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8 ISHITA DAS,  
9 Plaintiff,  
10 v.  
11 UNITY SOFTWARE INC., et al.,  
12 Defendants.

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

**ORDER GRANTING MOTIONS TO  
DISMISS**

Re: ECF Nos. 101, 102, 103

13 Lead Plaintiffs Oklahoma Firefighters Pension and Retirement System and Indiana Public  
14 Retirement System (“Lead Plaintiffs”), bring this federal securities class action against three  
15 groups of defendants: (1) Defendant Unity Software Inc. (“Unity”) and Unity’s individual officers  
16 and directors John S. Riccitiello, Luis Felipe Visoso, and Ingrid Lestiyo (collectively, “Unity  
17 Defendants”); (2) Defendant Silver Lake Group, LLC (“Silver Lake”); and (3) Defendants SC US  
18 SSF 2013 (TTGP), LLC and Sequoia Capital Operations, LLC (collectively, “Sequoia  
19 Defendants”) (all together, “Defendants”) alleging that Defendants violated Sections 10(b) and  
20(a) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 promulgated by  
21 the U.S. Securities and Exchange Commission (“SEC”). Am. Compl., ECF No. 71. Before the  
22 Court are three motions to dismiss filed by Unity Defendants, Sequoia Defendants, and Silver  
23 Lake. Unity Mot., ECF No. 103; Sequoia Mot., ECF No. 102; Silver Lake Mot., ECF No. 101.  
24 Lead Plaintiffs filed an omnibus opposition to all three motions, and Defendants filed individual  
25 replies. Opp’n, ECF No. 107; Unity Reply, ECF No. 109; Silver Lake Reply, ECF No. 110;  
26 Sequoia Reply, ECF No. 112.

27 Having carefully reviewed the relevant documents, the Court finds these motions suitable  
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1 for decision without oral argument pursuant to Civil Local Rule 7-1(b). For the reasons discussed  
2 below, the Court **GRANTS** Defendants' motions to dismiss with leave to amend.

3 **I. BACKGROUND**

4 **A. Parties**

5 Court-appointed Lead Plaintiffs Oklahoma Firefighters Pension and Retirement System  
6 provide retirement, disability, and survivor benefits to its members. Am. Compl. ¶¶ 23, 24. Lead  
7 Plaintiffs allege to have purchased or otherwise acquired Unity common stock during the Class  
8 Period and suffered a loss. *Id.* ¶ 1. Lead Plaintiffs bring this class action on behalf of all persons  
9 or entities who purchased or otherwise acquired Unity's publicly traded common stock or  
10 exchange-traded call options or sold Unity's exchange-traded put options between May 11, 2021  
11 and May 10, 2022 ("Class Period") and suffered a loss. *Id.*

12 Unity is a Delaware corporation with its principal office in San Francisco whose common  
13 stock trades on the New York Stock Exchange ("NYSE"). *Id.* ¶¶ 25, 35. Unity in part creates and  
14 operates a 3D content platform for software developers who create video games for mobile  
15 phones, computers, and game consoles so that software developers can create and monetize their  
16 games and content. *Id.* ¶ 36. Many of the video games that are developed on Unity's platform are  
17 played on devices that use Apple's iOS operating system. *Id.* Defendant John Riccitiello has  
18 served as Unity's Chief Executive Officer since October 2014. *Id.* ¶ 26. Defendant Luis Felipe  
19 Visoso has served as Unity's Chief Financial Officer since April 2021. *Id.* ¶ 27. Defendant Ingrid  
20 Lestiyo has served as Senior Vice President & General Manager of Operate Solutions at Unity  
21 since August 2020. *Id.* ¶ 28.

22 Sequoia Defendants and Silver Lake are two of Unity's largest shareholders.<sup>1</sup> *Id.* ¶ 2.  
23 Sequoia Defendants are part of a venture capital firm headquartered in Menlo Park, California  
24 specializing in investments in technology sector companies. *Id.* ¶ 30. Sequoia Defendants began  
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<sup>1</sup> Lead Plaintiffs also name another investment company, OTEE 2020 ApA ("OTEE"), as a  
27 defendant, but Lead Plaintiffs have been unable to serve OTEE as of the date of their opposition.  
See Opp'n 1.

1 investing in Unity in 2009 and owned approximately 13.2% of Unity's outstanding common stock  
2 by 2022. *Id.* ¶ 30. Silver Lake is a private equity firm headquartered in Menlo Park, California.  
3 Silver Lake began investing in Unity in 2017 and owned approximately 14.6% of Unity's  
4 outstanding common stock by 2021. *Id.* ¶ 31. Sequoia Defendants and Silver Lake continued to  
5 be some of Unity's largest stockholders as of April 2022. *Id.* ¶ 34.

