A9

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

COMPENDIUM OF UNREPORTED CASES

REPLY BRIEF IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR PROTECTIVE ORDER QUASHING THE HOUSEHOLD DEFENDANTS' THIRD-PARTY SUBPOENAS

PATRICK J. COUGHLIN
AZRA Z. MEHDI
MONIQUE C. WINKLER
SYLVIA SUM
LUKE O. BROOKS
LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP
100 Pine Street, Suite 2600
San Francisco, CA 94111

WILLIAM S. LERACH
LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP
401 B Street, Suite 1600
San Diego, CA 92101

MARVIN A. MILLER
LORI A. FANNING
MILLER FAUCHER AND CAFFERTY LLP
30 North LaSalle Street, Suite 3200
Chicago, IL 60602

LAWRENCE G. SOICHER
LAW OFFICES OF LAWRENCE G.SOICHER
305 Madison Avenue, 46th Floor
New York, NY 10165

Easton & Co. v. Mutual Benefit Life Ins. Co.,
Civ. No. 91-4012 (HLS), 1994 U.S. Dist. LEXIS 12308 (D.N.J. May 18, 1994)

Feldman v. Motorola, Inc.,
No. 90 C 5887, 1992 U.S. Dist. LEXIS 8157 (N.D. Ill. June 9, 1992)

In re Initial Pub. Offering Sec. Litig.,
21 MC 92 (SAS), 2004, WL 2297401 (S.D.N.Y. Oct. 13, 2004).

In re Lucent Techs. Inc. Sec. Litig.,
Civil Action No. 00-621 (JAP), 2002 U.S. Dist. LEXIS 8799 (D.N.J. May 7, 2002

In re NeoPharm, Inc. Sec. Litig.,
No. 02 C 2976, 2004 U.S. Dist. LEXIS 16287 (N.D. Ill. Aug. 17, 2004).

In re SciMed Life Sec. Litig.,
Civil No. 3-91-575, 1992 U.S. Dist. LEXIS 22144 (D. Minn. Nov. 20, 1992)

Seidman v. Stauffer Chem. Corp.,
Civil No. B-84-543 (TFGD), 1986 U.S. Dist. LEXIS 30264
(D. Conn. Jan. 17, 1986)

Tatz v. Nanophase Techs. Corp.,
No. 01 C 8440, 2003 U.S. Dist. LEXIS 9982 (N.D. Ill. June 12, 2003)

LEXSEE 1994 US DIST LEXIS 12308

EASTON & CO., Plaintiff, v. MUTUAL BENEFIT LIFE INSURANCE CO.; HENRY E. KATES; SHEARSON LEHMAN BROTHERS, INC.; and ERNST AND YOUNG, Defendants. EASTON & CO., Plaintiff, v. SHEARSON LEHMAN BROTHERS, INC., Defendant.

Civ. No. 91-4012(HLS), Civ. No. 92-2095(HLS)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

1994 U.S. Dist. LEXIS 12308

May 18, 1994, Filed

NOTICE: [*1] NOT FOR PUBLICATION

JUDGES: PISANO

OPINIONBY: JOEL A. PISANO

OPINION:

SECOND AMENDED OPINION

JOEL A. PISANO, U.S. MAGISTRATE JUDGE:

INTRODUCTION

This matter comes before the court upon the motion of plaintiff Easton & Co. ("Easton") for a protective order precluding defendants Ernst & Young and Shearson Lehman Brothers ("Shearson") from taking discovery of absent class members. Oral argument was heard on February 14, 1994.

BACKGROUND

Easton, a broker and securities dealer, purchased bonds issued on or about May 3, 1991 by the DeKalb Georgia Housing Authority (the "DeKalb Bonds"). Mutual Benefit Life Insurance Co. ("Mutual") guaranteed the interest payments on the DeKalb Bonds. Defendant Henry Kates was the President, CEO, and a director of Mutual until July 16, 1991. Defendant Ernst & Young, a partnership of certified accountants which acted as Mutual's auditor, issued opinion letters for Mutual. Lehman Brothers, a division of Shearson, was the lead underwriter and seller of the DeKalb Bonds. Shearson prepared and disseminated to the investment public an Official Statement regarding the DeKalb Bonds.

On September 7, 1991, plaintiff filed a complaint ("Easton I") against Mutual, Henry Kates, **[*2]** Shearson, and Ernst & Young, claiming that the defendants knowingly disseminated inaccurate and misleading written statements regarding Mutual's guarantee and the investment risks associated with the DeKalb bonds. Specifically, Easton asserts that the defendants knew of Mutual's precarious financial situation, but failed to disclose the information in the Official Statement offering the DeKalb Bonds for sale. The Easton I complaint alleges that defendants violated section 10(b) of the Securities and Exchange Act of 1934 and *15 U.S.C. § 78j*(b). Easton also asserts a state law negligent misrepresentation claim.

Easton filed Easton I on behalf of a class comprised of:

> all persons and entities who purchased DeKalb, Georgia Housing Authority Multifamily Housing Revenue Refunding Bonds (North Hill Ltd. Project), Series 1991, due November 30, 1994 (the "DeKalb Georgia Bonds") from May 3, 1991 through July 1991. Excluded from the class are defendants, subsidiaries and affiliates of the corporate and partnership defendants, and their respective principals, officers and directors, and the individual defendant and members of his immediate family, **[*3]** and the affiliates, heirs, successors or assignees.

(Pl.'s Br. in Supp. of Class Certification at 22).

On May 18, 1992, Easton filed a second class action (Easton II) naming only Shearson as a defendant. The Easton II complaint alleges that: 1) Shearson orally misrepresented that Mutual-backed bonds were rated AA or AAA and were a safe, conservative investment; 2) Shearson knew, or recklessly disregarded, facts showing that Mutual was experiencing financial difficulties and was rapidly moving toward insolvency, thus making Mutual's guarantees of the bonds worthless and the bonds a risky investment; and 3) had Easton and the class known of Mutual's financial position, they never would have purchased the Mutual-backed bonds.

Easton filed the complaint in Easton II on behalf of:

> all persons and entities who purchased any bond guaranteed by Mutual . . . from Shearson during the period April 19, 1991 through July 16, 1991, excluding Shearson, Mutual, or their subsidiaries, affiliates, principals, officers and directors and their heirs, successors or assignees.

