UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

KATELYN MARTIN, *individually and on behalf of all others similarly situated*, *Plaintiff*,	)	3:23-CV-915 (SVN)
v.	)	
BIOEXCEL THERAPEUTICS, INC., VIMAL MEHTA, and RICHARD STEINHART, *Defendants*.	)	October 4, 2023

ORDER AND RULING ON MOTIONS TO BE APPOINTED LEAD PLAINTIFF AND COUNSEL

Sarala V. Nagala, United States District Judge.

Named Plaintiff Katelyn Martin initiated this class action under the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, against Defendant BioXcel Therapeutics, Inc. ("BioXcel"), its President and Chief Executive Officer Vimal Mehta, and its Chief Financial Officer Richard Steinhart (together, "Defendants"). Named Plaintiff alleges that Defendants made materially false and misleading statements, which led her and other members of the class to purchase BioXcel's securities at artificially inflated prices. Presently before the Court are motions seeking appointment as Lead Plaintiff and approval of lead counsel. Following oral argument, two movants joined together to seek appointment as co-Lead Plaintiffs.

For the following reasons, the Court appoints Tonya Hills and the Oklahoma Law Enforcement Retirement System ("OLERS") as co-Lead Plaintiffs and approves of their selections of Levi & Korsinsky, LLP and Grant & Eisenhofer P.A. as co-lead counsel. Accordingly, the joint motion to be appointed co-Lead Plaintiffs, ECF No. 78, is GRANTED, Hills' and OLERS'

separate motions be appointed Lead Plaintiff, ECF Nos. 26 and 29, are DENIED AS MOOT, and Movant Robert Fraser's motion to appointed Lead Plaintiff, ECF No. 32, is DENIED.

I. FACTUAL BACKGROUND

Named Plaintiff's complaint alleges the following facts. BioXcel is a biopharmaceutical company that claims to use artificial intelligence approaches to develop medicines used in neuroscience and immuno-oncology. Compl., EFC No. 1, ¶ 3. BioXcel's most advanced clinical development program is BXCL501, which is purportedly a proprietary, orally dissolving film formulation of a drug used to treat agitation associated with psychiatric and neurological disorders. *Id*. ¶¶ 3, 18. On December 15, 2021, BioXcel announced that it had initiated a program to evaluate BXCL501 for the treatment of acute agitation associated with Alzheimer's disease. *Id*. ¶¶ 4, 19.

On June 29, 2023, BioXcel disclosed that the principal investigator for the clinical trial had failed to adhere to the informed consent requirements, failed to maintain adequate case histories for certain patients, and may have fabricated email correspondence with BioXcel's pharmacovigilance safety vendor regarding a serious adverse event. *Id*. ¶¶ 5, 28. BioXcel stated that these issues "may impact the timing of" regulatory approval of BXCL501 for the treatment of acute agitation associated with Alzheimer's disease. *Id*. ¶ 29. That same day, following disclosure of this information, BioXcel's stock price fell by $11.28 per share, losing 63.8% of its value and closing at $6.39 per share. *Id*. ¶ 30.

II. PROCEDURAL HISTORY

Soon thereafter, on July 7, 2023, Named Plaintiff initiated the present private securities fraud class action. She alleges that, throughout the class period—between BioXcel's announcement of the program on December 15, 2021, and its corrective disclosure on June 29, 2023—BioXcel and its corporate officers made materially false and misleading statements, insofar

as they failed to disclose material adverse facts about BioXcel's clinical trials and prospects. *Id.* ¶ 7. Named Plaintiff asserts two claims: first, that all Defendants deceived the class members and caused them to purchase BioXcel's securities at artificially inflated prices, in violation of 15 U.S.C. § 78j(b); and second, that Mehta and Steinhart had control over BioXcel's actions that violated § 78j(b) and thus are liable as well. Compl. ¶¶ 50, 62. Named Plaintiff brings these claims on behalf of herself and all persons and entities, other than Defendants and BioXcel's corporate officers, who purchased or acquired BioXcel securities during the class period. *Id*. ¶ 31.

