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7

8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 WASA MEDICAL HOLDINGS,  
Individually and on Behalf of All Others }  
11 Similarly Situated, }

12 Plaintiff, }

13 vs. }

14 SORRENTO THERAPEUTICS, INC.,  
et al., }

15 Defendants. }

Case No. 3:20-cv-00966-AJB-DEB

CLASS ACTION

ANDREW R. ZENOFF'S  
OPPOSITION TO COMPETING  
LEAD PLAINTIFF MOTIONS

DATE: September 3, 2020  
TIME: 2:00 p.m.  
CTRM: 4A  
JUDGE: Hon. Anthony J. Battaglia

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1 Pursuant to the Court’s July 28, 2020 Order (*see* ECF No. 11), Andrew R.  
2 Zenoff respectfully submits this memorandum of law in opposition to the motions  
3 filed by: (i) Jing Li; (ii) Jonathan Hirsch, Abraham Robenzadeh, Randy Rodriguez,  
4 and Fraidon Sarkis (the “SRNE Investor Group”); (iii) Thomas Hammond; (iv)  
5 Guiyun Qin; (v) Mike Nguyen; and (vi) Dr. Dean Roller.

## 6 I. INTRODUCTION

7 Seven lead plaintiff motions were filed by investors seeking appointment as  
8 lead plaintiff pursuant to the Private Securities Litigation Reform Act of 1995  
9 (“PSLRA”).<sup>1</sup> The PSLRA directs courts to “adopt a presumption that the most  
10 adequate plaintiff” is the person that “has the largest financial interest in the relief  
11 sought by the class” *and* “otherwise satisfies the requirements of Rule 23 of the  
12 Federal Rules of Civil Procedure.” 15 U.S.C. §78u-4(a)(3)(B)(iii)(I). Only Mr.  
13 Zenoff presently satisfies both of these elements.

14 While Ms. Li claims to possess the largest financial interest in the relief sought  
15 by the class, she is not the presumptive lead plaintiff because she has not provided the  
16 Court with a basis to find that she satisfies the typicality and adequacy requirements of  
17 Rule 23. Ms. Li fails to set forth any meaningful qualifications or attributes she  
18 possesses that can be deemed as “prox[ies] for [her] financial and legal  
19 sophistication.” *City of Warren Police & Fire Ret. Sys. v. World Wrestling Entm’t*  
20 *Inc.*, 2020 WL 2614703, at \*2 (S.D.N.Y. May 22, 2020) (quoting *Perez v. HEXO*  
21 *Corp.*, 2020 WL 905753, at \*2 (S.D.N.Y. Feb. 25, 2020)).<sup>2</sup> This required evidentiary  
22 showing is fundamental because “[a]n examination of such evidence promotes  
23 consistency with the PSLRA’s aim of ensuring a lead plaintiff can ‘act like a “real”  
24

25 \_\_\_\_\_  
26 <sup>1</sup> Mr. Nguyen, Mr. Roller, and Mr. Hammond have filed notices of non-opposition  
27 to the competing motions. *See* ECF Nos. 13-14, 17. Ms. Qin filed a notice of  
28 withdrawal of her motion. *See* ECF No. 18.

<sup>2</sup> Unless otherwise noted, all emphasis is added and citations are omitted.

1 client, carefully choosing counsel and monitoring counsel’s performance to make sure  
2 that adequate representation [i]s delivered at a reasonable price.” *Id.*

3 Here, Ms. Li claims in her PSLRA Certification (notably only “[t]o the best of  
4 [her] current knowledge”) that her class period transactions consisted only of two  
5 purchases totaling nearly \$1 million of common stock made on a single day. *See* ECF  
6 No. 10-5. Making an investment of that magnitude while practicing basic  
7 diversification principles would require an eight-figure, if not nine-figure, fortune, as  
8 well as meaningful investment experience. Yet, Ms. Li says she is “a homemaker”  
9 with a mere three years of investment experience. *See* ECF No. 10-6 at ¶2.

10 Seeking to fill these logical gaps and hopefully obviate an opposition to Ms.  
11 Li’s motion, Mr. Zenoff’s counsel asked Ms. Li’s counsel to confirm some very basic  
12 details about Ms. Li’s application – ***all of which Ms. Li should have disclosed to the***  
13 ***Court in her lead plaintiff application under well-established PSLRA jurisprudence,***  
14 including: (1) Ms. Li’s full name as it appears on her brokerage account(s);<sup>3</sup> (2)  
15 whether the accounts in which Ms. Li traded Sorrento Therapeutics, Inc. securities are  
16 jointly-owned accounts or trusts; and (3) whether Ms. Li was granted any legal  
17 assignments or powers of attorney with respect to the Sorrento securities she claims as  
18 part of her own financial interest. *See* Declaration of Danielle S. Myers in Support of  
19 Andrew R. Zenoff’s Opposition to Competing Lead Plaintiff Motions (“Myers Opp.  
20 Decl.”), Ex. 1. ***Ms. Li’s counsel declined to provide any response to the***  
21 ***correspondence.*** Ms. Li’s unwillingness or inability to provide such basic  
22 information to assess the *bona fides* of her motion, disqualifies her.<sup>4</sup>

23 \_\_\_\_\_  
24 <sup>3</sup> As indicated in the letter, Mr. Zenoff’s counsel took proactive steps to attempt to  
25 discover additional information about Ms. Li before requesting confirmation of her  
26 full name and address. These attempts proved unsuccessful due to the prevalence of  
individuals who share Ms. Li’s first and last name in Singapore and surrounding  
countries.

