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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID CROSSEN, on behalf of himself and
all others similarly situated,

Plaintiffs,

v.

CV THERAPEUTICS, INC., et al.,

Defendants.

No. C 03-3709 SI

**ORDER CONSOLIDATING ACTIONS;
APPOINTING LEAD PLAINTIFF AND
APPROVING SELECTION OF LEAD
COUNSEL; AND ORDERING
CERTIFICATION OF DOCUMENT
RETENTION NOTIFICATION**

On November 21, 2003, this Court heard argument on two motions for consolidation of related cases in the above captioned securities class action litigation, one by Fred and Christine McBroom (“the McBrooms”) and one by David Crossen (“Crossen”), who also moved the Court to order the preservation of documents. The Court also heard argument on two competing motions for appointment of lead plaintiff and approval of counsel, one by the McBrooms, represented by Schiffirin & Barroway, LLP and Green and Jigarjian, LLP; and one by Crossen, represented by Milberg, Weiss, Bershad, Hynes & Lerach, LLP. Having carefully considered the arguments of the parties and the papers submitted, the Court hereby GRANTS the motions for consolidation and GRANTS Crossen’s motion for appointment of lead plaintiff and approval of counsel. The McBrooms’ motion for appointment of lead plaintiff and approval of counsel is DENIED. The Court partially GRANTS Crossen’s motion for preservation of evidence.

BACKGROUND

Plaintiffs Crossen and McBroom have filed similar securities class actions against defendant CV Therapeutics, Inc. (“CV Therapeutics” or the “Company”), under Sections 10(b) and 20(a) of the Securities

1 Exchange Act of 1934 (the “‘34 Act”), 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 promulgated
2 thereunder by the Securities and Exchange Commission (“SEC”), 17 C.F.R. § 240.10b-5.

3 CV Therapeutics is a publicly held biopharmaceutical company engaged in the discovery, development
4 and commercialization of drugs to treat cardiovascular diseases. Crossen Compl. ¶ 2. The Company’s
5 executive offices are in Palo Alto, where its day-to-day operations occur. *Id.* at ¶ 6(b). Plaintiffs allege that
6 the Company and certain of its officers and directors artificially inflated the Company’s stock price during the
7 class period, May 14, 2003 through August 1, 2003 “by issuing a series of materially false and misleading
8 statements about the Company’s New Drug Application . . . for Raxena, a drug for the treatment of chronic
9 angina.” *Id.* at ¶¶ 1, 3. The defendants sold \$100 million of the Company’s securities when the stock traded
10 at its allegedly artificially inflated price. *Id.* at ¶¶ 5, 8. Plaintiff and other class members allegedly suffered injury
11 when they purchased the Company’s stock at artificially inflated prices. *Id.* at ¶ 50. On August 4, 2003, the
12 Company announced that the Food and Drug Administration would not review Raxena as scheduled; “[o]n this
13 news, the Company’s shares” declined 26%. *Id.* at ¶¶ 43, 44.

14 Plaintiff Crossen filed suit on August 8, 2003. *Id.* at p.16. Four other securities class action suits have
15 subsequently been filed in this District, alleging the Company’s violations of SEC Rule 10b-5. Crossen Mot.
16 for Appointment as Lead Plaintiff at 2-3. As required by § 21 D(a)(3)(A)(I) of the Exchange Act, Crossen
17 filed a notice of pendency of the action in Business Wire on August 8, 2003, advising class members of the
18 existence and nature of the litigation. *Id.*, citing Wahba Decl., Ex. B. The notice set a 60 day window for class
19 members to appear and move for appointment as lead plaintiff. *Id.* Two such motions have been filed within
20 the time limit, one by Crossen and the other by the McBrooms. In addition, Crossen and the McBrooms have
21 moved to have all the actions consolidated and Crossen has moved the Court to preserve documents.

22

23 LEGAL STANDARD

24 1. Motion to consolidate

25 Under Rule 42(a) of the Federal Rules of Civil Procedure:

26 When actions involving a common question of law or fact are pending before the court, it may order
27 a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions
28 consolidated; and it may make such orders concerning proceedings therein as may tend to avoid
unnecessary costs or delay.

1 Courts have recognized that securities class actions are particularly suited to consolidation to help expedite
2 pretrial proceedings, reduce case duplication, avoid the involvement of parties and witnesses in multiple
3 proceedings, and minimize the expenditure of time and money by everyone involved. See In re Equity Funding
4 of Amer. Sec. Litig., 416 F. Supp. 161, 176 (C.D. Cal. 1976) (citation omitted). A court must rule on a
5 motion to consolidate before it can rule on a motion to appoint a lead plaintiff. Securities Exchange Act, §
6 21D(a)(3)(B)(ii), 15 U.S.C. § 78u-4(a)(3)(B)(ii).

