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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KIRK HIMMELBERG, Individually and On Behalf Of All Others 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.

No. 3:20-cv-05949-VC

CLASS ACTION

RESPONSE OF VAXART INVESTOR GROUP IN OPPOSITION TO COMPETING MOTIONS FOR CONSOLIDATION OF RELATED ACTIONS, APPOINTMENT AS LEAD PLAINTIFF, AND APPROVAL OF THEIR SELECTION OF LEAD COUNSEL

Date: Thursday, December 3, 2020
Time: 10:00 a.m.
Courtroom: 4, 17th Floor
Judge: Hon. Vince Chhabria

ANI HOVHANNISYAN, Individually and On Behalf Of All Others Similarly Situated,

Plaintiff,

v.

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

Defendants.

No. 3:20-cv-06175-VC

CLASS ACTION

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I. INTRODUCTION

Four motions for appointment as lead plaintiff are pending before this Court pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA").[1] One movant stands above all as the "most adequate plaintiff," Vaxart Investor Group (comprised of movants Wei Huang and Langdon Elliott) (hereinafter "Vaxart Investor Group" or the "Huang/Elliott Group"). 15 U.S.C. § 78u-4(a)(3)(B)(i).[2]

First, competing movant VIG Group is an unwieldy group of internationally-dispersed investors that have not demonstrated that they are able to effectively work together to adequately oversee this litigation and monitor counsel. As an improper amalgamation of investors, the VIG Group should not be permitted to combine the losses of its members to form a greater loss. Instead, it is more appropriate for the Court to assess group losses on an individual basis. Here, the Vaxart Investor Group – a cohesive group of only two members from California and Texas – has the individual movant with the largest financial interest of any other movant, once the groups are disaggregated.[3] With $455,378.54 in losses, Vaxart Investor Group member Wei Huang has a larger loss than any other remaining movant:

	Loss Claimed
Vaxart Investor Group	
Wei Huang	**$455,378.54**
Langdon Elliott	$43,428.05
Total:	$498,806.59
VIG Group	
Jiri Kubanek	$249,174.96
Najaf Zaidi	$150,832.63
Syed Nabi	$62,317.50
Zayn Lim	$164,248.43
Total:	$626,573.52

[1] The four remaining movants are: (1) Vaxart Investor Group; (2) Pierce Parker ("Parker"); (3) Trudy York ("York"); and (4) VXRT Investor Group (comprised of movants Jiri Kubanek, Zayn Lim, Najaf Zaidi, and Syed Nabi (the "VIG Group"). Teoh Hock Guan and Muhammad Taqi, Aziz Ali, and Bozidar Novak withdrew their motions. ECF Nos. 56, 57.

[2] All capitalized terms are defined in Vaxart Investor Group's initial brief, unless otherwise indicated. *See* ECF No. 47.

[3] *See* ECF Nos. 31, 34, 38, 44, 51, respectively.

	Loss Claimed
Trudy York	$177,920.00
Pierce Parker	$54,285.56

Second, Vaxart Investor Group has made a *prima facie* showing of its typicality and adequacy. Here, Vaxart Investor Group's claims are typical because, like other class members, they raise the common question of whether Defendants made material misrepresentations that artificially inflated the company's stock price. Moreover, Vaxart Investor Group has demonstrated its adequacy given its significant financial stake and ability to zealously prosecute the class's claims.

Having satisfied these two steps, Vaxart Investor Group is entitled to a strong presumption that it is the "most adequate plaintiff." That presumption can only be rebutted "upon proof" that Vaxart Investor Group is inadequate or atypical. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). There are no facts, let alone any "proof," suggesting that Vaxart Investor Group is somehow unfit to represent the Class.

Accordingly, the Court should appoint Vaxart Investor Group Lead Plaintiff and approve its choice of counsel.

II. ARGUMENT

A. Vaxart Investor Group Is the Most Adequate Plaintiff

The PSLRA creates a presumption that the lead plaintiff is the movant that "has the largest financial interest in the relief sought by the class" and "otherwise satisfies the requirements of Rule 23." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I); *In re Cavanaugh*, 306 F.3d 726, 730 (9th Cir. 2002). The movant that has the largest financial interest need only make a prima facie showing that it satisfies Rule 23's typicality and adequacy requirements. *Hessefort v. Super Micro Computer, Inc.*, 317 F. Supp. 3d 1056, 1061 (N.D. Cal. 2018). Once this presumption is triggered, it can only be rebutted upon "proof" that the presumptive lead plaintiff will not fairly represent the interests of the class. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II); *see also Cavanaugh*, 306 F.3d 726, 732 (9th Cir. 2002)

(presumption triggered even if the district court believes another movant may be "more typical, [] more adequate . . . [or] would do a better job").

