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

IN RE: NETFLIX, INC., SECURITIES ) Case No. 12-0225 SC  
LITIGATION )  
) ORDER CONSOLIDATING CASES  
) AND APPOINTING LEAD  
) PLAINTIFF AND LEAD COUNSEL

\_\_\_\_\_  
This Order Also Relates To: )  
)  
ALL CONSOLIDATED ACTIONS )  
)  
and )  
)  
FRANK J. FISH, ) Case No. 12-1030 LHK  
)  
Plaintiff, )  
)  
v. )  
)  
NETFLIX, INC., et al., )  
)  
Defendants. )  
\_\_\_\_\_

I. INTRODUCTION

This case is a putative securities class action arising from allegations of false and misleading statements in violation of the federal securities laws. Now before the Court are six competing motions to appoint the proposed class's lead plaintiff and approve lead counsel, as well as a motion to consolidate Fish v. Netflix, Inc., et al., Case No. 12-1030-LHK (the "Fish action"). Having reviewed the papers and heard oral argument, the Court GRANTS the

1 motion of Arkansas Teacher Retirement System ("Arkansas Teacher")  
2 and State-Boston Retirement System ("Boston") (collectively,  
3 "Arkansas Teacher-Boston") and appoints them as Lead Plaintiffs.  
4 Accordingly, the Court DENIES the other five motions to serve as  
5 lead plaintiff. The Court APPROVES Arkansas Teacher-Boston's  
6 selection of the firm of Labaton Sucharow LLP ("Labaton Sucharow")  
7 as Lead Counsel, with Zelle Hofmann Voelbel & Mason LLP ("Zelle  
8 Hofmann") serving as Local Counsel. The Court GRANTS the motion to  
9 consolidate brought by Frank J. Fish, Anita and Roger Wilson, and  
10 Nancy Comstock (collectively, the "Fish Group").

11  
12 **II. BACKGROUND**

13 Defendants Reed Hastings, David B. Wells, Theodore A.  
14 Sarandos, Leslie J. Kilgore, and Neil D. Hunt are officers of  
15 Defendant Netflix, Inc. (collectively, "Netflix"). Netflix  
16 provides a popular online service that allows subscribers to watch  
17 films and other content streamed over the Internet and, in the  
18 United States, to have such content home-delivered through the  
19 mail. The Plaintiffs and Movants in this case are investors who  
20 held shares of Netflix stock between December 20, 2010 and October  
21 24, 2011 (the "class period"). They allege that Netflix concealed  
22 negative trends in its business, particularly regarding its  
23 relationships with content providers, and that the revelation of  
24 these negative trends resulted in a drop in Netflix's stock price  
25 and, thus, losses to investors.

26 On January 13, 2012, the City of Royal Oak Retirement System  
27 became the first investor to file suit against Netflix (the "City  
28

1 of Royal Oak action"). ECF No. 1.<sup>1</sup> On the same day, plaintiff's  
2 counsel in that case published notice of the action in the Business  
3 Wire, as required by the Private Securities Litigation Reform Act  
4 ("PSLRA"). See Stocker Decl. Ex. C.<sup>2</sup> The notice informed  
5 investors of the pendency of the action and of the class period,  
6 generally described the factual allegations and claims, and told  
7 potential class members that they had sixty days to move this Court  
8 to be appointed lead plaintiff. Id.

9 Seven such motions followed. One of them, filed by Irina  
10 Belenkova, was later withdrawn. ECF Nos. 25, 67. The six  
11 remaining motions are now pending before the Court. The motions  
12 were filed by: (1) Asbestos Workers Philadelphia Pension Fund  
13 ("Asbestos Workers"), ECF No. 17; (2) Duane Labbee ("Labbee"), ECF  
14 No. 22; (3) the Fish Group, ECF No. 23; (4) LBBW Asset Management  
15 Investmentgesellschaft mbH and the Police and the Fire Retirement  
16 System of the City of Detroit (collectively, the "Institutional  
17 Investors"), ECF No. 28; (5) Arkansas Teacher-Boston, ECF No. 32;  
18 and (6) Alaska Electrical Pension Fund and Locals 302 and 612 of  
19 the International Union of Operating Engineers-Employers

