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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JEFFRY BROWN, individually and on behalf of all others similarly situated,
Plaintiff,
v.
ACUTUS MEDICAL, INC., VINCE BURGESS, and DAVID H. ROMAN,
Defendants.

Case No.: 22-cv-206-RSH-KSC

ORDER GRANTING PAUL D. WEINBERG’S MOTION FOR CONSOLIDATION OF RELATED ACTIONS, APPOINTMENT AS LEAD PLAINTIFF, AND APPROVAL OF LEAD COUNSEL, AND DENYING COMPETING MOTIONS

[ECF Nos. 12, 13, 14]

CLINTON A. FERGUSON, individually and on behalf of all others similarly situated,
Plaintiff,
v.
ACUTUS MEDICAL, INC., VINCE BURGESS, and DAVID H. ROMAN,
Defendants.

Case No. 22-CV-388-RSH-KSC

1 On April 18, 2022, Paul D. Weinberg (“Weinberg”) filed a Motion For
2 Consolidation Of Related Actions, Appointment As Lead Plaintiff, And Approval Of
3 Lead Counsel (“Motion”). ECF No. 12. The Motion is unopposed. Three other purported
4 class members filed competing motions for consolidation, and appointment of lead
5 plaintiff and lead counsel: Ba Tran (“Tran”), Ron Harraka (“Harraka”), and Wayne R.
6 Miller and Dennis Midkiff (“Miller and Midkiff”). ECF Nos. 11, 13, 14. Tran and
7 Harraka, however, filed notices indicating they do not oppose Weinberg’s Motion and
8 acknowledging they do not have the largest financial interest in the litigation, ECF Nos.
9 15, 17, and Miller and Midkiff withdrew their motion, ECF No. 18. The deadline to file
10 any opposition to Weinberg’s Motion has passed. For the following reasons, the Court
11 **GRANTS** Weinberg’s Motion and **DENIES** the competing motions by Tran and
12 Harraka.

13 **I. REQUEST FOR CONSOLIDATION**

14 “If actions before the court involve a common question of law or fact, the court
15 may . . . consolidate the actions.” Fed. R. Civ. P. 42(a). “The district court has broad
16 discretion under this rule to consolidate cases pending in the same district.” *Invs. Rsch.*
17 *Co. v. U.S. Dist. Ct.*, 877 F.2d 777, 777 (9th Cir. 1989). In determining whether
18 consolidation is appropriate, the district court “weighs the saving of time and effort
19 consolidation would produce against any inconvenience, delay, or expense that it would
20 cause.” *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984) (subsequent history
21 omitted).

22 The two actions Weinberg moves to consolidate, *Jeffry Brown v. Acutus Medical,*
23 *Inc., et al.*, No. 22-cv-206, and *Clinton A. Ferguson v. Acutus Medical, Inc., et al.*, No.
24 22-cv-388, involve common questions of fact and law. The two complaints involve the
25 same defendants, identical proposed classes, many of the same factual allegations, and
26 identical causes of action under the federal securities laws. Given the similar factual and
27 legal issues, consolidation of the two cases would promote judicial economy. None of the
28 other parties or movants have provided any indication that consolidation would cause

1 inconvenience, delay, or expense. Accordingly, the Court **GRANTS** Weinberg’s Motion
2 for consolidation.

3 **II. APPOINTMENT OF LEAD PLAINTIFF**

4 Under the PSLRA, the district court “shall appoint as lead plaintiff the member or
5 members of the purported plaintiff class that the court determines to be most capable of
6 adequately representing the interests of class members.” 15 U.S.C. § 78u-4(a)(3)(B)(i).
7 “[T]he court shall adopt a rebuttable presumption” that the most adequate plaintiff is the
8 person or group that: (1) either filed the complaint or brought the motion for appointment
9 of lead plaintiff in response to the publication of notice, (2) has the “largest financial
10 interest” in the relief sought by the class, and (3) otherwise satisfies the requirements of
11 Federal Rule of Civil Procedure 23. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(aa)–(cc). The
12 presumption may be rebutted “only upon proof by a member of the purported plaintiff
13 class” that the presumptively most adequate plaintiff: (1) will not fairly and adequately
14 protect the interests of the class or (2) is subject to unique defenses that render such
15 plaintiff incapable of adequately representing the class. 15 U.S.C. § 78u-
16 4(a)(3)(B)(iii)(II)(aa)–(bb).

