NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RANDY SMITH, *individually and on behalf of all others similarly situated*,	Civil Action No. 17-8945 (MAS) (DEA)
Plaintiff,	
v.	**MEMORANDUM OPINION**
ANTARES PHARMA, INC., et al.,	
Defendants.	

SHIPP, District Judge

This matter comes before the Court on two motions: (i) Faraj Touchan's ("Touchan") Motion for Appointment as Lead Plaintiff and Approval of Lead Counsel (ECF No. 7); and (ii) Serghei Lungu's ("Lungu") Motion for Appointment as Lead Plaintiff and Approval of Counsel (ECF No. 9).[1] Touchan and Lungu each filed opposition (ECF Nos. 12, 14) and Lungu replied (ECF No. 16). The Court has carefully considered the parties' submissions and decides the matter without oral argument pursuant to Local Civil Rule 78.1. For the reasons set forth below, Lungu's motion is granted and Touchan's motion is denied without prejudice. The Court

[1] Antares Investor Group (consisting of Tai Duong, Dennis Roof, Robert Szczodrowski, Qiang Xie, and Daniel DeYoe) and Rehan Khan also moved to be appointed lead plaintiff and to appoint lead counsel. (ECF Nos. 8, 10.) These parties, however, later filed Notices of Non-Opposition, acknowledging that, after review of the submissions made by other movants, it appears they do not possess the "'largest financial interest in the relief sought by the class' as required by the [Private Securities Litigation Reform Act ("PSLRA")]" and, accordingly, do not oppose the competing motions. (Antares Investor Group Not. of Non-Opp'n 2, ECF No. 13; Khan Not. of Non-Opp'n 2, ECF No. 17.) Both parties noted, however, that should the Court find other movants inadequate, then they stand ready to serve as lead plaintiff and counsel. (*Id.*)

appoints: Lungu as Lead Plaintiff; Pomerantz LLP as Lead Counsel; and Lite DePalma Greenberg, LLC as Liaison Counsel.

I. BACKGROUND

This case is a putative securities class action brought on behalf of the investors who acquired Antares Pharma, Inc. ("Antares") securities between December 21, 2016 and October 12, 2017 ("Class Period"). Defendants Antares, Robert F. Apple, Antares's CEO, and Fred M. Powell, Antares's CFO, allegedly made materially deceptive and misleading disclosures about the FDA approval process of Xyosted in certain press releases and SEC filings. (*See generally* Compl. ¶¶ 20-32, ECF No. 1.) Specifically, Antares allegedly "made false and/or misleading statements and/or failed to disclose that: (i) Antares had provided insufficient data to the FDA in connection with its NDA for Xyosted; (ii) and accordingly, Antares had overstated the approval prospects for Xyosted; and (iii) as a result of the forgoing, Antares's public statements were materially false and misleading at all relevant times." (*Id.* ¶ 5.)

First-filed plaintiff Randy Smith initiated this action on October 23, 2017. Pursuant to 15 U.S.C. § 78u-4(a)(3)(A)(i), Smith published notice via Globe Newswire on that same day, informing investors within the putative class that they had until December 22, 2017[2] to move for appointment as lead plaintiff in the action. (*Id.*; Morsy Decl. Ex. A, ECF No. 7-3.) Both Touchan and Lungu timely moved for appointment, as both motions were filed on December 22, 2017 (*see* ECF Nos. 7, 9), and both filed certifications pursuant to 15 U.S.C. § 78u-4(a)(2) (*see* ECF Nos. 7-4, 9-2).

[2] *See* 15 U.S.C. § 78u-4(a)(3)(A)(i).

II. LEGAL STANDARD

The Court must appoint the most adequate plaintiff pursuant to the PSLRA. 15 U.S.C. § 78u-4(a)(3)(B)(ii). The PSLRA requires the court to adopt a rebuttable presumption that the most adequate plaintiff is the person (or group of persons) who: (i) filed the complaint or moved to be appointed lead plaintiff; (ii) based on the court's determination, "has the largest financial interest in the relief sought by the class"; and (iii) satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. *Id.* § 78u-4(a)(3)(B)(iii)(I); *Aguilar v. Vitamin Shoppe, Inc.*, No. 17-6454, 2018 WL 1960444, at *5 (D.N.J. Apr. 25, 2018) (citing *Lewis v. Lipocine Inc.*, No. 16-4009, 2016 WL 7042075, at *4 (D.N.J. Dec. 2, 2016)). "At this stage, in the context of the PSLRA, Rule 23 requires that the party or parties seeking to represent a class (1) have claims or defenses that are typical of the claims or defenses of the class, (the 'typicality requirement') and (2) be able to fairly and adequately protect the interests of the class, (the 'adequacy requirement')." *Aguilar*, 2018 WL 1960444, at *4 (citing Fed. R. Civ. P. 23(a); *In re Cendant Corp. Litig.*, 264 F.3d 201, 263 (3d Cir. 2001); *Lewis*, 2016 WL 7042075, at *4.) The Court will conduct a further analysis of the Rule 23 requirements in connection with its consideration of any motion for class certification. *Id.*

"Once a presumptive lead plaintiff is located, the court should then turn to the question [of] whether the presumption has been rebutted." *In re Cendant*, 264 F.3d at 268. To rebut the presumption, a purported class member must provide proof "that the presumptively most adequate plaintiff will not fairly and adequately protect the interests of the class or is subject to unique defenses that render such plaintiff incapable of adequately representing the class." *Sklar v. Amarin Corp. PLC*, No. 13-6663, 2014 WL 3748248, at *5 (D.N.J. July 29, 2014). "A proposed class representative is neither typical nor adequate if the representative is subject to a unique defense

that is likely to become a major focus of the litigation." *Beck v. Maximus, Inc.*, 457 F.3d 291, 301 (3d Cir. 2006).