1. Vaxart Investor Group Has the Largest Financial Interest in the Relief Sought By the Class

Vaxart Investor Group has the largest financial interest in the relief sought by the Class. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb). Consistent with Ninth Circuit precedent, this Court equates financial interest with financial loss. *See, e.g., Cavanaugh*, 306 F.3d at 732 ("So long as the plaintiff with the largest losses satisfies the typicality and adequacy requirements, [they are] entitled to lead plaintiff status . . . ."); *Monachelli v. Hortonworks, Inc*., No. 3:16-cv-00980-SI, 2016 WL 3078867, at *2 (N.D. Cal. June 1, 2016) (Illston, J.) (appointing investor as lead plaintiff based on size of investor's loss).As set forth above, Vaxart Investor Group member Wei Huang's loss is significantly larger than the loss claimed by every other lead plaintiff movant. Moreover, the Vaxart Investor Group is a small cohesive group of only two individuals, both residing domestically, who have shown they understand their obligations as a lead plaintiff, know that they can choose any counsel, have exchanged contact information so they may communicate without counsel, and are demonstrably capable of overseeing both the litigation and counsel. ECF No. 47-5 ¶¶ 7, 8, 10-12, 15.

As such, Vaxart Investor Group has the "largest financial interest in the relief sought by the class" and is entitled to be appointed Lead Plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb).

2. Vaxart Investor Group Satisfies the Requirements of Rule 23

In addition to possessing the largest financial interest in the relief sought by the Class, Vaxart Investor Group also satisfies the typicality and adequacy requirements of Rule 23. As demonstrated in Vaxart Investor Group's moving papers, Vaxart Investor Group is a typical class representative. *See* ECF No. 26. Here, like all other Class members, Vaxart Investor Group: (1) purchased Vaxart shares during the Class Period; (2) at prices artificially inflated by Defendants' materially false and misleading statements; and (3) was harmed when the truth was revealed. *See City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc*., No. 5:12-CV-06039-LHK, 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 incurred harm as a result). As such, Vaxart Investor Group is a typical Class representative.

Vaxart Investor Group similarly satisfies Rule 23's adequacy requirement because it is capable of "fairly and adequately protect[ing] the interests of the class." Fed. R. Civ. P. 23(a)(4). Vaxart Investor Group has a substantial financial stake in the litigation as well as the incentive and ability to vigorously represent the Class' claims. Further, Vaxart Investor Group's interests are perfectly aligned with those of other Class members and are not antagonistic in any way. There are no facts to suggest any actual or potential conflict of interest or other antagonism between Vaxart Investor Group and other Class members.

To overcome the strong presumption of appointing Vaxart Investor Group as Lead Plaintiff, the PSLRA requires "proof" that the presumptive lead plaintiff is inadequate. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). Here, no such proof exists in this case and there can be no credible arguments to the contrary.

B. The Motions Of The Competing Movants Should Be Denied Because They Have Smaller Losses, Are Not Proper Groups And Are Otherwise Inadequate

1. The VIG Group Is an Improper and Unwieldy Group of Unusually Dispersed Investors

The VIG Group has already proven itself to be an unwieldy amalgamation, rather than the type of "group" permitted by the PSLRA. Courts interpreting the PSLRA have held that courts should approve only those groups of lead plaintiffs that are "capable of actively overseeing the litigation and monitoring its counsel." *See Doherty v. Pivotal Software, Inc.*, No. 3:19-cv-03589-CRB, 2019 WL 5864581, at *6 (N.D. Cal. Nov. 8, 2019). Courts, including those in this District, adopt this interpretation of the PSLRA and regularly appoint only groups of lead plaintiff movants which have proven themselves able to effectively manage the litigation and counsel. *See e.g., In re Network Assocs. Sec. Litig.*, 76 F. Supp. 2d 1017, 1026 (N.D. Cal. 1999) (A "group of persons" within the meaning of the Act should, like an institution or single large investor, be able to actively oversee the conduct of the litigation and monitor the effectiveness of counsel. In short, the Act's