On the same day as filing the complaint, Named Plaintiff published a notice of the present action in *Business Wire*. ECF No. 29-5 at 2; ECF No. 30 at 2. Thereafter, the Court received seven competing motions seeking appointment as Lead Plaintiff and approval of lead counsel. EFC Nos. 19, 23, 25, 29, 32, 35. Four movants withdrew, *see* ECF Nos. 50, 67, leaving three live motions to be appointed Lead Plaintiff and to approve lead counsel: Tonya Hills, represented by Levi & Korsinsky, LLP; OLERS, a pension fund represented by Grant & Eisenhofer P.A.; and Robert Fraser, represented by Kahn, Swick & Foti, LLC.[1] The Court ordered further briefing, *see* ECF No. 40, and held oral argument, ECF No. 61. Fraser did not respond to the other movants' motions as ordered by the Court, *see* ECF No. 40, and did not attend the oral argument on the motions. The Court therefore denies his motion to be appointed as Lead Plaintiff, to the extent he has not already withdrawn it by failing to respond and appear.

Hills and OLERS each advocated to be appointed as Lead Plaintiff. At oral argument, the Court queried whether they would be amenable to appointment as co-Lead Plaintiffs, and counsel

[1] Because Named Plaintiff did not file a motion to be appointed Lead Plaintiff or oppose any of the other pending motions to be appointed Lead Plaintiff, the Court presumes she does not seek appointment as Named Plaintiff. *See* ECF No. 1-1 ¶ 3 (Named Plaintiff averring that she is "willing to serve as a representative party on behalf of a class . . . *if necessary*" (emphasis added)); *Retail Wholesale Dep't Store Union Loc. 338 Ret. Fund v. Synchrony Fin.*, No. 3:18-CV-1818 (VAB), 2019 WL 4928889, at *4 (D. Conn. Feb. 5, 2019) ("While [the named plaintiff] has indicated that it is willing to serve as a representative party 'if necessary,' . . . it is not seeking an appointment as lead plaintiff.").

indicated that they would discuss this prospect with their clients. Later that same day, Hills and OLERS filed a joint motion seeking appointment as co-Lead Plaintiffs and co-lead counsel, ECF No. 78.

III. APPOINTMENT OF LEAD PLAINTIFF

A. Legal Standard

The Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4, prevents "abuses in securities fraud class actions" by requiring district courts to appoint a lead plaintiff who is most capable of adequately representing the class. *See Weltz v. Lee*, 199 F.R.D. 129, 131 (S.D.N.Y. 2001); 15 U.S.C. § 78u-4(a)(3)(B). "The purpose behind the PSLRA was to prevent 'lawyer-driven' litigation, and to ensure that 'parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiffs' counsel.'" *Weltz*, 199 F.R.D. at 131 (quoting *In re Oxford Health Plans, Inc., Sec. Litig.*, 182 F.R.D. 42, 43–44 (S.D.N.Y.1998)); *accord Galmi v. Teva Pharms. Indus. Ltd.*, 302 F. Supp. 3d 485, 493 (D. Conn. 2017) (quoting *Topping v. Deloitte Touche Tohmatsu CPA*, 95 F. Supp. 3d 607, 615 (S.D.N.Y. 2015)).

Under the PSLRA, no less than twenty days after filing the complaint, a plaintiff must publish notice of the pendency of the action "in a widely circulated national business-oriented publication or wire service." 15 U.S.C. § 78u-4(a)(3)(A)(i). No later than sixty days after the notice is published, "any member of the purported class may move the court to serve as lead plaintiff of the purported class." *Id.* § 78u-4(a)(3)(A)(i)(II). No later than ninety days after the notice is published, the district court "shall appoint as lead plaintiff the member or members of the

purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members." *Id.* § 78u-4(a)(3)(B)(i).

