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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

AARON SNEED JR.,
Plaintiff,
v.
ACELRX PHARMACEUTICALS, INC., et
al.,
Defendants.

Case No. 21-cv-04353-BLF

**ORDER APPOINTING AARON SNEED
AND YAACOV MUSRY AS LEAD
PLAINTIFFS AND POMERANTZ LLP
AS LEAD COUNSEL**

[Re: ECF Nos. 28, 33]

Before the Court are two¹ competing motions to appoint lead plaintiffs and lead counsel in this securities class action brought against AcelRx Pharmaceuticals, Inc., Vincent Angotti, and Raffi Asadorian over allegedly misleading statements made about AcelRx’s DSUIVA drug.² The first motion is brought by putative lead plaintiffs Aaron Sneed and Yaacov Musry and their putative counsel Pomerantz LLP. ECF No. 28 (“S&M Motion”). The second is brought by putative lead plaintiff Paul Dupré and his putative counsel Roche Freedman LLP. ECF No. 33 (“Dupré Motion”). Each party has filed an opposition to the competing motion. ECF Nos. 36, 38. The Court held a hearing on this matter on December 16, 2021. For the reasons stated on the record and explained below, the Court APPOINTS Aaron Sneed and Yaacov Musry as the lead

¹ Two additional motions to appoint a lead plaintiff were filed and later withdrawn. *See* ECF Nos. 20, 35 (David O’Grady); 16, 34 (Kevin Havens).

² The Court has also consolidated four follow-on derivative actions against these defendants and others related to the same facts. *See In re AcelRx Pharmaceuticals Derivative Litig.*, No. 21-cv-5197. That consolidated case is stayed pending the resolution of the anticipated motion to dismiss in this case.

1 plaintiffs and Pomerantz LLP as lead counsel. Accordingly, Dupré’s motion is DENIED and
2 Sneed and Musry’s motion is GRANTED.

3 **I. LEGAL STANDARD**

4 **A. Lead Plaintiff**

5 The Private Securities Litigation Reform Act of 1995 (“PSLRA”) governs the procedure
6 for selection of lead plaintiff in all private class actions under the Securities Exchange Act of
7 1934. 15 U.S.C. § 78u-4(a)(3). Pursuant to the PSLRA, the court shall appoint as lead plaintiff
8 “the most adequate plaintiff”—“the member or members of the purported plaintiff class that the
9 court determines to be most capable of adequately representing the interests of class members.”
10 *Id.* § 78u-4(a)(3)(B)(i).

11 The PSLRA “provides a simple three-step process for identifying the lead plaintiff.” *In re*
12 *Cavanaugh*, 306 F.3d 726, 729 (9th Cir. 2002). First, the pendency of the action, the claims made,
13 and the purported class period must be publicized in a “widely circulated national business-
14 oriented publication or wire service.” *Id.*; *see also* 15 U.S.C. § 78u-4(a)(3)(A)(i)(I). This notice
15 must be published within 20 days of the filing of the complaint. *Id.* It must also alert members of
16 the purported class that they have 60 days to move for appointment as lead plaintiff. 15 U.S.C.
17 § 78u-4(a)(3)(A)(i)(II).

18 Second, the court must identify the presumptive lead plaintiff. To do so, the court “must
19 compare the financial stakes of the various plaintiffs and determine which one has the most to gain
20 from the lawsuit.” *In re Cavanaugh*, 306 F.3d at 730. The court must then determine whether that
21 individual, “based on the information he has provided in his pleadings and declarations,” satisfies
22 the requirements of Rule 23(a), “in particular those of ‘typicality’ and ‘adequacy.’” *Id.* If the
23 plaintiff with the largest financial interest satisfies these requirements, he becomes the
24 “presumptively most adequate plaintiff.” *Id.*; *see also* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

25 Finally, the other plaintiffs must have “an opportunity to rebut the presumptive lead
26 plaintiff’s showing that [he] satisfies Rule 23’s typicality and adequacy requirements.” *In re*
27 *Cavanaugh*, 306 F.3d at 730. Unless a member of the purported plaintiff class provides proof that
28 the presumptive plaintiff “(aa) will not fairly and adequately protect the interests of the class; or

1 (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing
2 the class,” the court must appoint the presumptively most adequate plaintiff as lead plaintiff. 15
3 U.S.C. § 78u-4(a)(3)(B)(iii)(II); *see also In re Cavanaugh*, 306 F.3d at 732.

4 **B. Lead Counsel**

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

11 **II. DISCUSSION**

12 **A. Procedural Requirements**

13 Both sets of movants have complied with the antecedent procedural requirements to
14 qualify as putative lead plaintiffs. Putative counsel for Sneed and Musry, Pomerantz LLP, caused
15 to be published over *PR Newswire* a notice stating that this securities action had been filed against
16 Defendants and advising putative plaintiffs to file motions by August 9, 2021, in compliance with
17 15 U.S.C. § 78u-4(a)(3)(A)(i). ECF No. 28-4 (press release announcing lawsuit). Both Sneed and
18 Musry and Dupré filed timely motions on that date. The procedural requirements are thus met.

