

United States District Court  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

JOEL KRIEGER, Individually and on Behalf of )	Case No.: 11-CV-00640-LHK
All Others Similarly Situated, )	
)	ORDER APPOINTING LEAD
Plaintiff, )	PLAINTIFF AND LEAD COUNSEL
)	
v. )	
)	
ATHEROS COMMUNICATIONS, INC.; DR. )	
WILLY C. SHIH; R. TERESA H. MENG; DR. )	
CRAIG H BARRATT; ANDREW S. )	
RAPPAPORT; DAN A. ARTUSI; CHARLES E. )	
HARRIS; MARSHALL L. MOHR; CHRISTINE )	
KING; QUALLCOM INC.; and T MERGER )	
SUB, INC., )	
)	
Defendants. )	

Before the Court is Plaintiff’s unopposed motion to approve lead plaintiff and lead counsel. ECF No. 52. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for determination without oral argument. Accordingly, the hearing on the motion set for December 15, 2011, is hereby VACATED. For the foregoing reasons, Plaintiff’s unopposed motion is GRANTED.

**I. Background**

Plaintiff Joel Krieger filed a private securities class action complaint, on behalf of himself and similarly situated shareholders of Atheros Communications, Inc. (“Atheros”), against Defendants Atheros, Dr. Willy C. Shih, Dr. Teresa H. Meng, Dr. Craig H. Barratee, Andrew S. Rappaport, Dan A. Artusi, Charles E. Harris, Marshall L. Mohr, Christine King, Qualcomm Inc., and T Merger Sub, Inc. (collectively “Defendants”). ECF No. 1 (“Compl.”). The initial complaint contained individual federal securities law claims and class state law claims. Plaintiff filed an

1 amended complaint on June 30, 2011, asserting class claims under federal securities laws. ECF  
2 No. 50 (“FAC”). The FAC alleges that Defendants violated Sections 14(a) and 20(a) of the  
3 Securities Exchange Act, 15 U.S.C. § 78n(a), 78t(a), and SEC Rule 14a-9, 17 C.F.R. § 240.14a-  
4 9(a), by issuing a definitive merger proxy that contained information regarding the merger between  
5 Atheros and Qualcomm that Defendants should have known was materially false and misleading.  
6 FAC ¶¶ 112-118.

7 On September 16, 2011, Plaintiff moved the Court for appointment of Joel Krieger as lead  
8 plaintiff and for approval of the law firm of Faruqi & Faruqi, LLP as lead counsel in this action.  
9 ECF No. 52, 53. No other individuals have sought to be named lead plaintiff nor have any other  
10 law firms sought to be named lead counsel. Having considered the motion, and for good cause  
11 shown, the Court GRANTS the motion.

## 12 II. Legal Standard

13 The Private Securities Litigation Reform Act (“PSLRA”), 15 U.S.C. § 78u-4, governs the  
14 selection of a lead plaintiff in private securities class actions. In the PSLRA’s own words, this  
15 plaintiff is to be the “most capable of adequately representing the interests of class members.” 15  
16 U.S.C. § 78u-4(a)(3)(B)(i). Under the PSLRA, a three-step process determines the lead plaintiff.  
17 *In re Cavanaugh*, 306 F.3d 726, 729 (9th Cir. 2002). First, the first plaintiff to file an action  
18 governed by the PSLRA must publicize the pendency of the action, the claims made, and the  
19 purported class period “in a widely circulated national business-oriented publication or wire  
20 service.” 15 U.S.C. § 78u-4(a)(3)(A)(i)(I).<sup>1</sup> This notice must also alert the public that “any  
21 member of the purported class may move the court to serve as lead plaintiff.” 15 U.S.C. § 78u-  
22 4(a)(3)(A)(i)(II).<sup>2</sup>

23 Second, the court must select the presumptive lead plaintiff. *See In re Cavanaugh*, 306  
24 F.3d at 729–30 (citing 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)). In order to determine the presumptive  
25 lead plaintiff, “the district court must compare the financial stakes of the various plaintiffs and  
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27 <sup>1</sup> This publication is to be made “[n]o later than 20 days after the date on which the complaint is  
filed.” 15 U.S.C. § 78u-4(a)(3)(A)(i).

28 <sup>2</sup> Those who wish to move the court for appointment as lead plaintiff must do so “not later than 60  
days after the date on which the notice is published.” 15 U.S.C. § 78u-4(a)(3)(A)(i)(II).

1 determine which one has the most to gain from the lawsuit.” *Id.* at 730 (footnote omitted). Once  
2 the district court identifies the plaintiff with the most to gain, the district court must determine  
3 whether that plaintiff, based on the information he provides, “satisfies the requirements of Rule  
4 23(a), in particular those of ‘typicality’ and ‘adequacy.’” *Id.* If he does, that plaintiff becomes the  
5 presumptive lead plaintiff. *Id.* If not, the court selects the plaintiff with the next-largest financial  
6 stake and determines whether that plaintiff satisfies the requirements of Rule 23. *Id.* The court  
7 repeats this process until it selects a presumptive lead plaintiff. *Id.*

8 Third, those plaintiffs not selected as the presumptive lead plaintiff may “rebut the  
9 presumptive lead plaintiff’s showing that it satisfies Rule 23’s typicality and adequacy  
10 requirements.” *Id.* (citing 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)). This is done by showing that the  
11 presumptive lead plaintiff either “will not fairly and adequately protect the interests of the class” or  
12 “is subject to unique defenses that render such plaintiff incapable of adequately representing the  
13 class.” 15 U.S.C. § 78u-4(a)(3)(B) (iii)(II)(aa)-(bb). If the court determines that the presumptive  
14 lead plaintiff does not meet the typicality or adequacy requirement, then it must return to step two,  
15 select a new presumptive lead plaintiff, and again allow the other plaintiffs to rebut the new  
16 presumptive lead plaintiff’s showing. *In re Cavanaugh*, 306 F.3d at 731. The court repeats this  
17 process “until all challenges have been exhausted.” *Id.* (citation and footnote omitted).