The PSLRA instructs the district court to presume that the most adequate plaintiff is "the person or group of persons" that: has filed the complaint or a motion to be appointed as Lead Plaintiff, has "the largest financial interest in the relief sought by the class," and otherwise satisfies the requirements of Federal Rule of Civil Procedure 23. *Id.* § 78u-4(a)(3)(B)(iii)(I)(aa)–(cc). This presumption is rebuttable upon 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." *Id.* § 78u-4(a)(3)(B)(iii)(II)(aa)–(bb).

Although the PSLRA permits a district court to appoint a group of persons as Lead Plaintiff, *id.* § 78u-4(a)(3)(B)(iii)(I), it "does not define what a 'group' can or should be, nor how its 'members' must be related to one another." *Varghese v. China Shenghuo Pharm. Holdings, Inc.*, 589 F. Supp. 2d 388, 391–92 (S.D.N.Y. 2008) (citing *In re eSpeed, Inc. Sec. Litig.*, 232 F.R.D. 95, 99 (S.D.N.Y. 2005)). Courts are "skeptical" of artificial groupings of unrelated investors who move for appointment as co-Lead Plaintiffs because such an arrangement "ensures that the lawyers, who are invariably the matchmakers behind such marriages of convenience, are the true drivers of the litigation." *In re Petrobras Sec. Litig.*, 104 F. Supp. 3d 618, 621–22 (S.D.N.Y. 2015). *See also Galmi*, 302 F. Supp. 3d at 493 (although a group of prospective lead plaintiffs "with a relationship that pre-dates the litigation may aggregate their financial interests and form a putative lead plaintiff group with minimal court scrutiny," a proposed group in which the "members have limited or no prior relationship" is viewed "skeptically" with an eye toward "whether the grouping operates to circumvent the purposes of the PSLRA").

Courts have permitted "unrelated investors to join together as a group seeking lead-plaintiff status on a case-by-case basis, if such a grouping would best serve the class." *Varghese*, 589 F. Supp. 2d at 392; *Galmi*, 302 F. Supp. 3d at 493. In that vein, courts have found that appointment of co-Lead Plaintiffs "who did not move initially as a group" can serve the interests of the class in certain situations, such as when an individual investor and an institutional investor are paired and "may each bring a unique perspective to the litigation." *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. LaBranche & Co.*, 229 F.R.D. 395, 419 (S.D.N.Y. 2004) (quoting *Laborers Loc. 1298 Pension Fund v. Campbell Soup Co.*, No. 00 Civ. 152 (JEI), 2000 WL 486956, at *3 (D.N.J. Apr. 24, 2000)); *In re Cable & Wireless, PLC Sec. Litig.*, 217 F.R.D. 372, 376 (E.D. Va. 2003) (appointing individual investor and institutional investor as co-Lead Plaintiffs to ensure that "all class members will adequately be represented" and to advance the purpose of the PLSRA to "get institutional investors involved in the prosecution of securities class action suits"); *see also In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. at 45. As one court in this District reasoned, any "concern that the PSLRA does not condone lawyer-driven aggregations is ameliorated" when the district court creates the Lead Plaintiff group rather than accepting any "prefabricated groups of unrelated individuals." *In re Star Gas Sec. Litig.*, No. 3:04-CV-1766 (JBA), 2005 WL 818617, at *5 n.3 (D. Conn. Apr. 8, 2005).

