

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ISHITA DAS,
Plaintiff,
v.
UNITY SOFTWARE INC., et al.,
Defendants.

Case No. [5:22-cv-03962-EJD](#)

**ORDER GRANTING MOTION OF
OKLAHOMA FIREFIGHTERS
PENSION AND RETIREMENT
SYSTEM AND INDIANA PUBLIC
RETIREMENT SYSTEM FOR
APPOINTMENT OF LEAD
PLAINTIFF AND APPROVAL OF
SELECTION OF LEAD COUNSEL**

Re: ECF Nos. 21, 25, 30, 34, 35

Pending before the Court are five motions to appoint lead plaintiff and approve selection of lead counsel. ECF Nos. 21, 25, 30, 34, and 35. Having considered movants’ motions and for the reasons discussed below, the Court GRANTS Oklahoma Firefighters Pension and Retirement System (“Oklahoma Fire”) and Indiana Public Retirement System’s (“Indiana”) motion. ECF No. 25. The Court APPOINTS Oklahoma Fire and Indiana as Lead Plaintiff and APPROVES its selection of Lead Counsel and Liaison Counsel.

I. BACKGROUND

On July 6, 2022, Plaintiff Das initiated a securities class action brought on behalf of all persons or entities that purchased or acquired Unity Software stock between March 5, 2021 to May 10, 2022 and were allegedly damaged by Defendants’ “materially false and misleading statements” or omissions in violation of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t(a)) (the “Class”). *See generally* ECF No. 1, Compl.

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1 Defendant Unity Software, Inc. (“Unity”) creates and operates a 3D content platform that provides
2 software developers who create video games (for mobile phones, computers, and game consoles) a
3 platform to create and monetize their games and content. *Id.* ¶¶ 18–19. Unity provides a
4 “Pinpointer” which is a “user acquisition service which uses real-time user valuation at the time of
5 an ad request.” *Id.* ¶ 2.

6 Plaintiff alleges that throughout the Class Period, Defendants made false or misleading
7 statements or failed to disclose that:

8 (i) deficiencies in Unity’s product platform reduced the accuracy of
9 the Company’s machine learning technology; (ii) the foregoing was
10 likely to have a material negative impact on the Company’s revenues;
11 (iii) accordingly, Unity had overstated the Company’s commercial
12 and/or financial prospects for 2022; (iv) as a result, the Company was
13 likely to have to reduce its fiscal 2022 guidance; and (v) as a result,
14 the Company’s public statements were materially false and
15 misleading at all relevant times.

16 *Id.* ¶ 3. After the market closed on May 10, 2022, Unity announced its financial results for the
17 first quarter of 2022 and fiscal guidance citing a “fault” in its platform which resulted in “reduced
18 accuracy” for Pinpointer. *Id.* ¶ 4. The following day its stock fell \$17.83 per share, or
19 approximately a 37% decrease. *Id.* ¶ 5. Plaintiffs allege that the market decline resulted from
20 Defendants’ false or misleading statements and/or omissions, and they were harmed as a result.
21 *Id.* ¶ 6.

22 Initially, seven movants timely moved for lead plaintiff and lead counsel: (1) Dennis
23 Johnson (ECF No. 15), (2) Aleksandr Kuperman (ECF No. 18), (3) Melanie Kight (ECF No. 21),
24 (4) Oklahoma Fire and Indiana (ECF No. 25), (5) Timothy Aines (ECF No. 30), (6) City of North
25 Miami Beach Police Officers and Firefighters Retirement Plan (“North Miami Beach”) (ECF No.
26 34), and (7) Victor Winfrey (ECF No. 35).¹ Movants Johnson and Kuperman withdrew their

27 ¹ The procedural requirements of the PSLRA are satisfied. First, all moving plaintiffs timely filed
28 motions within 60 days of the publication of Early Notice in accordance with 15 U.S.C. § 78u-
4(a)(3)(A)(i)(II). Early Notice was published in *GlobalNewswire* on July 6, 2022, and all movants
timely moved for appointment of lead plaintiff on or before September 6, 2022. *See* ECF No. 25-
5, Ex. D. Second, all proposed lead plaintiffs must have submitted a sworn certification setting
forth certain facts designed to assure the court that the plaintiff (i) has suffered more than a
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1 motions the following day. *See* ECF Nos. 40, 41. Shortly thereafter, movants Kight, Aines, North
2 Miami Beach, and Winfrey filed notices of non-opposition, acknowledging that each lacked the
3 “largest financial interest” in this litigation within the meaning of the PSLRA. *See* ECF Nos. 43,
4 44, 45, 46. On January 19, 2023, the Court held a brief hearing on the motions and indicated that
5 it would grant Oklahoma Fire and Indiana’s motion in light of it having the largest financial
6 interest and otherwise satisfying the PSLRA requirements and a lack of opposition. ECF No. 56.