7
8 **2. Motion to appoint lead plaintiff**

9 It has been long recognized that private securities litigation provides "a most effective weapon in the
10 enforcement' of the securities laws and [is] 'a necessary supplement to [administrative] action.'" Bateman
11 Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310, 105 S. Ct. 2622 (1985). Although Congress
12 affirmed that such litigation "is an indispensable tool with which defrauded investors can recover losses," it
13 enacted the Private Securities Litigation Reform Act of 1995 (PSLRA) in response to a widespread perception
14 of abuse in securities class actions. Joint Explanatory Statement of the Committee of Conf., Conference Report
15 on Sec. Litig. Reform, H.R. Conf. Rep. No. 104-39 at 31 (1995). Section 21D of the PSLRA provides
16 well-defined standards and procedures for selecting lead plaintiffs in a securities class action and is "intended
17 to encourage the most capable representatives of the plaintiff class to participate in class action litigation and
18 to exercise supervision and control of the lawyers for the class." H.R. 104-39 at 32. See generally In re
19 Microstrategy Inc. Sec. Litig., 110 F. Supp. 2d 427, 432-436 (E.D. Va. 2000).

20 Under the procedures set out in the PSLRA, all proposed lead plaintiffs must have submitted a sworn
21 certification setting forth certain facts designed to assure the court that the plaintiff (i) has suffered more than
22 a nominal loss, (ii) is not a professional litigant, and (iii) is otherwise interested and able to serve as a class
23 representative. 15 U. S.C. § 78u-4(a)(2)(A). The plaintiff in the first lawsuit to be filed must additionally
24 publish notice of the complaint in a widely circulated business publication within twenty days of filing the
25 complaint. *Id.* at § 78u-4(a)(3)(A)(I). The notice must include a description of the claim and notify
26 prospective class members that they may move within 60 days of the notice to be named lead plaintiff.

27 Once applications for lead plaintiff status are closed, the district court must determine who among the
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1 movants for lead plaintiff status is the "most adequate plaintiff." Id. at § 78u-4(a)(3)(B)(I). The PSLRA directs
2 courts to "appoint as lead plaintiff the member or members of the purported plaintiff class that the court
3 determines to be most capable of adequately representing the interests of class members" Id. Toward
4 this end, the court must consider three factors: "the court shall adopt a presumption that the most adequate
5 plaintiff . . . is the person or group of persons that - (aa) has either filed the complaint or made a motion in
6 response to a notice . . . ; (bb) in the determination of the court, has the largest financial interest in the relief
7 sought by the class; and (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil
8 Procedure." Id. at § 78u-4(a)(3)(B)(iii)(I). The presumption of most adequate plaintiff may be rebutted by
9 evidence that the designated plaintiff "will not fairly and adequately protect the interests of the class" or "is
10 subject to unique defenses that render such plaintiff incapable of adequately representing the class." Id. at §
11 78u-4(a)(3)(B)(iii)(II).

12 In the Ninth Circuit, In re Cavanaugh, 306 F.3d 726, 729-30 (9th Cir. 2002), governs lead plaintiff
13 selection and establishes a three-step process. First, as discussed above, timely and complete notice of the
14 action must be published. Id. at 729. Second, the district court considers the losses suffered by potential lead
15 plaintiffs and selects "the one who 'has the largest financial interest in the relief sought by the class' and
16 'otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.'" Id. at 730, citing 15
17 U.S.C. § 78u-4(a)(3)(B)(iii)(I). Thus the court must determine which plaintiff "has the most to gain from the
18 lawsuit." Cavanaugh, at 730. Finally, the court focuses on that plaintiff to ensure that the proposed lead plaintiff
19 "satisfies the requirements of [Fed. R. Civ. Pro.] 23 (a), in particular those of 'typicality' and 'adequacy.'" Id.

20
21 A plaintiff who satisfies the first two steps becomes the "presumptively most adequate plaintiff." Id.
22 In step three, other plaintiffs have the opportunity to rebut the presumptive lead plaintiff's showing of typicality
23 and adequacy. Id. at 730, citing 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

24 Once the court has designated a lead plaintiff, the lead plaintiff " shall, subject to the approval of the
25 court, select and retain counsel to represent the class." 15 U.S.C. § 78u-4(a)(3)(B)(v). A court generally
26 should accept the lead plaintiff's choice of counsel unless it appears necessary to appoint different counsel to
27 "protect the interests of the class." Id. at § 78u-4(a)(3)(B)(iii)(II)(aa). In the Ninth Circuit, Cavanaugh
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1 establishes the standard for approval of lead counsel. “[T]he district court does not select class counsel at all,”
2 id. at 732; instead, the district court generally approves the lead plaintiff’s selection of counsel.

