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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BRIAN H. ROBB,
Plaintiff,

v.

FITBIT INC., et al.,
Defendants.

Case No. [16-cv-00151-SI](#)

**ORDER RE: APPOINTMENT OF LEAD
PLAINTIFF**

Re: Dkt. Nos. 11, 14, 22, 26

Now before the Court are several competing motions for appointment as lead plaintiff. Docket Nos. 11, 14, 22, 26. This matter came on for hearing on April 15, 2016. Having considered the arguments presented in the papers and at the hearing, the Court hereby GRANTS Fitbit Investor Group’s motion for appointment as lead plaintiff.

BACKGROUND

Plaintiff Brian Robb brings this class action lawsuit for violation of the federal securities laws against defendants Fitbit, Inc., James Park, and William Zarella. He sues on behalf of all persons other than defendants who purchased or otherwise acquired Fitbit securities pursuant and/or traceable to Fitbit’s June 18, 2015 initial public offering, or between June 18, 2015, and January 6, 2016, both dates inclusive. Docket No. 1 ¶ 2. He brings claims under Sections 11 and 15 of the Securities Act of 1933 (the “Securities Act”), 15 U.S.C. §§ 77k and 77o; and Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission (“SEC”), 17 C.F.R. § 240.10b-5.

1 According to the complaint, Fitbit manufactures fitness-tracking devices. Docket No. 1
2 ¶ 3. Among these devices are the Fitbit Charge HR and Fitbit Surge, both of which include heart
3 rate trackers that purport to monitor users' heart rates. *Id.* On June 18, 2015, Fitbit completed its
4 initial public offering. *Id.* ¶ 5. On January 5, 2016, a consumer class action suit was filed in this
5 district against Fitbit.¹ *Id.* ¶ 7 (citing *McLellan v. Fitbit, Inc.*, No. 16-cv-0036-JD). That suit
6 alleged that Fitbit's heart rate monitoring system on the Charge HR and Surge "were dangerously
7 inaccurate and posed serious health risks to users" *Id.* On January 6, 2016, Fitbit's stock fell
8 \$1.40, or 5.8%, to close at \$22.90. *Id.* ¶ 8.

9 Plaintiff Robb filed this action on January 11, 2016. Docket No. 1. As required by Section
10 21D(a)(3)(A)(i) of the Exchange Act, a notice was published over Globe Newswire on January 11,
11 2016, advising class members of the existence and nature of the litigation. Docket No. 12-1. The
12 notice set a 60-day window for class members to appear and move for appointment as lead
13 plaintiff, by March 11, 2016. *Id.*

14 On March 11, 2016, the following individuals and institutions filed motions for
15 appointment as lead plaintiff:

- 16 (1) George Diaz;
- 17 (2) Fitbit Investor Group, comprised of individuals Timothy Flynn, Jesse M. Koth and
18 Kelley Koth, Viet Tran, and Mark Cunningham;
- 19 (3) Bright Agyapong;
- 20 (4) Teamsters Local 282 Trust Funds ("Local 282"); and
- 21 (5) Institutional Investor Group, comprised of City of Omaha Police and Fire
22 Retirement System, Local No. 8 IBEW Retirement Plan & Trust, and Chester County
23 Employees Retirement Fund.

24 Docket Nos. 11, 14, 18, 22, 26. George Diaz filed no opposition or reply. Bright Agyapong filed
25 a notice withdrawing his motion. Docket No. 45. Plaintiff Robb has not sought to be made lead
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27 ¹ The complaint in this case erroneously states that the consumer suit was filed on January
28 6, 2016, but it notes the correct filing date of January 5 in the citation of the case. *See* Docket No.
1 ¶ 7.

1 plaintiff. Fitbit Investor Group, Local 282, and Institutional Investor Group filed opposition and
2 reply briefs.² Of these three movants, each claims to have the largest financial interest and attacks
3 the adequacy and typicality of the other movants.

4 Following the hearing, the Court ordered Fitbit Investor Group to file supplemental
5 declarations, which it did on April 20, 2016. Docket Nos. 62, 64. Institutional Investor Group
6 sought leave to respond, which the Court granted. Docket Nos. 65, 69. On May 2, 2016, Local
7 282 filed a notice of supplemental authority, and Institutional Investor Group then filed a response
8 to the notice. Docket Nos. 68, 72.