7 **II. DISCUSSION**

8 Pursuant to the Private Securities Litigation Reform Act of 1995 (“PLSRA”), 15 U.S.C. §
9 78u–4(a)(3)(B)(i), the Court shall appoint the lead plaintiff that “the court determines to be most
10 capable of adequately representing the interests of class members.” 15 U.S.C. § 78u–4(a)(3)(B)(i).
11 There is a rebuttable presumption that the most adequate plaintiff is a person or group of persons
12 who:

- 13 (aa) has either filed the complaint or made a motion in response to a
14 notice under subparagraph (A)(i);
- 15 (bb) in the determination of the court, has the largest financial interest
16 in the relief sought by the class; and
- 17 (cc) otherwise satisfies the requirements of Rule 23 of the Federal
18 Rules of Civil Procedure.

19 15 U.S.C. § 78u–4(a)(3)(B)(iii)(I). Rule 23 requires that “the claims or defenses of the
20 representative parties are typical of the claims or defenses of the class: and the representatives will
21 fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(3)–(4).

22 There is a “simple three-step process” to identify a lead plaintiff. *In re Cavanaugh*, 306
23 F.3d 726, 729 (9th Cir. 2002) (citing 15 U.S.C. § 78u–4(a)(3)(A)). First, “[t]he first step consists
24 of publicizing the pendency of the action, the claims made and the purported class period.” *Id.* at
25 729. Second, the Court determines which plaintiff has the highest financial stake. *Id.* at 729–30.
26 Finally, rebuttal of the presumptive lead plaintiff’s showing that it satisfies Rule 23’s typicality

27 nominal loss, (ii) is not a professional litigant, and (iii) is otherwise interested and able to serve as
28 a class representative. 15 U.S.C. § 78u–4(a)(2)(A). Here, all movants filed signed certifications
pursuant to § 78u-4(a)(2).

1 and adequacy requirements. *Id.* at 730.

2 **III. ANALYSIS**

3 **A. Appointment of Lead Plaintiff**

4 **1. Largest Financial Interest**

5 Oklahoma Fire and Indiana have the “largest financial interest in the relief sought by the
6 class,” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb), totaling \$3,895,186.93 in losses incurred on their
7 investments in the securities of Unity calculated under a last-in, first-out (“LIFO”) basis. ECF No.
8 25-3, Ex. B. Their loss is nearly seven times the second largest financial interest, Victor Winfrey,
9 who sustained a \$569,214.00 loss. *Id.* They purchased 53,119 total shares of common stock
10 during the class period, with 31,132 net shares purchased over the Class Period at a net cost of
11 approximately \$5,084,477.39. *Id.*

12 **2. Rule 23 Requirements**

13 “Once a movant has demonstrated that it has the largest financial interest, it need only
14 make a prima facie showing of its typicality and adequacy.” *Hessefort v. Super Micro Comput.,*
15 *Inc.*, 317 F. Supp. 3d 1056, 1060–61 (N.D. Cal. 2018).

16 A representative party’s claims or defenses must be typical of the class. Fed. R. Civ. P.
17 23(a)(3). “The typicality requirement is satisfied when the putative lead plaintiff has suffered the
18 same injuries as absent class members as a result of the same conduct by the defendants.” *Felix v.*
19 *Symantec Corp.*, No. 18-CV-02902-WHA, 2018 WL 4029053, at *3 (N.D. Cal. Aug. 23, 2018)
20 (citing *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). Oklahoma Fire and
21 Indiana satisfy typicality because: they purchased and/or acquired Unity securities during the
22 Class Period; the prices were allegedly artificially inflated by Defendants’ materially false and
23 misleading statements and/or omissions; and they suffered damages as a result.

24 Next, under Rule 23(a)(4), a representative party must “fairly and adequately protect the
25 interests of the Class.” Fed. R. Civ. P. 23(a)(4). The inquiry is: “(1) whether there are conflicts
26 within the class; and (2) whether plaintiff and counsel will vigorously fulfill their duties to the

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1 class.” *Symantec Corp.*, 2018 WL 4029053, at *3 (citing *Ellis v. Costco Wholesale Corp.*, 657
2 F.3d 970, 985 (9th Cir. 2011)). Oklahoma Fire and Indiana are sophisticated institutional
3 investors with over a \$3.5 million interest in the litigation. Oklahoma Fire’s net assets exceed
4 \$3.5 billion as of June 2021. ECF No. 25-4, Ex. C ¶ 2. Indiana holds approximately \$45.8 billion
5 in net assets as of June 2021. *Id.* ¶ 4.