27 <sup>4</sup> The failure to respond to Mr. Zenoff’s letter is ironic in light of Ms. Li’s counsel’s  
28 representation in an analogous situation to fill in gaps about a movant’s identity when,  
like here, the motion lacked basic details. *See Staublein v. ACADIA Pharm. Inc.*, No.  
3:18-cv-01647-AJB-BGS, ECF No. 30 at 2 (S.D. Cal. Oct. 24, 2018) (“Siry

1 In contrast to Ms. Li, Mr. Zenoff possesses the largest loss of any qualified  
2 movant and satisfies the adequacy and typicality requirements of Rule 23. Mr. Zenoff  
3 is a California-based entrepreneur and inventor with experience hiring and overseeing  
4 counsel. He also possesses the sort of financial and business sophistication few  
5 individual lead plaintiff movants can rival. Unlike Ms. Li (about whom what little is  
6 known raises more questions about her typicality and adequacy than answers), Mr.  
7 Zenoff has demonstrated both his ability and willingness to serve in a fiduciary  
8 position of trust to absent class members. Ms. Li's motion should be denied because  
9 she fails to satisfy Rule 23.<sup>5</sup>

10 Similarly, the SRNE Investor Group's submission confirms that it is an  
11 amalgamation of disparate class members who lack any pre-existing relationship to  
12 one another and who each claim financial interests smaller than that of Mr. Zenoff.  
13 This Court has joined the majority of courts in this District and Circuit in holding that  
14 groups such as the SRNE Investor Group should not be allowed to aggregate its  
15 members' losses to leapfrog a single individual who would otherwise be entitled to  
16 presumptive lead plaintiff status. *See Fialkov v. Celladon Corp.*, 2015 WL 11658717,  
17 at \*4 (S.D. Cal. Dec. 9, 2015). Accordingly, the SRNE Investor Group's motion  
18 should be denied.

19 Finally, the other movants with a smaller financial interest than Mr. Zenoff  
20 cannot trigger the presumption, or prove that Mr. Zenoff should not be appointed, and  
21 their motions should likewise be denied.

22  
23  
24 Investments' counsel, Robbins Geller Rudman & Dowd LLP ('Robbins Geller'),  
25 could have easily learned the truth had they simply contacted Pomerantz, Wood's  
26 counsel.'').

26 <sup>5</sup> If the Court is nonetheless inclined to consider Ms. Li's application, Mr. Zenoff  
27 respectfully requests that this Court order all movants interested in serving as a lead  
28 plaintiff to appear in a manner acceptable to the Court at the September 3, 2020  
hearing prepared to answer the Court's questions concerning their standing and ability  
to satisfy Rule 23. *See Myers Opp. Decl.*, Ex. 2.



1 **II. ARGUMENT**

2 To identify the presumptively most adequate plaintiff, the Court “must compare  
3 the financial stakes of the various plaintiffs and determine which one has the most to  
4 gain from the lawsuit.” *In re Cavanaugh*, 306 F.3d 726, 729-730 (9th Cir. 2002). It  
5 “must then focus its attention on *that* plaintiff and determine, *based on the*  
6 *information he has provided in his pleadings and declarations*, whether he satisfies  
7 the requirements of Rule 23(a), in particular those of ‘typicality’ and ‘adequacy.’” *Id.*  
8 at 730 (emphasis added and in original). “If the plaintiff with the greatest financial  
9 stake does not satisfy the Rule 23(a) criteria, the court must repeat the inquiry, this  
10 time considering the plaintiff with the next-largest financial stake, until it finds a  
11 plaintiff who is both willing to serve and satisfies the requirements of Rule 23.” *Id.*

12 Although two movants claim to have suffered a larger loss than Mr. Zenoff  
13 suffered, each fails to meet the Rule 23 typicality and/or adequacy requirement and  
14 cannot serve as lead plaintiff.

