merits of the allegations, and expressing our interest in recovering the losses we suffered."). Similarly, the Joint Declaration evidences that the Scott+Scott Group's counsel was not only the link between the group's members, but also the genesis of the group's formation. *Id* at ¶ 9 ("Upon learning of each other's interest seeking appointment of lead plaintiff in this matter through our counsel, we communicated with one another and counsel via conference call on Friday, October 23, 2020"). Thus, the lawyers at Scott+Scott arranged for a single conference call among the Scott+Scott Group's members *on the day the lead plaintiff motion was due*. Accordingly, the Scott+Scott Joint Declaration fails its evidentiary burden because it does not adequately set forth how this group was formed and why its members decided to apply for lead plaintiff appointment collectively. *See Network Assocs.*, 76 F. Supp. 2d at 1026; *Cloudera*, 2019 WL 6842021, at *7 (declining to appoint two unrelated entities as lead plaintiff finding that "two funds explain that each fund had 'independently determined to seek appointment as Lead Plaintiff,' but they 'learned of the possibility of serving together' after discussions with their counsel. . . .").

Moreover, the Scott+Scott Joint Declaration fails to assert, much less establish, *any* pre-existing relationships among the Scott+Scott Group's members. Scott+Scott Joint Declaration ¶¶ 1–18; *see Isaacs*, 2018 WL 6182753, at *3 (the joint declaration "reflects that the TIG members are unrelated and were introduced to one another by their lawyers . . . and, although

the members suggest that they will be able to work together well, efficiently, and so forth, there is nothing concrete to back that up," especially considering "the members participated in only one joint call prior to filing the motion for appointment."). And, the Scott+Scott Joint Declaration's admission that the Scott+Scott Group members conducted their lone conference call with one another before deciding to move jointly on October 23, 2020—the same day the lead plaintiff motions were due—further bolsters the inference that the lawyers at Scott+Scott are at the helm. Scott+Scott Joint Declaration ¶ 9. And, the Scott+Scott Joint Declaration fails to specify *who* organized the single conference call, how long it lasted, and when and why any emails were purportedly exchanged. *See Beckman v. Ener1, Inc.*, 2012 WL 512651, at *3–4 (S.D.N.Y. Feb. 15, 2012) (S.D.N.Y. Feb. 15, 2012) (rejecting unrelated group where it did not specify who organized the "single conference call" on which they claimed to have discussed moving jointly, "how long it lasted," or "who put the group together"); *see Cloudera*, 2019 WL 6842021, at *7 (rejecting unrelated group which failed to specify who organized the "one conference call" wherein they claimed to discuss their "strategy for prosecuting this action.").

The Scott+Scott Joint Declaration fails to explain how the Scott+Scott Group will decide issues in the case, including resolving any disputes among the group's members. *See Eichenholtz*, 2008 WL 3925289, at *9 (holding the submitted declaration did not "clarify how the group will tackle the massive coordination and strategic issues that are certain to arise in this litigation."). Specifically, while the Scott+Scott Group state that they "fully expect to reach a consensus regarding litigation decisions" they offer no prior examples of the group's members ever working together on any occasion. *See* Scott+Scott Joint Declaration ¶¶ 1–18. Thus, there is no support for this claim of cohesiveness, supporting the denial of their lead plaintiff application. *See Frias v. Dendreon Corp.*, 835 F. Supp. 2d 1067, 1075 (W.D. Wash. 2011) (denying lead plaintiff application by group which submitted "conclusory statements concerning cohesiveness"). The Scott+Scott Joint Declaration also claims that its four members "agree to abide by a majority vote" to resolve any disagreements. However, the Scott+Scott Group is comprised of an even number of members (*i.e.*, four members) and their Joint Declaration fails to explain how any ties in such voting will be resolved. *Id.* ¶ 15; *Cloudera*, 2019 WL 6842021,

at *7 ("Other than describing one conference call where the funds discussed their 'strategy for prosecuting this action' and their 'interests in prosecuting the case in a collaborative, like-minded manner,' the Boston Group provided no further information about how it would jointly manage the case or resolve disagreements."); *Stitch Fix*, 393 F. Supp. 3d at 835–37 (appointing individual investor with fourth greatest losses as lead plaintiff because three other competing movants with greater claimed losses, including a group of unrelated investors, were inadequate under the PSLRA); *Isaacs*, 2018 WL 6182753, at *3 (denying motion by artificial grouping of individuals).

