

1                                    IN THE UNITED STATES DISTRICT COURT  
2                                    FOR THE NORTHERN DISTRICT OF CALIFORNIA

3  
4        ARINDAM BANERJEE and JOGESH  
5        HARJAI, Individually and on  
6        Behalf of All Others Similarly  
7        Situated,

8                                    Plaintiffs,

9                                    v.

10        AVINGER, INC., JEFFREY M.  
11        SOINSKI, MATTHEW B. FERGUSON,  
12        DONALD A. LUCAS, JOHN B.  
13        SIMPSON, JAMES B. MCELWEE,  
14        JAMES G. CULLEN, THOMAS J.  
15        FOGARTY, CANACCORD GENUITY,  
16        INC., COWEN AND COMPANY LLC,  
17        OPPENHEIMER & CO., BTIG,  
18        STEPHENS INC., AND DOES 1  
19        through 25, inclusive,

20                                    Defendants.

Case No. 17-cv-03400-CW

ORDER APPOINTING LEAD  
PLAINTIFFS AND APPROVING  
PLAINTIFFS' SELECTION OF LEAD  
COUNSEL

21                                    Now pending are three motions to be appointed as lead  
22        plaintiff pursuant to the Private Securities Litigation Reform  
23        Act of 1995 (PSLRA), 15 U.S.C. § 77z-1 et seq., and for approval  
24        of the selection of lead counsel. The motions were filed by:  
25        Lindsay Grotewiel and Todd Vogel; Arindam Banerjee and Jogesh  
26        Harjai; and Michael Dolan. The Grotewiel/Vogel and  
27        Banerjee/Harjai groups have opposed the others' motions and filed  
28        replies to each others' oppositions. Additionally, Grotewiel and  
29        Vogel filed objections to reply evidence submitted by Banerjee  
30        and Harjai, and Banerjee and Harjai filed a motion for leave to  
31        file a response to Grotewiel and Vogel's objections.

32                                    Having considered all the papers filed by the parties, the  
33        Court appoints Banerjee and Harjai as Lead Plaintiffs and

1 approves their selection of the law firm of Scott+Scott,  
2 Attorneys at Law, LLP, as Lead Counsel for the putative class.  
3 The Court also grants the parties' requests to submit  
4 supplemental filings, and has considered those filings.

5 BACKGROUND

6 On May 22, 2017, Plaintiff Lindsay Grotewiel filed a class  
7 action complaint in San Mateo County Superior Court against  
8 Avinger, Inc. and several of its individual officers and  
9 directors, alleging violations of the Securities Act of 1933 (the  
10 Securities Act), 15 U.S.C. §§ 77k, 77l(a)(2), 77o. Grotewiel  
11 claims that Defendants issued a materially false and misleading  
12 registration statement and prospectus in connection with  
13 Avinger's January 30, 2015 initial public offering (IPO).  
14 Defendants removed the action to this Court on June 12, 2017. On  
15 June 19, 2017, this Court granted the parties' joint motion to  
16 relate this case to Olberding v. Avinger, No. 17-cv-03398,<sup>1</sup> and  
17 Gonzalez v. Avinger, No. 17-cv-03401.

18 The plaintiffs in Olberding and Gonzalez filed motions to  
19 remand, but Grotewiel did not. The Court remanded the related  
20 cases and issued an order to show cause why this case should not  
21 also be remanded. On August 22, 2017, following briefing, the  
22 Court discharged the order to show cause, holding that the  
23 statutory removal bar in the Securities Act is not jurisdictional  
24 and was waived by Grotewiel.

25 Meanwhile, Grotewiel published the PSLRA notice of pendency

26 \_\_\_\_\_  
27 <sup>1</sup> Plaintiff Kyle Olberding was represented by John T. Jasnoch  
28 and Thomas L. Laughlin, IV, of Scott+Scott. Scott+Scott  
represent that they moved to withdraw as counsel for Olberding in  
state court on September 20, 2017.

1 of a putative securities fraud class action on July 7, 2017, and  
2 these timely lead Plaintiff motions followed. See 15 U.S.C.  
3 § 78u-4(a)(3)(A)(i).

4 LEGAL STANDARD

5 The PSLRA provides that the Court "shall appoint as lead  
6 plaintiff the member or members of the purported plaintiff class  
7 that the court determines to be most capable of adequately  
8 representing the interests of class members." 15 U.S.C. § 77z-  
9 1(a)(3)(B)(i); see also In re Cavanaugh, 306 F.3d 726, 729-30  
10 (9th Cir. 2002) (discussing application of identical standard  
11 under 15 U.S.C. § 78u-4(a)(3)(B)). The statute further provides  
12 that the Court shall adopt a rebuttable presumption that the most  
13 adequate plaintiff is

14 the person or group of persons that--

15 (aa) has either filed the complaint or made a motion in  
16 response to a notice under subparagraph (A)(i);

17 (bb) in the determination of the court, has the largest  
18 financial interest in the relief sought by the class;  
and

19 (cc) otherwise satisfies the requirements of Rule 23 of  
the Federal Rules of Civil Procedure.