(Pl.'s Br. in Supp. of Class Certification at 22).

On November 4, 1992, Judge Sarokin entered an order **[*4]** consolidating Easton I and Easton II. On February 9, 1993, Judge Sarokin issued an Opinion certifying Easton I to proceed as a class action under *Rule 23 of the Federal Rules of Civil Procedure.* Prior to this time, Shearson had agreed to certification of an Easton II class consisting of all fixed-rate bondholders.

On June 1, 1993, the Court entered an Order approving the proposed notices of pendency of the class actions and directed that the notices be provided to potential class members. The notices approved by the court informed class members that they need not take any action to be included in the class action, but gave them an opportunity to "opt-out" of the class by August 31, 1993. None of the class members elected to be excluded. Easton represents that there are 160 Easton I and Easton II class members.

On August 13, 1993 and November 16, 1993, respectively, Ernst & Young and Shearson served fifteen interrogatories and a single document request on the class members. The defendants do not dispute that the questions generally relate to the individual circumstances of each class member's purchase of the bonds and resulting damages. The information defendants **[*5]** seek includes:

(1) the number of bonds purchased;

(2) the price at which the bonds were purchased;

(3) the name of the broker used for each purchase;

(4) the dates and amounts for which the bonds were sold;

(5) the person to whom they were sold;

(6) the broker(s) used in connection with the purchase/sale;

(7) all advice, information, and/or documents received, reviewed, or relied upon in connection with the bond purchases;

(8) whether class members regularly read The Wall Street Journal;

(9) when class members learned of Mutual's financial difficulties;

(10) prior investment history of each absent class member from January 1987 through July 1991, including a listing of up to fifteen purchases of securities items identified by name, price, and date.

(Pl.'s Br. in Supp. of Protective Order at 6).

The instructions to defendants' discovery requests inform class members that they will risk dismissal of their claims if they fail to respond or if their responses are insufficient.

On December 23, 1993 Easton filed the instant motion for a protective order precluding the class members from answering Shearson and Ernst & Young's interrogatories. On January 7, 1994, **[*6]** Shearson and Ernst & Young filed separate submissions in opposition to Easton's motion. Oral argument was heard on February 14, 1994.

DISCUSSION

It is fairly well-settled that, where warranted, discovery may be taken of absent class members during the course of class action litigation under Rule 23. In *Brennan v. Midwestern United Life, 450 F.2d 999, 1005 (7th Cir. 1971),* the court explained that:

> If discovery from the absent members is necessary or helpful to the proper presentation and correct adjudication of the principal suit, [there is] no reason why it should not be allowed, so long as adequate precautionary measures are taken to insure that the absent class members are not misled or confused.

The guidelines first discussed in Brennan were modified by later cases, notably *Clark v. Universal Builders, 501 F.2d 324 (7th Cir. 1974)* and *Cox v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir. 1986)*, cert. denied, *479 U.S. 883, 93 L. Ed. 2d 250, 107 S. Ct. 274 (1986)*. One court, which undertook a survey of the **[*7]** various federal decisions following Brennan, concluded that:

> the majority of courts considering the scope of discovery against absent class members have granted discovery via interrogatories or document requests (1) where the information requested is relevant to the decision of common questions, (2) when the discovery requests are tendered in good faith and are not unduly burdensome, and (3) when the information is not available from the class representative parties.

Transamerican Refining Corp. v. Dravo, 139 F.R.D. 619, 621 (S.C. Tex. 1991) (citing *Dellums v. Powell, 184 U.S. App. D.C. 275, 566 F.2d 167 (D.C. Cir. 1977); United States v. Trucking Employers, Inc., 72 F.R.D. 101 (D.D.C. 1976);* and Brennan). A fourth requirement was referred to in Clark: that the discovery not seek information on matters already known to defendants. *Clark, 501 F.2d 324, 341 n. 24*

Easton essentially argues that the discovery currently at issue is irrelevant to the decision of common questions. The interrogatories focus on the reliance of the class **[*8]** members as individuals upon the alleged misrepresentations. Easton maintains that questions of individual reliance are irrelevant to the determination of class-wide issues relating to the liability of the defendants. According to Easton, this determination focuses on the "fraud on the market" theory.

The Supreme Court has explained that:

> The fraud on the market theory is based on the hypothesis that . . . the price of a company's stock is determined by the available material information regarding the company and its business . . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements . . . . The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations.

Basic v. Levinson, 485 U.S. 224, 241-42, 99 L. Ed. 2d 194, 108 S. Ct. 978 (1988). In Basic, the Supreme Court held that when a plaintiff asserts a "fraud on the market" theory of liability, a presumption of causation arises. Id.

However, the presumption of causation **[*9]** is rebuttable. *Id. at 250. Blackie v. Barrack, 524 F.2d 891, 906 (9th Cir. 1975)*, cert. denied, *429 U.S. 816, 97 S. Ct. 57, 50 L. Ed. 2d 75 (1976)*, set forth the manner in which a defendant may rebut the presumption of causation in a "fraud on the market" case:

> (1) by disproving materiality, or by proving that despite materiality, an insufficient number of traders relied on the deception so as to inflate the price; or (2) by proving that an individual plaintiff purchased despite knowledge of the falsity of a representation, or that he would have, had he known of it.

Therefore, as summarized in *Jaroslawicz v. Engelhard Corp., 724 F. Supp. 294, 301 (D.N.J. 1989)*, "defendants may rebut fraud-on-the-market reliance as to the class, or as to each class member."

Defendants assert that, because they may rebut reliance as to the class and as to each class member, the discovery at issue is relevant to the common question of whether the market was actually defrauded. Defendants explain that if the discovery **[*10]** shows that a significant number of class members who were purchasers in the market had information about Mutual's decline from sources other than Lehman, it would tend to prove that the market was not defrauded, and thus the benefit of the "fraud on the market" presumption would be unavailable on a common basis to any of the class members, including individuals who might not themselves have learned of Mutual's problems. (Shearson's Br. in Opp'n to Protective Order at 10-11).