17 The Court must presume that Weinberg is the most adequate plaintiff. Weinberg
18 has filed a timely Motion in response to Plaintiff’s published notice. *See* ECF Nos. 12,
19 12-3 (filing Motion on April 18, 2022, *i.e.*, sixty days after notice); 15 U.S.C. § 78u-
20 4(a)(3)(A)(i)(II) (allowing purported class members to move for appointment as lead
21 plaintiff within 60 days of publication of notice by plaintiffs). He also has the largest
22 financial interest in the relief sought. The Motion attaches a chart reflecting total losses of
23 \$29,943.10, ECF No. 12-5, far exceeding Plaintiff Jeffrey Brown’s alleged losses, ECF
24 No. 1 at 32-33 (indicating purchase of only 100 shares at \$12.25), and also exceeding the
25 alleged losses of Clinton A. Ferguson, the Plaintiff in the related case, *see* Case No. 22-
26 cv-0388, ECF No. 1 at 44 (indicating purchase of 500 shares at prices ranging from \$7.81
27 to \$8.50). The remaining competing movants, Harraka and Tran, concede they do not
28 have the largest financial interest in the action, ECF No 15 at 1; ECF No. 17 at 2.

1 Finally, Weinberg has satisfied the requirements of Federal Rule of Civil
2 Procedure 23 for purposes of a lead plaintiff motion. In assessing whether a lead plaintiff
3 applicant meets those requirements, the Court must analyze “in particular those of
4 ‘typicality’ and ‘adequacy.’” *In re Cavanaugh*, 306 F.3d 726, 730 (9th Cir. 2002).
5 Representative claims are “typical” if they are “reasonably co-extensive with those of
6 absent class members,” although “they need not be substantially identical.” *Hanlon v.*
7 *Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998), *overruled on other grounds by Wal-*
8 *Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). In analyzing “adequacy,” the Court must
9 ask whether the proposed lead plaintiff and his counsel “have any conflicts of interest
10 with other class members” and whether they will “prosecute the action vigorously on
11 behalf of the class.” *Hanlon*, 150 F.3d at 1020. “[T]he inquiry at this stage of the
12 litigation is not as searching as the one triggered by a motion for class certification, [but]
13 the proposed lead plaintiff must make at least a preliminary showing that it meets the
14 typicality and adequacy factor[s].” *See Zhu v. UCBH Holdings, Inc.*, 682 F. Supp. 2d
15 1049, 1053 (N.D. Cal. 2010).

16 Weinberg’s claims and defenses are typical of those of the other putative class
17 members because, “[l]ike all members of the class,” Weinberg purchased Acutus stock
18 during the class period, suffered losses from those transactions due to the artificial
19 inflation of that stock, and makes typical allegations that Defendants violated the federal
20 securities laws by making material misstatements concerning Acutus’s operations and
21 financial prospects. ECF No. 12-1 at 7. Weinberg’s claims and defenses are reasonably
22 co-extensive with those of the other putative class members. Weinberg has also
23 demonstrated he is an adequate representative because there is no evidence that his
24 interests are antagonistic to the class, he has sufficient experience, and has retained
25 competent counsel. *Id.* at 7-8. Weinberg has made a sufficient showing of typicality and
26 adequacy at this preliminary stage.

27 Because Weinberg has timely filed a Motion indicating he has the largest financial
28 interest and otherwise satisfies the elements of Federal Rule of Civil Procedure 23 at this

1 stage, the Court presumes he is the most adequate plaintiff to represent the interests of the
2 putative class.