3
4 **3. Motion to preserve evidence**

5 “The PSLRA requires parties to treat evidence in their custody or control as if it were the subject of
6 a continuing discovery request during the pendency of any stay imposed by the PSLRA.” Weisz v. Calpine
7 Corp., et al., No. C 02-1200 SBA, at *6 (N.D. Cal. 2002) (attached as Ex. A to Handler Decl. In Support
8 of Oppo.), citing 15 U.S.C. § 78u-4(b)(3)(C)(I). The Weisz court, as discussed below, ordered certification
9 that clients had been notified of their duties with regard to document preservation.

10
11 **DISCUSSION**

12 **1. Motion to consolidate**

13 Both proposed lead plaintiffs have filed motions to consolidate the five related cases pending in the
14 Northern District of California, and both motions are unopposed. The Court GRANTS the motions to
15 consolidate.

16
17 **2. Competing motions to appoint lead plaintiff and approve lead counsel**

18 Crossen and The McBrooms have filed timely motions for appointment as lead plaintiff. The Court will
19 examine the qualifications of each, using the three-step process established by Cavanaugh, 306 F.3d 726.

20 First, with regard to published notice, Crossen filed his suit first and timely and completely filed public
21 notice.

22 Second, with regard to financial interest in the litigation, Crossen initially filed documents showing a
23 \$112,110.14 loss. Crossen’s Mot. for Appt. at 7, citing Wahba Decl., Ex. A. Later Crossen “supplemented
24 his certification to show his sales of call options, which show a gain (through premiums received) of \$60,875.”
25 Crossen’s Reply in Further Support at 1, citing Decl. of Sylvia Wahba Keller, Ex. A. Crossen argues that
26 “[t]hese trades involve a different security and thus should not be offset against [his] losses in common stock.
27 Even if they are offset,” he continues, he has suffered losses of “at least \$51,235.” Crossen’s Reply in Further
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1 Support at 1. The McBrooms reported total losses of \$34,861. Handler Decl. in Support, Ex. C.

2 The parties dispute the relevant loss figures. The Ninth Circuit does not have a uniform or mandatory
3 rule for calculating financial interest. See Cavanaugh, 306 F.3d 726, 730 n. 4 (the court did “not decide the
4 scope of the district court’s discretion in determining which plaintiff has the greatest financial interest in the
5 litigation.”). A recent Northern District case adopted a four factor test to identify the plaintiff with the largest
6 financial interest. The four factors to be considered are: “(1) the number of shares purchased during the class
7 period; (2) the number of net shares purchased during the class period; (3) the total net funds expended during
8 the class period; and (4) the approximate losses suffered.” Casden v. HPL Technologies, Inc., 2003 U.S. Dist
9 LEXIS 19606, *12 (N.D. Cal. 2003). See also In re Enron Corp. Sec. Litig., 206 F.R.D. 427, 440 (S.D.
10 Tex. 2002); In re Olsten Corp. Sec. Litig., 3 F.Supp. 2d 286, 295 (E.D.N.Y. 1998).

11 Applying the four factor test here, Crossen prevails on factors one, three and four: (1) Crossen
12 purchased 18,400 shares, while the McBrooms purchased 3,900; (3) Crossen expended \$236,498, while the
13 McBrooms expended \$131,152; and (4) Crossen’s approximate net loss was \$51,235, while the McBrooms’
14 approximate loss was \$34,861. Crossen concedes that the McBrooms prevail on factor two, since Crossen
15 was a net seller, “having sold more shares (18,900) during the class period than he purchased (17,400)
16 because he was selling shares during the class period that he owned before the class period began.”
17 McBroom’s Oppo. to Crossen’s Lead Plaintiff Mot. at 2.¹

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19
20 The McBrooms focus on Crossen’s status as a “net seller,” and argue that this factor automatically
21 makes him ineligible to serve as lead plaintiff. To support their argument, the McBrooms rely on Weisz v.
22 Calpine Corp., et al., No. C 02-1200 SBA, at *8 (N.D. Cal. 2002) (attached as Ex. A to Handler Decl. In
23 Support of Oppo.). In that case, the court declined to appoint a net selling party as lead plaintiff because “it

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25 _____
26 ¹Crossen disputes the McBrooms’ calculations regarding the “net seller” factor, arguing that “the
27 McBrooms’ calculations of the shares sold during the Class Period improperly include shares that were called
28 away pursuant to Crossen’s call options – which transactions, in material part, were executed prior to the Class
Period – not ‘sold’ in the open market.” Crossen’s Reply in Further Support at 1. The Court need not decide
which is the correct methodology to calculate the net seller figures because it has accepted the McBrooms’
figures for the purpose of analysis; even accepting the McBrooms’ loss calculations for both parties, Crossen
has the largest financial stake in the litigation.