19 **B. Greatest Financial Loss**

20 The Court must next identify the presumptive lead plaintiff—the putative lead plaintiff
21 with the greatest financial interest in the litigation. *See In re Cavanaugh*, 306 F.3d at 730. To
22 determine which movant has the largest financial interest, courts have looked to four measures
23 first articulated in *Lax v. First Merchants Acceptance Corp.*, 1997 WL 461036 (N.D. Ill. Aug. 11,
24 1997): (1) the number of shares purchased during the class period; (2) the number of net shares
25 purchased during the class period; (3) total net funds expended during the class period; and (4) the
26 approximate losses suffered during the class period. *See City of Royal Oak Ret. Sys. v. Juniper*
27 *Networks, Inc.*, 2012 WL 78780, at *4 (N.D. Cal. Jan. 9, 2012). The total approximate losses are
28 the most significant consideration. *Nicolow v. Hewlett Packard Co.*, 2013 WL 792642, at *4

1 (N.D. Cal. Mar. 4, 2013).

2 The movants do not dispute the information each has provided regarding these factors,
3 which are summarized in the table below:

4 Movant	Shares	Retained	Net Funds	Total Loss	Source
5	Purchased	Shares	Expended		
6 Dupré	78,100	76,800	\$182,294	\$57,183	ECF No. 25-2
7 Sneed and Musry	80,333	80,333	\$158,977	\$31,356	ECF No. 28-3
8 <i>Sneed only</i>	<i>39,008</i>	<i>39,008</i>	<i>\$79,001</i>	<i>\$16,799</i>	<i>Id.</i>
9 <i>Musry only</i>	<i>41,025</i>	<i>41,025</i>	<i>\$79,976</i>	<i>\$14,558</i>	<i>Id.</i>

10 Based on these submissions, Dupré has the largest financial interest of the two sets of movants.
11 While Sneed and Musry together purchased and retained more shares than did Dupré, Dupré
12 expended the most funds and had a higher total loss. Because the total approximate losses are the
13 most significant consideration, *Nicolow*, 2013 WL 792642, at *4, the Court finds that Dupré has
14 the largest financial interest, which makes him the presumptive lead plaintiff.

15 **C. Rule 23 Requirements**

16 Upon determining the movant with the largest financial interest, the court “must then focus
17 its attention on that plaintiff and determine ... whether he satisfies the requirements of Rule 23(a).”
18 *In re Cavanaugh*, 306 F.3d at 730; *see also* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc). Rule 23(a)
19 requires satisfaction of four factors to serve as a class representative:

- 20 (1) the class is so numerous that joinder of all members is
21 impracticable; (2) there are questions of law or fact common to the
22 class; (3) the claims or defenses of the representative parties are
23 typical of the claims or defenses of the class; and (4) the
24 representative parties will fairly and adequately protect the interests
25 of the class.

26 Fed. R. Civ. P. 23(a). The typicality and adequacy requirements of Rule 23 are the main focus of
27 the determination of a lead plaintiff. *See In re Cavanaugh*, 306 F.3d at 730. Examination of the
28 remaining requirements is deferred until the lead plaintiff moves for class certification.

The plaintiff with the largest financial stake in the controversy that preliminarily satisfies

1 the typicality and adequacy requirements is presumed to be the “most adequate plaintiff.” *In re*
2 *Cavanaugh*, 306 F.3d at 730. The adequacy requirement is met if there are no conflicts between
3 the representative and class interests and the representative's attorneys are qualified, experienced,
4 and generally able to conduct the litigation. Fed. R. Civ. P. 23(a)(4); *Staton v. Boeing Co.*, 327
5 F.3d 938, 957 (9th Cir. 2003). The test of typicality “is whether other members have the same or
6 similar injury, whether the action is based on conduct which is not unique to the named plaintiffs,
7 and whether other class members have been injured by the same course of conduct.” *Hanon v.*
8 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citing *Schwartz v. Harp*, 108 F.R.D. 279,
9 282 (C.D. Cal. 1985)).

10 Court must then “give other plaintiffs an opportunity to rebut the presumptive lead
11 plaintiff's showing that it satisfies Rule 23's typicality and adequacy requirements.” *In re*
12 *Cavanaugh*, 306 F.3d at 730 (citing 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)). The presumption of
13 adequacy “may be rebutted only upon proof ... that the presumptively most adequate plaintiff”
14 does not satisfy the adequacy or typicality requirements of Rule 23. 15 U.S.C. § 78u-
15 4(a)(3)(B)(iii)(II); *In re Cavanaugh*, 306 F.3d at 729. If the presumptive lead plaintiff does not
16 meet the typicality or adequacy requirement, the court determines whether the plaintiff with the
17 next highest stake in the litigation has made a prima facie showing of typicality and adequacy. *In*
18 *re Cavanaugh*, 306 F.3d at 731. “If so, it must declare that plaintiff the presumptive lead plaintiff
19 and repeat step three of the process by giving other plaintiffs an opportunity to rebut that showing.
20 This process must be repeated sequentially until all challenges have been exhausted.” *Id.*

21 **i. Dupré**

22 Because Dupré has the largest financial interest and is thus the presumptive lead plaintiff,
23 the Court first analyzes these factors as to him and looks to Sneed and Musry's attempts to rebut
24 the presumption.