15 **A. Ms. Li Has Not Demonstrated that She Satisfies the Rule 23**  
16 **Requirements**

17 The PSLRA was passed to reduce lawyer-driven litigation and “curb the use  
18 of . . . figurehead plaintiffs who would serve the interests of plaintiffs’ lawyers, not  
19 the class.” *In re Network Assocs., Inc., Sec. Litig.*, 76 F. Supp. 2d 1017, 1047 (N.D.  
20 Cal. 1999). To that end, the statute “does not permit courts simply to ‘presume’ that  
21 the movant with ‘the largest financial interest in the relief sought by the class satisfies  
22 the typicality and adequacy requirements.’” *In re Cendant Corp. Litig.*, 264 F.3d 201,  
23 264 (3d Cir. 2001); *see In re Cable & Wireless, PLC Sec. Litig.*, 217 F.R.D. 372, 377  
24 (E.D. Va. 2003) (“[A] movant’s financial interest is just a beginning point, and courts  
25 acknowledge that they must also consider the movant’s ability and willingness to  
26 adequately represent the class.”). Indeed, the goal of the PSLRA’s lead plaintiff  
27 provision “is to locate a person or entity whose sophistication and interest in the  
28

1 litigation are sufficient to permit that person or entity to function as an active agent for  
2 the class.” *Cendant*, 264 F.3d at 266.

3 District courts around the country, including this Court, have increasingly  
4 required movants to proffer sufficient information about who they are to enable courts  
5 to determine that the movant possesses a baseline level of financial and legal  
6 sophistication sufficient to allow them to be an effective fiduciary to the entire class of  
7 investors. *See Camp v. Qualcomm Inc.*, 2019 WL 277360, at \*2-\*3 (S.D. Cal. Jan. 22,  
8 2019) (this Court finding that it was “difficult to determine whether [a movant] would  
9 indeed be a typical plaintiff for the class” when that movant “failed to include any  
10 basic details about himself, including where he lives or *who he is*”); *HEXO*, 2020 WL  
11 905753, at \*2-\*3 (finding “vague” declaration that nonetheless provided movant’s  
12 residence, education, and investment experience was not a sufficient “proxy for the  
13 movant’s financial and legal sophistication and, in turn, the likelihood that the movant  
14 will play a meaningful role in limiting the ‘lawyer-driven litigation that the PSLRA  
15 was designed to curtail’”); *World Wrestling Entm’t*, 2020 WL 2614703, at \*3  
16 (ordering interested movants to attend telephonic hearing; declining to appoint movant  
17 whose testimony revealed that he “lacks meaningful litigation experience . . .  
18 combined with career experience that appears to have no bearing on the management  
19 of securities litigation, undermine his claim that he can ‘meaningfully oversee and  
20 control the prosecution of this consolidated class action’”).<sup>6</sup>

21 \_\_\_\_\_  
22 <sup>6</sup> *See also Gross v. AT&T Inc.*, 2019 WL 7759222, at \*2 (S.D.N.Y. June 24, 2019)  
23 (disqualifying competing movant, finding that “[w]hile the Court agrees with Pro-  
24 Alpha that mere speculation is not enough to disqualify a prospective lead plaintiff, it  
25 is an undisputed fact that Pro-Alpha has failed to provide any information, beyond the  
26 name of a director, as to its business, management, structure, or its experience with  
27 securities litigation”); *Karp v. Diebold Nixdorf, Inc.*, 2019 WL 5587148, at \*5  
28 (S.D.N.Y. Oct. 30, 2019) (“Here, the Aroras, as individual investors, have provided  
the Court with little to go on with respect to their alleged capacity to manage this  
litigation. For example, the Certifications supplied by the Aroras note that they have  
not served as a lead plaintiff in a securities action within the past three years, and the  
Court has no knowledge as to whether the Aroras have ever had any experience  
serving as lead plaintiff prior to that. . . . Given this lack of information, the Court is  
skeptical that the Aroras are equipped to serve as lead plaintiff.”); *In re Gemstar-TV  
Guide Int’l, Inc. Sec. Litig.*, 209 F.R.D. 447, 452 (C.D. Cal. 2002) (finding that the

1 Ms. Li is not eligible for appointment because here, as was the case in  
 2 *Qualcomm, HEXO, In re Boeing Co. Aircraft Sec. Litig.*, 2019 WL 6052399 (N.D. Ill.  
 3 Nov. 15, 2019), and *World Wrestling Entm't*, the record is devoid of the requisite  
 4 information with which the Court could in any meaningful way gauge her financial  
 5 and legal sophistication, much less conclude that Ms. Li is adequate to lead the  
 6 putative class. See ECF No. 10-6. As a preliminary matter, the Court has been  
 7 provided no evidence about Ms. Li other than she is a 47-year old homemaker living  
 8 in Singapore<sup>7</sup> who has invested in the securities markets for three years and who has  
 9 an unspecified 2-year degree from “Singapore,” and invested ***nearly \$1 million, in a***  
 10 ***single stock - on a single day***. See ECF Nos. 10-3; 10-6 at ¶2. This dearth of relevant  
 11 available information raises questions as to whether Ms. Li can ““meaningfully  
 12 oversee and control the prosecution of this consolidated class action,”” and  
 13 ““monitor[] counsel’s performance to make sure that adequate representation [i]s  
 14 delivered.”” *World Wrestling Entm't*, 2020 WL 2614703, at \*2-\*3; see also *Boeing*,  
 15 2019 WL 6052399, at \*8 n.10 (“[I]t is incumbent on the Wangs to make a preliminary