20 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I).

21 In determining which candidate has the largest financial  
22 interest, courts consider factors that may include: "1) number of  
23 shares purchased during the class period; 2) net shares purchased  
24 during the class period; 3) net funds expended during the class  
25 period; and 4) approximate losses from the alleged fraud." In re  
26 McKesson HBOC, Inc. Sec. Litig., 97 F. Supp. 2d 993, 995 (N.D.  
27 Cal. 1999) (citing In re Olsten Corp. Sec. Litig., 3 F. Supp. 2d  
28 286, 295 (E.D.N.Y. 1998) (suggesting this four-factor analysis);

1 see also Markette v. XOMA Corp., No. 15-cv-03425-HSG, 2016 WL  
2 2902286, at \*\*5-6 (N.D. Cal. May 13, 2016) (discussing methods of  
3 calculating financial stake).

4 The presumption may be rebutted only upon proof that the  
5 presumptively most adequate plaintiff

6 (aa) will not fairly and adequately protect the  
7 interests of the class; or

8 (bb) is subject to unique defenses that render such  
9 plaintiff incapable of adequately representing the  
class.

10 15 U.S.C. § 77z-1(a)(3)(B)(iii)(II); see also 15 U.S.C. § 77z-  
11 1(a)(3)(B)(vi) (additional restrictions on professional  
12 plaintiffs).

13 The party chosen as lead plaintiff "shall, subject to the  
14 approval of the court, select and retain counsel to represent the  
15 class." 15 U.S.C. § 77z-1(a)(3)(B)(v).

16 DISCUSSION

17 If Banerjee and Harjai are permitted to proceed as a "group  
18 of persons" under 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I), their  
19 financial interest is the largest of any of the lead plaintiff  
20 candidates. They have submitted evidence that they purchased and  
21 retained 9,195 shares of Avinger stock during the class period,  
22 for which they spent \$148,535.59. Grotewiel and Vogel purchased  
23 a total of 16,551 shares of Avinger stock, expending \$137,773.60,  
24 and retain 15,642 of those shares for a net loss of \$127,589.98.  
25 Dolan has a net out-of-pocket loss of \$19,064.54.

26 Grotewiel and Vogel argue, however, that the Court may not  
27 consider Banerjee and Harjai as a group and aggregate their  
28 financial losses. Grotewiel and Vogel are married to each other,

1 and it is undisputed that they may be considered as a group.  
2 See, e.g., Markette, 2016 WL 2902286, at \*8 (citing Aronson v.  
3 McKesson HBOC, Inc., 79 F. Supp. 2d 1146, 1153-54 (N.D. Cal.  
4 1999)). The Court knows very little about Banerjee and Harjai's  
5 relationship, however. They submitted a joint reply declaration  
6 in which they state that they are medical doctors who "have known  
7 each other personally and professionally for 3 years." Joint  
8 Declaration at ¶¶ 3, 5.<sup>2</sup>

9 Courts "have found that unrelated groups of individuals,  
10 brought together solely for the purpose of aggregating their  
11 claims in an effort to become the presumptive lead plaintiff fail  
12 to meet the adequacy prong of Rule 23." Frias v. Dendreon Corp.,  
13 835 F. Supp. 2d 1067, 1073 (W.D. Wash. 2011). This is because,  
14 if the group is not small and cohesive, and especially if the  
15 individuals in the group were brought together by counsel for the  
16 purpose of becoming lead plaintiffs, it may undermine the purpose  
17 of the PSLRA to prevent lawyer-driven litigation. Id. Here,  
18 Banerjee and Harjai have sworn that they were acquainted prior to  
19 their purchases of Avinger stock, which means that they had a  
20 relationship prior to this litigation. They also have declared  
21 that they consulted together before deciding to seek appointment  
22 as lead plaintiffs. The lack of significant information about  
23 their relationship, the way they intend to function as a cohesive  
24 group and their intention to direct the litigation rather than be  
25 directed by their counsel detracts substantially from their

26 \_\_\_\_\_  
27 <sup>2</sup> The Court discourages the parties, in the future, from  
28 filing joint declarations, especially when all declarants cannot  
attest under penalty of perjury to each and every statement in  
the declaration.

1 showing. See Sabbagh v. Cell Therapeutics, Inc., No. 10-cv-  
2 00414-MJP, 2010 WL 3064427, at \*6 (W.D. Wash. Aug. 2, 2010). On  
3 balance, however, the Court finds that the evidence of their pre-  
4 existing relationship is sufficient to treat them as a lead  
5 plaintiff group under the PSLRA.