9
10 **LEGAL STANDARD**

11 Section 21D of the Private Securities Litigation Reform Act of 1995 (“PSLRA”) is
12 “intended to encourage the most capable representatives of the plaintiff class to participate in class
13 action litigation and to exercise supervision and control of the lawyers for the class.” Joint
14 Explanatory Statement of the Committee of Conf., Conference Report on Sec. Litig. Reform, H.R.
15 Conf. Rep. No. 104-39 at 32 (1995); *see generally In re Microstrategy Inc. Sec. Litig.*, 110 F.
16 Supp. 2d 427, 432-36 (E.D. Va. 2000). Under the procedures set out in the PSLRA, all proposed
17 lead plaintiffs must submit a sworn certification setting forth certain facts designed to assure the
18 Court that the plaintiff (i) has suffered more than a nominal loss, (ii) is not a professional litigant,
19 and (iii) is otherwise interested and able to serve as a class representative. 15 U.S.C. § 78u-
20 4(a)(2)(A). The plaintiff in the first lawsuit to be filed must additionally publish notice of the
21 complaint in a widely circulated business publication within twenty days of filing the complaint.
22 *Id.* at § 78u-4(a)(3)(A)(I). The notice must include a description of the claim and notify
23 prospective class members that they may move within 60 days of the notice to be named lead
24 plaintiff.

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27 ² Due to an automobile accident, Local 282 filed its opposition brief and supporting
28 declaration shortly after the midnight filing deadline of March 25, 2016. Docket No. 44. The
Court agrees with Local 282 that the other movants were not prejudiced by this delay and will
consider Local 282’s opposition as though timely filed.

1 Once applications for lead plaintiff status are closed, the district court must determine who
2 among the movants is the “most adequate plaintiff.” *Id.* at § 78u-4(a)(3)(B)(I). The PSLRA
3 directs courts to “appoint as lead plaintiff the member or members of the purported plaintiff class
4 that the court determines to be most capable of adequately representing the interests of class
5 members” *Id.* In the Ninth Circuit, *In re Cavanaugh*, 306 F.3d 726 (9th Cir. 2002), governs
6 lead plaintiff selection and establishes a three-step process. First, as discussed above, timely and
7 complete notice of the action must be published. *Cavanaugh*, 306 F.3d at 729. Second, the
8 district court considers the losses suffered by potential lead plaintiffs and selects “the one who
9 ‘has the largest financial interest in the relief sought by the class’ and ‘otherwise satisfies the
10 requirements of Rule 23 of the Federal Rules of Civil Procedure.’” *Id.* at 730 (citing 15 U.S.C.
11 § 78u-4(a)(3)(B)(iii)(I)). Finally, the court focuses on that plaintiff to ensure that the proposed
12 lead plaintiff “satisfies the requirements of Rule 23(a), in particular those of ‘typicality’ and
13 ‘adequacy.’” *Id.* A plaintiff who satisfies the first two steps becomes the “presumptively most
14 adequate plaintiff.” *Id.* In step three, other plaintiffs have the opportunity to rebut the
15 presumptive lead plaintiff’s showing of typicality and adequacy. *Id.* (citing 15 U.S.C. § 78u-
16 4(a)(3)(B)(iii)(II)).

17 Once the court has designated a lead plaintiff, the lead plaintiff “shall, subject to the
18 approval of the court, select and retain counsel to represent the class.” *Id.* § 78u-4(a)(3)(B)(v).
19 The Ninth Circuit has explained that “the district court does not select class counsel at all.”
20 *Cavanaugh*, 306 F.3d at 732. Instead, the district court generally approves the lead plaintiff’s
21 selection of counsel.

DISCUSSION

I. Selection of Lead Plaintiff

A. Financial Interest in the Litigation

26 Having determined, as discussed above, that publication of notice of this lawsuit was
27 completed within the required timeframe, the Court must next determine which movant has “the
28 largest financial interest in the relief sought by the class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii). Three

1 movants submitted full briefing in support of their applications for lead plaintiff: Fitbit Investor
2 Group, Local 282, and Institutional Investor Group. These are also the three movants who have
3 claimed the largest financial interests.