Even assuming that the Scott+Scott Group could be a proper lead plaintiff, this group is not typical as it is subject to a unique defense.[2] Specifically, a key member of the Scott+Scott Group—Najaf Zaidi ("Zaidi") is a "day-trader" that can subject the entire group to additional defenses. *See Eichenholtz*, 2008 WL 3925289, at *10–*11 (rejecting a group as atypical because the group "may have a day-trader member that can subject it to additional defenses"). Mr. Zaidi's trades indicate that he made multiple purchases and sales trades during the relevant period. See ECF No. 51-5 at 3–6. The fact that Mr. Zaidi is a day trader can be "fatal" as this investor "would not be typical of the class because the class's damages stem from reliance upon the company's financial statements, not upon daily market volatility" and thus "may be subject to a unique defense regarding its reliance upon publicly available information." *Eichenholtz*, 2008 WL 3925289, at *11 citing *Silicon Storage Tech., Inc.*, 2005 U.S. Dist. LEXIS 45246 at *33 (refusing to appoint an in-and-out trader as lead plaintiff because it did not meet typicality requirement).

Finally, it is unclear from the Scott+Scott Joint Declaration how its members will be able to effectively communicate with one another and their counsel about the litigation. *See Network Assocs.*, 76 F. Supp. 2d at 1026 (unrelated group of investors seeking to aggregate their losses

[2] Once a presumptive lead plaintiff has been identified, the other movants have the opportunity to present evidence that the presumptively most adequate plaintiff "will not fairly and adequately protect the interests of the class or is subject to unique defenses that render such plaintiff incapable of adequately representing the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). *Cavanaugh*, 306 F.3d at 730.

should include "a description of the mechanism that its members and the proposed lead counsel have established to communicate with one another about the litigation."). This is especially true because two of the group's members live abroad and two reside here in the United States: Mr. Lim resides in Singapore and Mr. Kubanek resides in Prague, Czech Republic, while Mr. Zaidi resides in Bethlehem, Pennsylvania and Mr. Nabi resides in Atlanta, Georgia. Scott+Scott Joint Declaration ¶¶ 3–6.

Accordingly, the Scott+Scott Group was "'created by the efforts of lawyers hoping to ensure their eventual appointment as lead counsel and, as such, are 'groups' of the sort district courts in this circuit and throughout the country look upon with disfavor.'" *Markette v. XOMA Corp.*, 2016 WL 2902286, at *9 (N.D. Cal. May 13, 2016) (quoting *Eichenholtz*, 2008 WL 3925289, at *9).

2. The Hagens Berman Group Is An Improper Group Of Unrelated Individuals

The Hagens Berman Group also provided the Court with a Joint Declaration ("Hagens Berman Joint Declaration") attempting to show that its two members satisfy the Rule 23 adequacy requirement and should be permitted to aggregate their losses and serve as a lead plaintiff group of unrelated investors. ECF No. 47-5. Just like the Scott+Scott Joint Declaration, however, the Hagens Berman Joint Declaration fails to make the required showing that the group is adequate and not lawyer driven. *See Network Assocs.*, 76 F. Supp. 2d at 1026 (joint declarations from groups attempting to aggregate losses "should include descriptions of its members, including any pre-existing relationships among them; an explanation of how it was formed and how its members would function collectively; and a description of the mechanism that its members and the proposed lead counsel have established to communicate with one another about the litigation.").

The Hagens Berman Joint Declaration fails to make the evidentiary showing of adequacy necessary to permit aggregating group losses. *First*, the Hagens Berman Joint Declaration gives only a brief description of the group's two members individually and does not justify why these two unrelated individuals can adequately serve as a lead plaintiff together. Instead, the Hagens

Berman Joint Declaration clearly shows that it was their counsel who formed this group. *See* ECF No. 47-5, Hagens Berman Joint Declaration ¶ 14 ("We individually contacted the law firm of Hagens Berman, and after careful consideration, selected Hagens Berman to serve as Lead Counsel"). So, while these two individual investors contacted Hagens Berman *separately*, as a direct result of that contact and a phone call between the two and lawyers at Hagens Berman on the same day the lead plaintiff applications were due, the Hagens Berman Group's two members now "understand that we are jointly seeking to be appointed as Lead Plaintiff." ECF No. 47-5 ¶ 8. Accordingly, the Hagens Berman Joint Declaration fails its evidentiary burden because it does not show that this group was properly formed (*e.g.*, the members had a pre-existing relationship and contacted Hagens Berman together jointly to serve as co-lead plaintiffs). It also fails to explain why its members decided to apply for lead plaintiff appointment collectively after contacting Hagens Berman separately. ECF NO. 47-5 ¶¶ 1–19; *see Cloudera*, 2019 WL 6842021, at *7 (declining to appoint two unrelated entities as lead plaintiff finding that "two funds explain that each fund had 'independently determined to seek appointment as Lead Plaintiff,' but they 'learned of the possibility of serving together' after discussions with their counsel.").