25 *a. Typicality*

26 The Court finds that Dupré has satisfied the typicality requirement because he possesses
27 the same injury as members of the putative class and does not base his claims on conduct unique
28 to him. *Hanon*, 976 F.2d at 497. Indeed, no party has contested Dupré's typicality.

1 clear at the hearing, he did not even disclose them to his own counsel until after counsel for Sneed
2 and Musry confronted them about it. After Sneed and Musry identified the issue for the Court in
3 their own papers, in reply Dupré declined to submit an additional declaration explaining the
4 offenses and his lack of candor about them. This leaves the Court with only the generic unsworn
5 statements in his response brief that he has “reformed his life” since his offenses. Dupré’s failure
6 to disclose his prior felony embezzlement conviction to his own attorney raises the concern that
7 his personal conduct will at least be a distraction from the case in chief or actually create unique
8 defenses to be raised against him in discovery and later phases of the case.

9 Dupré’s prior offenses, combined with his lack of candor to his attorney and the Court,
10 lead the Court to conclude that Dupré is an inadequate class representative, and thus that Sneed
11 and Musry have rebutted his status as presumptive lead plaintiff.

12 **ii. Sneed and Musry**

13 With Dupré’s status as presumptive lead plaintiff rebutted, the Court turns to Sneed and
14 Musry as the movants with the “next highest stake in the litigation” to determine if they are typical
15 and adequate class representatives. *In re Cavanaugh*, 306 F.3d at 731.

16 *a. Typicality*

17 The Court finds that Sneed and Musry have satisfied the typicality requirement for the
18 same reasons as Dupré did. No movant contests their typicality. *Hanon*, 976 F.2d at 497.

19 *b. Adequacy*

20 The Court also finds that Sneed and Musry have satisfied the adequacy requirement. There
21 is no indication that there are any conflicts between them and the class’s interests, and as the Court
22 concludes below their attorneys are qualified, experienced, and generally able to conduct the
23 litigation. Fed. R. Civ. P. 23(a)(4); *Staton*, 327 F.3d at 957. Sneed and Musry have submitted
24 declarations indicating their willingness to serve as class representatives, and their significant
25 losses due to their purchase of AcelRx securities demonstrate their significant personal interest in
26 this litigation.

27 Dupré argues that Sneed and Musry are not suitable to act as class representatives because
28 they are an “inappropriate movant group brought together by counsel solely as an attempt to create

1 the largest financial interest.” ECF No. 38. Dupré notes that they reside in different states and
2 have no pre-litigation relationship. *Id.* Sneed and Musry respond that the PSLRA specifically
3 allows groups of lead plaintiffs, and that their “small and cohesive” two-person group will
4 zealously represent the class’s interests. ECF No. 39 at 5.

5 The Court agrees that Sneed and Musry are a suitable pair of lead plaintiffs. The PSLRA
6 defines the “most adequate plaintiff” as “the member *or members* of the purported plaintiff class
7 that the court determines to be most capable of adequately representing the interests of class
8 members.” 15 U.S.C. § 78u-4(a)(3)(B)(i) (emphasis added). Courts have held that “small and
9 manageable groups serving as lead plaintiffs do not frustrate Congress’ desire to ensure that
10 investors, rather than lawyers, control securities litigation.” *Perrin v. Sw. Water Co.*, 2009 WL
11 10654690, at *3 (C.D. Cal. Feb. 13, 2009) (citing *In re Cavanaugh*, 306 F.3d at 726) (appointing
12 group of three lead plaintiffs); *accord In re Cendant Corp. Litig.*, 264 F.3d 201, 266–67 (3d Cir.
13 2001) (recognizing the PSLRA specifically provides for “groups of persons” to serve as lead
14 plaintiff). Both Sneed and Musry are sophisticated investors who understand the responsibilities
15 of being a lead plaintiff under the PSLRA and have indicated that they will cooperate in the
16 prosecution of this litigation on behalf of the class. ECF No. 28-6 ¶¶ 4-12. The Court finds that
17 Sneed and Musry together are a “small and manageable” pair of lead plaintiffs, and thus that they
18 satisfy the requirements of Rule 23.

19 **D. Lead Counsel**

20 No party has objected to Sneed and Musry’s selection of Pomerantz LLP as lead counsel.
21 The Court has reviewed Pomerantz’s firm resume and is satisfied that Sneed and Musry have
22 made a reasonable choice of counsel. *See* ECF No. 25-4. Accordingly, the Court APPROVES
23 Sneed and Musry’s selection of Pomerantz as lead counsel.

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III. ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that Sneed and Musry’s motion to appoint lead plaintiffs and lead counsel is GRANTED. Dupré’s competing motion is DENIED. **No later than January 14, 2022**, the parties SHALL meet-and-confer and propose a schedule for (1) the filing of an amended complaint and (2) the filing of Defendants’ responsive pleading.

Dated: December 16, 2021


BETH LABSON FREEMAN
United States District Judge