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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
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7 JAMES ZIOLKOWSKI,

8 Plaintiff,

9 v.

10 NETFLIX, INC., et al.,

11 Defendants.

Case No. [17-cv-01070-HSG](#)

**ORDER DENYING BAGLEY'S
MOTION AND GRANTING DUDASH'S
MOTION RE: APPOINTMENT AS
LEAD PLAINTIFF AND APPROVAL
OF LEAD COUNSEL**

Re: Dkt. Nos. 20, 24

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13 On March 1, 2017, Plaintiff James Ziolkowski filed this securities class action lawsuit
14 individually and on behalf of others who acquired common stock of Netflix, Inc. (“Netflix”)
15 during the period between July 22, 2014 and October 15, 2014 (“Class Period”) and consequently
16 suffered damages. Dkt. No. 1 (“Compl.”). Also on March 1, 2017, notice of this suit was
17 published in GlobeNewswire. Abadou Decl., Ex. C.¹ The complaint asserts claims under §§ 10(a)
18 and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) & 78t(a), and Rule 10b-5,
19 17 C.F.R. § 240.10b-5. Compl. ¶¶ 60–75. The complaint names the following defendants:
20 Netflix, Inc. (“Netflix”); Netflix’s Chief Executive Officer, Reed Hastings; and Netflix’s Chief
21 Financial Officer, David Wells. Compl. ¶¶ 11–13.

22 On May 1, 2017, two competing motions for appointment as lead plaintiff and approval of
23 lead counsel were filed: (1) a motion filed by Linda Bagley, seeking appointment of herself as
24 lead plaintiff and approval of Levi & Korsinky, LLP as lead counsel, Dkt. No. 20; and (2) a
25 motion filed by Michael DuDash, seeking appointment of himself as lead plaintiff and approval of
26 Kahn Swick & Foti, LLC (“KSF”) and Finkelstein & Krinsk, LLP (“F&K”) as lead counsel, Dkt.
27 No. 24 (“DuDash’s Mot.”). On May 15, 2017, Bagley filed a notice of non-opposition with

28 ¹ The declaration of Ramzi Abadou was filed as Dkt. No. 25.

1 respect to these competing motions because she appeared not to have the “largest financial
2 interest in the relief sought by the class’ as required by the by the PSLRA.” Dkt. No. 27 at 2
3 (quoting 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb)). Also on May 15, 2017, DuDash filed an
4 opposition representing that he was the presumptive lead plaintiff, Dkt. No. 28, as well as a notice
5 of unopposed motion, Dkt. No. 29. Accordingly, DuDash’s motion is now unopposed. Having
6 carefully considered the relevant filings and authorities, the Court hereby **DENIES** Bagley’s
7 motion and **GRANTS** DuDash’s motion.²

8 **I. BACKGROUND**

9 Defendant Netflix’s business is primarily focused on streaming content whereby customers
10 pay a monthly fee to view shows and movies online. Compl. ¶ 1. Defendants allegedly made
11 materially false or misleading statements concerning the impact of Netflix’s increased subscription
12 fee on the company’s subscriber growth and financials, and when that impact was revealed, the
13 stock price plummeted and the putative class members, who acquired Netflix’s common stock at
14 inflated prices during the Class Period, suffered financial losses. See id. ¶¶ 1–6, 14–59.

15 Specifically, on May 9, 2014, Defendants raised the price of Netflix’s most popular
16 streaming subscription from \$7.99 to \$8.99 per month. Id. ¶ 21. In a letter to shareholders on July
17 21, 2014, Defendants announced strong subscriber growth during the second quarter, predicted
18 that 1.3 million U.S. subscribers would be added in the third quarter, and stated that the price
19 increase had a “minimal impact on membership growth.” Id. ¶ 22–23. Later that day, during the
20 quarterly earnings interview, Defendant Hastings characterized the “impact of the price change” as
21 “pretty nominal” and “background noise,” and stated that “when we make a small change in price,
22 and handle it appropriately, it really makes no noticeable effect in the business.” Id. ¶ 24.
23 Subsequently, after market hours on October 15, 2014, Defendants announced the third-quarter
24 financial results, reporting that Netflix added 980,000 U.S. subscribers (35% fewer than
25 predicted), and that “the primary cause is the slightly higher prices we now have compared to a
26 year ago.” Id. ¶ 27–28. Defendants sought to harmonize their July 21 and October 15 statements

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28 ² The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. See Civil L.R. 7-1(b).

1 by explaining that “we believe that [in] late Q2 and early Q3[,] the impact of higher prices
2 appeared to be offset for about two months by the large positive reception to Season Two of
3 Orange is the New Black” (“OITNB”). Id. ¶ 29. Defendants reduced the fourth-quarter earnings
4 forecast by almost 50%. Id. ¶ 32. By closing of the next trading day, October 16, 2014, Netflix’s
5 stock price fell from \$448.59 to \$361.70 per share, cutting the company’s market value by more
6 than \$5 billion. Id.