B. Discussion

Here, the Court finds that appointment of Hills and OLERS as co-Lead Plaintiffs will best serve the interests of the class. Importantly, Hills and OLERS have unique attributes that make them well suited to serve as co-Lead Plaintiffs: Hills has the most significant financial interest, while OLERS has a sizeable financial interest and holds the preferred status of an institutional investor. *See In re Star Gas Sec. Litig.*, 2005 WL 818617, at *5 (appointing co-Lead Plaintiffs

who all had "unique attributes"). Those qualifications, combined with their agreement to work together to represent the interests of the class following the Court's suggestion, demonstrate that Hills and OLERS are both the most adequate representatives of the class and thus appointing them as co-Lead Plaintiffs will best serve the interests of the class. *See Lavin v. Virgin Galactic Holdings, Inc.*, No. 21-CV-3070 (ARR) (TAM), 2021 WL 5409798, at *5 (E.D.N.Y. Sept. 17, 2021) (appointing co-lead plaintiffs who stipulated to jointly represent the class after initially opposing their competing motions to be appointed as lead plaintiff).

To begin, both Hills and OLERS initially filed timely motions to be appointed Lead Plaintiff and thus satisfy that requirement for appointment. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(aa).

Next, no party disputes that Hills has the largest financial interest in the relief sought, *see* ECF No. 56 at 8, and OLERS has the next largest financial interest. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb). Because neither the PSLRA, nor the U.S. Supreme Court or the Second Circuit, have instructed district courts on the appropriate method to measure financial interest, the vast majority of courts in this Circuit consider the following four factors:

> (1) the total number of shares purchased during the class period; (2) the net shares purchased during the class period (in other words, the difference between the number of shares purchased and the number of shares sold during the class period); (3) the net funds expended during the class period (in other words, the difference between the amount spent to purchase shares and the amount received for the sale of shares during the class period); and (4) the approximate losses suffered.

Galmi, 302 F. Supp. 3d at 497 (citing *Lax v. First Merchs. Acceptance Corp.*, Nos. 97 C 2715 et al., 1997 WL 461036, at *5 (N.D. Ill. Aug. 11, 1997), and *In re Olsten Corp. Sec. Litig.*, 3 F. Supp. 2d 286, 295 (E.D.N.Y.1998)). *Accord Topping*, 95 F. Supp. 3d at 616; *Brday v. Frontier Commc'ns Corp.*, No. 3:17-CV-1617 (VAB), 2018 WL 525485, at *8 (D. Conn. Jan. 18, 2018).

"Financial loss, the last factor, is the most important element of the test." *Varghese*, 589 F. Supp. 2d at 395.

Across four accounts, Hills purchased and retained a total of 42,878 shares through the end of the class period, and claims to have suffered $540,922.65 in losses under a last-in, first-out ("LIFO") analysis.[2] ECF No. 30-2 at 13. For its part, OLERS purchased and retained a total of 6,185 shares through the end of the class period, and claims to have suffered losses amounting to $158,360 under a LIFO analysis. ECF No. 29-4 at 2. While this is less than Hills' financial interest, it is more than the interests of the other movants who withdrew their motions. Together, Hills and OLERS undoubtedly possess the largest financial interest. And because the Court was the first to propose the co-Lead Plaintiff arrangement, it is not concerned that Hills and OLERS joined together in a strategic move to aggregate their losses and jump ahead of any other parties who may otherwise have been presumptive Lead Plaintiff candidates.

In addition, the Court finds, for the purpose of appointing co-Lead Plaintiffs, that Hills and OLERS satisfy the requirements of Federal Rule of Civil Procedure 23. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc). "Of the four Rule 23 requirements—numerosity, commonality, adequacy, and typicality—only adequacy and typicality come into play when appointing a lead plaintiff under the PSLRA." *In re Host Am. Corp. Sec. Litig.*, 236 F.R.D. 102, 105 (D. Conn. 2006). *See also In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. at 49 (same). Although the Court cannot "pay