16  
 17 “record contains no evidence that [the individual movants] are competent to serve as  
 18 lead plaintiffs” or “to supervise the . . . attorneys representing them”); *Clair v.*  
 19 *DeLuca*, 232 F.R.D. 219, 226-27 (W.D. Pa. 2005) (finding “no evidence that  
 20 [individual lead plaintiff movants] are the type of sophisticated investor who can  
 21 control a multi-million dollar class action”); *Piven v. Sykes Enters., Inc.*, 137 F. Supp.  
 22 2d 1295, 1304-05 (M.D. Fla. 2000) (lack of information concerning plaintiff’s  
 “identity, resources, and experience” prevented appointment as lead plaintiff); *Pirelli*  
*Armstrong Tire Corp. Retiree Med. Benefits Tr. v. LaBranche & Co.*, 229 F.R.D. 395,  
 417 (S.D.N.Y. 2004) (“While the size, available resources or even experience of a  
 candidate are not dispositive factors in appointing a lead plaintiff, they are nonetheless  
 relevant to reaching a determination as to whether a candidate will be capable of  
 adequately protecting the interests of the class.”).

23 <sup>7</sup> If Ms. Li’s Certification was executed outside the United States (as it appears that  
 24 her Declaration was), the Certification is legally defective because it lacks the  
 25 necessary “penalty of perjury under the laws of the United States of America”  
 26 language required by 28 U.S.C. §1746. That defect provides a sufficient independent  
 27 basis to deny her motion. See *Nasin v. Hongli Clean Energy Techs. Corp.*, 2017 WL  
 28 5598214, at \*3 (D.N.J. Nov. 21, 2017) (denying lead plaintiff application where  
 movants’ PSLRA declarations lacked the required language under 28 U.S.C. §1746,  
 rejecting contention that “the missing language in the PSLRA certifications as a  
 technicality that was cured with its amended filing” because “it still stands that such  
 filing was late”).

1 showing of their adequacy to serve as representatives of the putative class and their  
2 proffer of a *facially incredible explanation of their wealth*, unsupported by any  
3 evidence, convinces the court that that the Wangs are not able or willing to carry out  
4 the duties of a lead plaintiff in a securities fraud class action.”). The need for basic  
5 evidence regarding Ms. Li is further compounded by the fact that she is only able to  
6 affirm her class period transactions in Sorrento securities “[t]o the best of [her] current  
7 knowledge.” See ECF No. 10-5 at ¶5. All nine of the other class members who  
8 submitted PSLRA Certifications with their lead plaintiff motions in this case were  
9 able to affirm, without equivocation, their class period transactions, as required by the  
10 PSLRA. See ECF Nos. 4-2 at ¶4; 5-4 at ¶4; 6-3 at ¶5; 8-3 at ¶5; 9-4 at ¶4; see  
11 generally 15 U.S.C. §78u-4(a)(2)(A).

12 Hoping to negate the need for an opposition entirely, Mr. Zenoff’s counsel sent  
13 a meet-and-confer letter to Ms. Li’s counsel on July 30, 2020 seeking clarity on basic  
14 details of Ms. Li’s application and candidacy:

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David A. Rosenfeld  
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July 30, 2020

VIA E-MAIL

Jeremy A. Lieberman  
POMERANTZ LLP  
600 Third Avenue  
New York, NY 10016

Re: *Wasa Medical Holdings v. Sorrento Therapeutics, Inc.*, No. 3:20-cv-00966 (S.D. Cal.)

Dear Jeremy:

Jing Li’s lead plaintiff motion does not provide sufficient information to enable the Court or other movants to determine whether it is appropriate for Jing Li to serve as the sole fiduciary for the putative class. Accordingly, on behalf of our client Andrew R. Zenoff, we respectfully request that you provide the following information by August 4, 2020, to allow us sufficient time to ascertain whether an opposition brief is warranted:

- Ms. Li’s full name and address so a basic background and prior litigation search can be conducted in light of the fact that Jing Li is an extremely common name in China, Hong Kong, and Singapore where Ms. Li currently resides.
- Please confirm Jing Li’s full name as it appears in the name of the account(s) in which the Sorrento securities at issue traded. Please state whether any such account(s) is a joint account or trust. Please state whether Jing Li received any assignments in connection with the Sorrento securities or this lawsuit.
- Ms. Li’s declaration states that she “approved” Pomerantz as her designated lead counsel. ECF No. 10-6 at ¶3. Please identify if any other law firm(s) are working with Jing Li, will be paid any remuneration in this case if it is successful, and/or referred Ms. Li to Pomerantz and the underlying details concerning the nature of that referral and/or any such arrangements.