6 The record is devoid of any evidence of conflicts, and Oklahoma Fire and Indiana’s
7 interests appear to align with those of the class members such that they will “vigorously”
8 prosecute the action on behalf of the class. Oklahoma Fire and Indiana have prior experience in
9 serving as lead and/or co-lead plaintiff with other institutional investors in securities class actions.
10 *See* ECF No. 25-4, Ex. C ¶¶ 3, 5. They believe that they can maximize the Class’s recovery by
11 combining their resources and experience. ECF No. 25-4 ¶ 8. Both funds have conferred to
12 discuss the claims, their funds’ common goals of the litigation, and how they will successfully and
13 cost-effectively jointly prosecute this action to obtain the greatest possible recovery for the Class.
14 ECF No. 25 at 3–4; 25-4, Ex. C ¶¶ 8–13, 15.

15 Finally, “[t]he presumption of most adequate plaintiff may be rebutted by evidence that the
16 designated plaintiff ‘will not fairly and adequately protect the interests of the class’ or ‘is subject
17 to unique defenses that render such plaintiff incapable of adequately representing the class.’” *In re*
18 *Versata, Inc., Sec. Litig.*, No. 01-CV-1439 SI, 2001 WL 34012374, at *2 (N.D. Cal. Aug. 20,
19 2001) (quoting 15 U.S.C. § 78u–4(a)(3)(B)(iii)(II)). None of the four other movants challenge the
20 presumption that Oklahoma Fire and Indiana are the most adequate lead plaintiff, nor do they
21 challenge their selection of lead counsel. In fact, all four movants filed notices of non-opposition
22 recognizing that they are not the largest financial stakeholders. *See* ECF Nos. 43, 44, 45, 46, 47.

23 The Court therefore finds that Oklahoma Fire and Indiana have made a prima facie
24 showing of typicality and adequacy.

25 **B. Approval of Lead Counsel**

26 “Once a lead plaintiff is chosen, that plaintiff may select its counsel, subject to approval of

1 the court.” *Hessefort*, 317 F. Supp. 3d at 1062. “[I]f the lead plaintiff has made a reasonable
2 choice of counsel, the district court should generally defer to that choice.” *Cohen v. U.S. Dist. Ct.*
3 *for N. Dist. of California*, 586 F.3d 703, 712 (9th Cir. 2009) (citing *In re Cendant Corp. Litig.*, 264
4 F.3d 201, 276 (3d Cir. 2001)).

5 Oklahoma Fire and Indiana selected Labaton Sucharow LLP (“Labaton Sucharow”) as
6 proposed Lead Counsel based on the firm’s accomplishments and reputation as a well-regarded
7 firm that has obtained “significant recoveries for plaintiffs in securities class action like this case.”
8 ECF No. 25-4, Ex. C ¶ 17. The firm’s résumé boasts the firm’s extensive securities class action
9 experience. ECF No. 25-6, Ex. E. The firm has successfully recovered \$18 billion in the
10 aggregate in securities class actions and has successfully served as lead or co-lead counsel in
11 numerous actions. *See In re Am. Int’l Group, Inc. Sec. Litig.*, No. 04-cv- 8141 (S.D.N.Y.) (serving
12 as lead counsel and recovering over \$1 billion); *In re Countrywide Fin. Corp. Sec. Litig.*, No. 07-
13 CV-05295 (C.D. Cal.) (serving as lead counsel and recovering approximately \$624 million for the
14 investor class); *In re HealthSouth Corp. Sec. Litig.*, No. 03-CV-01500 (N.D. Ala.) (serving as co-
15 lead counsel and securing a \$671 million settlement); *In re Schering-Plough/ENHANCE Sec.*
16 *Litig.*, No. 08-CV-00397 (D. N.J.) (serving as co-lead counsel, and recovering \$473 million for the
17 class). Moreover, the firm currently serves as lead counsel in this district in *Boston Ret. System v.*
18 *Uber Techs., Inc., et al.*, No. 19-CV-6361 (N.D. Cal.) and *Hill v. Silver Lake Group, L.L.C.*
19 *(Intelsat S.A.)*, No. 20-CV-2341 (N.D. Cal.). Accordingly, Labaton Sucharow is highly qualified
20 to serve as Lead Counsel for the Class.