6 **B. Factual Background**

7 This case arises from Lead Plaintiffs' allegations that Defendants made material  
8 misstatements and omissions to investors regarding Unity's Audience Pinpointer ad monetization  
9 tool and Unity's ability to effectively serve its ad customers following Apple, Inc.'s changes to  
10 privacy settings in April 2021. The Court will briefly summarize Lead Plaintiffs' allegations  
11 regarding Unity's structure and advertising business generally, changes in Apple, Inc.'s privacy  
12 policies that led to the broader rollout of Audience Pinpointer, customer complaints regarding  
13 Audience Pinpointer, Unity's subsequent revenue loss and acquisitions, and the statements made  
14 during earnings calls and in publications which Lead Plaintiffs allege were misleading and omitted  
15 material information regarding the issues with Audience Pinpointer.<sup>2</sup>

16 **1. Unity's Structure and Advertising Business During the Class Period**

17 Unity provides software developers with a platform to create and monetize their video  
18 games for mobile phones, computers, and game consoles, with a significant number of Unity-  
19 developed games operating on Apple's "iOS" operating system. *Id.* ¶ 36.

20 During the Class Period, Unity reported that it derived its revenues primarily from two  
21 business segments: Create Solutions ("Create"), which generated approximately 30% of Unity's  
22 revenue through subscription fees; and Operate Solutions ("Operate"), which generated  
23 approximately 65% of Unity's revenue through ad placement within developers' games and  
24 revenue-sharing contracts with the developers. *Id.* ¶¶ 42, 224. To generate Operate revenue  
25 through ad placements, Unity relied on two tools: (1) Unified Auction, and (2) Audience

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<sup>2</sup> The Court will only address facts relevant to the Court's analysis in this Order.  
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1 Pinpointer. *Id.* ¶ 42. Unified Auction allows advertisers to submit competing bids to place ads on  
2 games developed on Unity's platform. *Id.* ¶ 44. Unity splits the advertising fee from the highest  
3 bidder with the developer whose game displayed the ad. *Id.* Audience Pinpointer tracks users'  
4 activity to predict which users had a high probability of engaging with an ad. *Id.* ¶ 46. Working  
5 in tandem with Unified Auction, Audience Pinpointer provides data on users who played the  
6 games on Unity's platform, and that data is used to inform advertisers which games attracted users  
7 who were likely to engage with their ads. *Id.* ¶¶ 46, 47. This data generally results in increased  
8 advertisement bids on certain games on Unity's platform and, in turn, increased revenue for Unity.  
9 *Id.*

10 Using both tools, Unity is able to collect costs for the installation of an application and  
11 costs for the impression of an advertisement. *Id.* ¶ 43. In other words, Unity generates revenue  
12 each time an end user installs an application after viewing an advertisement and each time an  
13 advertisement starts to play. *Id.*

14 **2. Apple's Privacy Changes Prior to Class Period Increased the  
15 Importance of the New Audience Pinpointer Tool**

16 On September 18, 2020, Unity conducted its initial public offering ("IPO"), after which  
17 time it became worth approximately \$13.7 billion and traded on the NYSE. *Id.* ¶ 37.

18 Three months before Unity's public offering, Apple announced new data privacy features  
19 that would be rolled out in its future software updates in 2021, which was expected to disrupt  
20 Unity's advertising business. *Id.* ¶ 52.

21 Prior to the Class Period, Operate primarily segment tracked user data to supply to  
22 advertisement bidders through Apple's Identifier for Advertisers ("IDFA"). *Id.* ¶ 5. IDFA  
23 assigned a unique, anonymous identifier to each mobile device to provide data to advertisers to use  
24 when placing ads by analyzing in-app events, showing whether users clicked on ads or not. *Id.* In  
25 June 2020, Apple announced that new data privacy features would be included in a version of iOS  
26 in 2021, which would allow Apple device users to prohibit companies like Unity from tracking  
27 their data that had previously been obtained through IDFA. *Id.* This privacy change was expected

1 to negatively impact the monetization of user advertising data across the industry—for example  
2 Facebook announced that advertisers would lose approximately 50% of their review without  
3 personalized targeting and optimization. *Id.* ¶ 54.

4 In response to this anticipated change, years prior to Apple’s announcement, Unity  
5 assembled a team to prepare for the loss of IDFA data. Lead Plaintiffs allege that this team led to  
6 the broader rollout of Audience Pinpointer. *Id.* ¶ 255. Unlike acquiring data through IDFA, in  
7 general terms, the Audience Pinpointer tool tracked and analyzed users’ behavior rather than their  
8 clicks. *Id.* ¶¶ 4, 76, 253.

### 9           **3.       Unity Rolls Out Audience Pinpointer Tool After Apple Announcement**

10       Upon Apple’s privacy change announcement, Unity informed investors that it had been  
11 prepared for the IDFA change and indicated that the privacy change would actually give Unity a  
12 “competitive advantage” because of the development of Audience Pinpointer. *Id.* ¶¶ 64, 161.  
13 Audience Pinpointer had been available since 2018 only to a few of Unity’s ad clients prior to  
14 Apple’s announcement, *id.* ¶ 87, but following Apple’s announcement, Unity marketed Audience  
15 Pinpointer more broadly, *id.* ¶ 5.