allowance for a "group of persons" as lead plaintiff must be interpreted by reference to the Act as a whole and to the Act's purpose.") (*citing Amicus Brief of SEC in Parnes, et al., v. Digital Lightwave, Inc.*, at 12, 15, No. 99-11293 (11th Cir. Aug. 25, 1999)); *Markette v. Xoma Corp.*, No. 15-cv-03425-HSG, 2016 WL 2902286, at *8 (N.D. Cal. May 13, 2016); *Eichenholtz v. Verifone Holdings, Inc.*, No. C 07-06140 MHP, 2008 WL 3925289, at *8 (N.D. Cal. Aug. 22, 2008).

In this case, counsel for the VIG Group proffers an unwieldy group of four individuals who reside in three countries and two states spread internationally, rather than the cohesive, functioning groups called for under the PSLRA. The members of the VIG Group reside in Singapore, Pennsylvania, Georgia, and the Czech Republic. *See* The VXRT Investor Group's Joint Declaration In Support Of Its Motion For: (1) Consolidation; (2) Appointment as Lead Plaintiff; and (3) Approval Of Lead Counsel, Dkt No. 51-4 at ¶¶ 3-6. Given their respective locations, it is difficult to imagine how these four widely dispersed individuals will be able to effectively manage and collectively oversee the efforts of counsel – as opposed to counsel overseeing them. This issue will only be exacerbated as the litigation progresses should these individuals be appointed as lead plaintiff. The VIG Group fails to address how four investors from three separate continents will effectively work together to direct their lawyers as opposed to vice versa. The group is also notably silent as to how the class would benefit from the added expense and logistical challenges of having four internationally-dispersed individuals serve as lead plaintiff, including expenses related to travel, depositions, and additional discovery. *See In re Petrobras Sec. Litig.*, 104 F. Supp. 3d 618, 622 (S.D.N.Y. 2015) (rejecting "wholly artificial" of group "hail[ing] from three different countries"); *In re Lernout & Hauspie Sec. Litig.*, 138 F. Supp. 2d 39, 45 (D. Mass. 2001) (expressing concerns regarding whether three individuals, as "foreign citizens," from three different countries where "English is not the native language," and "with no prior relationship," would have the cohesiveness as a "group to spearhead a federal litigation in the United States."); *Eichenholtz v. Verifone Holdings, Inc.*, 2008 WL 3925289, at *10 n.8 (N.D. Cal. Aug. 22, 2008) ("[movant's] physical distance from this forum may create practical difficulties that may make it difficult for it to be the class

representative. Since individuals at [movant company] may have to testify at trial, it could be difficult for them to attend a long trial in its entirety.").

Compounding these concerns is the VIG Group's inexplicable listing of two different law firms currently representing the VIG Group. Similarly, the VIG Group's Joint Declaration does not discuss the need for, their awareness of, or how they came to have or approve representation by two different law firms. ECF No. 51-4. Nor do they explain what roles the different law firms will play, or how they will manage counsel to avoid duplication. *Id*. These circumstances undermine the group's claims regarding the "efficient prosecution of the Action." *Id.* at ¶ 14. *See In re Gemstar-Tv Guide Int'l Sec. Litig*., 209 F.R.D. 447, 451 (C.D. Cal. 2002) ("Allowing [movant group] to serve as lead plaintiff in this action and to be represented by two different law firms would defeat the purpose of choosing a lead plaintiff and undermine the objectives of the PSLRA," one of which is "to prevent lawyer-driven litigation."). In contrast, the Vaxart Investor Group is led by a single law firm that has proven it has the resources to zealously litigate this case on its own. *See* ECF No. 47-6 at Ex. D. In short, the VIG Group is nothing more than an unwieldy and random assemblage of individuals from different countries cobbled together by their lawyers and should not be appointed as lead plaintiff.