[2] "To calculate the approximate losses sustained by a proposed lead plaintiff in a securities class action, courts . . . typically employ one of two methodologies: First-In-First-Out ('FIFO') or Last-In-First-Out ('LIFO'). Under FIFO, stocks acquired first are assumed to have been sold first in the calculation of losses; under LIFO, stocks acquired most recently are assumed to have been the first sold." *Rodriguez v. DraftKings Inc.*, No. 21 CIV. 5739 (PAE), 2021 WL 5282006, at *4 (S.D.N.Y. Nov. 12, 2021). LIFO has the benefit of taking into account "gains that might have accrued to plaintiffs during the class period due to the inflation of the stock price"; FIFO, on the other hand, "ignores sales occurring during the class period and hence may exaggerate losses." *In re eSpeed, Inc. Sec. Litig.*, 232 F.R.D. at 101. Accordingly, most courts have applied the LIFO method to calculate a prospective Lead Plaintiff's financial incentive. *Id.*; *Khunt v. Alibaba Grp. Holding Ltd.*, 102 F. Supp. 3d 523, 531–32 (S.D.N.Y. 2015); *Rodriguez*, 2021 WL 5282006, at *4.

mere lip service to the requirement that a prospective lead plaintiff satisfy the requirements of Rule 23," there is no need for a "searching inquiry" at this early stage. *Brday*, 2018 WL 525485, at *9 (alterations, citations, internal quotation marks omitted); *see also Synchrony Fin.*, 2019 WL 4928889, at *5 (same). Rather, a prospective Lead Plaintiff "must only meet its *prima facie* burden of establishing its adequacy and typicality." *Galmi*, 302 F. Supp. 3d at 505 (italicization added) (citing *Varghese*, 589 F. Supp. 2d at 397); *see also Topping*, 95 F. Supp. 3d at 623. Here, Hills' and OLERS' claims and injuries are typical of those of the class because they "arise from the same conduct from which the other class members' claims and injuries arise." *See In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. at 50 (citing *In re Drexel Burnham Lambert Grp.*, 960 F.2d 285, 291 (2d Cir. 1992)).

Moreover, for the purpose of appointment as co-Lead Plaintiffs, Hills and OLERS have shown that they will be adequate representatives of the class. "The adequacy requirement will be satisfied where (1) class counsel is qualified, experienced and generally able to conduct the litigation; (2) the class members do not have interests that are antagonistic to one another; and (3) the class has a sufficient interest in the outcome of the case to ensure vigorous adequacy." *Weltz*, 199 F.R.D. at 133 (citing *In re Olsten*, 3 F. Supp. 2d at 296). Hills' counsel, Levi & Korsinsky, LLP, and OLERS' counsel, Grant & Eisenhofer P.A., both have extensive experience litigating securities fraud class actions on behalf of aggrieved shareholders and institutional investors. ECF No. 30-4 at 4, 6–15; ECF No. 29-6 at 2. There is nothing to suggest that Hills or OLERS have interests that are antagonistic to each other or other members in the class. Hills' significant claimed losses and potential recovery afford her a sufficient interest in litigating the case vigorously. And OLERS' claimed losses, as well as its status as an institutional investor, afford it a sufficient interest in litigating the case vigorously as well. *See In re eSpeed, Inc. Sec. Litig.*, 232 F.R.D. at

99 (noting that "the PSLRA was designed to favor institutional investors"); *Brday*, 2018 WL 525485, at *10 (recognizing that "Congress intended to encourage institutional investors with the largest stake in the litigation to steer the litigation"). Accordingly, Hills and OLERS are the presumptively most adequate Lead Plaintiffs.

In addition, the Court finds that, for the purpose appointing co-Lead Plaintiffs, neither Hills nor OLERS are subject to unique defenses that render them incapable of adequately representing the class. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(bb). First, Neither Hills nor any of the other movants have opposed OLERS' motion to be appointed Lead Plaintiff on the grounds that OLERS would be subject to unique defenses or otherwise would not adequately represent the interests of the class.