In a case very similar to the one at hand, *In re SciMed Life Securities Litigation, Civ. No. 3-91-575, 1992 WL 413867*, at *3 (D. Minn. Nov. 20, 1992), the court permitted discovery of plaintiffs' investment history and background. As in the present case, the SciMed class of stock purchasers sought to assert a "fraud on the market" theory of liability. The plaintiffs objected to discovery relating to their investment background and history. Id. at *2. The defendants argued that the information was highly relevant to the plaintiffs' reliance-based claims. Id.

Citing Blackie, the court noted that the presumption of reliance raised by the "fraud on the market" theory may be rebutted as to individual **[*11]** plaintiffs. Id. at *3. The court also noted that, as in the present case, the

plaintiffs had asserted common law actions of fraud and negligent misrepresentation, which require showings of actual reliance. Id. (citing *Rosenberg v. Digilog, Inc., 648 F. Supp. 40 (E.D. Pa. 1985)).* The SciMed court concluded that the need for the defendants to conduct discovery concerning the plaintiffs' entire investment history and background was important, and ordered compliance with the majority of the requested discovery. n1 Id.

> n1 The SciMed court found that the defendants did not need the plaintiffs' financial statements or tax returns to adequately assess plaintiffs' investment history and background. Id. at *3. The court ordered the plaintiffs to comply with requests for customer agreements, account statements, margin agreements, prospectus and official statements, correspondence concerning securities purchases, and documents concerning purchases and sales of securities. Id.

[*12]

The requests for discovery in the instant case are similar to those permitted in SciMed. As defendants admit, the discovery is relevant to issues of individual reliance. However, these issues of individual reliance are relevant to the ultimate determination of liability under the "fraud on the market" theory, the theory of liability which plaintiffs raise as a class. Therefore, the requested discovery is relevant to the determination of common questions.

Easton also claims that the requested discovery is unduly burdensome and amounts to an impermissible "opt-in" requirement of class members. Easton bases this argument on case law emphasizing that class members should not be made to take affirmative steps to remain in a class. See *Clark v. Universal Builders, Inc. 501 F.2d 324 (7th Cir. 1974); Cox v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir. 1986),* cert. denied, *479 U.S. 883, 93 L. Ed. 2d 250, 107 S. Ct. 274 (1986); B & B Investment Club v. Kleinert's, 62 F.R.D. 140 (E.C. Pa. 1974); Wainwright v. Kraftco, 54 F.R.D. 532 (N.D. Ga. 1972).* **[*13]** However, in the cases plaintiff cites, rejection of the disputed discovery was routinely based on the failure of the discovery to comport with guidelines first discussed in Brennan.

In Clark, the Seventh Circuit found that the requested discovery was abusive in that it required the civil rights plaintiffs to acquire technical and legal advice in order to understand the questions and formulate responses, *Clark, 501 F.2d at 340-41 n. 24.* Moreover, the court found that the Clark defendants made no showing that the requested information was necessary to trial preparation, in contravention of the guidelines set forth in Brennan. *Id. at 340.*

Similarly, Cox did not hold that propounding interrogatories on absent class members is impermissible per se. In Cox, the Eleventh Circuit reversed a district court ruling dismissing the claims of absent class members who had failed to answer interrogatories. The interrogatories had been prefaced with a warning that failure to answer the interrogatories could result in dismissal from the class action suit. *Cox, 784 F.2d at 1556.* The Court **[*14]** of Appeals observed that dismissal is the most severe of sanctions and is to be used only where noncompliance results from willful or bad faith disregard. Id. The Court of Appeals found that, because "the lower court made no finding of any bad faith resistance to discovery orders and, further, left no indication on the record that it considered and rejected sanctions less severe than dismissal," the district court erred in dismissing the claims. Id.

The Eleventh Circuit declined "to approve the use of the discovery sanction of dismissal against passive class members in a class action suit even to the extent that it may be permitted by Brennan and Clark." *Id. at 1556-57.* However, the court discussed the guidelines set forth in Brennan and Clark and specifically found that the disputed interrogatories failed to satisfy those guidelines because they were an improper attempt to reduce class size and were of questionable necessity. *Id. at 1556.*

As drafted, the discovery in the instant case is not abusive. Class members need not obtain counsel to answer the interrogatories and document requests. However, the **[*15]** discovery may be made less burdensome. The discovery is prefaced by warnings that failure to respond completely and accurately could result in dismissal of individual claims. As noted in Cox, dismissal is the most severe of sanctions. The threat of dismissal need not be raised at this juncture, where there is no indication that class members will fail to comply with the discovery requests. Therefore, as a precaution against unnecessary intimidation of class members, the court directs that defendants re-draft the discovery requests to exclude the warnings regarding dismissal.

Moreover, based upon the representations of defense counsel at oral argument, the court finds that the discovery requests could be streamlined by incorporating information already available to defendants. At oral argument, the court proposed that the discovery be re-drafted in the form of a questionnaire informing an individual class member of the securities purchased by him or her, as well as the dates, prices, and brokers correlating to those purchases. (Tr. of 2/14/94 at 26:13 to 27:4). Mr. Charles M. Lizza, counsel for Shearson, admitted that producing such a questionnaire would be

possible. (Tr. at 27:6-8). [*16] In keeping with Clark's directive that discovery not seek information on matters already known to defendants, the court orders defendants to redraft the discovery requests as questionnaires providing, to the extent possible, the following information: (1) the securities purchased by the individual class member; (2) the dates of such purchases; (3) the prices paid for such securities; (4) the brokers involved in such transactions.

CONCLUSION

Easton's motion for a protective order precluding discovery of absent class members is denied. The discovery requests propounded by defendants Shearson and Ernst & Young shall be re-drafted in the manner prescribed by the court.

JOEL A. PISANO

U.S. MAGISTRATE JUDGE

LEXSEE 1992 US DIST LEXIS 8157

MEYER FELDMAN, et al., Plaintiffs, v. MOTOROLA, INC., et al., Defendants.

No. 90 C 5887

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1992 U.S. Dist. LEXIS 8157

June 9, 1992, Decided
June 10, 1992, Docketed

LexisNexis(R) Headnotes

JUDGES: [*1] GOTTSCHALL

OPINIONBY: JOAN B. GOTTSCHALL

OPINION:

MEMORANDUM OPINION AND ORDER

This matter is before the court on defendants' motion to compel. For the reasons set forth below, the motion is granted.