4 The Ninth Circuit has not prescribed a particular method for calculating a plaintiff's
5 financial interest but has directed that courts "may select accounting methods that are both rational
6 and consistently applied." *Cavanaugh*, 306 F.3d at 730 n.4. Courts often look to the "Olsten-
7 Lax" factors for guidance. *See, e.g., Richardson v. TVIA, Inc.*, No. 06-6304-RMW, 2007 WL
8 1129344, at *3 (N.D. Cal. Apr. 16, 2007) (citing *In re Olsten Corp. Sec. Litig.*, 3 F. Supp. 2d 286,
9 295 (E.D.N.Y. 1998); *Lax v. First Merchants Acceptance Corp.*, 1997 WL 461036, at *5 (N.D.
10 Ill. Aug. 11, 1997)). Under this test, courts examine: "(1) the number of shares purchased during
11 the class period; (2) the number of net shares purchased during the class period; (3) the total net
12 funds expended during the class period; and (4) the approximate losses suffered." *Id.* The last of
13 these factors typically carries the most weight. *In re Diamond Foods, Inc., Sec. Litig.*, 281 F.R.D.
14 405, 408 (N.D. Cal. 2012).

15 Here, when the claims of its investors are aggregated, Fitbit Investor Group has the largest
16 claim under the Olsten-Lax factors.³ First, Fitbit Investor Group states that its group collectively
17 purchased 500,469 shares of Fitbit stock during the class period. Docket No. 15-3 at 4. By
18 contrast, Local 282 claims to have purchased 48,058 shares of stock, and Institutional Investor
19 Group collectively claims to have purchased 90,120 shares. Docket Nos. 23-3 at 3, 27-5 at 2-4.⁴
20 Second, Fitbit Investor Group claims to have retained a total of 194,509 net shares during the class
21 period. Docket No. 15-3 at 4. Local 282 asserts net shares totaling 48,058, while Institutional
22 Investor Group claims net shares of 89,133 (based on the sale of 987 shares during the class
23 period). Docket Nos. 23-3 at 3, 27-5 at 2-4. As to the third factor, Fitbit Investor Group has not

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25 ³ By following the Olsten-Lax factors here, the Court need not consider the various figures
for compensatory damages that several movants put forth in their papers.

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27 ⁴ The breakdown of Institutional Investor Group's stock purchases is as follows: IBEW
28 Local No. 8 Retirement Plan and Trust—42,300 shares; City of Omaha Police and Fireman's
Retirement System—34,845 shares; and Chester County Employees Retirement Fund—12,975
shares. Docket No. 27-5 at 2-4.

1 presented its net expenditures during the class period in a readily ascertainable format. However,
 2 the Court’s preliminary calculations indicate that the figure exceeds \$5 million. Local 282 says it
 3 expended a net total of \$1,789,803 during the class period. Docket No. 23-3 at 3. Institutional
 4 Investor Group claims net expenditures of approximately \$3,449,398.58.⁵ See Docket No. 27-5 at
 5 2-4.

6 The final and most important Olsten-Lax factor is the financial loss suffered. Fitbit
 7 Investor Group claims the largest loss overall: \$3,176,023. Docket No. 38 at 3-4. It also claims
 8 that its member Timothy Flynn has the largest loss suffered by any individual member or movant:
 9 \$1,117,674. *Id.* at 3. Institutional Investor Group argues that in the aggregate it has the largest
 10 loss—slightly over \$2 million—and argues for disaggregation of the losses of Fitbit Investor
 11 Group. Docket Nos. 26 at 5, 40 at 3. Local 282 claims to have suffered the largest loss—just over
 12 or under \$1 million, depending on the calculation method—if the Court disaggregates the losses of
 13 both the other groups. Docket Nos. 42 at 3, 46 at 3. Importantly, all of the movants’ varying
 14 charts name Fitbit Investor Group as having the largest financial loss, if the losses of that group
 15 are aggregated. See Docket Nos. 38 at 3-4, 40 at 3, 42 at 3, 46 at 3, 47 at 5, 48 at 2.