As for whether Hills is subject to unique defenses, OLERS initially contended that Hills' day-trading practices would subject her to the unique defense that she did not rely on BioXcel's public misrepresentations about the BXCL501 program or the integrity of the market when making her purchases. ECF No. 56 at 10, 13. OLERS argued that these unique defenses would be a distraction to the litigation, and that Hills would need to divert resources toward defending against these allegations, whereas OLERS, if appointed as Lead Plaintiff, could focus solely on representing the class vigorously. Hills, for her part, disputed OLERS' characterization of her trading practices, contending that she placed a substantially smaller number of orders with her brokers, who then split the orders into many small transactions, and denying that she engaged in day trading. ECF No. 63-1 at 2–3.

Here, the Court has not been presented with proof[3] that Hills is subject to unique defenses that would render her incapable of adequately representing the class alongside OLERS. Courts in this Circuit have frequently been faced with prospective Lead Plaintiffs who are alleged to have engaged in day trading and in-and-out trading practices. A day trader buys and sells stock repeatedly on a single trading day; an in-and-out trader buys and sells "all of their holdings during the class period, *i.e.*, after the stock price was fraudulently inflated and before it dropped due to a corrective disclosure." *Rodriguez*, 2021 WL 5282006, at *5, *7.[4] Although day traders and in-and-out traders "are not automatically disqualified from serving as lead plaintiffs," courts have recognized the potential that such traders may hold "a unique position that would defeat typicality and adequacy." *Broadfoot v. Barrick Gold Corp.*, No. 17 CIV. 3507 (NRB), 2017 WL 3738444, at *1 (S.D.N.Y. Aug. 9, 2017). *See also Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr.*, 229 F.R.D. at 415 (noting that "courts differ as to whether [day trading and in-and-out trading] entities may serve as a lead plaintiff in a standard securities fraud class action involving alleged fraud on the market"). For example, some courts have rejected day traders' and in-and-out traders' attempts to serve as Lead Plaintiff because their trading practices would introduce factual disputes about whether they genuinely relied on the corporate defendants' misrepresentations in buying stock, and those factual disputes would be expensive and distracting to resolve, to the ultimate

[3] Hills and OLERS disputed the showing that is required in order for the rebuttable presumption to be overcome, with Hills claiming that it is high—requiring "proof"—and OLERS arguing that all is required is non-speculative evidence that the presumptive candidate "may be subject" to unique defenses. *Galmi*, 302 F. Supp. 3d at 505 n.10. The statute explicitly states the presumption may be rebutted only "*upon proof*" that the presumptively most adequate plaintiff "*is* subject to" unique defenses that render her inadequate, suggesting that Hills had the better reading. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(bb) (emphasis added).

[4] As *Rodriguez* recognizes, "'[i]n-and-out' transactions . . . should be excluded from the PSLRA loss calculus" because any gain or loss due to such transactions could reasonably be read to reflect price fluctuations attributable to factors other than the fraud. 2021 WL 5282006, at *5 (citing *Dura Pharm, Inc. v. Broudo*, 544 U.S. 336, 344 (2005) and *Bo Young Cha v. Kinross Gold Corp.*, No. 12 Civ. 1203 (PAE), 2012 WL 2025850, at *4 (S.D.N.Y. May 31, 2012)). In cases involving in-and-out trading allegations, courts therefore adjust the financial loss allegations of prospective lead plaintiffs accordingly. *See id.* As OLERS did not assert that Hills conducted in-and-out trading, and because she utilized a LIFO method to calculate her alleged losses, the Court need not calculate such an adjustment here.

detriment of the class. *See Topping*, 95 F. Supp. 3d at 622 n.16; *Rodriguez*, 2021 WL 5282006, at *10; *George v. China Auto. Sys., Inc.*, No. 11 CIV. 7533 (KBF), 2013 WL 3357170, at *7 (S.D.N.Y. July 3, 2013). *See also In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 41 (2d Cir. 2009) (excluding in-and-out traders from a certified class).