In this action for securities fraud, plaintiffs seek recovery on a fraud-on-the-market theory. The Supreme Court has described the theory as follows:

The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business . . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers did not directly rely on the misstatements . . . . The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations.

Basic, Inc. v. Levinson, 485 U.S. 224, 241-242 (1988) (quoting *Peil v. Speiser, 806 F.2d 1154, 1160-1161 (3d Cir. 1986)).* The Basic decision went on to comment that this presumption of reliance is supported by common sense and probability, as empirical studies [*2] confirm that the market price of shares traded on well-developed markets reflected all publicly available information. Id. at 246. Basic also noted the comment in a district court opinion that "'it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?'" Id. at 246-247 (quoting *Schlanger v. Four-Phase Systems, Inc., 555 F.Supp. 535, 538 (S.D.N.Y. 1982)).*

Despite the perception that most purchasers rely on the integrity of the market, Basic found that the presumption of reliance could be rebutted. In the words of the Court, "any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." Id. at 248. As an example, the Court suggested that an investor might not have been misled if he or she had access to the true state of affairs within a corporate issuer of securities. Id. In such a scenario, the investor might believe the securities are undervalued, even despite artificial [*3] price inflation stemming from the fraud.

Hoping to rebut the presumption of reliance in this case, defendants seek production of plaintiffs' brokerage account statements from January 1, 1988 to the present. Although defendants allege no facts leading them to suspect plaintiffs did not rely on the market, they maintain that such discovery is reasonably calculated to lead to evidence that plaintiffs are "sophisticated investors" who purchased their shares in reliance on factors other than market price. Although this court agrees with defendants that the brokerage statements are relevant to the merits of plaintiffs' federal securities law claim, the inquiry does not end here. Plaintiff objects to this discovery because the question of class certification

has not yet been resolved. As this court sees it, the pertinent question therefore becomes one of whether to order production now or defer it until after resolution of the motion for class certification.

Defendants argue that this discovery is relevant to the requirements under Rule 23(a) that named plaintiffs adequately represent the class and that named plaintiffs have claims typical of those of the class. *Fed.R.Civ.P. 23(a)(3)* and **[*4]** (4). As support for their argument, they cite case law to the effect that a sophisticated investor is not an appropriate class representative. See, e.g., *J.H. Cohn & Co. Employment Retirement Trust v. American Appraisal Assoc., Inc., 628 F.2d 994, 998 (7th Cir. 1980); McNichols v. Loeb Rhoades & Co., Inc., 97 F.R.D. 331, 335 (N.D. Ill. 1982)* (plaintiffs subject to unique defense that they did not rely on integrity of market); *Lewis v. Johnson, 92 F.R.D. 758, 760 (E.D.N.Y. 1981); Kline v. Wolf, 88 F.R.D. 696, 699 (S.D.N.Y. 1981),* aff'd, *702 F.2d 400 (2d Cir. 1983)* (speculator in stocks subject to unique defenses on issue of reliance). Plaintiffs respond to this argument by pointing to decisions that have rejected the proposition that a sophisticated investor is subject to a unique defense. See, e.g., *Blackie v. Barrack, 524 F.2d 891, 905 (9th Cir. 1975),* cert. denied, *429 U.S. 816 (1976);* Spicer v. Chicago Board Options Exchange, Inc., [1989-1990 Transfer Binder]Fed.Sec.L.Rep. (CCH) P 94,943 at 95,252 (N.D. Ill. 1990); **[*5]** *Grossman v. Waste Management, Inc., 100 F.R.D. 781, 789 (N.D. Ill. 1984)* (omitted information is no more available to a "sophisticated" investor than to a "normal" one). Other decisions concur that non-reliance is not a unique defense in an action for securities fraud. See, e.g., *In re VMS Securities Litigation, 136 F.R.D. 466, 478 (N.D. Ill. 1991); Katz v. Comdisco, Inc., 117 F.R.D. 403, 409 (N.D. Ill. 1987)* (speculator not subject to unique defense because it is not atypical for investors to look for bargains); *Healy v. Loeb Rhoades and Co., 99 F.R.D. 540, 541 (N.D. Ill. 1983); Ridings v. Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd., 94 F.R.D. 147, 151 (N.D. Ill. 1982).* Which of these positions should prevail is not an easy question, however, as the question of class certification is a discretionary determination that turns on the facts of a particular case. See *J.H. Cohn & Co., 628 F.2d at 998; Alexander v. Centrafarm Group, N.V., 124 F.R.D. 178, 185 (N.D. Ill. 1988).*

Plaintiffs have submitted copies of unreported orders **[*6]** of other courts which have limited discovery of a class representative's investment transactions to those involving a particular corporate defendant's securities. A number of these orders do not discuss surrounding circumstances or enunciate the reasoning behind the court's decision to so limit discovery. Other decisions rule on the typicality of the non-reliance or sophisticated investor defense before the record on class certification is complete. See, e.g., Cohen v. Long Island Lighting Co., [1986-1987 Transfer Binder]Fed.Sec.L.Rep. (CCH) P 92,850 at 94,136 (E.D.N.Y. 1986); Malanka v. Data General Corp., [1986-1987 Transfer Binder]Fed.Sec.L.Rep. (CCH) P 92,837 at 94,073 (D.Mass. 1986). While this kind of preliminary decision not to consider a plaintiff's investment history may prove to be appropriate in many or even a majority of cases under a fraud-on-the-market theory, a plaintiff's investment history could reveal unusual typicality defenses. Shields v. Smith, [Current Binder]Fed.Sec.L.Rep. P 96,449 at 91,967 (N.D. Cal. 1991) (plaintiff exhibited consistent pattern of purchasing shares in troubled companies, possibly **[*7]** to pursue litigation).