16 The Ninth Circuit has not ruled on whether groups may aggregate their financial losses in
 17 order to assert the largest interest in a securities case. See *Cavanaugh*, 306 F.3d at 731 n.8
 18 (“While a ‘group of persons’ can collectively serve as a lead plaintiff, 15 U.S.C. § 78u-
 19 4(a)(3)(B)(iii)(I), we are not asked to determine whether a group can satisfy the ‘largest financial
 20 interest’ requirement by aggregating losses.”). However, the appeals court has disavowed the
 21 type of “round-robin” inquiry that Local 282 seems to suggest in its briefs. *Id.* at 732. *Cavanaugh*
 22 made clear that district courts are not to consider all movants simultaneously but are to follow a
 23 sequential process: “The court must examine potential lead plaintiffs one at a time, starting with
 24 the one who has the greatest financial interest, and continuing in descending order if and only if
 25 the presumptive lead plaintiff is found inadequate or atypical.” *Id.* Federal securities law
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27 ⁵ The Court calculates this figure by adding the total cost of shares purchased and
 28 subtracting the proceeds of 127 shares of stock sold at \$30.12110 and 860 shares sold at
 \$32.42580, all transactions occurring within the class period. See Docket No. 27-5 at 2-4.

1 “provides no occasion for comparing plaintiffs with each other on any basis other than their
2 financial stake in the case.” *Id.*

3 In this spirit, the Court finds Fitbit Investor Group is entitled to the presumption of most
4 adequate plaintiff, if it meets the requirements of typicality and adequacy under Rule 23.
5 Regardless of which figures are used to calculate the movants’ losses, Fitbit Investor Group has
6 the largest financial interest in the litigation. Any arguments for disaggregation will be treated as
7 attacks on the group’s adequacy and typicality and are addressed in turn below.

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9 **B. Typicality and Adequacy**

10 **1. Aggregation of Group Losses**

11 Having determined that Fitbit Investor Group has the largest financial interest, the Court
12 must next assess whether it “otherwise satisfies the requirements of Rule 23 of the Federal Rules
13 of Civil Procedure.” *Cavanaugh*, 306 F.3d at 730 (quoting 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).
14 Both Local 282 and Institutional Investor Group attack Fitbit Investor Group as a lawyer-created
15 group that contravenes the PSLRA’s purpose of reducing lawyer-driven litigation. Local 282
16 urges that the Court interpret the PSLRA as allowing a group of investors to act as lead plaintiff
17 only where the group had a preexisting relationship. Docket No. 42 at 5. Institutional Investor
18 Group argues that Fitbit Investor Group “failed to meet the criteria for appointing a group, as set
19 forth under this Court’s decision in *Versata*.”⁶ Docket No. 40 at 2 (citing *In re Versata, Inc. Sec.*
20 *Litig.*, No. 01-1439-SI, 2001 WL 34012374 (N.D. Cal. Aug. 20, 2001)). Both groups argue that
21 Fitbit Investor Group’s losses should be disaggregated.

22 In support of its opposition brief, on March 25, 2016, Fitbit Investor Group submitted a
23 joint declaration signed by its members. Docket No. 38-1. Among other items, the declaration
24 states that the individual members have discussed the responsibilities of acting as lead plaintiff,
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26 ⁶ In *Versata*, this Court found that “under appropriate circumstances small groups, whether
27 or not they have any pre-litigation relationship, can aggregate their financial losses.” *Versata*,
28 2001 WL 34012374 at *6. This Court refrained, however, from imposing set criteria in order for a
group to proceed as lead plaintiff. Instead, this Court found that a flexible, case-by-case inquiry
was the best approach. *Id.* at *5.

1 will stay in regular communication with counsel and with each other, and will make decisions by
2 consensus, using a majority vote as a back-stop. *Id.* ¶¶ 2, 6, 8. The group’s opponents argue that
3 the declaration is conclusory and untimely. Docket Nos. 46 at 4, 48 at 6. By way of comparison,
4 Institutional Investor Group points to its own joint declaration, which it says demonstrates its
5 superior fitness to lead this case. *See* Docket No. 27-6.