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20 <sup>1</sup> Shortly afterwards, two other putative class actions were filed  
21 in this district. The Court related and consolidated one of those  
22 actions into the above-captioned action ("In re Netflix"). ECF No.  
23 16. The other action was brought by movant Frank J. Fish and, as  
24 explained in Section IV.A infra, shall be consolidated with In re  
25 Netflix pursuant to this Order. In addition to the class actions,  
26 the Court is aware that at least four derivative lawsuits have been  
27 filed, two in this Court and two in the California Superior Court  
28 for the County of Santa Clara. ECF No. 52. One of the federal  
derivative lawsuits was already consolidated with this action. ECF  
No. 74. The Court does not presently have before it any motions  
concerning the other derivative lawsuits and does not address them  
here.

<sup>2</sup> Attorney Michael W. Stocker of Labaton Sucharow filed a  
declaration in support of Arkansas Teacher-Boston's motion. ECF  
No. 37 ("Stocker Decl.").

1 Construction Industry Retirement Trust (collectively, "Alaska  
2 Electrical"), ECF No. 44. After the first round of motions, three  
3 movants -- the Institutional Investors, Alaska Electrical, and  
4 Asbestos Workers -- filed statements of non-opposition to Arkansas  
5 Teacher-Boston's motion. ECF Nos. 58, 59, 61. Additionally,  
6 Labbee has effectively withdrawn by failing to make any filings  
7 after his first or appear at oral argument. Thus, only two  
8 contenders remain: the Fish Group and Arkansas Teacher-Boston.<sup>3</sup>

9 The Fish Group consists of three individual investors, Frank  
10 J. Fish, Anita and Roger Wilson, and Nancy Comstock.<sup>4</sup> Fish  
11 certifies that he suffered a loss of \$865,977.00. Houston Decl. ¶  
12 4, Ex. B.<sup>5</sup> The Wilsons certify that they suffered losses of  
13 \$617,963.44. Id. ¶ 6, Ex. C. Comstock certifies that she suffered  
14 losses of \$583,855.85. Id. ¶ 8, Ex. D. All three certifications  
15 were made on forms bearing the logo and name of Newman Ferrara LLP  
16 ("Newman Ferrara"), a law firm whose connection to this lawsuit is  
17 presently unknown. See id. Exs. B, C, D. Comstock's certification  
18 was signed by both Comstock and Roy Hurst, and offers as proof of  
19 Comstock's losses a printout of a website displaying the trading  
20 record for an account held by "Nancy Comstock TTEE." Id. Ex. D.  
21 Comstock declares that she and Hurst are married; that the account

22 \_\_\_\_\_  
23 <sup>3</sup> Their motions are fully briefed. ECF Nos. 23 ("Fish Mot."), 32  
24 ("ATB Mot.") 60 ("Fish Response"), 62 ("ATB Response"), 69 ("Fish  
Reply"), 73 ("ATB Reply").

25 <sup>4</sup> The Fish Group treats Anita and Roger Wilson, a married couple,  
26 as a single investor. Because the Court's decision in this matter  
is unaffected by whether the Fish Group contains three or four  
members, the Court accepts this figure.

27 <sup>5</sup> Attorney Matthew M. Houston of Harwood Feffer LLP ("Harwood  
28 Feffer") filed a declaration in support of the Fish Group's motion.  
ECF No. 23 ("Houston Decl.").

1 in which they traded Netflix stock is the Nancy Comstock Trust  
2 ("Comstock Trust"); that Comstock is the trustee of the Comstock  
3 Trust; that Hurst is the beneficiary of the trust and holds a Power  
4 of Attorney over the account; and that "[t]he account was  
5 principally set up in its present form for estate planning  
6 purposes." Comstock Decl. ¶¶ 2-3.<sup>6</sup> Taken together, the Fish Group  
7 claims losses of \$2,067,796.29. Houston Decl. ¶ 9. None of the  
8 Fish Group's members have ever served or sought to serve as lead  
9 plaintiff in a securities class action. See id. Exs. B, C, D. The  
10 members of the Fish Group admit that they had no relationship  
11 before this litigation. Fish Reply at 4-5.