Regards,



DAVID A. ROSENFELD

Case#4819-6845-9462.v1-7/30/20  
58 South Service Road Suite 200 Melville, NY 11747 Tel 631-367-7100 Fax 631-367-1173 rgdlaw.com

Myers Opp. Decl., Ex. 1.

***Ms. Li’s counsel ignored the letter.*** This is troubling. A movant’s reluctance to provide additional information at this early stage of a case makes “clear that they place priority on their privacy over leading this litigation,” and “casts further doubt on their adequacy because it suggests that they will be unable or unwilling to carry out the duties of a lead plaintiff, which include responding to discovery and providing deposition testimony.” *Boeing*, 2019 WL 6052399, at \*7-\*8 “As a result, it would be imprudent to appoint them as Lead Plaintiff.” *Id.*

1           The basic information requested in the letter could have ensured that the  
2 putative class is in good hands with Ms. Li at the helm. Without it, the putative class  
3 is at risk of a myriad potential landmines which could distract Ms. Li and/or  
4 undermine the class’s sole appointed fiduciary. **First**, if Ms. Li’s losses were actually  
5 incurred by a joint spousal account, legal trust, or altogether different entity type, her  
6 standing to assert these losses individually is implicated as well as whether her motion  
7 was made on behalf of the correct entity, and whether she has individual authority to  
8 execute the Certification on behalf of any other beneficial owners of the securities at  
9 issue.<sup>8</sup> Along those same lines, if Ms. Li’s financial interest is the product of someone  
10 else’s transactions, it will implicate questions of whether Ms. Li received any legal  
11 assignments and powers of attorney, and if so, whether they are valid under  
12 Singaporean law to give her standing to sue on their behalf in satisfaction of Ninth  
13 Circuit law. *See id.*

14           **Second**, the Court’s ability to ascertain Ms. Li’s claimed financial interest is  
15 undermined – not only by the qualifier in her own Certification – but by the logical  
16 gap her Declaration fails to fill in. It is plain that unless a lead plaintiff candidate  
17 decides “to eschew all tenets of financial diversification and to invest all of their  
18 wealth in the shares of a single company,” that movant’s claim to have invested huge  
19 sums of money in a single stock on a single day necessarily “implies the existence of  
20 substantially greater wealth.” *Boeing*, 2019 WL 6052399, at \*8 n.9. Unless Ms. Li is

21 <sup>8</sup> *See In re Netflix, Inc., Sec. Litig.*, 2012 WL 1496171, at \*4-\*5 (N.D. Cal. Apr. 27,  
22 2012) (finding movant does not satisfy the typicality requirement when “colorable  
23 issue” of standing was raised after she moved for appointment as lead plaintiff but was  
24 “not actually the legal entity who held the account on which her calculation of losses  
25 [was] based,” rather a “Trust [was]”); *Weisz v. Calpine Corp.*, 2002 WL 32818827, at  
26 \*6 (N.D. Cal. Aug. 19, 2002) (“Northern Oak provides no information concerning the  
27 nature and circumstances under which Northern Oak purchased Calpine stock during  
28 the Class Period. Nor is there any evidence demonstrating that Northern Oak  
coordinated and selected the investments of its clients, as opposed to merely executing  
its clients’ requests. Although Hickam-Makadia clearly discusses the evidentiary  
infirmity of Northern Oak-Tomei’s motion for appointment as lead plaintiff, the latter  
makes no attempt to present any evidence on these points.”); *see generally W.R. Huff  
Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100 (2d Cir. 2008) (finding  
investment manager lacked standing to bring securities claims).

1 able to “provide additional information that would offer some confirmation of [her]  
2 ability to plunk down \$[one] million on a single stock” on a single day, her claimed  
3 financial interest “is too incredible to accept at face value.” *Id.* at \*8.<sup>9</sup>

4 At present, to appoint Ms. Li in this high-profile pandemic-related litigation  
5 would have potentially disastrous effects for the class by prejudicing the class’s case  
6 in front of a jury and undermining the ability of that (impaired) lead plaintiff to  
7 negotiate vigorously on behalf of the class. *See Boeing*, 2019 WL 6052399, at \*7  
8 (“These are significant responsibilities in any case, and all the more so in one, like this  
9 one, arising from highly publicized global tragedies.”). The harm to absent class  
10 members in the event of denial of class certification due to a class representative who  
11 is either subject to unique defenses, inadequate, or lacks standing is certainly not  
12 speculative, particularly in light of recent Supreme Court jurisprudence that could  
13 arguably make it impossible to revive absent class members’ claims if any of these  
14 unknown individuals were to withdraw as the lead plaintiff or the class representative  
15 after such claims have become time-barred. *China Agritech, Inc. v. Resh*, \_ U.S.\_,  
16 138 S. Ct. 1800, 201 L. Ed. 2d 123 (2018). It makes little sense to expose any class to  
17 these risks where, as here, Mr. Zenoff, a typical and adequate in-State business leader  
18 stands ready and willing to serve as a lead plaintiff and his appointment will insulate  
19 the class from such threats.