7 With regard to Defendants’ scienter in making allegedly false or misleading statements, the
8 complaint states that Defendants (a) knew from pre-Class Period experience that releasing a new
9 season of a popular TV show significantly skews subscriber growth to the upside upon release; (b)
10 saw the actual negative effect of their price increase for several weeks before they saw the
11 “offsetting” positive effect of OITNB; (c) knew that a disproportionate share of Netflix’s overall
12 subscription growth during the second quarter of 2014 was driven by OITNB enthusiasts who
13 would not be there in the third quarter to offset the effect of the price increase; and (d) knew from
14 pre-Class Period experience that even small monthly price increases could have devastating effects
15 on the company, such that Defendants were acutely focused on the effects of the May 9 price
16 increase before making the July 21 statements. Id. ¶ 33; see also id. ¶¶ 34-51 (elaborating on these
17 allegations). Accordingly, Defendants allegedly knew or recklessly disregarded that their July 21,
18 2014 statements were false and misleading when made. Id. ¶ 51.

19 **II. APPOINTMENT OF LEAD PLAINTIFF**

20 The Private Securities Litigation Reform Act (“PSLRA”) “instructs district courts to select
21 as lead plaintiff the one ‘most capable of adequately representing the interests of class members.’”
22 In re Cavanaugh, 306 F.3d 726, 729 (9th Cir. 2002) (quoting 15 U.S.C. § 78u-4(a)(3)(B)(i)).
23 “The ‘most capable’ plaintiff—and hence the lead plaintiff—is the one who has the greatest
24 financial stake in the outcome of the case, so long as he meets the requirements of Rule 23.” See
25 id. at 729. The Ninth Circuit has interpreted the PSLRA as establishing “a simple three-step
26 process for identifying the lead plaintiff pursuant to these criteria.” Id. at 729.

27 **A. Step One**

28 Step One consists of meeting the PSLRA’s notice requirement. See id. at 729. “The first

1 plaintiff to file an action covered by the [PSLRA] must post this notice ‘in a widely circulated
2 national business-oriented publication or wire service.’” Id. at 729 (quoting 15 U.S.C. § 78u-
3 4(a)(3)(A)(i)). The notice must be published within 20 days of the filing of the complaint. 15
4 U.S.C. § 78u-4(a)(3)(A)(i). The notice must also alert putative class members “(I) of the
5 pendency of the action, the claims asserted therein, and the purported class period; and (II) that,
6 not later than 60 days after the date on which the notice is published, any member of the purported
7 class may move the court to serve as lead plaintiff of the purported class.” Id.

8 Here, notice was published in GlobeNewswire on the same day that the complaint was
9 filed. Compare Compl. with Abadou Decl., Ex. C (both filed March 1, 2017). This clearly
10 complied with the PSLRA’s 20-day filing deadline. See 15 U.S.C. § 78u-4(a)(3)(A)(i).
11 GlobeNewswire is “one of the world’s largest newswire distribution networks, specializing in the
12 delivery of corporate press releases[,] financial disclosures[,] and multimedia content to the media,
13 investment community, individual investors[,] and the general public.” Abadou Decl., Ex. C.
14 Thus, as required, the notice was posted “in a widely circulated national business-oriented
15 publication or wire service.” See Cavanaugh, 306 F.3d at 729 (quoting 15 U.S.C. § 78u-
16 4(a)(3)(A)(i)). Finally, the notice announced the filing of this class action, described the asserted
17 claims, specified the putative class period, and explained that any motion to be appointed lead
18 plaintiff had to be filed by May 1, 2017. See 15 U.S.C. § 78u-4(a)(3)(A)(i). For these reasons, the
19 Court rules that Step One’s requirements are met.

20 **B. Step Two**

21 Step Two consists of identifying the presumptive lead plaintiff. See Cavanaugh, 306 F.3d
22 at 729–30. There is a rebuttable presumption that the “most adequate plaintiff” is the one who
23 “(aa) has either filed the complaint or made a motion in response to a notice under subparagraph
24 (A)(i); (bb) in the determination of the court, has the largest financial interest in the relief sought
25 by the class; and (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil
26 Procedure.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). Thus, once the filing requirement of subsection
27 (a)(3)(B)(iii)(I)(aa) is met, “the district court must compare the financial stakes of the various
28 plaintiffs and determine which one has the most to gain from the lawsuit.” Cavanaugh, 306 F.3d

1 at 730. Next, the district court “must . . . focus its attention on that plaintiff and determine, based
2 on the information he has provided in his pleadings and declarations, whether he satisfies the
3 requirements of Rule 23(a), in particular those of ‘typicality’ and ‘adequacy.’” *Id.* (emphasis in
4 original). If so, he is the presumptive lead plaintiff. *Id.*

5 Here, DuDash timely filed his motion to be appointed lead plaintiff on May 1, 2017,
6 satisfying subsection (a)(3)(B)(iii)(I)(aa). Moreover, he suffered alleged losses totaling
7 \$18,865.50 as a result of his purchase of 150 shares of Netflix stock during the Class Period. See
8 Abadou Decl., Ex. B. This sum is greater than the \$8,428.34 loss alleged by Bagley, see Dkt. No.
9 21-2, who now recognizes that she lacks the largest financial interest in the relief sought by the
10 class, see Dkt. No. 27. Since DuDash’s motion is unopposed, and no other class member besides
11 Bagley filed a motion, no one claims to have suffered greater losses than him. Therefore, DuDash
12 “has the most to gain from the lawsuit.” See *Cavanaugh*, 306 F.3d at 730.

