IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24-cv-01873-RMR-TPO

FORREST A K WELLS, individually and on behalf of all others similarly situated,

Plaintiff,

v.

SEASTAR MEDICAL HOLDING CORPORATION,
ERIC SCHLORFF, and
CARYL BACON,

Defendants.

ORDER

Timothy P. O'Hara, United States Magistrate Judge

This matter comes before the Court upon the Motions for Appointment as Lead Plaintiff and Approval of Lead Counsel filed by the following: Movant Dr. Joshua Burton [ECF 6], Movant Raffi Khajerian [ECF 7], Movant Thomas Halter [ECF 9], Movant Gregory Conklin [ECF 11], and Movants Doug Lage and Jose Lazo [ECF 13]. These Motions were referred by District Judge Regina M. Rodriguez on September 9, 2024. ECF 14. Movants Burton Halter, Conklin, Lage, and Lazo then, respectively, filed Notices of Non-Opposition to Competing Lead Plaintiff Motions. [ECFs 15-18]. On October 16, 2024, upon my appointment, this matter was reassigned to me. *See* ECF 21. The Court has considered the Motions, Notices, the entire case file, and the applicable case law. For the following reasons, Movant Rafi Khajerian's Motion [ECF 7] is **GRANTED**.

BACKGROUND[1]

Plaintiff Forrest A K Wells brought this action on behalf of a class inclusive of all others similarly situated, that purchased or otherwise acquired SeaStar securities between October 31, 2022 and March 26, 2024. ECF 1 at ¶ 1. The Complaint alleges Defendants SeaStar, Eric Schlorff, and Caryl Baron made materially false and misleading statements regarding SeaStar's business, operations, and compliance policies in violation of Sections 10(b) and 20(a) of the Securities and Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder. *Id.* at ¶ 10 and ¶¶89-104.

SeaStar, previously operating as a special purpose acquisition company under the name LMF Acquisition Opportunities, Inc., entered into a merger agreement with Legacy SeaStar, "a medical technology company developing extracorporeal therapies to reduce the consequences of inflammation on vital organs." *Id.* at ¶¶ 2-3. SeaStar announced the merger agreement on April 22, 2022, announcing that it would operate with the name "SeaStar Medical Holding Corporation" and would retain Legacy SeaStar's management team. *Id.* at ¶ 3. Legacy SeaStar shares owned by existing equity holders would be converted into Class A Common Stock of the combined SeaStar Medical Holding Corporation. *Id.*

Plaintiff alleges that, following the announcement of the merger, SeaStar and Legacy SeaStar asserted an enterprise value of approximately $85 million and touted their product's "regulatory and commercial prospects." *Id.* at ¶ 4. Plaintiff alleges that SeaStar and Legacy SeaStar made multiple misleading misrepresentations to investors regarding compliance controls and procedures, the application for the "Humanitarian Device Exemption" ("HDE") from the U.S.

[1] The factual background is derived from Plaintiff's Complaint at ECF 1.

Food and Drug Administration ("FDA"), the scope and severity of deficiencies in its financial controls and procedures, and SeaStar's post-merger business and financial prospects. *Id.* at ¶10. [2]

Upon SeaStar disclosing that their HDE applications to the FDA were rejected due to deficiencies, their stock price fell 39.69%. *Id.* at ¶¶ 11-12. On March 27, 2024, SeaStar announced it would restate its financial statements for the fiscal year ending on December 31, 2022 and the interim periods ending on March 31, 2023, June 30, 2023, and September 30, 2023. *Id.* at ¶ 13. Following this announcement, SeaStar's stock price fell an additional 4.84%. *Id.* at ¶ 14. As a result of SeaStar's representations and statements, Plaintiff generally alleges that he and putative class members purchased shares of SeaStar at falsely inflated prices and suffered "significant losses and damages" as a result. *Id.* at ¶ 15.

Plaintiff filed his Complaint on July 5, 2024. *See* ECF 1. On July 10, 2024, counsel for Plaintiff published a notice on PRNewswire announcing that a securities class action had been initiated against Defendants. *See* ECF 8-3. Pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Movants timely[3] filed their competing Motions for Appointment of Lead Plaintiff and to Appoint Lead Counsel, which are now before the Court.