1 [was] apparent that [the party] may actually have profited, not suffered losses, as a result of the allegedly
2 artificially inflated stock price.” However, Weisz is different from the case at hand because even as a net seller,
3 Crossen suffered net losses; unlike the net selling party in Weisz, who apparently enjoyed a net profit, Crossen
4 suffered a net loss and his net loss exceeded that suffered by the McBrooms.²

5 This Court finds that Crossen has the largest financial interest in the litigation, since even as a net seller,
6 he suffered larger losses than the McBrooms.

7 Third, with respect to typicality and adequacy, in the Ninth Circuit, “[o]nce it determines which plaintiff
8 has the biggest stake, the [district] court must appoint that plaintiff as lead, unless it finds that he does not satisfy
9 the typicality or adequacy requirements.” Cavanaugh, at 732. The district court has latitude to decide what
10 information it will consider to determine typicality and adequacy. Cavanaugh, at 732.

11 With regard to typicality, the claims of all plaintiffs and class members need not be identical. In re
12 Enron Corp., 206 F.R.D. at 445, citing In re Lucent Techs., Inc. Sec. Litig., 194 F.R.D. 137, 150 (D.N.J.
13 2000) (“the typicality requirement is satisfied when the plaintiff’s claim arises from the same event or course
14 of conduct that gives rise to the claims of other members and is based on the same legal theory.”). See also
15 Weisz at *12. In fact, “the test for typicality is not demanding [T]he critical inquiry is whether the class
16 representative’s claims have the same essential characteristics of the putative class.” In re Enron, at 445, n.10,
17 citing Stirman v. Exxon Corp., 280 F.3d 554, 562-63 (5th Cir. 2002).

18 As the court explained in Deutschman v. Beneficial Corp., 132 F.R.D. 359, 373 (D. Del., 1990), “the
19 focus of the typicality inquiry is not on plaintiff’s behavior, but defendants’.” If defendants’ course of conduct
20 gave rise to all class members’ claims and if “defendants have not taken any action unique to the named plaintiff,
21 then the representative’s claim is typical.” Id. (citations omitted). In the case at hand, a focus on the
22 Company’s behavior to determine if its alleged misrepresentations and concealment injured its stockholders
23 by artificially inflating its stock price, suggests that Crossen’s claim is typical.

24 The McBrooms argue, however, that Crossen is an atypical investor who engaged in “low volatility
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28 ²In addition, the Weisz court had “serious concerns about the accuracy” of the alleged losses reported
by this defeated potential lead plaintiff. Id. at *10.

1 trading strategy” and that he “will be subject to unique defenses as a result.” McBroom Oppo. at 4. The
2 McBrooms argue that because of Crossen’s dealings in call options, he, “unlike most class members, did not
3 want the stock to realize its full upside potential.” Id. At 5. According to the McBrooms, Crossen hoped “for
4 low, short-term volatility – a strategy predicated on mathematics, not on the dissemination of [Company]
5 information in the marketplace.” Id. To support this proposition, they cite cases in which courts disqualified
6 potential lead plaintiffs because they had engaged in short selling. See Weisz. at *12; In re CriticalPath, Inc.
7 Securities Litigation, 156 F.Supp.2d 1192, 1109-10 (N.D.Cal. 2001).

8 As discussed at length in Deutschman, the “purchase of a call option contract is more similar to the
9 purchase of stock than it is to a short sale.” Id. at 370. While a short seller anticipates a decrease in the price
10 of the underlying security, purchasers of call options and stock “hope to profit from an *increase* in the market
11 price of the underlying security.” Id. at 370, 371 (emphasis in the original). Thus courts have allowed investors
12 in call options to represent classes in securities class action lawsuits. See, e.g., Deutschman, at 363-64, 383
13 (purchaser of call option contracts represents class consisting of purchasers of common stock and call option
14 contracts); In re Vesta Ins. Group, Inc. Sec. Litig., 1999 U.S. Dist LEXIS 22233, *38-39 (N.D. Ala., 1999)
15 (sophisticated investor in call options will not be so distracted by unique defense applicable only to him that he
16 becomes atypical as a result); In re Enron, 206 F.R.D. at 445 (courts “consistently” certify securities classes
17 “even though members of a class may have purchased different types of securities or interests, or purchased
18 similar securities at different times”; court further notes that purchasers of debt instruments and stock can
19 represent each other in the same action). This Court finds that Crossen’s dealings in call options may
20 differentiate him from some other investors but will not subject him to unique defenses that would make him an
21 atypical investor.