But the Court is not convinced that Hills must be disqualified from serving as a Lead Plaintiff on this basis. First, Hills is not an in-and-out trader. Based on the present record, she had not sold all of her stock before the close of the class period; at the time BioXcel issued the disclosure that caused its stock price to drop, she had retained 42,878 shares. *See Wilson v. LSB Indus., Inc.*, No. 15-CIV-7614 (RA) (GWG), 2018 WL 3913115, at *6 (S.D.N.Y. Aug. 13, 2018) (holding that because the prospective Lead Plaintiff held some amount of stock "prior to and throughout the period of corrective disclosures," he would "be able to prove loss causation"); *Pearlstein v. BlackBerry Ltd.*, No. 13 CIV. 7060 (CM), 2021 WL 253453, at *11 (S.D.N.Y. Jan. 26, 2021) (explaining that the prospective Lead Plaintiff was not "a true in-and-out trader" because he held stock from his first purchase until the end of the class period and thereafter).

Moreover, the Court does not find the factual issue of whether Hills was a day trader rife with so much additional distraction, delay, and expense, that appointing Hills as a co-Lead Plaintiff would be detrimental to the class. Based on the evidence presented thus far, the number of transactions potentially subject to a day trading defense is rather limited. Under OLERS' calculation, Hills engaged in day trading for only seventeen days out of the seventy-four days between her first purchase and the end of the class period. Accordingly, the majority of Hills' transactions will implicate the same factual inquiries that pertain to the claims of the rest of the class. Moreover, Hills has identified at least one basis on which she intends to rebut a claim of day trading: that her broker split her substantially smaller number of large orders into many small

transactions. *See In re Host Am. Corp. Sec. Litig.*, 236 F.R.D. at 108 (appointing a Lead Plaintiff notwithstanding accusations of day trading and noting that the prospective Lead Plaintiff did not actually engage in such a large number of trades, but rather used a broker that split the transactions into smaller lots). *See also Stoopler v. Direxion Shares ETF Tr.*, No. 09 CIV. 8011 (RJH), 2010 WL 3199679, at *4 (S.D.N.Y. Aug. 12, 2010), *as corrected* (Aug. 16, 2010) (appointing a Lead Plaintiff who was admittedly a day trader early in the class period, but purchased and retained a large number of shares throughout the latter part of the class period).

Even if Hills could be characterized as a day trader, that characterization alone does not amount to proof that she is subject to a defense that she did not rely on BioXcel's representations or the integrity of the market. As one court in this Circuit explained, "day and momentum traders have the same incentives to prove [the] defendants' liability as all other class members." *Prefontaine v. Rsch. in Mot. Ltd.*, No. 11 CIV. 4068 (RJS), 2012 WL 104770, at *4 (S.D.N.Y. Jan. 5, 2012) (citation and internal quotation marks omitted). *See also Chauhan v. Intercept Pharms.*, No. 21-CV-00036 (LJL), 2021 WL 235890, at *6 (S.D.N.Y. Jan. 25, 2021) (rejecting a challenge to a prospective Lead Plaintiff who engaged in day trading, reasoning that, "[a]bsent evidence that [the Lead Plaintiff] did not rely on the integrity of the market price, which has not been offered at this stage, there is no reason to disqualify [him] as lead plaintiff"). Indeed, when establishing the presumption of reliance on the integrity of the market, the U.S. Supreme Court explained: "[I]t is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?" *Basic Inc. v. Levinson*, 485 U.S. 224, 246–47 (1988) (quoting *Schlanger v. Four-Phase Sys. Inc.*, 555 F. Supp. 535, 538 (SDNY 1982)). Courts in this Circuit have employed this reasoning when rejecting challenges to presumptively most adequate Lead Plaintiffs on grounds of alleged day trading. *See Prefontaine*, 2012 WL

104770, at *4 n.5 (quoting *Basic*); *In re Host Am. Corp. Sec. Litig.*, 236 F.R.D. at 108 n.9 (same); *In re Oxford Health Plans, Inc. Sec. Litig.*, 199 F.R.D. 119, 124 (S.D.N.Y. 2001) (citing *Basic* and reasoning, "where the public market of a quoted security is polluted by false information, or where price, supply and demand are distorted as a result of misleading omissions, all types of investors are injured").