12 Arkansas Teacher-Boston consists of two institutional  
13 investors. Their counsel has provided a calculation of their  
14 respective losses using both the "First-In, First-Out" ("FIFO") and  
15 the "Last-In, First-Out" ("LIFO") accounting methods. Stocker  
16 Decl. Ex. B. According to these calculations, Arkansas Teacher  
17 suffered losses of \$993,921.31 under either accounting method,

18 \_\_\_\_\_  
19 <sup>6</sup> After Arkansas Teacher-Boston filed its Response, Comstock and  
20 Hurst jointly executed a declaration supporting the Fish Motion.  
21 ECF No. 72 ("Comstock Decl."). Arkansas Teacher-Boston, pointing  
22 to the PSLRA's sixty-day period to file motions for appointment as  
23 lead plaintiff, objects to the Comstock Declaration as an untimely  
24 supplement to the claims and information contained in the initial  
25 Fish Motion. ATB Reply at 4 n.6 (citing Miller v. Dyadic Int'l,  
26 Inc., No. 07-80948-CIV, 2008 WL 2465286, at \*5 (S.D.Fla. Apr. 18,  
27 2008)). But Miller, like other cases concerning supplementation,  
28 focuses on the practice of supplementing initial motions to  
manipulate the size of a group or its losses, not "supplements"  
that merely clarify earlier statements. See, e.g., In re Enron  
Corp. Sec. Litig., 206 F.R.D. 427, 440 (S.D. Tex. 2002) (finding  
that filing of additional information after sixty-day period "did  
not violate the spirit or purpose of the PSLRA and its express time  
deadlines" because requisite information about group member had  
been included in earlier filing and therefore amendment "did not  
'supplement' the group"). The Court therefore accepts the Comstock  
Declaration, although, as detailed in Section IV.B.1 infra, the  
declaration does not cure the defects in the Fish Group's motion.

1 while Boston suffered losses of \$725,269.31 under the FIFO method  
2 and \$438,243.26 under the LIFO method. Id. Taken together,  
3 Arkansas Teacher-Boston claims losses of \$1,719,190.62 under the  
4 FIFO method or \$1,432,164.56 under the LIFO method. Id. Arkansas  
5 Teacher certifies that, in the last three years, it has sought to  
6 serve as lead plaintiff in federal securities class actions ten  
7 times and has been appointed six times. Id. Ex. A. Boston  
8 certifies that, in the last three years, it has sought to serve as  
9 lead plaintiff in federal securities class actions six times and  
10 has been appointed three times. Id. Arkansas Teacher and Boston  
11 represent that they had a pre-existing relationship before this  
12 litigation. ATB Mot. at 10; ATB Response at 11; ATB Reply at 8.

13

14 **III. LEGAL STANDARD**

15 Under the PSLRA, the Court "shall appoint as lead plaintiff  
16 the member or members of the purported plaintiff class that the  
17 court determines to be most capable of adequately representing the  
18 interests of the class members . . . in accordance with this  
19 subparagraph." 15 U.S.C. § 78u-4(a)(3)(B)(i). "The 'most capable'  
20 plaintiff -- and hence the lead plaintiff -- is the one who has the  
21 greatest financial stake in the outcome of the case, so long as he  
22 meets the requirements of [Federal Rule of Civil Procedure] 23."  
23 In re Cavanaugh, 306 F.3d 726, 729 (9th Cir. 2002).

24 The PSLRA directs district courts to appoint the lead  
25 plaintiff through a three-step process. In the first step, the  
26 first plaintiff to file an action covered by the PSLRA must  
27 publicize the pendency of the action, the claims made, the  
28 purported class period, and the right of other members of the

1 purported class to move to serve as lead plaintiff. In re  
2 Cavanaugh, 306 F.3d at 729.

3 In the second step, the district court identifies the  
4 presumptive lead plaintiff. Id. at 729-30. The PSLRA creates a  
5 rebuttable presumption that the lead plaintiff shall be the one  
6 who: (1) filed the first complaint or brought a motion for  
7 appointment of lead counsel in response to the publication of  
8 notice; (2) possesses the "largest financial interest" in the  
9 relief sought by the class; and (3) otherwise satisfies the  
10 requirements of FRCP 23. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(aa)-  
11 (cc). To determine the size of each movant's financial interest,  
12 "the court may select accounting methods that are both rational and  
13 consistently applied." In re Cavanaugh, 306 F.3d at 730 n.4. The  
14 district court's Rule 23 inquiry focuses on the requirements of  
15 "typicality" and "adequacy." Id. at 730.