The question of class certification is to be decided "as soon as practicable" after the commencement of an action. E.g., *Rutan v. Republican Party of Illinois, 848 F.2d 1396, 1400 (7th Cir. 1988).* Some discovery may be appropriate to make the necessary class determinations. *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 895 (7th Cir. 1981),* cert. denied sub nom. *Joint Apprenticeship Comm. Local No. 130 v. Eggleston, 455 U.S. 1017 (1982).* At the same time, there exists a potential for abuse in that a defendant may use discovery of representative plaintiffs to delay. See C.Aron et al., Class Actions: Law and Practice § 25.02 (1987). In deciding this motion, the court also bears in mind that the class determination generally involves considerations that are "'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Coopers and Lybrand v. Livesay, 437 U.S. 463, 469 (1978)* (citation omitted); *Eggleston, 657 F.2d at 895* (boundary between class determination and merits not always easily discernible **[*8]** . . . some overlap may be unavoidable); *Gray v. First Winthrop Corp., 133 F.R.D. 39, 41 (N.D. Cal. 1990)* (discovery relating to class certification closely enmeshed with merits discovery). There is no hard and fast rule on the timing of discovery n1 and some flexibility is appropriate. See discussion in 2 H. Newberg, Newberg on Class Actions § § 9.43, 9.44 and 9.49 (2d ed. 1985).

> n1 The parties here have agreed that defendants' response to plaintiffs' motion for class certification will not be due until 30 days after the ruling on this motion to compel, with plaintiffs' reply due 30 days after the response is filed.

Here, plaintiffs' sole objection to the requested discovery is based on relevance. There is no claim of

undue burden or inability to protect confidential matter through a protective order. Although plaintiffs accuse defendants of seeking this discovery for purposes of harassment, they do not support this allegation with any description of underlying facts. Nor does the record **[*9]** suggest that defendants are utilizing discovery for delay or for any other abusive purpose. This court also prefers to defer ruling on the contours of the issues of typicality and adequacy of representation until the decision on class certification. Because this court considers the material relevant to the inquiry into class certification, it will allow this discovery. At the same time, in order that this discovery not become a source of delay, the court will hold the parties to their agreed briefing schedule. Defendants' motion to compel is therefore granted.

CONCLUSION

For the reasons set forth above, defendants' motion to compel is granted. Defendants' response to plaintiffs' motion for class certification is due July 8, 1992; plaintiffs' reply is due August 7, 1992.

ENTER:

JOAN B. GOTTSCHALL

United States Magistrate Judge

DATED: June 9, 1992

Westlaw.

Slip Copy
2004 WL 2297401 (S.D.N.Y.), Fed. Sec. L. Rep. P 93,014
(Cite as: 2004 WL 2297401 (S.D.N.Y.))

H

Motions, Pleadings and Filings

United States District Court,
S.D. New York.
In re: **INITIAL PUBLIC OFFERING** Securities Litigation
In re CORVIS CORP. **Initial Public Offering** Securities Litigation
In re ENGAGE TECHNOLOGIES, INC. **Initial Public Offering** Securities Litigation
In re FIREPOND, INC. **Initial Public Offering** Securities Litigation
In re IXL ENTERPRISES, INC. **Initial Public Offering** Securities Litigation
In re SYCAMORE NETWORKS, INC. **Initial Public Offering** Securities Litigation
In re VA LINUX CORP., formerly known as VA Linux Systems, Inc. **Initial Public Offering** Securities Litigation
No. 21 MC 92(SAS), 01 Civ. 3857(SAS), 01 Civ. 8408(SAS), 01 Civ. 7048(SAS), 01 Civ. 9417(SAS), 01 Civ. 6001(SAS), 01 Civ. 0242(SAS).

Oct. 13, 2004.

Melvyn I. Weiss, Robert A. Wallner, David A.P. Brower, Ariana J. Tadler, Milberg Weiss Bershad & Schulman LLP, New York, NY, Stanley Bernstein, Rebecca M. Katz, Bernstein Liebhard & Lifshitz, LLP, New York, NY, Liaison Counsel for Plaintiffs.

Gandolfo V. DiBlasi, Penny Shane, Sullivan & Cromwell, New York, NY, Liaison Counsel for Defendants (Underwriters).

Jack C. Auspitz, Morrison & Foerster LLP, New York, NY, Liaison Counsel for Defendants (Issuers).

OPINION AND ORDER

SCHEINDLIN, J.

*1 This Document Relates to:

I. INTRODUCTION

***2** Between January 11 and December 6, 2001, thousands of investors filed class action lawsuits, alleging that 55 underwriters, 310 issuers and hundreds of individuals associated with those issuers had engaged in a sophisticated scheme to defraud the investing public. In brief, the scheme consisted of a requirement, imposed by the underwriters, that IPO allocants purchase shares in the aftermarket, often at escalating prices, and pay undisclosed compensation. In addition, the underwriters prepared analyst reports that contained inaccurate information and recommendations because the analysts operated under a conflict of interest. As a result of the scheme, plaintiffs allege that they collectively lost billions of dollars. These actions were consolidated before this Court for pre-trial supervision. At the suggestion of the Court, the parties selected six cases to be used as test cases for determining whether these suits can proceed as class actions. Upon plaintiffs' motion, I now address whether these test cases can be certified as class actions.

Defendants have submitted thousands of pages of briefs, affidavits, exhibits and reports in opposition to the motion. Although they raise every conceivable argument, their major contention is that individual

issues predominate over common issues with respect to almost every aspect of proof. In particular, defendants note that each plaintiff differs with respect to her knowledge of the alleged scheme when she invested (*e.g.*, whether she was an allocant or an aftermarket purchaser or both and whether and to what extent she was exposed to press reports and other public disclosures); the nature of her investment (*e.g.*, whether she was a long term investor, a short seller, a day trader, or a momentum trader); the timing of her investment (*e.g.*, the purchase price of the stock and the effect of any artificial inflation at the time of purchase); the amount of her damages (*e.g.*, the subsequent dissipation of any artificial inflation by the time of sale); and the traceability of her shares to a particular offering and registration statement. Because of these differences, defendants argue, common issues cannot predominate, and class certification must be denied. Defendants also contend that it would be impossible to ascertain which investors should be in the class and which must be excluded.