LEGAL STANDARD

The PSLRA establishes "a procedure that governs the appointment of Lead Plaintiffs in 'each private action arising under [the Securities and Exchange Act] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.'" *In re Ribozyme Pharm., Inc. Sec. Litig.*, 192 F.R.D. 656, 657 (D. Colo. 2000) (quoting 15 U.S.C. §78u-4(a)(1)). "Any member of

[2] This is a non-exhaustive list intended to provide a general overview of the factual background and dispute.

[3] 15 U.S.C. §78u-4(a)(1) requires that motions to serve as Lead Plaintiff must be filed within sixty days of published notice.

the purported class may move the court to serve as Lead Plaintiff, but must do so within sixty (60) days of the published notice of the potential class action." *Mariconda v. Farmland Partners, Inc.*, No. 18-cv-2104-DME-NYW, 2018 WL 6307868, at *2 (D. Colo. Dec. 3, 2018) (quoting 15 U.S.C. §78u-4(a)(3)(A)(i)(I)). Within ninety (90) days of the published notice of a potential class action, "the court shall consider any motion made by a purported class member in response to the notice," inclusive of non-Plaintiff Movants, "and 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." 15 U.S.C. § 78u-4(a)(3)(B)(i).

The PSLRA establishes a "rebuttable presumption" for appointing the lead plaintiff. *See* § 78u-4(a)(3)(B)(iii). The presumption is that the "most adequate plaintiff" to represent the class is the movant who (1) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i); (2) in the determination of the court, has the largest financial interest in the relief sought by the class; and (3) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. *Id.* "As for the requirements that the lead plaintiff otherwise satisfy the requirements of Rule 23, only two of the four requirements of Rule 23(a)—typicality and adequacy—impact the analysis of the lead plaintiff issue." *Wolfe v. AspenBio Pharma, Inc.*, 275 F.R.D. 625, 627 (D. Colo. 2011) (citing *In re Ribozyme Pharm., Inc.*, 192 F.R.D. at 658). The presumptive "most adequate plaintiff" may be rebutted only by proof that they either (1) will not fairly and adequately protect the interests of the class, or (2) are subject to unique defenses that render them incapable of adequately representing the class. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). The PSLRA also provides that the Lead Plaintiff "shall, subject to the approval of the court, select and retain counsel to represent the class." § 78u-4(3)(B)(v). Accordingly, it is within the Court's discretion to approve the appropriate lead counsel. *See In re*

Oppenheimer Rochester Funds Grp. Sec. Litig., No. 09-MD-02063-JLK-KMT, 2009 WL 4016635, at *2-3 (D. Colo. Nov. 18, 2009).

ANALYSIS

While multiple parties initially filed competing motions to be named Lead Plaintiff, all interested parties subsequently filed notices of non-opposition to one Movant, Mr. Rafi Khajerian. *See* ECFs 6-13, 15-18. Mr. Khajerian seeks to be named the Lead Plaintiff in this matter and seeks the Court's approval of selected counsel Levi & Korsisnky, LLP ("Levi & Korsinsky"). Based on the record, the Court finds and concludes that Mr. Khajerian has presented sufficient evidence to invoke the § 78u-4(a)(3)(B)(iii) presumption that he is the most adequate plaintiff to represent the interests of the purported class. The lack of opposition from any other Movant confirms the Court's conclusion.

First, the presumptive Lead Plaintiff must file a Motion within sixty days of receiving notice of the complaint and potential class action. On September 6, 2024, Mr. Khajerian timely filed the requisite Motion in response to the notice circulated pursuant to § 78u-4(a)(3)(A)(i) on July 10, 2024. *See* ECFs 7 and 8-3.

Second, the potential Lead Plaintiff must assert they have the "largest financial interest in the relief sought." In assessing the "largest financial interest" claimed, courts consider the four-factor test applied in *Lax v. First Merchants Acceptance Corp.*, Nos. 97-CV-2715 et al., 1997 WL 461036, at *5 (N.D. Ill. Aug. 11, 1997); *see also Mariconda*, 2018 WL 6307868, at * 3 ("[T]here appears to be a clear weight of authority favoring the four-factor *Lax* test … which considers: 1) the total number of shares purchased during the class period; 2) the number of net shares purchased during the class period; 3) the total net funds expended during the class period; and 4) the approximate loss suffered.") (citations omitted). Mr. Khajerian claims his financial interests as