6 The Court agrees that Fitbit Investor Group’s joint declaration is lacking in certain detail,
7 but Institutional Investor Group’s joint declaration does not substantially differ. The latter
8 declaration explains who the institutional investors are and describes a conference call they held
9 on March 11, 2016, the day they filed their motion. *See generally* Docket No. 27-6. This is not
10 enough for Institutional Investor Group to overcome the fact that the PSLRA prefers the movant
11 with the largest financial interest. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). Moreover, neither group
12 asserts that its members had a preexisting relationship outside of sharing common counsel.
13 Truthfully, no one group appears to be more or less “lawyer-driven” than the other. If the Court
14 were to disaggregate the losses of the Fitbit Investor Group, it finds that it would also be
15 appropriate to disaggregate the losses of the Institutional Investor Group.⁷

16 In any event, Timothy Flynn of the Fitbit Investor Group claims the largest loss of any
17 individual member. If disaggregating all groups’ claims, Timothy Flynn states a loss of
18 \$1,117,674. Docket No. 38 at 3. This exceeds the largest loss claimed by any one member of
19 Institutional Investor Group (\$922,784, claimed by IBEW Local No. 8 Retirement Plan and Trust)
20 or by Local 282 (\$1,036,137). *See* Docket Nos. 23-3 at 1, 27-5 at 2, 4.⁸ Therefore, “[t]his is not a
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22 ⁷ As to the timeliness of Fitbit Investor Group’s joint declaration, the Court finds no reason
23 to exclude Fitbit Investor Group’s joint declaration filed in support of its opposition. Briefing on
24 the motion was ongoing, and the other groups had the opportunity to address the joint declaration
in their replies and at the hearing.

25 ⁸ In its opposition and reply briefs, Institutional Investor Group put forth an alternate
26 calculation method, citing *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), to argue
27 that Timothy Flynn had a smaller loss than its group. Docket Nos. 40 at 3, 48 at 2. However, the
28 movants disagree as to whether this calculation method is valid. Fitbit Investor Group agrees with
the method used by Local 282, which still places Flynn as the individual with the largest loss. *See*
Docket No. 47 at 4-5. The Court is not persuaded by Institutional Investor Group’s alternative
loss calculations, particularly where Timothy Flynn retained the most shares of Fitbit stock of any

1 case . . . in which lawyers aggregated plaintiffs in order to overcome the largest stake requirement.
2 Rather, [Flynn] meets that requirement on his own.” *See Bruce v. Suntech Power Holdings Co.*,
3 No. 12-4061-RS, 2012 WL 5927985, at *2 (N.D. Cal. Nov. 13, 2012).⁹

4 The remaining information available to the Court indicates that Fitbit Investor Group can
5 meet the adequacy and typicality requirements of Rule 23(a). At the hearing, counsel for Fitbit
6 Investor Group provided information, later submitted through supplemental declarations,
7 regarding the education, occupations, and investing experience of the group’s members. See
8 Docket No. 64. This information indicated that the group could adequately represent the class and
9 that its claims are typical of those of other class members. The members of Fitbit Investor Group
10 are sophisticated individuals with between four and 25 years of experience investing in the
11 securities markets. Cunningham Decl. ¶ 5; Flynn Decl. ¶ 5; J. Koth Decl. ¶ 4; K. Koth Decl. ¶ 4;
12 Tran Decl. ¶ 5. As noted above, they have discussed the requirements and responsibilities of the
13 lead plaintiff role with each other and with counsel. Docket No. 38-1 ¶ 2. They have a plan for
14 decision-making. *Id.* ¶ 8. Importantly, each suffered substantial losses stemming from
15 investments in Fitbit securities, making their claims typical of those of the class at large. *See*
16 Cunningham Decl. ¶ 5; Flynn Decl. ¶ 5; J. Koth Decl. ¶ 4; K. Koth Decl. ¶ 4; Tran Decl. ¶ 5.

17 The Court is not at liberty to select Local 282 or Institutional Investor Group solely
18 because they are comprised of institutional investors. At heart, Local 282 rests its opposition on
19 the assertion that it "has the largest loss of any single institutional movant." Docket No. 42 at
20 1. But this is not the standard. “Congress enacts statutes, not purposes,” and it is outside the
21 Court’s power under the PSLRA to select an institutional movant over an individual one if the
22 latter has the larger financial interest. *Cavanaugh*, 306 F.3d at 731-32.

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24 single movant (75,319 shares) at the end of the class period. *See* Docket Nos. 15-3 at 4, 23-3 at 2,
25 27-5 at 2-4.