### 16           **4.       Audience Pinpointer Brings Widespread Customer Complaints**

17       Lead Plaintiffs allege that five confidential former Unity employees (“confidential  
18 witnesses” or “CW”) have come forward to reveal that the platform-wide introduction of  
19 Audience Pinpointer was rushed, as the tool had only been in beta testing and had no opportunity  
20 to be pressure tested, and Audience Pinpointer quickly brought in large amounts of negative  
21 customer complaints.

22       CW-1<sup>3</sup> was a Senior Business Intelligence Manager at Unity throughout the Class Period.  
23 *Id.* ¶ 81. CW-1 helped build out Unity’s resources to assess its customer data. *Id.* CW-2 was a  
24 Senior Manager in the Product Research department from May 2020 through August 2022. *Id.* ¶  
25 82. CW-2 focused on customer experience and tracking the customer journey. *Id.* CW-3 was a

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27       <sup>3</sup> Confidential witnesses are referred to in the Amended Complaint as “CW-[number]” to reference  
28 confidential witnesses numbered one through five.

1 Senior Software Engineer from pre-Class Period through January 2022. *Id.* ¶ 83. CW-3 worked  
 2 in the division where the engineers responsible for Audience Pinpointer and Unified Auction  
 3 worked. *Id.* CW-4 worked in Operate for more than 70% of the Class Period. *Id.* ¶ 84. CW-5  
 4 was formerly employed at Unity as a Software Engineer from pre-Class Period through September  
 5 2021. *Id.* ¶ 85.

6 While CW-4 and CW-5 only provide general information in the Amended Complaint  
 7 regarding how Unity's ad products work, the development of Audience Pinpointer, and the impact  
 8 of Apple's announcement in the ad field, *see Opp'n 14; Am. Compl. ¶¶ 86–88, 94, 96, 97, 101,*  
 9 102, Lead Plaintiffs allege that CW-1, CW-2, and CW-3's observations support their allegation  
 10 that Audience Pinpointer was experiencing issues during the class period which Defendants had a  
 11 duty to disclose. In their opposition, Lead Plaintiffs summarize the CWs' observations using the  
 12 table below. *See Opp'n 14–15.*

CW	Date	Audience Pinpointer Technical Problems/Customer Complaints
1	November 2020	“CW-1 recalled that, in November 2020, and after speaking with internal stakeholders and reviewing issues, he identified problems within Unity’s Operate segment including its ads business. CW-1 described Unity’s data in Operate as ‘definitely unclean’ and ‘in such a bad way.’” Am. Compl. ¶ 92.
1	November/December 2020	“According to CW-1, in November or December 2020, he realized Operate did not have visibility into: (i) its sales pipeline; or (ii) a holistic view of revenue by customer across all Operate products.” <i>Id.</i> ¶ 100.
1	Summer 2021	“CW-1’s team presented to Defendant Lestiyo, Jules Shumaker, and approximately 100 employees on the Customer Success side an analysis they had prepared regarding cross-selling products within the Operate segment.” <i>Id.</i> ¶ 110.
1	May/June 2021 - September/October 2021	“According to CW-1, he and his team had created a ‘sentiment analysis’ program for customers which showed ‘significant’ low customer sentiment ‘for a while.’ Specifically, CW-1’s team conducted a review of complaints in September or October 2021 that involved manually reviewing thousands of customer complaint tickets from approximately May or June 2021 through the following three months, to help train the machine learning portion of the ad tool.” <i>Id.</i> ¶ 111.
2	Broader Audience Pinpointer Rollout	“According to CW-2, his team was immediately seeing customer complaints that Audience Pinpointer was not working.” <i>Id.</i> ¶ 105.

1	2	Broader Audience Pinpointer Rollout	“CW-2 recalled a ‘tonal shift’ following the broader use of Audience Pinpointer. According to CW-2, customer feedback previously contained a combination of positive and negative sentiment, but after Audience Pinpointer was launched more broadly customer feedback was exclusively negative. CW-2 recalled issues coming from customers of all sizes, from SMB (small and medium-sized businesses) to Enterprise customers. According to CW-2, Unity was witnessing a ‘massive’ increase in complaints which he recalled increased ‘fivefold.’ CW-2 confirmed that profits were declining for ad solutions as customers complained about issues with the ‘accuracy’ of the Audience Pinpointer tool which was not working as intended.” <i>Id.</i> ¶ 106.
3	4	February 2021	“CW-3 recalled hearing in February 2021 that Audience Pinpointer had problems. CW-3 confirmed that in February 2021, he attended an all-hands engineering team status meeting . . . during which the Audience Pinpointer problems were discussed, and where it was discussed that Pinpointer’s engineers needed to ‘re-route’ certain data which would take approximately two weeks to analyze and fix. CW-3 indicated that his understanding was that Audience Pinpointer was having problems with its ability to gather and transmit data for analysis and that to fix it, the engineers needed to disconnect the data pipeline from one point and reconnect it to another point which they ultimately were able to do.” <i>Id.</i> ¶ 103.