16 In the third step, other candidates have the opportunity to  
17 rebut the presumption that the putative lead plaintiff identified  
18 in step two can adequately represent the class. Id. By statute,  
19 this presumption is rebuttable in only two ways: proof that the  
20 presumptive plaintiff either (1) will not fairly and adequately  
21 protect the interests of the class or (2) is subject to "unique  
22 defenses" that make the plaintiff unable to adequately represent  
23 the class. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa)-(bb). If the  
24 presumption is successfully rebutted, the district court must turn  
25 to the movant with the next-largest financial interest and repeat  
26 the process, continuing sequentially until it identifies the most  
27 capable plaintiff. In re Cavanaugh, 306 F.3d at 731.

28 Once a lead plaintiff is appointed, the PLSRA gives the lead

1 plaintiff the right, subject to court approval, to "select and  
2 retain counsel to represent the class." 15 U.S.C. § 78u-  
3 4(a)(3)(B)(v). "[I]f the lead plaintiff has made a reasonable  
4 choice of counsel, the district court should generally defer to  
5 that choice." Cohen v. U.S. Dist. Court, 586 F.3d 703, 712 (9th  
6 Cir. 2009).

7  
8 **IV. DISCUSSION**

9 **A. Consolidation**

10 "In securities actions where the complaints are based on the  
11 same public statements and reports[,] consolidation is appropriate  
12 if there are common questions of law and fact and the defendants  
13 will not be prejudiced." Wenderhold v. Cylink Corp., 188 F.R.D.  
14 577, 583 (N.D. Cal. 1999). In re Netflix and the Fish action are  
15 appropriate for consolidation. The operative complaints in both  
16 cases are based on the same public statements and reports, propose  
17 the same class period, set forth substantially identical legal  
18 claims and factual allegations, and name the same defendants.  
19 There has been no suggestion that consolidation will prejudice  
20 Netflix. Accordingly, the Court hereby CONSOLIDATES the Fish  
21 action with In re Netflix. The parties in the Fish action shall  
22 comply with the Court's previous consolidation order in In re  
23 Netflix. ECF No. 16.

24 **B. Appointment of Lead Plaintiff**

25 The first step of the PSLRA's lead-plaintiff selection process  
26 is for the plaintiff who filed the first class action under the  
27 statute to publicize the action. See In re Cavanaugh, 306 F.3d at  
28 729. This step was completed on January 13, 2012, when plaintiff's



1 counsel in the City of Royal Oak action published their notice in  
2 the Business Wire. The Court therefore proceeds to the second step  
3 of the selection process and "compare[s] the financial stakes of  
4 the various plaintiffs and determine[s] which one has the most to  
5 gain from the lawsuit." Id. at 730.

6 **1. The Fish Group**

7 The Fish Group stakes its claim to being the presumptive lead  
8 plaintiff on the aggregated losses of its three members, which they  
9 calculate to be roughly \$2 million. If accepted, this figure would  
10 surpass Arkansas Teacher-Boston's aggregated losses of roughly \$1.7  
11 million and make the Fish Group the presumptive lead plaintiff,  
12 assuming that the Fish Group could satisfy Rule 23. However, the  
13 courts of this circuit uniformly refuse to aggregate the losses of  
14 individual investors with no apparent connection to each other  
15 aside from their counsel. See, e.g., In re Network Assocs. Sec.  
16 Litig., 76 F. Supp. 2d 1017, 1019-1027 (N.D. Cal. 1999); Aronson v.  
17 McKesson HBOC, Inc., 79 F. Supp. 2d 1146, 1152-1154 (N.D. Cal.  
18 1999); Wenderhold v. Cylink Corp., 188 F.R.D. 577, 586 (N.D. Cal.  
19 1999). As one court recently explained:

20 The rationale of courts in declining to appoint a group  
21 of unrelated persons as lead plaintiff varies widely.  
22 Some courts focus primarily on the underlying purposes of  
23 the PSLRA, which is to prevent lawyer-driven litigation,  
24 and which is undermined by allowing lawyers to designate  
25 unrelated plaintiffs as a "group" and aggregate their  
26 financial stakes because such a practice would allow and  
27 encourage lawyers to direct the litigation. [Citation.]  
28 Other courts have explained that one of the principal  
purposes of the PSLRA is to allow for institutional  
plaintiffs with big financial stakes and expertise in the  
area to serve as lead plaintiff and control the  
litigation. [Citation.] Other courts have found that  
unrelated groups of individuals, brought together solely  
for the purpose of aggregating their claims in an effort  
to become the presumptive lead plaintiff fail to meet the  
adequacy prong of Rule 23. [Citation.] Irrespective of

1 whether courts reject the formulation because it is  
2 contrary to legislative intent or because it fails under  
3 Rule 23, the analysis and results are the same because  
4 acting contrary to the purposes of the PSLRA, which was  
5 designed to benefit class members, would also threaten  
6 the interests of the purported class.

7 Frias v. Dendreon Corp., No. C11-1291JLR, 2011 WL 6330179, at \*4, -  
8 -- F. Supp. 2d --- (W.D. Wash. Dec. 19, 2011) (internal quotation  
9 marks omitted).

10 The Court determines that the Fish Group is an unrelated group  
11 of individuals and accordingly declines to aggregate their  
12 individual losses. The Fish Group has made no showing of former  
13 ties or current cohesion. On the contrary, all signs point to the  
14 Fish Group having been recruited by one law firm, Newman Ferrara,  
15 and then transferred for reasons unknown to their present counsel,  
16 Harwood Feffer. The Fish Group has not marshaled any evidence to  
17 the contrary or issued a denial, despite having been challenged on  
18 this point by Arkansas Teacher-Boston both in the papers and at  
19 oral argument. ATB Response at 8. The Court takes this as an  
20 admission, and finds it to be a sufficient reason to decline to  
21 aggregate the individual claims of the Fish Group's members.

22 Even if the Court were to aggregate the Fish Group members'  
23 losses, the Court determines that the Fish Group could not satisfy  
24 the PSLRA's requirement that lead plaintiffs be subject to no  
25 "unique defenses." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). There is  
26 no requirement at this early stage to prove a defense, only to show  
27 a degree of likelihood that a unique defense might play a  
28 significant role at trial. Beck v. Maximus, Inc., 457 F.3d 291,  
300 (3d Cir. 2006); see also Eichenholtz v. Verifone Holdings,  
Inc., No. C07-06140MHP, 2008 WL 3925289, at \*10-11 (N.D. Cal. Aug.  
22, 2008) (refusing to appoint group that included day trader whose

1 presence might subject class to additional defenses). The point of  
2 this requirement is not to adjudicate the case before it has even  
3 begun, but rather to protect the absent class members from the  
4 expense of litigating defenses applicable to lead plaintiffs but  
5 not to the class as a whole. See Hanon v. Dataproducts Corp., 976  
6 F.2d 497, 508 (9th Cir. 1992).

7 The Court finds a substantial likelihood that a unique defense  
8 could be raised against a member of the Fish Group. Arkansas  
9 Teacher-Boston points out that Comstock is not actually the legal  
10 entity who held the account on which her calculation of losses is  
11 based. Rather, the Comstock Trust is. ATB Response at 6. The  
12 Court need not decide whether this fact would result in a valid  
13 defense, only whether it is substantially likely that the Fish  
14 Group -- and hence, the putative class -- could be forced to  
15 litigate against defenses arising from it. Comstock's presence  
16 among the Fish Group could subject the class to the burden of  
17 litigation focused on her standing. The Comstock Trust does not  
18 appear in the Fish Group's initial motion and did not assign its  
19 claims to Comstock. See W.R. Huff Asset Mgmt. Co., LLC v. Deloitte  
20 & Touche LLP, 549 F.3d 100, 106-07 (2d Cir. 2008); see also In re  
21 Herley Indus. Inc. Sec. Litig., CIV.A. 06-2596, 2009 WL 3169888, at  
22 \*12 (E.D. Pa. Sept. 30, 2009) (refusing to appoint as lead  
23 plaintiff an investment adviser who possibly lacked third-party  
24 standing). Arkansas Teacher-Boston argues persuasively that this  
25 may raise a colorable issue of whether Comstock herself, as a legal  
26 entity distinct from the Comstock Trust, has standing to bring a  
27 claim. Thus, even if the Court were to aggregate the Fish Group  
28 members' individual claims, the Fish Group would not satisfy the