18 Under the PSLRA, the lead plaintiff is given the right, subject to court approval, to “select  
19 and retain counsel to represent the class.” 15 U.S.C. § 78u-4(a)(3)(B)(v). “[T]he district court  
20 should not reject a lead plaintiff’s proposed counsel merely because it would have chosen  
21 differently.” *Cohen v. U.S. Dist. Court*, 586 F.3d 703, 711 (9th Cir. 2009) (citation omitted). “[I]f  
22 the lead plaintiff has made a reasonable choice of counsel, the district court should generally defer  
23 to that choice.” *Id.* at 712 (citations omitted).

### 24 **III. Analysis**

25 In conformity with the procedure established by the PSLRA and the Ninth Circuit in *In re*  
26 *Cavanaugh*, the Court will decide whether Joel Krieger should serve as lead plaintiff and whether  
27 Faruqi & Faruqi, LLP should serve as lead counsel in the instant action.

#### 28 **A. Procedural Requirements**

1           On July 19, 2011, counsel published a notice in Business Wire. The notice was published  
2 within 20 days after Krieger filed the FAC, which was the first complaint to contain class claims  
3 pursuant to the PSLRA. The notice also listed the claims, the class period, and advised putative  
4 class members that they had 60 days from the date of the notice to file a motion to seek  
5 appointment as lead plaintiff in the lawsuit. *See* Alexander Decl. Ex. B. Within 60 days after the  
6 published notice, on September 16, 2011, Krieger filed the currently pending motion seeking  
7 appointment as lead plaintiff. Krieger has therefore met the procedural requirements as set forth in  
8 15 U.S.C. § 78u-4(a)(3)(A).

9                           **B. Financial Interest**

10           The PSLRA provides that, after notice of the class action has been given, a “court shall  
11 consider any motion made by a purported class member in response to the notice . . . and shall  
12 appoint as lead plaintiff the member or members of the purported plaintiff class that the court  
13 determines to be most capable of adequately representing the interest of class members.” 15  
14 U.S.C. § 78u-4(a)(3)(B)(i). The most capable plaintiff is generally the one who has the greatest  
15 financial stake in the outcome of the case, so long as he meets the requirements of Rule 23. *In re*  
16 *Cavanaugh*, 306 F.3d at 729. Krieger has submitted a declaration establishing that during the class  
17 period he purchased 100 shares at \$45.943 per share. *See* Krieger Decl. ¶ 4. As he is the only  
18 party to make a motion for appointment as lead plaintiff, and this motion is unopposed, Krieger is  
19 necessarily the prospective lead plaintiff with the greatest financial interest in the litigation. *See*  
20 *Bassin v. Decode Genetics, Inc.*, 230 F.R.D. 313, 316 (S.D.N.Y. 2005) (“Without access to  
21 financial information from other parties, the Court is constrained to conclude that the Bullock  
22 Group’s alleged loss best qualifies it to serve as lead plaintiff.”).

23                           **C. Rule 23**

24           Krieger has also made a sufficient showing to establish that he satisfies the requirements of  
25 Rule 23(a), in particular, that it he is a typical class member and an adequate representative. *See In*  
26 *re SLM Corp. Secs. Litig.*, 258 F.R.D. 112, 116 (S.D.N.Y. 2009) (“Under the PSLRA, a proposed  
27 lead plaintiff must, inter alia, make a preliminary showing that it satisfies the typicality and  
28 adequacy requirements of F.R.C.P. 23.”) (internal quotation marks omitted). This showing need

1 not be as thorough as what would be required on a class certification motion. *See Zhu v. UCBH*  
2 *Holdings, Inc.*, 682 F. Supp. 2d 1049, 1053 (N.D. Cal. 2010). Here, Krieger’s claims under  
3 sections 14(a) and 20(a) of the Securities Exchange Act are typical, if not identical, to the claims of  
4 the other members of the putative class. *See* Krieger Decl. ¶ 4. Moreover, there is nothing to  
5 indicate that Krieger’s claims conflict with those of the putative class, or that he is subject to  
6 unique defenses. *See* Krieger Decl. ¶ 6. Accordingly, Krieger has demonstrated that he is an  
7 adequate lead plaintiff.

8 **D. Lead Counsel**

9 The PSLRA provides that “[t]he most adequate plaintiff shall, subject to the approval of the  
10 court, select and retain counsel to represent the class.” 15 U.S.C. § 78u-4(a)(3)(B)(v). The  
11 decision of lead counsel belongs to the lead plaintiff. *In re Cavanaugh*, 306 F.3d at 734 n.14.  
12 Krieger has chosen the law firm of Faruqi & Faruqi, LLP. The Court has reviewed the firm’s  
13 resume and is satisfied that the lead plaintiff has made a reasonable choice of counsel. In light of  
14 this showing, the Court will defer to the Plaintiff’s choice in counsel.

15 **IV. Conclusion**

16 The Court appoints Joel Krieger as the lead plaintiff in this action and approves Krieger’s  
17 selection of Faruqi & Faruqi, LLP as lead counsel.

18 **IT IS SO ORDERED.**

19 Dated: December 12, 2011

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21 LUCY H. KOH  
22 United States District Judge  
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