## 5. Revenue Loss and Acquisitions

CW-1 confirmed that Unity was seeing “a lot” of ads clients move to Unity’s competitors, though the timeline CW-1 references is unclear. *Id.* ¶ 124. According to CW-2, “it was ‘impossible’ that Unity was not aware of the declining revenue growth in the Operate segment starting in the summer of 2021,” but Unity focused on acquiring companies during that time to “get [Unity’s] share [price] up.” *Id.* ¶¶ 82, 125. During the Class Period, Unity expended over \$2.1 billion on acquisitions with software solutions companies and intelligence services. *Id.* ¶¶ 133–40. Unity also closed a \$4.4 billion all-stock agreement to merge with an advertising monetization technology company in November 2022. *Id.* ¶¶ 141, 146.

## 6. Misleading Statements

Lead Plaintiffs allege that, throughout the Class Period, Defendants made materially false and misleading representations during various earnings calls and publications by failing to disclose known, adverse facts—namely, that Audience Pinpointer was losing customers and losing revenue. *Id.* ¶¶ 158, 169. While Defendants challenge forty statements from the Amended Complaint, to illustrate for purposes of this Order, a small sample of these statements include the

1 following:

2 [O]ur contextual model, which very importantly does not rely on  
3 IDFA, is working well. Am. Compl. ¶ 150.

4 [T]he customer feedback we're getting is very strong." *Id.* ¶¶ 151–  
5 52.

6 We believe that the ability to analyze this data positions us very well  
7 in the industry. *Id.* ¶ 152.

8 There is a shift towards ROI-based campaigns on our platform  
9 through Audience Pinpointer . . . . *Id.* ¶ 152.

10 So IDFA will most likely impact the ads industry, but we believe that  
11 our data and analytics advantage plus this advanced preparation that  
12 I was mentioning, position us very well to manage the IDFA. *Id.* ¶  
13 152.

14 Literally, in every country in the world, minute to minute, our data  
15 understanding is huge. *Id.* ¶ 153.

16 And I'm highly confident in our monetization platform as part of  
17 Operate is going to continue to win. *Id.* ¶ 154.

18 There are precious few companies anywhere with our sophistication  
19 around advertising and data. And those are skills that we want to  
20 apply more broadly and will. *Id.* ¶ 163.

21 Ours is a better way to monetize even absent the changes that were  
22 introduced by Apple with IDFA and choice [around] on privacy. And on a relative basis, we gained advantage to all those who use identity,  
23 individual identity, they know you and your brother, whose birthday  
24 it is that became relatively weaker, and we became relatively stronger  
25 and we have the single largest data insight based on the largest MAU  
26 count for anybody in our world. *Id.* ¶ 172.

27 The business momentum coupled with the quality of our innovation  
28 plans gives us confidence to guide to a revenue growth range of 34%  
to 36% in 2022 as we continue to improve margins. *Id.* ¶ 176.

29 We also saw strong performance from our sophisticated analytics  
30 tools and products such as Audience Pinpointer that deliver strong  
31 return on investment to our customers without manual guesswork. *Id.*  
32 ¶ 178.

33 As a result, a large number of our advertisers have open spending  
34 limits with us as they can clearly measure the positive return on their  
35 spend. *Id.* ¶ 185.

## 26 7. Audience Pinpointer Deficiencies Revealed

27 On May 10, 2022, in a press release announcing Unity's Q1 2022 financial results, Unity

1 reported revenue of \$320.1 million, missing analysts' consensus estimate of \$321.5 million. *Id.* ¶  
2 193. Unity also reduced Q2 2022 guidance to almost twenty percent below the consensus  
3 estimates of \$361 million and lowered its full-year 2022 revenue guidance to a range of \$1.35 and  
4 \$1.425 billion from its earlier estimate of \$1.50 billion. *Id.* The press release stated, in relevant  
5 part: "Unity delivered record quarterly revenue in the first quarter of 2022, the highest in the  
6 company's history, up 36% compared with the first quarter of 2021, with Create over-performing  
7 at 65% year-on-year growth, offset by slower growth in Operate . . . [W]e are laser-focused on  
8 accelerating growth in Operate." *Id.* During the earnings call that same day, Unity Defendants  
9 explained the loss in more depth, revealing that Operate started the year strong in January, but then  
10 significantly slowed down in February and March due in part to issues with Audience Pinpointer's  
11 accuracy. *Id.* ¶ 194.