1 PSLRA's typicality requirement. Accordingly, the Court looks to  
2 the movant with the next-largest financial interest in the  
3 litigation.

## 4 2. Arkansas Teacher-Boston

5 It is undisputed that Arkansas Teacher-Boston has the largest  
6 total losses of any group other than the Fish Group and that  
7 Arkansas Teacher, taken individually, has the largest loss of any  
8 individual movant. The Court must determine whether aggregation of  
9 Arkansas Teacher and Boston's losses is appropriate (which could  
10 result in appointment of the Arkansas Teacher-Boston group as a  
11 single lead plaintiff) or whether to treat the two institutional  
12 investors separately. The latter course would effectively put  
13 Boston out of the running and place Arkansas Teacher, as the movant  
14 with the greatest individual losses, solely in the pole position.

15 The Court determines that aggregation of Arkansas Teacher and  
16 Boston's losses is appropriate in this case because the two  
17 entities have shown a pre-existing relationship which indicates  
18 their cohesion and ability to "adequately control and oversee the  
19 litigation." Eichenholtz, 2008 WL 3925289, at \*8 (citations  
20 omitted). Arkansas Teacher and Boston comprise, along with other  
21 institutional investors, the lead-plaintiff group currently  
22 prosecuting the ongoing Colonial Bancgroup securities fraud class  
23 action, In re Colonial Bancgroup, Inc. Securities Litigation, No.  
24 09-CV-104 (M.D. Ala.) ("In re Colonial"). This collaboration makes  
25 Arkansas Teacher and Boston something more than unaffiliated  
26 strangers. Moreover, this Court takes judicial notice of the fact  
27 that the district court overseeing In re Colonial has preliminarily  
28 approved a partial settlement in that case. This evidence

1 demonstrates Arkansas Teacher and Boston's ability to adequately  
2 prosecute complex securities litigation on behalf of a settlement  
3 class and further confirms the propriety of aggregating Arkansas  
4 Teacher and Boston's losses for purposes of the instant case.

5       Turning to the requirements of Rule 23, the Court finds that  
6 Arkansas Teacher-Boston satisfies both the typicality and adequacy  
7 prongs. "The typicality requirement is satisfied when the putative  
8 lead plaintiff has suffered the same injuries as absent class  
9 members, as a result of the same conduct by the defendants." In re  
10 Diamond Foods, Inc., Sec. Litig., No. C 11-05386 WHA, 2012 WL  
11 934030, at \*3, --- F. Supp. 2d --- (N.D. Cal. Mar. 20, 2012)  
12 (citing Hanon, 976 F.2d at 508). Both Arkansas Teacher and  
13 Boston's purchases and sales of Netflix stock occurred in their own  
14 names and during the class period. See Stocker Decl. Ex. A. The  
15 losses they suffered arose from the same events as those of the  
16 class and give rise to the same claims. As to adequacy, a district  
17 court inquires "whether the class representative and [its] counsel  
18 have any conflicts of interest with other class members and whether  
19 the class representative and its counsel will prosecute the action  
20 vigorously on behalf of the class." In re Diamond Foods, 2012 WL  
21 934030, at \*3 (quoting Staton v. Boeing Co., 327 F.3d 938, 957 (9th  
22 Cir. 2003) (internal quotation marks omitted)). Arkansas Teacher  
23 and Boston have the same interest in the litigation as the absent  
24 class members -- to recover their losses. No showing has been made  
25 that Arkansas Boston-Teacher or its counsel will fail to prosecute  
26 the action vigorously. Moreover, Arkansas Teacher-Boston's  
27 extensive lead-plaintiff experience, including their current  
28 prosecution of In re Colonial, suggests that the group will be able

1 to effectively and efficiently control and oversee the litigation  
2 on behalf of the putative class.