1,508,872 gross shares purchased, 1,000,000 net shares retained, $1,164,635.82 net funds expended, and $473,539.45 in claimed losses. *See* ECF 19 at p. 6.[4] The next greatest asserted financial interest is by Movants Doug Lage and Jose Lazo, who asserted 6,090 gross shares purchased, 6,047 net shares retained, $158,518.48 net funds expended, and $90,821.00 claimed losses. *Id.* On all four of the *Lax* factors, Mr. Khajerian has demonstrated that he has the "largest financial interest." Moreover, all other Movants conceded that they did not appear to have the largest financial interest. *See* ECFs 15-18.

Finally, considering the third requirement that the presumptive Lead Plaintiff otherwise satisfies the requirements of Fed. R. Civ. P. 23, a prima facie showing that the movant satisfies the two requirements of typicality and adequacy is sufficient. *Mariconda*, 2018 WL 6307868 at *5; *Wolfe*, 275 F.R.D. 625 at 627-628. For typicality, courts should consider whether the movant's losses are "markedly different" or whether their legal theories differ from those underlying other class members' claims. *See Mariconda*, 2018 WL 6307868 at *5 (citations omitted). In considering "adequacy," courts assess "(1) the absence of potential conflict between the named plaintiff and the class members and (2) if counsel chosen by [the Lead Plaintiff] is qualified, experienced, and able to vigorously conduct the proposed litigation." *Id.* (citations omitted).

The Court finds that Mr. Khajerian's claims are typical of the class because his claims are identical to the other Class Members'. *See* ECF 7 at pp. 8-9; *see also* ECF 19 at pp. 6-7. Mr. Khajerian, like all class members, purchased SeaStar securities during the class period, at prices which he joins in alleging were artificially inflated by Defendants' false and misleading statements. *Id.* The record thus indicates that Mr. Khajerian satisfies the typicality requirement.

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[4] For numbering purposes, the Court uses the page numbers designated by ECF, not the page numbers in the filings themselves.

The record further supports that Mr. Khajerian meets the adequacy requirement. *See* ECF 19 at pp. 7-8. There is no apparent conflict, and there are no remaining challenges to his appointment. There are also no apparent unique defenses that would apply to Mr. Khajerian and render him inadequate.

Mr. Khajerian has made the necessary preliminary showings to meet the requirements set forth under the PSRLA and is presumptively the Lead Plaintiff. No Movant has rebutted this presumption. As the most adequate plaintiff, he "shall, subject to the approval of the court, select and retain counsel to represent the class." 15 U.S.C. § 78u-4(3)(B)(v). Mr. Khajerian's selected counsel, Levi & Korsinsky, is experienced in securities litigation and has been lead counsel in similar actions. *See* ECF 7 at pp. 15-16. The Court is satisfied that Levi & Korsinsky is "qualified, experienced and able to conduct the proposed litigation." *In re Ribozyme*, 192 F.R.D at 659.

Accordingly, the Court finds that Mr. Khajerian shall be appointed Lead Plaintiff and his request that Levi & Korinsky be appointed Lead Counsel is granted.

CONCLUSION

Based upon the record herein and for the reasons stated above, it is **ORDERED:**

1. Movant Dr. Joshua Burton's Motion for Appointment as Lead Plaintiff and Approval of Lead Counsel [ECF 6] is **DENIED**,
2. Movant Thomas Halter's Motion for Appointment as Lead Plaintiff and Approval of Lead Counsel [ECF 9] is **DENIED**,
3. Movant Gregory Conklin's Motion for Appointment as Lead Plaintiff and Approval of Lead Counsel [ECF 11] is **DENIED**,
4. Movant Doug Lage's and Jose Lazo's Motion for Appointment as Lead Plaintiff and Approval of Lead Counsel [ECF 13] is **DENIED**,
5. Movant Raffi Khajerian's Motion for Appointment as Lead Plaintiff and Approval of Lead Counsel [ECF 7] is **GRANTED,** and
   a. Raffi Khajerian is **APPOINTED** as Lead Plaintiff;
   b. Levi & Korinsky, LLC is **APPOINTED** as Lead Counsel.

DATED at Denver, Colorado, this 27th day of December, 2024.

BY THE COURT:

Timothy P. O'Hara
United States Magistrate Judge