13 Next, the Court turns to the “typicality” and “adequacy” requirements of Rule 23(a). The
14 Court finds that “typicality” is satisfied because the claims and defenses of DuDash “are typical of
15 the claims and defenses of the class.” See Fed. R. Civ. P. 23(a)(3). Like other putative class
16 members, DuDash alleges that during the Class Period, he acquired Netflix’s common stock at
17 prices that were inflated by Defendants’ material misrepresentations, and that he consequently
18 suffered damages. See Compl. ¶¶ 1–6, 14–59; Abadou Decl., Ex. A (DuDash’s certification
19 declaring under penalty of perjury that he adopts the allegations of the complaint and that he
20 purchased 150 shares of Netflix securities during the Class Period); *id.*, Ex. B (DuDash’s loss
21 chart alleging that his purchase of these 150 shares resulted in damages totaling \$18,865.50). In
22 addition, DuDash’s motion represents that “[t]here is no evidence of antagonism between his
23 interests and those of the proposed class,” see DuDash’s Mot. at 8, and given that the motion is
24 now unopposed, the court has no reason to doubt this representation, cf. *Bodri v. GoPro, Inc.*,
25 2016 U.S. Dist. LEXIS 57559, at *16–17 (N.D. Cal. Apr. 28, 2016) (finding that the typicality
26 requirement was satisfied where movant represented that it was “not aware of any conflicts
27 between its claims and those asserted by the class” and “no other movant ha[d] presented the
28 Court with any reason to doubt these assertions”). The Court also finds that “adequacy” is

1 satisfied because DuDash “will fairly and adequately protect the interests of the class.” See Fed.
2 R. Civ. P. 23(a)(4). Like the lead plaintiff appointed in Bodri, DuDash’s “substantial financial
3 stake in the outcome of this litigation, [his] timely filing of [his] motion, and the quality of [his]
4 briefing all demonstrate that [he] is both motivated to, and capable of, vigorously pursuing this
5 litigation.” See 2016 U.S. Dist. LEXIS 57559, at *17.

6 Consequently, the Court holds that Step Two’s requirements are met.

7 **C. Step Three**

8 Step Three consists of “giv[ing] other plaintiffs an opportunity to rebut the presumptive
9 lead plaintiff’s showing that it satisfies Rule 23’s typicality and adequacy requirements.”
10 Cavanaugh, 306 F.3d at 730. DuDash’s motion is now unopposed. Since his presumptive lead
11 plaintiff status is not rebutted, Step Three’s requirements are met. DuDash’s appointment as lead
12 plaintiff is appropriate.

13 **III. APPOINTMENT OF LEAD COUNSEL**

14 DuDash has moved for approval of his selection of KSF and F&K as class counsel. Mot.
15 at 8–9; see also 15 U.S.C. § 78u-4(a)(3)(B)(v) (“The most adequate plaintiff shall, subject to the
16 approval of the court, select and retain counsel to represent the class.”) The Court defers to
17 DuDash’s choice of lead counsel because his choice is not “so irrational, or so tainted by self-
18 dealing or conflict of interest, as to cast genuine and serious doubt on [his] willingness or ability to
19 perform the functions of lead plaintiff.” See Cavanaugh, 306 F.3d at 733; see also *id.* at 739 n.11
20 (“Congress gave the lead plaintiff, and not the court, the power to select a lawyer for the class.”)
21 KSF and F&K both have extensive experience as lead counsel in securities class actions. See
22 Abadou Decl., Exs. D–E (firm resumes). Approval of DuDash’s selection of lead counsel is
23 therefore merited. Nonetheless, KSF and F&K should divide up litigation responsibilities in a
24 way that promotes the efficient representation of the putative class. See *Norfolk Cnty. Ret. Sys. v.*
25 *Solazyme, Inc.*, 2015 U.S. Dist. LEXIS 138654, at *7–8 (N.D. Cal. Oct. 8, 2015).


26 **IV. CONCLUSION**

27 For the foregoing reasons, the Court **DENIES** Bagley’s motion and **GRANTS** DuDash’s
28 motion. DuDash is appointed as lead plaintiff for the putative class. KSF and F&K are approved

1 as lead counsel for the putative class. Having reviewed the parties' proposed schedule for filing
2 an amended complaint and a motion to dismiss, the Court hereby **SETS** the following schedule:
3 amended complaint by August 14, 2017; motion to dismiss by October 13, 2017; opposition by
4 November 27, 2017; reply by December 27, 2017; hearing on January 11, 2018, at 2:00 p.m.;
5 further case management conference on April 17, 2018, at 2:00 p.m.

6 **IT IS SO ORDERED.**

7 Dated: 6/14/2017

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9 HAYWOOD S. GILLIAM, JR.
10 United States District Judge

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