3 The Fish Group argues that this very experience disqualifies  
4 the members of Arkansas Teacher-Boston as professional plaintiffs.  
5 The argument misapprehends both the spirit and the letter of the  
6 PSLRA. It is beyond dispute that Congress passed the PSLRA in part  
7 to encourage institutional investors such as Arkansas Teachers-  
8 Boston to take the lead in private securities class actions.  
9 Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 321  
10 (2007); H.R. Conf. Rep. 104-369, at 33-35, reprinted in 1995  
11 U.S.C.C.A.N. at 732-34. And the purpose of the PSLRA's  
12 discretionary bar against professional plaintiffs, codified at 15  
13 U.S.C. § 78u-4(a)(3)(B)(vi),<sup>7</sup> "is to favor institutional investors  
14 over individuals such that a repeat individual lead-plaintiff  
15 candidate may be prevented from exceeding the statutory limit." In  
16 re Diamond Foods, 2012 WL 934030, at \*4. Moreover, the bar is, by  
17 its plain language, discretionary, not absolute. The Court is not  
18 moved to disqualify Arkansas Teacher or Boston as a professional  
19 plaintiff only to turn and appoint the unrelated strangers of the  
20 Fish Group.

21 The Fish Group raises one last challenge to Arkansas Teacher-  
22 Boston's appointment. At oral argument, the Fish Group urged the  
23 Court to measure the "largest financial stake" as a percentage of

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24 <sup>7</sup> Except as the court may otherwise permit, consistent  
25 with the purposes of this section, a person may be a  
26 lead plaintiff, or an officer, director, or  
27 fiduciary of a lead plaintiff, in no more than 5  
28 securities class actions brought as plaintiff class  
actions pursuant to the Federal Rules of Civil  
Procedure during any 3-year period.

15 U.S.C. § 78u-4(a)(3)(B)(vi).

1 losses relative to the investor's overall portfolio, on the premise  
2 that a small investor who has lost a greater percentage of her  
3 portfolio will be more motivated to pursue relief on behalf of the  
4 class than a relatively deep-pocketed investor whose losses, even  
5 if larger in an absolute sense, are smaller proportionally. The  
6 argument is unavailing. As Arkansas Teacher-Boston points out, a  
7 proportional measure would result in individual investors nearly  
8 always having the largest financial stake relative to institutional  
9 investors whose holdings frequently amount to hundreds of millions  
10 of dollars. Such a result would defeat the PSLRA's aim of putting  
11 institutional investors at the helm of more private securities  
12 class actions.

13 Because Arkansas Teacher-Boston satisfies Rule 23 and has  
14 combined losses that exceed those of any remaining movant, and  
15 because no movant has rebutted the presumption that Arkansas  
16 Teacher-Boston is the lead plaintiff in this putative class action,  
17 the Court appoints Arkansas Teacher-Boston as Lead Plaintiffs.  
18 Also, having reviewed the qualifications of Arkansas Teacher-  
19 Boston's counsel and observed them at oral argument, the Court  
20 approves Arkansas Teacher-Boston's selection of Labaton Sucharow as  
21 Lead Counsel, with Zelle Hofmann serving as Local Counsel.

22

23 **V. CONCLUSION**

24 For the foregoing reasons, the Court GRANTS the motion of  
25 Arkansas Teacher Retirement System and State-Boston Retirement  
26 System and appoints them as Lead Plaintiffs. Accordingly, the  
27 Court DENIES the other five groups' motions to serve as lead  
28 plaintiff. The Court APPROVES Labaton Sucharow LLP as Lead

1 Counsel, with Zelle Hofmann Voelbel & Mason LLP serving as Local  
2 Counsel. The Court GRANTS the Fish Group's motion to consolidate.

3 Lead Plaintiffs' counsel shall file a consolidated complaint  
4 within thirty (30) calendar days of this Order. Netflix may then  
5 file an answer or motion to dismiss within thirty (30) calendar  
6 days after filing of the consolidated complaint.

7

8 IT IS SO ORDERED.

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10 Dated: April 26, 2012

  
UNITED STATES DISTRICT JUDGE

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