12 Approximately two months after the May 10, 2022, announcement, Lead Plaintiffs filed  
13 the present suit seeking to recover damages caused by Defendants' violations of the federal  
14 securities laws and to pursue remedies under Exchange Act sections 10(b) and 20(a) and SEC  
15 Rule 10b-5.

16 **II. LEGAL STANDARD**

17 To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must plead each claim with  
18 enough specificity to "give the defendant fair notice of what the . . . claim is and the grounds upon  
19 which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). A bare  
20 recital of the elements of a claim, supported only with conclusory allegations, is inadequate.  
21 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rather, the complaint must contain sufficient factual  
22 allegations to allow a court to reasonably infer that the defendant is liable. *Id.*

23 Securities fraud cases must also meet the higher bar set by the particularity requirements of  
24 Rule 9(b) and the Private Securities Litigation Reform Act ("PSLRA"). *Or. Pub. Emps. Ret. Fund*  
25 *v. Apollo Grp. Inc.*, 774 F.3d 598, 604 (9th Cir. 2014). Rule 9(b) requires a plaintiff alleging fraud  
26 to plead with particularity the circumstances constituting fraud. Fed. R. Civ. P. 9(b). Specifically,  
27 a plaintiff must plead the "who, what, when, where, and how" of the alleged fraud. *Kearns v.*  
28

1     Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009) (citation omitted). The PSLRA demands  
2 even more, requiring a plaintiff “to state with particularity both the facts constituting the alleged  
3 violation and the facts evidencing scienter.” *In re Rigel Pharms., Inc. Sec. Litig.*, 697 F.3d 869,  
4 876 (9th Cir. 2012). To plead falsity, a securities plaintiff must “specify each statement alleged to  
5 have been misleading [and] the reason or reasons why the statement is misleading.” *Id.* at 877  
6 (quoting 15 U.S.C. § 78u4(b)(1)). To plead scienter, the plaintiff must “state with particularity  
7 facts giving rise to a strong inference that the defendant acted with the required state of mind.” *Id.*  
8 (quoting 15 U.S.C. § 78u4(b)(2)(A)). An inference of scienter must be more than plausible, it  
9 must be “cogent and at least as compelling as any opposing inference of nonfraudulent intent.”  
10 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007).

11       If the court concludes that a 12(b)(6) motion should be granted, the “court should grant  
12 leave to amend even if no request to amend the pleading was made, unless it determines that the  
13 pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d  
14 1122, 1127 (9th Cir. 2000) (en banc) (quotation omitted).

### 15       **III. DISCUSSION**

#### 16           **A. Incorporation by Reference and Judicial Notice**

17       As an initial matter, Unity Defendants request that the Court consider seventeen documents  
18 referenced in their motion to dismiss under the doctrines of incorporation by reference and judicial  
19 notice. Req. for Consideration and Judicial Notice (“Req.”), ECF No. 104. Silver Lake and  
20 Sequoia Defendants join in this request. Joinder, ECF No. 113. Lead Plaintiffs filed an  
21 opposition, and Defendants filed a reply. Opp’n to Req., ECF No. 108; Brief re Req. (“Reply”),  
22 ECF No. 111.

23       As a general rule, a court may not consider any material outside the pleadings in ruling on  
24 a Rule 12(b)(6) motion. *United States v. Corinthian Colleges*, 655 F.3d 984, 998 (9th Cir. 2011).  
25 There are two exceptions to this rule: when the complaint necessarily relies on the documents  
26 (incorporation by reference), and when the documents are “matters of public record” under Fed. R.  
27 Evid. 201(b). *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

1 Notably, however, the Ninth Circuit prohibits courts from considering facts in incorporated  
2 documents or taking judicial notice of facts in documents that are being used as a basis to resolve  
3 genuine factual disputes in a complaint, warning that the “overuse and improper application of  
4 judicial notice and the incorporation-by-reference doctrine . . . can lead to unintended and harmful  
5 results.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998–99 (9th Cir. 2018). The Ninth  
6 Circuit in *Khoja* recognized the “alluring temptation to pile on numerous documents to their  
7 motions to dismiss to undermine the complaint, and hopefully dismiss the case at an early stage,”  
8 but cautioned that “the unscrupulous use of extrinsic documents to resolve competing theories  
9 against the complaint risks premature dismissals of plausible claims that may turn out to be valid  
10 after discovery.” *Id.*

11 The Court will address Defendants’ requests for incorporation by reference and judicial  
12 notice in turn.

13 **1. Incorporation by Reference**

14 The incorporation by reference doctrine allows for the consideration of material that is  
15 attached to the complaint, as well as the consideration of “unattached evidence on which the  
16 complaint ‘necessarily relies’ if: (1) the complaint refers to the document; (2) the document is  
17 central to plaintiff’s claim; and (3) no party questions the authenticity of the document.”  
18 *Corinthian Colleges*, 655 F.3d at 999. The complaint must go beyond merely mentioning the  
19 existence of a document—rather, a defendant may only seek to incorporate a document into the  
20 complaint “if the plaintiff refers extensively to the document or the document forms the basis of  
21 the plaintiff’s claim.” *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003).