Second, the Hagens Berman Joint Declaration does not show a pre-existing relationship between the two group members, further eroding their adequacy. *See* Hagens Berman Joint Declaration ¶ 9 ("Prior to this contact [a joint telephone call on October 23, 2020], we had never met one another and have no familial or business relationship with one another."). In declining to appoint a group as lead plaintiff despite the group's overall largest financial interest in the litigation, the *Eichenholtz* court concluded: "[t]he only thing the investors in [the] group have in common . . . is the lawyer. They have no link to each other. They are not organized with any group decisionmaking apparatus. They attended no organizing meetings. They have no cohesive identity. They have no name other than one arbitrarily selected by the lawyers." *Eichenholtz*, 2008 WL 3925289, at *9 (citing *In re Network Assocs., Inc., Sec. Litig.*, 76 F. Supp. 2d 1017, 1026 (N.D. Cal. 1999)). The Hagens Berman Joint Declaration's admission that the Hagens Berman Group members conducted their lone ***joint*** conference call with one another and

their counsel before deciding to move jointly on October 23, 2020, the day their application was due, further supports the inference that this group is lawyer driven and therefore inadequate. Hagens Berman Joint Declaration ¶¶ 3, 9. And, the Hagens Berman Joint Declaration fails to explain who set up their single joint conference call and how long it lasted. *See Cloudera*, 2019 WL 6842021, at *7 (rejecting unrelated group where it did not specify who organized the "one conference call" on which they claimed to have discussed their "strategy for prosecuting this action.").

Third, the Hagens Berman Joint Declaration does not adequately explain how the Hagens Berman Group will decide issues in the case, including resolving any disputes among the group's members. *See Eichenholtz*, 2008 WL 3925289, at *9 (holding the submitted declaration did not "clarify how the group will tackle the massive coordination and strategic issues that are certain to arise in this litigation."). Specifically, while the Hagens Berman Joint Declaration claims the two members discussed "a decision-making structure" during their sole joint call on October 23, 2020, it fails to provide any further details as to how that "structure" will operate. *See* Hagens Joint Declaration ¶ 10. Thus, there is no support for any claim of cohesiveness, supporting the inadequacy of this proposed group and denial of their lead plaintiff application. *See Frias*, 835 F. Supp. 2d at 1075 (denying lead plaintiff application by group which submitted "conclusory statements concerning cohesiveness"). Indeed, the Hagens Berman Group is comprised of an even number of members (*i.e.*, two members) and their Joint Declaration fails to explain how any ties in their voting will be resolved. *See Stitch Fix*, 393 F. Supp. 3d at 835–37; *Isaacs*, 2018 WL 6182753, at *3; *Cloudera*, 2019 WL 6842021, at *7 ("Other than describing one conference call where the funds discussed their 'strategy for prosecuting this action' and their 'interests in prosecuting the case in a collaborative, like-minded manner,' the Boston Group provided no further information about how it would jointly manage the case or resolve disagreements.").

In short, the Hagens Berman Group fails to provide evidence justifying the need for such a group and of its cohesion. The evidence the Hagens Berman Group did provide raises more questions than provides answers and only further establishes that it cannot fairly and adequately represent the Class. *See Bodri v. Gopro, Inc.*, 2016 WL 1718217, at *4 (N.D. Cal. Apr. 28,

2016) (finding that individual group inadequate because "[t]o allow an aggregation of unrelated plaintiffs to serve as lead plaintiffs defeats the purpose of choosing a lead plaintiff"); *Crihfield v. CytRx Corp.*, 2016 WL 10587938, at *4 (C.D. Cal. Oct. 26, 2016) (rejecting group which submitted joint declaration as lawyer-driven and appointing individual movant with largest financial interest).

B. Ms. York Is the Most Qualified Movant To Serve As Lead Plaintiff

The Court should consider Ms. York's motion and qualifications because the movants claiming a larger financial interest are unable to meet the PSLRA's lead plaintiff requirements. *See Cavanaugh*, 306 F.3d at 731. Courts refer to the *Olsten/Lax* factors for guidance as to determining who has the greatest financial interest in the relief sought by the class. These factors include: (1) the number of shares purchased during the class period; (2) the number of net shares purchased during the class period (*i.e.* retained through the end of the class period); (3) the total net funds expended during the class period; and (4) the approximate losses suffered. *Robb v. Fitbit Inc.*, 2016 WL 2654351, at *3 (N.D. Cal. May 10, 2016). Moreover, courts have found that the fourth factor, approximate loss suffered, is the most important factor and afford it the greatest weight in determining which movant has the largest financial interest. *Id.* (citing *In re Diamond Foods, Inc., Sec. Litig.*, 281 F.R.D. 405, 408 (N.D. Cal. 2012) (noting that "the last of these factors typically carries the most weight").