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24 <sup>9</sup> Counsel for Ms. Li is aware that a supplemental showing is required when open  
25 questions concerning a movant’s claimed business or investment activities cast doubt  
26 on that movant’s adequacy. *See Gross v. AT&T, Inc.*, No. 1:19-cv-02892-VEC, ECF  
27 No. 45 at 4 (S.D.N.Y. June 14, 2019) (Mr. Li’s counsel prevailing on argument that  
28 “opaque” non-US movant cannot be appointed absent additional information “as to,  
*inter alia*, the ***origins of its capital***, the qualifications of its Director to manage this  
litigation, or the identities of the true decision-makers for [the movant.]”); *AT&T*,  
2019 WL 7759222, at \*2 (appointing Pomerantz’ client and “declin[ing] to appoint as  
lead-plaintiff an entity that lacks basic transparency even at this juncture”).

**B. The SRNE Investor Group Is an Improper Amalgamation of Unrelated Individuals Brought Together for the Sole Purpose of Claiming the Largest (Combined) Financial Interest**

While Mr. Zenoff claims the next-largest individual loss of any class member seeking appointment as lead plaintiff, the SRNE Investor Group is able to claim a larger *combined* loss if it aggregates its four members’ losses:

MOVANT	CLAIMED LOSS
<b>Andrew R. Zenoff</b>	<b>\$195,501.91</b>
<del>Thomas Hammond</del>	<del>\$195,343.18</del>
Fraidon Sarkis	\$177,002.25
Jonathan Hirsch	\$75,225.75
Abraham Robenzadeh	\$67,017.15
Randy Rodriguez	\$61,663.67
<del>Guivun Qin</del>	<del>\$170,195.88</del>
<del>Mike Neuen</del>	<del>\$107,019.74</del>
<del>Dr. Dean Roller</del>	<del>\$78,003</del>

The SRNE Investor Group – comprised of a student in Canada, a real estate professional in New York, a Coloradan consumer finance specialist, and an internet businessman from Illinois – is an assemblage of individuals with no pre-existing relationships with each other that were seemingly brought together by their lawyers for the sole purpose of satisfying the largest financial interest requirement.

While the PSLRA surely contemplates the appointment of a “person or group of persons” as lead plaintiff, (15 U.S.C. §78u-4(a)(3)(B)(iii)(I)), “[c]ourts have *uniformly* refused to appoint as lead plaintiff groups of unrelated individuals, brought together for the sole purpose of aggregating their claims in an effort to become the presumptive lead plaintiff.” *In re Cloudera, Inc. Sec. Litig.*, 2019 WL 6842021, at \*6 (N.D. Cal. Dec. 16, 2019) (quoting *Gemstar-TV Guide*, 209 F.R.D. at 451). The reason is simple: “allow[ing] lawyers to designate unrelated plaintiffs as a “group” and aggregate their financial stakes would allow and encourage lawyers to direct the litigation” – an outcome that would contravene Congress’s intention to appoint “a single, strong lead plaintiff to control counsel and the litigation.” *Network Assocs.*, 76



1 F. Supp. 2d at 1023, 1025; *Ruland v. InfoSonics Corp.*, 2006 WL 3746716, at \*4 (S.D.  
2 Cal. Oct. 23, 2006) (“Appointment of lead counsel should not depend on which law  
3 firm can accumulate the most class members.”).

4 Courts within this District and Circuit have disallowed counsel to aggregate  
5 unrelated class members’ losses for the purpose of claiming the largest financial  
6 interest. *See Duncan v. Vical Inc.*, No. 3:13-cv-02628-DMS-RBB, ECF No. 26 at 5-7  
7 (S.D. Cal. Feb. 26, 2014) (finding that a group of unrelated investors failed to meet the  
8 adequacy requirement of Rule 23(a) and that a single, individual investor was the most  
9 adequate plaintiff because “[counsel’s] involvement in the creation of the [g]roup”  
10 raises concerns regarding the group’s ability to “fairly and adequately represent[] the  
11 interests of the class”); *InfoSonics*, 2006 WL 3746716, at \*3 (“If courts permit  
12 lawyers to designate unrelated plaintiffs as a ‘group’ and aggregate their financial  
13 stakes, the purpose of the PSLRA would be undermined.”); *In re Peregrine Sys. Sec.*  
14 *Litig.*, 2002 WL 32769239, at \*13 (S.D. Cal. Oct. 9, 2002) (“nothing in the PSLRA  
15 authorizes [lead plaintiff movants] to consolidate their losses for the sole purpose of  
16 leapfrogging other movants”).<sup>10</sup>

17 And in *Celladon*, this Court considered the issue of aggregating multiple class  
18 members’ losses for the purpose of calculating financial interest. 2015 WL 11658717,