22 If the court deems a document incorporated by reference, “the entire document is assumed  
23 to be true for purposes of a motion to dismiss, and both parties—and the Court—are free to refer  
24 to any of its contents.” *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1058 n.10 (9th Cir. 2014)  
25 (internal quotations omitted) (quoting *City of Roseville Emps.’ Ret. Sys. v. Sterling Fin. Corp.*, 963  
26 F.Supp.2d 1092, 1107 (E.D. Wash. 2013)). However, as discussed above, it is improper to assume  
27 the truth of everything in an incorporated document for the sole purpose of “resolv[ing] factual  
28

1 disputes against the plaintiff's well-pled allegations in the complaint." *Khoja*, 899 F.3d at 1014.  
2 As the Ninth Circuit has recently emphasized, "[t]he incorporation-by-reference doctrine does not  
3 override the fundamental rule that courts must interpret the allegations and factual disputes in  
4 favor of the plaintiff at the pleading stage." *Id.*

5 Defendants request that the Court consider the following documents under the  
6 incorporation by reference doctrine:

- 7 • Ex. 1: Transcript of Unity's May 11, 2021, earnings call regarding Q1 2021
- 8 • Ex. 2: Unity Press Release, attached to SEC Form 8-K filed on August 10, 2021
- 9 • Ex. 3: Transcript of Unity's August 10, 2021, earnings regarding Q2 2021
- 10 • Ex. 4: Transcript of Unity's November 9, 2021, earnings call regarding Q3 2021
- 11 • Ex. 5: Unity Press Release, attached to SEC Form 8-K filed on February 3, 2022
- 12 • Ex. 6: Transcript of Unity's February 3, 2022, earnings call regarding Q4 2021
- 13 • Ex. 7: Unity's 2021 Annual Report, filed on SEC Form 10-K on February 22, 2022
- 14 • Ex. 8: Unity Press Release, attached to SEC Form 8-K filed on May 10, 2022
- 15 • Ex. 9: Transcript of Unity's May 10, 2022 earnings call regarding Q1 2022
- 16 • Ex. 12: Unity Press Release, attached to SEC Form 8-K filed on May 11, 2021
- 17 • Ex. 13: Unity Press Release, attached to SEC Form 8-K filed on November 9, 2021
- 18 • Ex. 14: Unity's Schedule 14A as filed with the SEC on April 28, 2021

19 The Court will consider Exhibits 1–9 and 12–14 as incorporated by reference, as the  
20 Amended Complaint necessarily relies on statements in these documents as the basis for their  
21 claims. *See* Am. Compl. ¶¶ 150–89 (pulling alleged material misrepresentations and omissions  
22 from statements in Exhibits 1–7), 148 (alleging that the press release in Exhibit 12 initiated the  
23 Class Period), 171 (quoting statements from Exhibit 13), 30–31 (relying on proxy statement in  
24 Exhibit 14 to plead claims against Sequoia Defendants and Silver Lake). However, the Court  
25 declines Unity's request to use the statements in these documents to resolve genuine factual  
26 disputes at this stage. *See, e.g.*, Mot. 13 (arguing that Defendants' statements regarding the  
27 strength of the Company's platform and product were not false because the Exhibits show that

1 Operate revenue “grew throughout the Class Period”), 4 (arguing the Exhibits show that Unity’s  
2 reach to active end-users also grew in line with Unity’s statements throughout the class period).

3 **2. Judicial Notice**

4 A court may take judicial notice of a fact that is “not subject to reasonable dispute in that it  
5 is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of  
6 accurate and ready determination by resort to sources whose accuracy cannot reasonably be  
7 questioned.” Fed. R. Evid. 201(b).

8 Courts have taken judicial notice of SEC filings as publicly available documents whose  
9 accuracy cannot reasonably be questioned; however, courts generally consider SEC filings “only  
10 for the purpose of determining what statements the documents contain, not to prove the truth of  
11 the documents’ contents.” *Troy Grp., Inc. v. Tilson*, 364 F. Supp. 2d 1149, 1152 (C.D. Cal. 2005);  
12 *see also, e.g.*, *Lee*, 250 F.3d at 689 (9th Cir. 2001) (“A court may take judicial notice of matters of  
13 public record without converting a motion to dismiss into a motion for summary judgment. But a  
14 court may not take judicial notice of a fact that is subject to reasonable dispute.”) (internal  
15 quotation marks omitted) (citing *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th  
16 Cir.1986)); *In re Silver Wheaton Corp. Sec. Litig.*, 2019 WL 1512269, at \*8 (C.D. Cal. Mar. 25,  
17 2019) (granting request for judicial notice of SEC filings only to the extent the filings “contained  
18 certain disclosures” and denying request all other respects); *Shapiro v. Hasbro, Inc.*, 2016 WL  
19 9176559, at \*4 n.10 (C.D. Cal. Aug. 23, 2016) (taking judicial notice of SEC filings to show that a  
20 statement was made, but not for the truth of the statement).