6 Grotewiel and Vogel also argue that Banerjee and Harjai are  
7 not adequate to serve as lead plaintiffs because the share price  
8 information submitted by Banerjee is inaccurate, falling outside  
9 the range of prices at which Avinger stock traded on the days in  
10 question. Banerjee and Harjai respond that this discrepancy is  
11 due to a clerical error, inadvertently listing the transactions  
12 as occurring on the settlement dates rather than the purchase  
13 dates. Banerjee and Harjai corrected the error in reply, and  
14 there is no indication that the error was committed in bad faith.  
15 The Court finds that this clerical error is not sufficient to  
16 prove that Banerjee and Harjai will not be adequate plaintiffs  
17 under the PSLRA. See, e.g., In re Solar City Corp. Sec. Litig.,  
18 No. 16-CV-04686-LHK, 2017 WL 363274, at \*6 (N.D. Cal. Jan. 25,  
19 2017) ("While the Court finds the error in Fish's claimed damages  
20 to be troubling, those errors do not rebut the presumption that  
21 Fish is lead plaintiff. Multiple district courts have held that  
22 'minor or inadvertent mistakes made in a sworn certification do  
23 not strike at the heart of Rule 23's adequacy requirement.'").  
24 The Court warns Banerjee and Harjai, however, that they must  
25 review the briefing and evidence that they submit more carefully  
26 in the future.

27 Next, Grotewiel and Vogel argue that Harjai is subject to a  
28 unique defense based on reliance, because he purchased his shares

1 of Avinger stock in March 2016, more than twelve months after  
2 Avinger's January 2015 IPO. See Hildes v. Arthur Andersen LLP,  
3 734 F.3d 854, 859-60 (9th Cir. 2013) (discussing reliance  
4 requirement of 15 U.S.C. § 77k(a)). In reply, Banerjee and  
5 Harjai note that a portion of Grotewiel and Vogel's losses will  
6 be subject to the same defense, and even if all such losses are  
7 excluded, Banerjee and Harjai's losses would still be larger.  
8 Additionally, Banerjee and Harjai note that this issue is not  
9 unique, but rather, will be common to many class members, because  
10 the class period is alleged to include dates more than a year  
11 after the IPO. The Court finds that the timing of Harjai's  
12 purchases is not enough to subject him to a unique defense under  
13 15 U.S.C. § 77z-1(a)(3)(B)(iii)(II)(bb).

14 Banerjee and Harjai may be considered as a group and no  
15 other candidate has submitted proof that this presumptive lead  
16 plaintiff group will not fairly and adequately protect the  
17 interests of the class or is subject to unique defenses. The  
18 Court appoints Banerjee and Harjai as the lead Plaintiff group.

19 In addition, the Court approves Banerjee and Harjai's choice  
20 of Scott+Scott as lead counsel, based on the information  
21 submitted regarding the firm's experience and expertise in the  
22 area of securities litigation. The Court finds that the fact  
23 that Scott+Scott formerly represented Plaintiff Olberding in a  
24 related action in this Court, obtained remand of that action and  
25 then withdrew as counsel after seeking appointment in this  
26 action, does not create a conflict of interest or mean that they  
27 have engaged in impermissible forum shopping. See Evellard v.  
28 LendingClub Corp., No. 16-cv-02627-WHA, 2016 WL 9108914, at \*4

1 (N.D. Cal. Aug. 15, 2016) (approving lead counsel who had  
2 withdrawn from parallel state court action).

3 CONCLUSION

4 For the foregoing reasons, the Court APPOINTS Arindam  
5 Banerjee and Jogesh Harjai as the lead Plaintiff group, and  
6 APPROVES their selection of Scott+Scott as lead counsel (Docket  
7 No. 41). The Clerk shall update the docket.

8 The Court DENIES the competing motions of Michael Dolan  
9 (Docket No. 37) and Lindsay Grotewiel and Todd Vogel (Docket No.  
10 44).

11 The Court also GRANTS Grotewiel and Vogel leave to file  
12 objections (Docket No. 79) to Banerjee and Harjai's reply  
13 evidence and GRANTS Banerjee and Harjai's motion for leave to  
14 file a response to those objections (Docket No. 80). Banerjee  
15 and Harjai's response (Docket No. 80-1) is deemed filed. The  
16 Court has fully considered both the objections and the response.

17 The case management conference remains set for October 17,  
18 2017 at 2:30 p.m. The joint case management conference statement  
19 remains due October 13, 2017 at 12:00 p.m.

20 IT IS SO ORDERED.

21  
22 Dated: October 11, 2017

  
\_\_\_\_\_  
CLAUDIA WILKEN  
United States District Judge

23  
24  
25  
26  
27  
28