In their zeal to defeat the motion for class certification, defendants have launched such a broad attack that accepting their arguments would sound the death knell of securities class actions. Yet class-wide adjudication under Rule 23 of the Federal Rules of Civil Procedure is particularly well-suited to securities fraud cases. [FN1] In opposing certification, defendants do not truly seek separate adjudications of each individual claim. In reality, they seek *no* adjudication because the prospect of 310 million individual lawsuits (based on a hypothetical average class membership of one million investors), represents an impossible burden for all parties--the individual plaintiffs, the defendants and the courts. [FN2] Thus, if certification is denied, defendants will have essentially defeated the claims without ever having been compelled to defend the suits on the merits. Of course, if plaintiffs fail to satisfy the stringent requirements of Rule 23, then a class cannot be certified, even if that results in plaintiffs' inability to press their claims. [FN3]

FN1. *See* Fed.R.Civ.P. 23(b)(3) Advisory Committee Note (acknowledging that class action is an appealing tool for adjudicating cases of "fraud perpetrated on numerous persons by the use of similar misrepresentations").

FN2. *See In re Worldcom, Inc. Sec. Litig.*, 219 F.R.D. 267, 304 (S.D.N.Y.2003) ("Few individuals could even contemplate proceeding with this litigation in any context other than through their participation in a class action, given the expense and burden that such litigation would entail.").

FN3. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 209 F.R.D. 323, 353 (S.D.N.Y.2002) (denying class certification).

***3** "The class action device was designed to promote judicial efficiency and to provide aggrieved persons a remedy when individual litigation is economically unrealistic, as well as to protect the interests of absentee class members." [FN4] This underlying purpose of Rule 23 provides much-needed guidance in focusing on the real issues. While highly competent counsel, with unlimited resources, have the capability to advance an almost unlimited array of complex arguments against certification, the Court must not lose sight of the ultimate question: whether class adjudication of the issues raised in these complaints is clearly superior to any other form of dispute resolution. Although defendants' arguments have raised a number of thorny problems, forcing this Court to take a hard look at the pleadings and the many submissions made in support of and in opposition to this motion, the balance tips strongly in favor of certification. Trying these cases will be an arduous task, but that is no reason to close the courthouse door to the alleged victims of a sophisticated and widespread fraudulent scheme. Accordingly, for the reasons set forth below, class certification, to the extent noted, is granted in each of the six focus cases.

FN4. 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.03 (3d ed.2004).

II. FACTS

A. The Alleged Scheme

Plaintiffs seek recovery for securities fraud pursuant to the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act"). Plaintiffs allege that defendants engaged in a comprehensive scheme to defraud investors by artificially inflating the prices of the issuers' stocks. The alleged scheme is described at length in my February 19, 2003 Opinion denying defendants' motion to dismiss. [FN5] Familiarity with that Opinion is assumed.

FN5. *See In re Initial Public Offering Sec. Litig. ("In re IPO")*, 241 F.Supp.2d 281 (S.D.N.Y.2003).

B. The Focus Cases

These proceedings sweep together for pre-trial management 310 consolidated class actions, each with a distinct group of defendants (many of whom are overlapping) but alleging the same scheme to defraud investors. Because the question of whether a class can be certified under the rigorous standard set forth by Rule 23 is common to *all* of these consolidated actions, judicial efficiency counsels in favor of a test case approach. Accordingly, the parties have presented for the Court's consideration six cases, involving the following issuers: Corvis Corp. ("Corvis"); Engage Technologies, Inc. ("Engage"); Firepond, Inc. ("Firepond"); iXL Enterprises, Inc. ("iXL"); Sycamore Networks, Inc. ("Sycamore"); and VA Software Corp, formerly known as VA Linux Systems, Inc. ("VA Linux") (collectively, the "focus cases"). [FN6]

FN6. Plaintiffs selected Corvis, Engage, Firepond, Sycamore and VA Linux. *See* 10/14/03 Letter to the Court from Melvyn I. Weiss, liaison counsel for plaintiffs. Defendants selected iXL. *See* 11/26/03 Letter to Weiss from Mark Holland, counsel for defendant Merrill Lynch.

The parties have agreed that "[t]he rulings on the class certification motions in the selected cases will govern those cases only." [FN7] However, most of the issues this Opinion addresses would undoubtedly be raised in a motion for class certification with respect to the remaining 304 consolidated actions. This Opinion is intended to provide strong guidance, if not dispositive effect, to all parties when considering class certification in the remaining actions. [FN8]

FN7. 7/11/03 Case Management Term Sheet, Part II.D.

FN8. *See* Transcript of 6/17/04 Hearing at 3:1-6 ("THE COURT: [O]nce there is a decision on these motions, ... we can talk about what common issues ... would only reappear in every other class certification motion, and what unique issues there may be in the remaining action.").

C. The Parties' Submissions

*4 On September 2, 2003, plaintiffs moved for class certification and submitted Plaintiffs' Memorandum of Law in Support of Their Omnibus Motion for Class Certification ("Plaintiffs' Omnibus Mem."). Defendants responded with six opposition briefs: the Underwriter Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification in Corvis ("Corvis Mem."); the Memorandum in Opposition to Omnibus Motion for Class Certification, and to Certification of the Proposed Class in Engage Technologies, Inc. ("Engage Mem."); the Underwriter Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification in Firepond ("Firepond Mem."); the iXL Underwriter Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification ("iXL Mem."); the Underwriter Defendants' Opposition to Plaintiffs' Motion for Class Certification in Sycamore ("Sycamore Mem."); and Credit Suisse First Boston ("CSFB") LLC's Memorandum in Opposition to Plaintiffs' Motion for Class Certification in VA Linux ("VA Linux Mem."). [FN9] Plaintiffs replied on April 19, 2004, with Plaintiffs' Corrected Reply Memorandum of Law in Support of Their Omnibus Motion for Class Certification ("Plaintiffs' Reply"). Defendants responded on May 10, 2004, with the Underwriter Defendants' Sur-Reply Memorandum in Opposition to Plaintiffs' Motion for Class Certification ("Defendants' Sur-Reply"), and plaintiffs submitted Plaintiffs' Response to Underwriter Defendants' Sur-Reply Memorandum in Opposition to Class Certification ("Plaintiffs' Response") on May 19, 2004.