The following table demonstrates that Ms. York possesses the largest financial interest in the relief sought by the Class of any remaining movants:

Financial Interest of Remaining Competing Movants

Movant	Total Shares Purchased	Net Funds Expended	Loss Suffered
Trudy York	29,000	$382,660.00	-$177,920.00
Pierce Parker	7,000	$106,920.00	-$54,285.56

As demonstrated above, Ms. York has the largest financial interest under all of the *Olsten/Lax* factors as compared to the remaining movant. Under the most important factor, the approximate loss suffered, Ms. York suffered more than three times the amount of losses as the next closest competing movant, Pierce Parker. Ms. York not only suffered a significant

$177,920 loss; she has provided the Court with sufficient information in her moving papers to demonstrate that she meets the Rule 23 typicality and adequacy requirements. *See* ECF No. 39-3 at Exhibit C ("York Certification") and ECF No. 39-4 at Exhibit D ("York Decl.").

"'The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Royal Oak*, 2012 WL 78780, at *5 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). Here, like other members of the purported class, Ms. York purchased Vaxart securities during the Class Period in reliance on the defendants' false and misleading statements and suffered damages as a result. Accordingly, "because [York's] claims are premised on the same legal and remedial theories and are based on the same types of alleged misrepresentations and omissions as the class's claims, [York's] claims are typical of the claims of other members of the putative class." *See In re Solar City Corp. Sec. Litig.*, 2017 WL 363274, at *5 (N.D. Cal. Jan. 25, 2017); *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc., 2013 WL 2368059, at *4 (N.D. Cal. May 29, 2013)* (finding typicality requirement met when proposed lead plaintiff "purchased [the defendant's] common stock during the Class Period, allegedly in reliance upon [the d]efendants' purported false and misleading statements, and alleged suffered damages as a result").

The test for adequacy of a class representative is whether: (i) the named plaintiffs and their counsel have any conflicts of interest with other class members; and (ii) whether the named plaintiffs and their counsel will prosecute the action vigorously on behalf of the class. *See Solar City*, 2017 WL 363274, at *5 (citing *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003)). Here, there is no suggestion of conflicts between Ms. York and other class members.

Ms. York has a significant stake in the outcome of the instant action such that the Court can be confident she will vigorously prosecute the claims. Ms. York has submitted a sworn declaration that she "understand[s] that a lead plaintiff acts on behalf of and for the benefit of all potential class members and oversees and directs counsel throughout the litigation." *See* York Decl., ECF No. 39-4, Ex. D ¶ 4. Ms. York also submitted evidence that she has hired

counsel with experience in the prosecution of securities class actions. *Id.* ¶ 8; *Solar City*, 2017 WL 363274, at *5 (finding adequacy partly because Plaintiff's counsel had experience in prosecuting complex securities class actions).

Ms. York's timely declaration explains, among other things:

- Ms. York's professional accomplishments (York Decl., ECF No. 39-4, Ex. D, ¶ 2);
- Ms. York's residence and investing experience (*id*. ¶ 3);
- that Ms. York understands and is "willing" to perform her duties as a lead plaintiff, which she understands to include, among other things, directing and overseeing counsel, participating in discovery and authorizing any settlement (*id*. ¶ 5); and
- Ms. York's interest and incentive in prosecuting the case on behalf of all Vaxart shareholders (*id*. ¶ 6).

Accordingly, for purposes of the appointment of lead plaintiff, Ms. York has made a showing that she meets the typicality and adequacy requirements of Rule 23.

III. CONCLUSION

Regardless of the losses claimed by the Scott+Scott Group and the Hagens Berman Group, each of these movants fails to meet the Rule 23 requirements to trigger the PSLRA's most adequate plaintiff presumption. The remaining movant lacks the largest financial interest. As a result, none of these competing movants can be appointed lead plaintiff and their motions should be denied in their entirety. Ms. York is the movant with the next largest loss, and, unlike the competing movants, she meets all the PSLRA's requirements to trigger the presumption. As such, her motion should be granted.

Respectfully Submitted,

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