19 \_\_\_\_\_  
20 <sup>10</sup> *See also In re Stitch Fix, Inc. Sec. Litig.*, 393 F. Supp. 3d 833, 836 (N.D. Cal.  
21 2019) (declining to appoint group of unrelated individuals); *Cloudera*, 2019 WL  
22 6842021, at \*7; *Crihfield v. CytRx Corp.*, 2016 WL 10587938, at \*4 (C.D. Cal. Oct.  
23 26, 2016) (same); *Gemstar*, 209 F.R.D. at 451 (same); *Isaacs v. Musk*, 2018 WL  
24 6182753, at \*2 (N.D. Cal. Nov. 27, 2018) (“courts have also been skeptical of  
25 ‘artificial’ groups”); *Bodri v. Gopro, Inc.*, 2016 WL 1718217, at \*4 (N.D. Cal. Apr.  
26 28, 2016) (“Northern District of California courts have generally found that  
27 ‘appointing a group of unrelated investors undercuts the primary purpose of the  
28 PSLRA: to eliminate lawyer-driven litigation.”); *Netflix*, 2012 WL 1496171, at \*4  
29 (“the courts of this circuit uniformly refuse to aggregate the losses of individual  
30 investors with no apparent connection to each other aside from their counsel”);  
31 *Eichenholtz v. Verifone Holdings, Inc.*, 2008 WL 3925289, at \*7 (N.D. Cal. Aug. 22,  
32 2008) (declining to aggregate the losses of groups of unrelated entities because doing  
33 so would be “acting contrary to the purposes of the PSLRA”); *Tsirekidze v. Syntax-*  
34 *Brilliant Corp.*, 2008 WL 942273, at \*3 (D. Ariz. Apr. 7, 2008) (“when unrelated  
35 investors are cobbled together, the clear implication is that counsel, rather than the  
36 parties, are steering the litigation”).

1 at \*4. Noting that there “was no pre-existing relationship between the individuals that  
 2 now comprise the group,” this Court specifically declined to allow disparate class  
 3 members to aggregate their losses in order to claim the largest financial interest over a  
 4 qualified individual movant:

5        Though counsel for the Celladon Group persuasively argued the group  
 6 members could work together cohesively and have the wherewithal to  
 7 oversee counsel and appropriately litigate the class members’ claims,  
 8 appointment of an individual as lead plaintiff alleviates any concerns  
 9 regarding cohesiveness and group decision making. Moreover, the  
 10 Celladon Group’s joint declaration confirms there was no pre-existing  
 11 relationship between the individuals that now comprise the group.  
 12 *Niederklein v. PCS AdventuresA.com, Inc.*, No. 1:10-CV-00479, 2011  
 13 WL 759553, at \*4 (D. Idaho Feb. 24, 2011) (finding appointment of a  
 14 group inconsistent with the purpose of the PSI RA when the record was  
 15 “devoid of evidence demonstrating the group is cohesive and not purely  
 16 lawyer-driven”). Absent lead plaintiff movants with significant  
 17 individual losses, the Court would likely favor appointment of the  
 18 Celladon Group given their substantial aggregate financial interests in  
 19 this litigation. However, given the policy of the PSI RA, and the  
 20 existence of two individual proposed movants with significant financial  
 21 interests, the Court declines to aggregate the Celladon Group’s  
 22 individual losses.

23 *Id.*

24        While the SRNE Investor Group may highlight parts of its Joint Declaration to  
 25 advocate for aggregation, the Joint Declaration’s largely conclusory or rhetorical  
 26 statements do nothing to remedy the Group’s inadequacy or to materially distinguish it  
 27 from the unrelated groupings that have been rejected by this Court and others.  
 28 *Compare, e.g.,* ECF No. 5-6 with *Celladon*, 2015 WL 11658717, at \*4; *see also* *Stitch*  
*Fix*, 393 F. Supp. 3d at 835-36 (“Nothing in the two joint declarations submitted by  
 the group demonstrates that it is the group members, and not the lawyers, who are  
 driving their lead plaintiff application.”). Indeed, beyond the Joint Declaration’s  
 aspirational assurances about the SRNE Investor Group members being able to work  
 together in the future, the Joint Declaration is entirely silent as to *why* the group was  
 formed or *why* four individual movants – located in two different countries and three  
 different states within the United States – are necessary to lead this case, or *why* Mr.  
 Sarkin (whose financial interest is more than twice larger than that of each of his

1 fellow group members) would consent to diluting his decision-making authority by  
 2 agreeing to joint this group.<sup>11</sup> “Simply stated, [the SRNE Investor Group’s]  
 3 conclusory declaration has little or no substance.” *Eichenholtz*, 2008 WL 3925289, at  
 4 \*9.<sup>12</sup>

5 Consistent with *Celladon*, and the clear consensus within this District and  
 6 Circuit, the Court should deny the SRNE Investor Group’s motion as it is an artificial  
 7 amalgamation of unrelated investors formed solely by lawyers to achieve the largest  
 8 financial interest designation.