26 ⁹ For that reason, the Court’s decision today is not inconsistent with the recent decision
27 that Local 282 filed with the Court, wherein Judge Tigar denied lead plaintiff appointment to a
28 group “of previously unrelated individuals” who joined together “for the sole purpose of
aggregating their claims in an effort to become the presumptive lead plaintiff.” *Bodri v. Gopro, Inc.*, No. 16-0232-JST, 2016 WL 1718217, at *4 (N.D. Cal. Apr. 28, 2016) (quoting *Eichenholtz v. Verifone Holdings, Inc.*, No. 07-6140-MHP, 2008 WL 3925289, at *9 (N.D. Cal. Aug. 22, 2008)).

1 Nor is the Court persuaded by the complaints of Local 282 that members of Fitbit Investor
2 Group “executed pro forma statutory certifications months apart from one another and on different
3 certification forms, supplied by different lawyers.” Docket No. 42 at 6. It is enough that Fitbit
4 Investor Group executed the certifications required under 15 U.S.C. § 78u-4(a)(2)(A). Nothing in
5 the PSLRA says that a group must execute all certifications on the same date or use the same
6 certification forms. And the use of uniform certifications could just as easily be an indicator of
7 “lawyer-driven litigation” as could certifications lacking in uniformity. Local 282’s attacks on the
8 certifications do not suffice to raise serious concerns regarding adequacy and typicality.

9

10 **2. Concerns Regarding Viet Tran’s Counsel**

11 The briefs also raise concerns regarding Fitbit Investor Group’s counsel. Member Viet
12 Tran signed a certification in February 2016 stating that he intends to retain the Rosen Law Firm
13 as counsel, yet this firm does not appear on the group’s briefs and is not one of the two firms
14 presently seeking appointment as co-lead counsel. Docket No. 15-2 at 8. Institutional Investor
15 Group argues that Viet Tran cannot be part of the group because he is not represented by the
16 proposed co-lead counsel. Docket No. 40 at 2. In reply, Fitbit Investor Group notes that its joint
17 declaration clearly states that all members of the group have chosen to be represented by proposed
18 co-lead counsel, Glancy Prongay & Murray LLP and Pomerantz LLP. Docket No. 47 at 7 n.6.
19 Where Viet Tran has signed a declaration in this case expressing his desire to have the current
20 proposed co-lead firms represent him, this point is not fatal to Fitbit Investor Group’s bid for lead
21 plaintiff.

22

23 **3. Concerns Regarding Mark Cunningham’s In-and-Out Trading**

24 Finally, Institutional Investor Group argues that Mark Cunningham, a member of the Fitbit
25 Investor Group, is an “in-and-out” trader who cannot meet Rule 23’s typicality requirement. *See*
26 Docket No. 40 at 2-3. “An in/out trader is one who both purchases and sells stocks during the
27 same period of alleged price inflation [and thus] recoups at least some of the loss incurred by the
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1 purchase because he both buys and sells during the period of price inflation.” *Welling v. Alexy*,
2 155 F.R.D. 654, 661-62 (N.D. Cal. 1994).

3 As indicated in Fitbit Investor Group’s moving papers and reiterated at the hearing,
4 Cunningham retained 61,000 shares of Fitbit stock at the end of the class period. Docket Nos. 15-
5 3 at 4, 38 at 3. Moreover, Institutional Investor Group also bought and sold shares within the class
6 period, albeit a smaller number. *See* Docket No. 27-5 at 2. Additionally, other courts have
7 certified classes and appointed in-and-out traders as class representatives in securities actions.
8 *See, e.g., Welling*, 155 F.R.D. at 661-62. To meet the typicality requirement, the claims of a lead
9 plaintiff and class members need not be identical. *In re Lucent Techs., Inc. Sec. Litig.*, 194 F.R.D.
10 137, 150 (D.N.J. 2000) (“the typicality requirement is satisfied when the ‘plaintiff’s claim arises
11 from the same event or course of conduct that gives rise to the claims of other class members and
12 is based on the same legal theory.’”) (citations omitted). “The focus of the typicality inquiry is not
13 on Plaintiff’s behavior, but defendants’.” *Deutschman v. Beneficial Corp.*, 132 F.R.D. 359, 373
14 (D. Del. 1990). Finally, Cunningham does not seek appointment as the sole lead plaintiff but as
15 part of a group whose other members’ investing activities have not been challenged. The central
16 question in this case is whether defendants made misrepresentations that artificially inflated the
17 company’s stock price. There is no suggestion that defendants took any action specific to Mark
18 Cunningham that would render his claims atypical.