21 Defendants request that the Court take judicial notice of the following documents:

- 22
- 23 • Ex. 10: Unity’s 2020 Annual Report filed on SEC Form 10-K on March 5, 2021
  - 24 • Ex. 11: Unity Press Release, attached to SEC Form 8-K filed on February 4, 2021
  - 25 • Ex. 15: Ricciello’s SEC Form 4 filings reflecting stock sales during Class Period
  - 26 • Ex. 16: Lestiyo’s SEC Form 4 filings reflecting stock sales during Class Period
  - 27 • Ex. 17: Visoso’s SEC Form 4 filings reflecting stock sales during Class Period

28 The Court will take judicial notice of these SEC filings as public documents whose  
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accuracy cannot reasonably be questioned. However, the Court will not consider the truth of the statements within the filings or, as discussed above, use the filings to resolve any factual disputes at this stage.

**B. Exchange Act Section 10(b) and SEC Rule 10b-5**

Moving to the merits of Defendants' motions, to state a claim under Section 10(b) and Rule 10b-5, a plaintiff must allege "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *In re Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130, 1140 (9th Cir. 2017) (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014)).

The PSLRA requires a plaintiff proceeding with a misrepresentation theory to plead the falsity of an alleged misstatement with particularity. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 990-91 (9th Cir. 2009). This is an "exacting requirement[]," necessitating "'specific facts indicating why' the statements at issue were false." *Kipling*, 2020 WL 2793463, at \*14 (quoting *Metzler*, 540 F.3d at 1070). The particularized facts must be "necessarily inconsistent" with the challenged statements. *In re Read-Rite Corp. Sec. Litig.*, 335 F.3d 843, 848 (9th Cir. 2003). This requires pleading "contemporaneous facts that would establish a contradiction between the alleged materially misleading statements and reality." *Norfolk Cnty. Ret. Sys. v. Solazyme, Inc.*, No. 15-cv-02938-HSG, 2016 WL 7475555, at \*3 (N.D. Cal., Dec. 29, 2016). To plead an omissions theory, a plaintiff must plead facts showing that a statement "affirmatively create[s] an impression of a state of affairs that differs in a material way from the one that actually exists." *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002). Though, federal securities laws "do not create an affirmative duty to disclose any and all material information." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011). Statements are not actionable merely because they are incomplete, and "[o]ften, a statement will not mislead even if it is incomplete or does not include all relevant facts." *Brody*, 280 F.3d at 1006.

As a threshold issue, Defendants argue that Lead Plaintiffs have failed to plead with  
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1 particularity facts showing that the alleged statements are false or misleading because Lead  
2 Plaintiffs have failed to allege that Audience Pinpointer had serious known technical flaws during  
3 the Class Period. Unity Mot. 9. The Court agrees.

4 Lead Plaintiffs rely on five confidential witnesses to show that Unity was experiencing  
5 significant challenges with Audience Pinpointer during the Class Period. However, most of the  
6 confidential witnesses' observations occurred pre-Class Period. To reiterate, the Class Period is  
7 alleged to be from May 11, 2021, through May 10, 2022. Am. Compl. ¶ 1. CW-1 recounts facts  
8 from November/December 2020, such as "identif[ying] problems within Unity's Operate segment  
9 including its ads business," "describ[ing] Unity's data in Operate as 'definitely unclean' and 'in  
10 such a bad way,'" and "realiz[ing] Operate did not have visibility into: (i) its sales pipeline; or (ii)  
11 a holistic view of revenue by customer across all Operate products." *Id.* ¶¶ 92, 100. CW-3  
12 recounts facts from February 2021, such as hearing "that Audience Pinpointer had problems"  
13 whereby "engineers needed to 're-route' certain data which would take approximately two  
14 weeks," and attending an all-hands engineering team status meeting "during which the Audience  
15 Pinpointer problems were discussed." *Id.* ¶ 103. CW-3's statement indicates that this specific  
16 problem was in fact resolved in two weeks. *Id.* CW-2 recounts facts occurring during the  
17 "[r]ollout of Audience Pinpointer to all customers," which Lead Plaintiffs allege began following  
18 Apple's announcement in mid-2020. *Id.* ¶¶ 5, 105–06. CW-2's recollections include  
19 "immediately seeing customer complaints that Audience Pinpointer was not working," recalling a  
20 "massive" "five-fold" increase in complaints following the broader use of Audience Pinpointer,  
21 and confirming that "profits were declining for ad solutions as customers complained about issues  
22 with the accuracy of the Audience Pinpointer tool which was not working as intend." *Id.* ¶¶ 105–  
23 06. Finally, CW-4 and CW-5 do not speak to any technical challenges with Audience Pinpointer,  
24 instead providing background information on the product. *See Id.* ¶¶ 86–88, 94, 96–97, 101–02.