3 None of the movants or other parties have submitted any evidence to rebut this
4 presumption. There is no proof on the record indicating that Weinberg cannot fairly and
5 adequately protect the interests of the class or that he is subject to unique defenses
6 rendering him incapable of representing the class. Indeed, the two remaining movants,
7 Tran and Harraka, have submitted notices indicating they do not oppose Weinberg's
8 Motion. ECF Nos. 15, 17. The deadline for any opposition to the Motion has also passed.
9 Under these circumstances, there is no basis to rebut the presumption that Weinberg is
10 the most adequate plaintiff. *See* 5 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa)–(bb) (“The
11 presumption . . . may be rebutted only upon proof by a member of the purported plaintiff
12 class”). Given the unrebutted presumption that Weinberg is the most adequate plaintiff,
13 the Court **GRANTS** Weinberg's Motion to be appointed lead plaintiff.

14 **III. APPOINTMENT OF LEAD COUNSEL**

15 The PSLRA provides that the lead plaintiff shall select and retain counsel to
16 represent the class, “subject to the approval of the court.” 15 U.S.C. § 78u-4(a)(3)(B)(v).
17 “[I]f the lead plaintiff has made a reasonable choice of counsel, the district court should
18 generally defer to that choice.” *Cohen v. U.S. Dist. Ct.*, 586 F.3d 703, 712 (9th Cir.
19 2009); *see also Cavanaugh*, 306 F.3d at 732-33 (noting that “the district court has no
20 authority to select for the class what it considers to be the best possible lawyer”).

21 Glancy Prongay & Murray LLP (“GPM”) has extensive experience in representing
22 investors in class actions throughout the country and has served as lead or co-lead
23 counsel in numerous securities class actions that resulted in significant recoveries for
24 class members. ECF No. 12-6 at 2-4. Because GPM appears competent to represent the
25 class, the Court defers to Weinberg's choice and hereby approves GPM as lead counsel.
26 *See also* Fed. R. Civ. P. 23(g)(1)(A) (requiring courts to consider in appointing class
27 counsel, *inter alia*, “counsel's experience in handling class actions, other complex
28

1 litigation, and the types of claims asserted in the action” and “counsel’s knowledge of the
2 applicable law”).

3 **IV. CONCLUSION**

4 For the reasons stated above, the Court **GRANTS** Weinberg’s Motion, ECF No.
5 12, and **ORDERS** as follows:

- 6 1. *Jeffry Brown v. Acutus Medical, Inc., et al.*, No. 22-cv-206, and *Clinton A.*
7 *Ferguson v. Acutus Medical, Inc., et al.*, No. 22-cv-388 are consolidated for
8 all purposes (the “Consolidated Action”). This Order will apply to the
9 Consolidated Action and to each case that relates to the same subject matter
10 that is subsequently filed in this District or is transferred to this District, and
11 is consolidated with the Consolidated Action.
- 12 2. A Master File is established for this proceeding. The Master File will be
13 Case No. 3:22-cv-206-RSH-KSC. The Clerk will file all pleadings in the
14 Master File and note such filings on the Master Docket.
- 15 3. Every pleading in the Consolidated Action must have the following caption:
16

IN RE ACUTUS MEDICAL, INC.
SECURITIES LITIGATION

17 Case No. 22-CV-206-RSH-KSC
- 18
- 19 4. Pursuant to 15 U.S.C. § 78u-4(a)(3)(B), Paul D. Weinberg is appointed to
20 serve as Lead Plaintiff in the Consolidated Action.
- 21 5. Pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v), Paul D. Weinberg’s selection of
22 Glancy Prongay & Murray LLP as Lead Counsel for the class is approved.
23 Lead Counsel will have the authority to speak for all plaintiffs and class
24 members in all matters regarding the litigation, including, but not limited to,
25 pre-trial proceedings, motion practice, trial, and settlement.

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1 The competing motions by Tran and Harraka, ECF Nos. 13, 14, are hereby **DENIED**.

2 **IT IS SO ORDERED.**

3 Dated: July 19, 2022

Robert S. Huie

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Hon. Robert S. Huie
United States District Judge

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