9 **C. The Presumption of “Most Adequate Plaintiff” Which Lies**  
 10 **in Favor of Mr. Zenoff Cannot Be Rebutted**

11 Because the movants who claim a larger financial interest do not satisfy the  
 12 PSLRA’s requirements, the Court must “repeat the inquiry, this time considering the  
 13 plaintiff with the next-largest financial stake.” *Cavanaugh*, 306 F. 3d at 730. With  
 14 losses of nearly \$200,000, Mr. Zenoff is that movant.

15 <sup>11</sup> The SRNE Investor Group’s purported mechanism to oversee the litigation  
 16 illustrates the Group’s inadequacy. While the SRNE Investor Group members  
 17 speculate that they “do not anticipate that any disagreements will arise,” and that they  
 18 aspirationally hope “to reach a consensus with respect to all decisions arising out of  
 19 this action” they have agreed to resolve any disagreement by a “majority vote,” and  
 20 “[i]n the event of a ‘tie,’ [they] agree that the total calculated loss of group members  
 21 shall serve as the tiebreaker.” ECF No. 5-6 at ¶13. This decision-making structure is  
 22 problematic as the three group members asserting the smallest losses (Mr. Hirsch, Mr.  
 23 Robenzadeh, and Mr. Rodriguez) would be empowered to override the vote by the  
 24 member with the largest loss (Mr. Sarkis). *Id.* This would turn the statute on its head,  
 25 enabling movants with the smallest financial interest to control the lead plaintiff’s  
 26 decisions. 15 U.S.C. §78u-4(a)(3)(B)(iii).

22 <sup>12</sup> *See also CytRx Corp.*, 2016 WL 10587938, at \*4 (“The Joint Declaration, totaling  
 23 ten paragraphs of which six merely aver the residence and occupation of the members,  
 24 falls far short of convincing the Court the group is anything but an effort to engage in  
 25 “lawyer-driven litigation.”); *Cloudera*, 2019 WL 6842021, at \*7 (“In *Isaacs*, Judge  
 26 Chen declined to appoint a lead plaintiff group that was unable to substantiate its  
 27 claim that the group members would be able to work well together. . . . The group had  
 28 provided a ‘joint declaration’ that merely confirmed that the members were ‘unrelated  
 and were introduced to one another by their lawyers.’ . . . As in the instant case, Judge  
 Chen found that the group members were connected by nothing more than ‘*one joint  
 call prior to filing the motion for appointment.*’”); *InfoSonics*, 2006 WL 3746716, at  
 \*4 (“Here, it does not appear that there is any real preexisting relationship between or  
 among the various members of the individual groups. The tie that binds the members  
 of each group is representation by the same lawyers.”).

1 Aside from having the largest financial interest of any remaining movant, the  
2 PSLRA requires that, to be designated the presumptively most adequate plaintiff, Mr.  
3 Zenoff must also “otherwise satisf[y] the requirements of Rule 23.” 15 U.S.C. §78u-  
4 4(a)(3)(B)(iii)(cc). There is no question that Mr. Zenoff satisfies these requirements.  
5 See ECF No. 9-6 at ¶¶3-6. Indeed, “other than pointing out [his] relatively low[er]  
6 financial stake in the litigation,” it is unlikely that the other movants will make any  
7 argument against Mr. Zenoff’s appointment. *Syntax-Brillian*, 2008 WL 942273, at \*5.

8 Moreover, Mr. Zenoff has provided the Court with a Declaration setting forth  
9 his ability and willingness to serve as a lead plaintiff, setting forth his 20 plus years of  
10 investing experience, his prior experience in hiring and overseeing counsel, and his  
11 track record as a Silicon Valley business leader who operates a trusted maternity  
12 brand. See ECF No. 9-6. Mr. Zenoff’s Declaration likewise sets forth his diligence  
13 with respect to his selection of counsel. *Id.* at ¶11. Mr. Zenoff is the exact type of  
14 judicious and diligent lead plaintiff envisioned by the PSLRA.

15 **D. The Remaining Movants Do Not Qualify for the PSLRA’s**  
16 **Presumption**

17 The remaining movants claim smaller losses than Mr. Zenoff. Consequently,  
18 the Court cannot consider their motions unless the presumption in favor of  
19 appointment of Mr. Zenoff as lead plaintiff is rebutted. See *Cendant*, 264 F.3d at 268.  
20 Accordingly, because Mr. Zenoff is willing to serve and satisfies Rule 23’s  
21 requirements, the competing motions should be denied.

22 **III. CONCLUSION**

23 None of the competing movants satisfy *all* of the PSLRA’s requirements for  
24 appointment as lead plaintiff. Accordingly, their motions should be denied.

25 DATED: August 11, 2020

Respectfully submitted,

26 s/ Danielle S. Myers  
27 \_\_\_\_\_  
DANIELLE S. MYERS

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