FN9. The iXL Mem. is dated February 23, 2004. The Corvis, Engage, Firepond and VA Linux memoranda are all dated February 24, 2003. The corrected Sycamore Mem. is dated April 7, 2004.

After oral argument on June 17, 2004, I directed plaintiffs to submit a letter brief refining their proposed class definition, which plaintiffs submitted on July 6, 2004 ("Class Def. Letter"). Defendants responded to the proposed definition on July 20, 2004, in a letter brief of their own ("Class Def. Opp."). Finally, on September 7, 2004, I ordered plaintiffs to submit a proposed trial plan, which plaintiffs submitted on September 15, 2004 ("Trial Plan"). Defendants opposed the Trial Plan in a letter brief dated September 22, 2004, and plaintiffs replied on September 28, 2004.

The parties have also submitted many expert reports

regarding the hotly contested issues of loss causation and damages. Plaintiffs submitted an expert report by Professor Daniel Fischel on January 20, 2004 ("1/20/04 Fischel Report"). Defendants countered with reports by the following experts: Dr. Christopher B. Barry in support of iXL Mem. ("Barry Report"); Dr. Paul A. Gompers in support of Sycamore Mem. ("Gompers Report"); Dr. Allan W. Kleidon in support of Sycamore Mem. ("Kleidon Report"); Dr. Maureen O'Hara in support of Corvis Mem. and VA Linux Mem. ("2/23/04 O'Hara Report"); Dr. Erik R. Sirri in support of iXL Mem. ("Sirri Report"); and Dr. Rene M. Stultz in support of Firepond Mem. ("Stultz Report"). [FN10] Plaintiffs submitted a rebuttal report by Professor Fischel dated April 15, 2004 ("4/15/04 Fischel Report"). Defendants countered with a report by Dr. Bradford Cornell, dated May 10, 2004 ("Cornell Report"). In my June 21, 2004 Order, I directed plaintiffs to "submit a supplemental report from [ ] Fischel in which he analyzes the causal link between the alleged tie-in agreements and their effect on stock price in light of *all* tie-in purchases in the six focus cases known to plaintiffs' counsel (both in the form of aftermarket trades and pre-opening bids-and-asks). [ ] Fischel is advised to pay particular attention to the duration of any inflationary effect caused by this activity." [FN11] Plaintiffs submitted a final Fischel report on July 12, 2004 ("7/12/04 Fischel Report"), and defendants countered with a report from Dr. O'Hara dated July 23, 2004 (the "7/23/04 O'Hara Report").

FN10. The Barry Report, 2/23/04 O'Hara Report and Sirri Report are all dated February 23, 2004. The Gompers Report, Kleidon Report and Stultz Report are all dated February 24, 2004.

FN11. *In re IPO*, No. 21 MC 92, 2004 WL 1635575, at *1 (S.D.N.Y. June 23, 2004) (emphasis in original).

D. The Proposed Class Periods

***5** For each of these consolidated actions, "[t]he Class consists of all persons and entities that purchased or otherwise acquired the securities of [Specific Issuer] during the Class Period and were damaged thereby," subject to various exclusions. [FN12] Plaintiffs propose class periods for each case that span the period between the initial public offering ("IPO") and December 6, 2000. [FN13] For the purposes of this Opinion, plaintiffs' proposed class periods are adopted for plaintiffs' Exchange Act claims; however, plaintiffs' proposed class periods must be shortened with respect to plaintiffs' claims pursuant to section 11 of the Securities Act in each of the six focus cases. [FN14]

FN12. Class Def. Letter at 1. The exclusions from this class definition are discussed in detail in Part IV.A.4., *infra*.

FN13. *See* 4/19/02 Consolidated Amended Class Action Complaint For Violations of the Federal Securities Laws for Corvis ¶ 58; 4/19/02 Consolidated Amended Class Action Complaint For Violations of the Federal Securities Laws for Engage ¶ 55; 4/19/02 Consolidated Amended Class Action Complaint For Violations of the Federal Securities Laws for Firepond ¶ 53; 4/19/02 Amended Class Action Complaint For Violations of the Federal Securities Laws for iXL ¶ 64; 4/19/02 Consolidated Amended Class Action Complaint For Violations of the Federal Securities Laws for Sycamore ¶ 68; 4/19/02 Consolidated Amended Class Action Complaint For Violations of the Federal Securities Laws for VA Linux ¶ 52.

FN14. *See infra* Part IV.B.4.

E. Focus Case-Specific Facts

1. Corvis

a. The Corvis IPO

Corvis held its IPO on July 28, 2000, with CSFB serving as the lead underwriter, offering 31,625,000 shares at $36.00 per share.15 Defendants note that "[p]rior to the IPO, Corvis had issued a significant number of unregistered shares ... which would have been freely tradeable at the time of the IPO, provided that the shareholders satisfied SEC Rule 144." [FN16] Corvis reported a number of outstanding unregistered shares of stock that had been issued to other companies and to Corvis affiliates before the Corvis IPO. [FN17] On the first day of trading, the stock opened at $74.00, peaked at $98.00 and closed at $84.72, a 135% increase over the offering price. [FN18] By the end of the first day of trading, 28,137,100 shares had changed hands in 35,755 transactions. [FN19]

Plaintiffs allege that 195 of the institutional allocants in the Corvis IPO, to whom 12,193,450 shares were

allocated, entered into tie-in agreements with the allocating underwriter. [FN20] Plaintiffs further allege that purchase orders from these allocants accounted for 1,469,600 of the 2,569,600 purchase orders placed during the pre-open bid session, during which the opening share price rose to more than twice the $36.00 offering price. [FN21] During the ten business days from July 28 through August 10, 2000, Corvis allocants purchased a total of 11,582,004 shares in the aftermarket. The same investors sold a total of 1,543,240 shares during that time. [FN22]