19 At the end of the day, the lead plaintiff must have sufficient interest in the case’s outcome
20 to ensure vigorous advocacy. The Court finds no evidence of any antagonism between the
21 interests of Fitbit Investor Group and the class. The group has certified its willingness to serve as
22 representative plaintiff and has retained counsel experienced in securities class actions. As the
23 plaintiff with the largest financial stake in the litigation that meets the typicality and adequacy
24 requirements, it is the presumptively most adequate plaintiff. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii);
25 *Cavanaugh*, 306 F.3d at 730. Institutional Investor Group and Local 282 have not rebutted that
26 presumption with proof that Fitbit Investor Group “will not fairly and adequately protect the
27 interests of the class[] or . . . is subject to unique defenses that render [Fitbit Investor Group]
28 incapable of adequately representing the class.” *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii). The attacks

1 on Fitbit Investor Group’s cohesiveness, on Tran’s initial intent to retain a different law firm, and
2 on Cunningham’s trading activities simply do not constitute evidence of the group’s lack of
3 adequacy or typicality. For these reasons, the Court finds that the other movants have not
4 successfully rebutted the presumption that Fitbit Investor Group will do a fair and adequate job as
5 lead plaintiff. *See Cavanaugh*, 306 F.3d at 732 n.10 (“[O]nce the presumption is triggered . . . the
6 question is whether anyone can prove that the presumptive lead plaintiff will not do a fair and
7 adequate job.”) (internal quotations omitted).

8 Accordingly, the Court GRANTS Fitbit Investor Group’s motion for appointment as lead
9 plaintiff.

10
11 **II. Selection of Lead Counsel**

12 The PSLRA states that “[t]he most adequate plaintiff shall, subject to approval of the court,
13 select and retain counsel to represent the class.” 15 U.S.C. § 78u-4(a)(3)(B)(v). A court generally
14 should accept the lead plaintiff’s choice of counsel unless it appears necessary to appoint different
15 counsel to “protect the interests of the class.” *Id.* at § 78u-4(a)(3)(B)(iii)(II)(aa). *Cavanaugh* bars
16 the Court from “select[ing] for the class what it considers to be the best possible lawyer”
17 *Cavanaugh*, 306 F.3d at 732.

18 Fitbit Investor Group seeks the appointment of co-lead counsel Glancy Prongay & Murray
19 LLP and Pomerantz LLP. Docket No. 38-1 ¶ 1. Local 282 argues that Fitbit Investor Group needs
20 to explain why it seeks to involve multiple firms. Docket No. 42 at 7. The PSLRA imposes no
21 such requirement, and courts often approve co-lead counsel where that is the representation
22 structure the lead plaintiff has chosen. *See, e.g., City of Ann Arbor Employees’ Retirement Sys., v.*
23 *Accuray Inc.*, No. 09-3362-CW, at *3 (N.D. Cal. Oct. 26, 2009); *Versata*, 2001 WL 34012374 at
24 *7.

25 Here, the proposed firms have presented declarations and resumes attesting to their many
26 years of experience in the area of securities litigation and listing the numerous multi-million dollar
27 recoveries they have achieved on behalf of defrauded investors. Docket Nos. 15-4, 15-5. The
28 other movants have made no attacks on the firms’ ability to represent the class adequately. The

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Court therefore GRANTS the motion to approve as co-lead counsel the law firms of Glancy Prongay & Murray LLP and Pomerantz LLP. The Court does so with the caution, however, that if a class is certified in the case, the Court has the power to award reasonable attorneys' fees and will scrutinize those fees to ensure there were no duplication of efforts attributable to the co-lead counsel arrangement. *See* Fed. R. Civ. P. 23(h).

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS Fitbit Investor Group's motion for appointment as lead plaintiff and GRANTS its motion for appointment of Glancy Prongay & Murray LLP and Pomerantz LLP as co-lead counsel. The remaining motions for appointment of lead plaintiff and lead counsel are DENIED.

IT IS SO ORDERED.

Dated: May 10, 2016



SUSAN ILLSTON
United States District Judge