22 In the Ninth Circuit, “representation is ‘adequate’ when counsel for the class is qualified and
23 competent, the representative’s interests are not antagonistic to the interests of absent class members, and it
24 is unlikely that the action is collusive.” Weisz. at *13 (citations omitted). The representative must have
25 sufficient interest in the case’s outcome to ensure vigorous advocacy. Id. The Court finds no evidence of any
26 antagonism between the interests of Crossen and the class. Crossen attended the hearing on this motion, has
27 certified his willingness to serve as representative plaintiff and has retained counsel experienced in litigation
28

1 securities class actions. Crossen's Mot. at 8, citing Wahba Decl.Ex. A and C.

2 The Court finds that Crossen, as the plaintiff with the largest financial stake in the litigation, also satisfies
3 the typicality and adequacy tests necessary for him to serve as lead plaintiff in this litigation. Thus the Court will
4 appoint Crossen as lead plaintiff in the consolidated action and will approve his selection of Milberg Weiss as
5 his counsel.

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8 **3. Motion to preserve evidence**

9 Crossen moves this Court to order the preservation of relevant documents "in accordance with 15
10 U.S.C. § 78u-4(b)(3)(C)(I), both prior to and after the filing of any motion to dismiss." Crossen's Mot. for
11 Consol. and Preserv., at 6. Furthermore, Crossen asks this Court to order "certification that documents or
12 other information have not been knowingly destroyed, altered or concealed akin to the provision in § 802 of
13 the Sarbanes-Oxley Act [18 U.S.C. § 1519]." Id.³ Crossen points to no judicial precedent ordering such
14 certification, and this Court can find none. Thus this Court will not order such compliance, especially when
15 Crossen fails to indicate any specific reason requiring heightened protective measures.

16 Crossen submitted an order from another district judge in this district, ordering defendants to certify
17 their compliance with the required notification of the document preservation provisions contained in the PSLRA.
18 Crossen's Reply in Further Support at 2, citing Weisz, at *6. See 15 U.S.C. § 78u-4(b)(3)(C)(I). In Weisz,
19 the court added the underlined language to the Northern District's Model Stipulation and Proposed
20 Consolidation Order:

21 Counsel for the parties shall notify their clients of their document preservation obligations pursuant to
22 the federal securities laws and local rules, and the possible legal consequences of their failure to comply
23 as such. Upon completion of such notification, counsel shall certify to the Court, in writing, the date
of such notification. Weisz, at *6.

24 The Weisz court believed that its requirement seemed "somewhat superfluous," in light of the PSLRA's

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26 ³ 18 U.S.C. § 1519 provides: "Whoever knowingly alters, destroys, mutilates, conceals, covers up,
27 falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct,
28 or influence the investigation or proper administration of any matter within the jurisdiction of any department
or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such
matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

1 document preservation requirements. Id. Yet, the court also considered the “instances where such obligations
2 are disregarded, resulting in the irreparable loss of evidence.” Id. Thus the court added the underlined
3 language to the Model Order.

4 This Court finds the reasoning in Weisz persuasive. Requiring counsel to certify notification of clients
5 regarding their obligations may underscore the importance of compliance, without unduly burdening any party.
6 This Court will adopt the language used by the Weisz court at 6.

7
8 **CONCLUSION**

9 For the foregoing reasons and for good cause shown, the Court hereby orders consolidation of the
10 related actions, appoints Crossen as lead plaintiff and approves his selection of counsel, and orders certification
11 of notification regarding defendants’ duties to preserve evidence as set out in Weisz. [Docket ## 12, 14, 18,
12 19, 23 and 24.]

13 Counsel for Crossen is ordered to prepare, circulate for approval as to form and submit to the Court
14 an order of consolidation and an Amended, Consolidated Complaint, **all to be filed on or before December**
15 **8, 2003.**

16 **IT IS SO ORDERED.**

17
18 Dated: November 21, 2003

18 S/SUSAN ILLSTON
19 SUSAN ILLSTON
20 United States District Judge