21 Oklahoma Fire and Indiana also selected Hagens Berman Sobol Shapiro LLP (“Hagens
22 Berman”), located in Berkley, California, to serve as Liaison Counsel. Hagens Berman has
23 experience as lead counsel and co-lead counsel prosecuting securities and investor fraud class
24 actions. ECF No. 25-7, Ex. F at 31–32; *see also In re Schwab Corp. Securities Litig.*, No. 08-CV-
25 01510 (N.D. Cal. 2008) (serving as lead counsel and recovering \$235 million for the investor
26 class); *In re Tremont Securities Law, State Law and Insurance Litig.*, No. 08-CV-11117 (S.D.N.Y.
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1 2008) (serving as co-lead counsel and securing a \$100 million settlement); *In re Core Bond Fund*
2 (*“Oppenheimer”*), No. 09-CV-1186 (S.D. Colo.) (serving as additional counsel).

3 No movant challenges Oklahoma Fire and Indiana’s selection of Class Counsel and
4 Liaison Counsel. In light of the qualifications and experience of both firms, no grounds exist to
5 disturb the choice that these law firms serve as Lead and Liaison Counsel.

6 **IV. CONCLUSION**

7 For the foregoing reasons, the Court GRANTS Oklahoma Fire and Indiana’s motion and
8 APPOINTS Oklahoma Fire and Indiana as Lead Plaintiff in this action. The Court APPROVES
9 Oklahoma Fire and Indiana’s selection of Lead Counsel for the Class, Labaton Sucharow LLP,
10 and Hagens Berman Sobol Shapiro LLP as Liaison Counsel for the Class. Accordingly, the
11 competing motions for appointment of lead plaintiff and approval of lead counsel at ECF Nos. 21,
12 30, 34, and 35 are DENIED.

13 **IT IS FURTHER ORDERED:**

14 1. This order (the “Order”) shall apply to the above-captioned action (the “Action”)
15 and to each case that relates to the same subject matter that is subsequently filed in this Court
16 or is transferred to this Court, and is consolidated with the Action.

17 2. A Master File is established for this proceeding. The Master File shall be Civil
18 Action No. 5:22-cv-03962-EJD. The Clerk shall file all pleadings in the Master File and note
19 such filings on the Master Docket. Every pleading in the Action shall have the following
20 caption: *In re Unity Software Inc. Securities Litigation*, No. 5:22-cv-03962-EJD (N.D. Cal.).

21 3. Each new case that arises out of the subject matter of the Action shall be
22 consolidated with the Action. This Order shall apply thereto, unless a party objects to
23 consolidation (as provided for herein), or to any provision of this Order, within ten (10) days
24 after the date upon which a copy of this Order is served on counsel for such party by filing an
25 application for relief, and this Court deems it appropriate to grant such application. Nothing in
26 the foregoing shall be construed as a waiver of Defendants’ right to object to the consolidation

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1 of any subsequently filed or transferred related action.

2 4. Lead Counsel, Labaton Sucharow LLP, shall have the authority to speak for all
3 Plaintiffs and Class members in all matters regarding the litigation, including, but not limited
4 to, pretrial proceedings, motion practice, trial, and settlement. Lead Counsel shall make all
5 work assignments in such a manner as to facilitate the orderly and efficient prosecution of this
6 litigation, and to avoid duplicative or unproductive effort. Additionally, Lead Counsel shall
7 have the following responsibilities:

- 8 a) to brief and argue motions;
- 9 b) to initiate and conduct discovery, including, but not limited to, coordination of
10 discovery with Defendants' counsel, and the preparation of written interrogatories,
11 requests for admissions, and requests for production of documents;
- 12 c) to direct and coordinate the examination of witnesses in depositions;
- 13 d) to act as spokesperson at pretrial conferences;
- 14 e) to call and chair meetings of Plaintiffs' counsel as appropriate or necessary from
15 time to time;
- 16 f) to initiate and conduct any settlement negotiations with Defendants' counsel;
- 17 g) to provide general coordination of the activities of Plaintiffs' counsel and to
18 delegate work responsibilities to selected counsel as may be required, in such a
19 manner as to lead to the orderly and efficient prosecution of this litigation and to
20 avoid duplication or unproductive effort;
- 21 h) to consult with and employ experts;
- 22 i) to receive and review periodic time reports of all attorneys on behalf of Plaintiffs,
23 to determine if the time is being spent appropriately and for the benefit of Plaintiffs,
24 and to determine and distribute Plaintiffs' attorneys' fees; and
- 25 j) to perform such other duties as may be expressly authorized by further order of this
26 Court.

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IT IS SO ORDERED.

Dated: February 10, 2023



EDWARD J. DAVILA
United States District Judge

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