In other words, on the record presently before the Court, the Court cannot conclude that there is sufficient proof that Hills is subject to a unique defense that would render her an inadequate Lead Plaintiff, particularly when joined with OLERS. *See Lavin*, 2021 WL 5409798, at *8 (citing *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr.*, 229 F.R.D. at 415). Moreover, to the extent Defendants assert unique defenses against Hills that threaten the best interests of the class, the Court's appointment of OLERS as co-Lead Plaintiff will "help ensure adequate protection of the class." *Id.* at *7. In sum, the Court finds that the best interests of the class will be furthered by appointment of Hills and OLERS as co-Lead Plaintiffs.

IV. APPROVAL OF LEAD COUNSEL

The PSLRA provides that the most adequate plaintiff "shall, subject to the approval of the court, select and retain counsel to represent the class." 15 U.S.C. § 78u-4(a)(3)(B)(v). *See also In re Flight Safety Techs., Inc. Sec. Litig.*, 231 F.R.D. 124, 132 (D. Conn. 2005) ("Lead plaintiffs have the discretion to retain counsel of their choice to represent the class, subject to court approval."). "There is a strong presumption in favor of approving a properly-selected lead plaintiff's decision as to counsel." *Galmi*, 302 F. Supp. 3d at 506 (quoting *Topping*, 95 F. Supp. 3d at 623–24). Indeed, courts "typically do not disturb a lead plaintiff's selection unless it is necessary to protect the interests of the class." *Synchrony Fin.*, 2019 WL 4928889, at *6 (quoting *In re Host Am. Corp. Sec. Litig.*, 236 F.R.D. at 109).

As explained above, Hills has retained counsel at Levi & Korsinsky, LLP, and OLERS has retained counsel at Grant & Eisenhofer P.A. Both firms tout their extensive experience litigating securities fraud class actions on behalf of aggrieved shareholders and institutional investors. ECF No. 304 at 4, 6–15; ECF No. 29-6 at 2. The Court finds that Levi & Korsinsky and Grant & Eisenhofer are qualified to serve as co-lead counsel and accordingly approves those selections, "provided that there is no duplication of attorneys' services, and the use of co-lead counsel does not in any way increase attorneys' fees and expenses." *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr.*, 229 F.R.D. at 421 (quoting *In re Donnkenny Inc. Sec. Litig.*, 171 F.R.D. 156, 158 (S.D.N.Y. 1997)); *accord Chernysh v. Chembio Diagnostics, Inc.*, No. 20-2706 (ARR) (ARL), 2020 WL 9813453, at *5 (E.D.N.Y. Dec. 29, 2020). Should any such situations arise, the Court will reconsider the co-Lead Plaintiff arrangement.

V. CONCLUSION

For the reasons described above, the Court GRANTS Hills' and OLERS' joint motion to be appointed co-Lead Plaintiffs and to approve their selections of co-lead counsel, ECF No. 78. The Court DENIES AS MOOT Hills' motion to be appointed Lead Plaintiff, ECF No. 26, and OLERS' motion to be appointed Lead Plaintiff, ECF No. 29. In addition, the Court DENIES Fraser's motion to be appointed Lead Plaintiff, ECF No. 32. The Clerk is directed to amend the case caption to reflect that Hills and OLERS are the only Named Plaintiffs in this action.

By **October 18, 2023**, the parties shall submit a joint notice proposing a deadline for Lead Plaintiffs to submit an amended complaint, if desired, and a deadline for Defendants to file a

response to the operative complaint. *See* ECF No. 40.

SO ORDERED at Hartford, Connecticut, this 4th day of October, 2023.

/s/ Sarala V. Nagala
SARALA V. NAGALA
UNITED STATES DISTRICT JUDGE