2. The Court Should Appoint the Vaxart Investor Group as Lead Plaintiff, as It Has the Shareholder with the Largest Loss and is Otherwise Adequate and Typical

Where, as with the VIG Group, there is a real threat of lawyer-driven litigation, the Court may reject the aggregation of a group's members for lead plaintiff status and instead consider the losses of the individual group members. *See Beckman v. Ener1, Inc.*, No. 1:11-cv-05794-PAC, 2012 WL 512651, at *4 (S.D.N.Y. Feb. 15, 2012) ("The Court will disaggregate the Patel Group and consider Juan Andres Botero R., Linda Carelle, and Henry Lima, as individual contenders for lead plaintiff"); Order Re Lead Plaintiff and Lead Counsel, *In re Zoom Sec. Litig.*, Case No. 3:20-cv-02353-JD (Nov. 4, 2020) ("Consequently, the Court will not consider this aggregate loss in determining the presumptive lead plaintiff.") (*citing In re Stitch Fix, Inc. Securities Litigation*, 393 F. Supp. 3d. 833, 835 (N.D. Cal. 2019)). Once its members' losses are disaggregated, none of the VIG Group's members may individually claim the largest loss.

Instead, given that the Vaxart Investor Group has the shareholder with the greatest loss, and is otherwise typical and adequate, it is appropriate for the Court to appoint it as Lead Plaintiff. Courts have repeatedly taken this approach in similar circumstances. *See In re Surebeam Corp. Sec. Litig.*, No. 3:03-cv-01721-JM-POR, 2003 U.S. Dist. LEXIS 25022, at *15 (S.D. Cal. Dec. 31, 2003) (finding that group of unrelated investors had largest financial interest where an individual within that group had the greatest financial loss); *McCracken v. Edwards Lifesciences Corp.*, No. 8:13-cv-01463-JLS-RNB, 2014 WL 12694135, at *3 (C.D. Cal. Jan. 8, 2014) (appointing group where one member's "loss exceeds that of [the competing movants]" and finding that the group "has the largest financial interest in the relief sought."); *Petrie v. Elec. Game Card, Inc.*, No. 8:10-cv-00252-DOC-KES, 2010 WL 2292288, at *2 (C.D. Cal. June 4, 2010) (appointing group of three investors where married couple in the group had the highest financial loss of all proposed lead plaintiffs); *Varghese v. China Shenghuo Pharm. Holdings, Inc.*, 589 F. Supp. 2d 388, 394 (S.D.N.Y. 2008) (finding it proper to "consider Maa, the largest shareholder of the Maa Group, individually, as if he had moved to be appointed as lead plaintiff alone."); *see also In re Donnkenny Inc. Sec. Litig.*, 171 F.R.D. 156, 158 (S.D.N.Y. 1997) (appointing individual entity as lead plaintiff after denying the motion of its larger group).

3. The Remaining Movants Have Significantly Smaller Losses Than Vaxart Investor Group

The other remaining movants – York and Parker – have suffered losses which are substantially less than Vaxart Investor Group's losses ($177,920.00 and $54,285.56 respectively), and neither have rebutted the presumption that Vaxart Investor Group is the most adequate plaintiff. Therefore, Vaxart Investor Group remains the presumptive lead plaintiff.

C. Vaxart Investor Group Selected Well-Qualified Lead Counsel To Represent The Class

The PSLRA vests authority in the lead plaintiff to select and retain lead counsel, subject to the Court's approval. *See* 15 U.S.C. § 78u-4(a)(3)(B)(v). In making this determination, the PSLRA states that a court is not to disturb the lead plaintiff's choice of counsel unless it is necessary to "protect the interests of the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa).

Here, Hagens Berman is a leading securities class action law firm, has previously been appointed as lead counsel in numerous other cases, and has an established track record obtaining successful recoveries for investors in securities class actions, including within this District. *See* ECF No. 47-6 at Ex. D; *see also In re Charles Schwab Corp. Securities Litigation*, Case No. 3:08-1510-WHA (N.D. Cal.) ($235 million class recovery); *In Re Mckesson Corporation Derivative Litigation*, Case No. 4:17-cv-1850-CW (N.D. Cal.) ($175 million class recovery). Accordingly, the Court may be assured that by granting this Motion, the Class will receive the highest caliber of legal representation.

III. CONCLUSION

For the reasons discussed above, the Vaxart Investor Group (movants Wei Huang and Langdon Elliott) respectfully requests that the Court appoint it Lead Plaintiff and approve its selection of Hagens Berman as Lead Counsel for the Class. In the alternative, should the Court find it more appropriate to appoint a single individual as Lead Plaintiff, Huang and Elliott each stand ready to serve as Lead Plaintiff individually. See ECF No. 47-5 at ¶ 19.

Dated: November 6, 2020

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