25 The only facts regarding Audience Pinpointer's functionality during the Class Period  
26 derive from CW-1. CW-1 stated that in Summer 2021, his team presented to Defendant Lestiyo,  
27 Jules Shumaker, and other employees "an analysis they prepared regarding cross-selling products

1 within the Operate segment.” *Id.* ¶ 110. CW-1 also provides that in “May/June 2021–September  
2 /October 2021,” his team created a customer program which showed significant low customer  
3 sentiment “for a while,” and included a review of thousands of customer complaint tickets from  
4 approximately May or June 2021 through the following three months. *Id.* ¶ 111. However, the  
5 Court agrees with Defendants’ characterization of these statements—“[v]ague complaints from an  
6 unspecified number of unknown customers that a product was not working as intended at some  
7 unspecified time does not show that any Challenged Statement was false when made.” Unity Mot.  
8 9. Lead Plaintiffs have failed to satisfy the “exacting” pleading requirement imposed by the  
9 PSLRA necessitating “specific” and “contemporaneous” facts indicating when and how Audience  
10 Pinpointer experienced the issues which Lead Plaintiffs allege made Defendants’ statements false.  
11 *Kipling*, 2020 WL 2793463, at \*14; *In re Read-Rite Corp. Sec. Litig.*, 335 F.3d at 848; *Norfolk*,  
12 2016 WL 7475555, at \*3.

13 It is true, as Lead Plaintiffs highlight, that issues with Audience Pinpointer prior to the  
14 Class Period could be useful to show that these issues continued into the Class Period or that  
15 Defendants knew the statements made during the Class Period were false. Opp’n 133. However,  
16 Lead Plaintiffs’ pre-Class Period allegations here do not establish the falsity of the statements  
17 made during the Class Period. Without more, “any inference that pre-Class Period practices  
18 continued during the Class Period amounts to unsubstantiated speculation.” *Johnson v. Costco*  
19 *Wholesale Corp.*, No. 18-cv-1611-TSZ, 2019 WL 6327580, at \*7 (W.D. Wash. Nov. 26, 2019);  
20 *see also In re Downey Sec. Litig.*, No. 08-cv-3261-JFW, 2009 WL 2767670, at \*10 (C.D. Cal.  
21 Aug. 21, 2009) (rejecting CW allegations that occurred outside of the class period).

22 Accordingly, the Court **GRANTS** Defendants’ motion to dismiss the Section 10(b) and  
23 Rule 10b-5 claims. Because the Court dismisses on the threshold issue that Lead Plaintiffs have  
24 failed to plead with particularity facts to show a falsity, the Court will not address Defendants’  
25 remaining arguments at this time.

26 **C. Exchange Act Section 20(a)**

27 Unity Defendants, Silver Lake, and Sequoia Defendants all separately move to dismiss  
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1 Lead Plaintiffs Section 20(a) claims against them for failure to state a claim. Unity Mot.; Silver  
2 Lake Mot; Sequoia Mot.

3 Section 20(a) of the Securities Exchange Act provides that “[e]very person who, directly or  
4 indirectly, controls any person liable under any provision of [the Securities Exchange Act] shall  
5 also be liable jointly and severally with and to the same extent as such controlled person to any  
6 person to whom such controlled person is liable.” 15 U.S.C. § 78t(a). A plaintiff alleging a  
7 violation of Section 20(a) must demonstrate: “(1) a primary violation of federal securities laws and  
8 (2) that the defendant exercised actual power or control over the primary violator.” *Webb v.*  
9 *Solarcity Corp.*, 884 F.3d 844, 858 (9th Cir. 2018) (quotations and citation omitted).

10 The primary federal securities law violations upon which Lead Plaintiffs rely are the  
11 Section 10(b) and Rule 10b-5 claims dismissed above. Am. Compl. ¶ 292. Because the Court  
12 finds Lead Plaintiffs’ Section 10(b) and Rule 10b-5 claims insufficiently pled, their Section 20(a)  
13 claim necessarily fails at the first step. The Court therefore need not address Defendants’  
14 arguments regarding the second step at this time.

15 Accordingly, the Court **GRANTS** Defendants’ motion to dismiss the Section 20(a) claims  
16 for failure to state a claim of a primary violation of the securities laws.

17 **IV. CONCLUSION**

18 For the foregoing reasons, the Court **GRANTS** Defendants’ motions to dismiss with leave  
19 to amend. Lead Plaintiffs may file an amended complaint if they choose by April 5, 2024.

20 **IT IS SO ORDERED.**

21 Dated: March 15, 2024

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EDWARD J. DAVILA  
United States District Judge