III. DISCUSSION

A. "Largest Financial Interest"

In determining which movant has the largest financial interest in the relief sought by the litigation, "courts should consider (1) the number of shares that the movant purchased during the putative class period; (2) the total net funds expended by the plaintiffs during the class period; and (3) the approximate losses suffered by the plaintiffs." *In re Cendant*, 264 F.3d at 262 (citing *Lax v. First Merchants Acceptance Corp.*, No. 97 C 2716, 1997 WL 461036, at *5 (N.D. Ill. Aug. 6, 1997)). "The most critical among these factors is the approximate loss suffered." *Patel v. Zoompass Holdings, Inc.*, No. 17-3831, 2017 WL 4179814, at *1 (D.N.J. Sept. 20, 2017) (citing as examples *In re Vicuron Pharms., Inc. Sec. Litig.*, 225 F.R.D. 508, 511 (E.D. Pa. 2004); *Janovici v. DVI, Inc.*, No. 03-4795, 2003 WL 22849604, at *12 (E.D. Pa. Nov. 25, 2003); *In re Am. Bus. Fin. Servs., Inc. Sec. Litig.*, 2004 WL 1221353, at *1, (E.D. Pa. Jun. 3, 2004); *A.F.I.K. Holding SPRL v. Fass*, 216 F.R.D. 567, 572 (D.N.J. 2003)).

Touchan states that he purchased a total of 30,000 Antares shares and 26,435 net Antares shares during the Class Period, spent $110,565.86 in net funds, and incurred losses in an amount of $49,236.66.[3] (Touchan's Moving Br. 6, ECF No. 7-1.) Lungu, on the other hand, claims that he purchased 50,000 Antares shares and retained 40,000 shares, spent $189,158 on his purchases, and suffered a loss of $61,763.69. (Lungu's Moving Br. 5, ECF No. 9-1.)

[3] Lungu asserts that Touchan actually suffered a maximum loss of $41,295 because his transaction history reflects share prices outside of the range of prices during the Class Period, and accordingly, his claimed losses were inaccurately calculated. (Lungu's Opp'n Br. 4 n.4, ECF No. 12.) The difference in amounts, however, is not material to the Court's analysis.

Touchan asserts that when determining which movant is the presumptively most adequate plaintiff, courts afford the greatest weight to the approximate losses suffered and only assess the other movants' suitability if the presumptive plaintiff does not comport with Rule 23. (Touchan's Opp'n Br. 2-3, ECF No. 14.) When movants have claimed similar amounts of losses, however, Touchan asserts that courts may deviate from this process. (*Id.* at 3.) Here, according to Touchan, he and Lungu suffered roughly equal losses of $49,236.66 and $61,763.69, respectively—a difference of only about $12,500. (*Id.* at 3-4.) Accordingly, Touchan asserts that for the purposes of the Court's analysis, both "movants have equivalent financial interests." (*Id.* at 4.) Further, Touchan asserts that Lungu is a day trader because he bought and sold 10,000 shares on October 12, 2017 and is, therefore, subject to a unique defense that renders him inadequate and atypical. (*Id.* at 6-7.) Touchan asserts that Lungu may not be able to invoke the fraud-on-the-market presumption of reliance and cites examples where courts have disqualified lead plaintiff movants as a result of their day trading activities.[4] (*Id.* at 7-8.) Finally, Touchan asserts that even if the Court does not find Lungu to be inadequate and atypical, because both movants have "roughly equal interests" and neither has a "significantly larger" interest, both should be appointed co-lead plaintiffs. (*Id.* at 9-10.) Finally, according to Touchan's calculations, he and Lungu have equivalent stakes in the litigation because the difference in their estimated recoveries is only $263.06. (*Id.* at 10.)

Lungu asserts that he has the largest financial interest in the relief sought because he

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[4] The fraud-on-the market theory allows "'reliance [to] be presumed when a fraudulent misrepresentation or omission impairs the value of a security traded in an efficient market.'" *Rabin v. NASDAQ OMS PHLX, LLC*, 712 F. App'x 188, 195 (3d Cir. 2017) (quoting *Malack v. BDO Seidman, LLP*, 617 F.3d 743, 747 (3d Cir. 2010)). "This presumption is based on the hypothesis that the price of a stock 'in an open and developed securities market . . . is determined by the available material information regarding the company and its business.'" *Id.* (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 241 (1988)).

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