Following the IPO, Corvis's stock climbed to its highest price, $108.06 per share, on August 4, 2000, the same day Broadwing disclosed a $44,000,000 investment position in Corvis and announced that it would buy $200,000,000 in equipment. [FN23] By the end of September 2000, the stock had fallen to just over $60.00 per share. [FN24] On October 2, 2000, Corvis filed a prospectus for 2,446,074 newly registered shares acquired through the exercise of employee stock options. [FN25] Corvis explicitly incorporated the disclosures made in its IPO prospectus into its October 2, 2000 prospectus. [FN26] During November 2000, the stock slid from $64.00 to $28.81 per share. [FN27] Corvis experienced a slight rebound in December 2000, reaching $40.38 per share on December 6. [FN28] According to Professor Fischel, Corvis underperformed when compared to various market benchmarks by 27 to 64 percentage points from July 28 to December 6, 2000, and by 35 to 67 points thereafter. [FN29] On May 10, 2001, when the first Corvis case, *PRFT Partners v. Corvis Corp.*, No. 01 Civ. 3994, was filed, shares of Corvis closed at $7.380 per share. [FN30]

b. Corvis Class Representatives [FN31]

(1) Satswana Basu

***6** Satswana Basu, who also seeks to act as a class representative in six other IPO cases, purchased and sold 95,198 Corvis shares, and sold and covered short 20,000 Corvis shares between November 17 and December 6, 2000, resulting in a $736,869.20 loss during that time. Basu also purchased Corvis shares after December 6, 2000. [FN32]

(2) Michael Huff

Between August 24 and September 26, 2000, Michael Huff bought and sold 12,000 shares of Corvis stock for a $22,755.00 profit. On September 28 and 29, 2000, however, Huff purchased a total of 6,000 shares for $472,832.50, which he had not sold as of December 6, 2000. Had he sold the shares that day, when the stock closed at $40.38 per share, Huff would have suffered a total pre-December 6, 2000 loss of $207,797.50. [FN33]

(3) Sean Rooney

Sean Rooney purchased 1,000 shares of Corvis stock on August 7, 2000 at $107.50 per share and another 500 shares on August 11, 2000 at $90.00 per share. Rooney sold 500 shares on December 5, 2000, at $39.00 per share, leaving him with 1,000 unsold shares on December 6, 2000. Had he sold his shares that day, when the stock closed at $40.38 per share, he would have suffered a total pre-December 6, 2000 loss of $92,620.00. [FN34] Rooney also received an allocation of 500 shares in the Priceline.com IPO. [FN35]

2. Engage

a. The Engage IPO

Engage held its IPO on July 20, 1999, with Goldman Sachs acting as lead underwriter, offering 6,938,000 shares at $15.00 per share. [FN36] The IPO prospectus for Engage notes that 1,225,324 shares of common stock were already outstanding well before the IPO, on April 30, 1999. [FN37] On the first day of trading, the stock opened at $28.00, peaked at $47.00 and closed at $41.00, a 173% increase over its offering price. By the end of the first day of trading, 14,887,200 shares had changed hands. [FN38]

Plaintiffs allege that forty-nine of the institutional allocants in the Engage IPO, to whom 786,900 shares were allocated, entered into tie-in agreements with the allocating underwriter. [FN39] Plaintiffs further allege that purchase orders from these allocants made up 693,000 of the 1,251,000 total purchase orders placed during the pre-open bidding session, during which the opening price for Engage was set at $28.00, $13.00 above the offering price. [FN40] During the ten business days from July 20, 1999 through August 2, 1999, Engage allocants purchased a total of 3,313,660 shares in the aftermarket. [FN41] The same investors sold a total of 135,850 shares during that time. [FN42]

Following the IPO, the price for Engage stock fell, but the stock traded consistently in the mid-twenties through the end of 1999. [FN43] On January 16, 2000, approximately 6,700,000 non-IPO shares

associated with "employee stock options, corporate acquisitions, and other transactions became freely tradable in large numbers in the secondary market." [FN44] From January to February 2000, Engage prices climbed to all-time highs, peaking at over $180.00 per share. [FN45] The price declined rapidly in March and April of 2000, and the stock split two for one on April 4, 2000. [FN46] By August 2000, the stock was trading around the offering price of $15.00 per share when adjusted to reflect the split. The price dropped below the offering price for the first time in October 2000, and continued to decline through December 6, 2000, when it was trading at a split-adjusted price of approximately $3.19 per share. [FN47] Fischel asserts that Engage underperformed when compared to various market benchmarks by 35 to 72 percentage points from July 20, 1999 to December 6, 2000, and by 34 to 68 points thereafter. [FN48] On September 7, 2001, when the first Engage case, *Chin v. Engage Tech., Inc.*, No. 01 Civ. 8404, was filed, Engage stock closed at $0.190 per share. [FN49]

b. Engage Class Representatives

(1) Stathis Pappas

***7** Stathis Pappas was an allocant in Engage's IPO, receiving 100 shares of Engage stock on July 20, 1999, at $15.00 per share. [FN50] Pappas made no aftermarket purchases in Engage. It does not appear from the facts before this Court that Pappas ever sold any of those shares, which were worth approximately $3.19 per share on December 6, 2000. [FN51] Had he sold his shares that day, he would have suffered a $1,181.26 loss on the transaction. According to defendants, Pappas is a member of more than fifteen potential classes in these consolidated actions. [FN52]

(2) Krikor Kasbarian

Between March 31 and August 29, 2000, Krikor Kasbarian purchased 20,000 shares of Engage stock for $1,008,687.50 and sold 30,000 post-split shares for $411,450.00, resulting in a total pre-December 6, 2000 loss of $597,237.50. [FN53] On his October 8, 2001 PSLRA certification, Kasbarian failed to disclose several transactions. [FN54] In October, 2000, Kasbarian destroyed records documenting his Engage trades. [FN55] He held no Engage stock on December 6, 2000. [FN56]

Kasbarian engaged in six transactions involving Engage after December 6, 2000. In July 2001, Kasbarian bought Engage twice and sold twice, each sale within a few days of the respective purchase. Kasbarian made a profit of $.06 per share on the first set of trades and broke even on the second set. [FN57] Kasbarian failed to disclose these trades on his PSLRA certification. [FN58] Following submission of the certification, Kasbarian made a final pair of trades in Engage stock, purchasing 4,000 shares on October 25, 2001, and selling those shares for a $.03 profit per share on October 30, 2001. [FN59] According to defendants, Kasbarian is also a member of more than fifteen potential classes in these consolidated actions and seeks to serve as a class representative in the TheGlobe.com litigation. [FN60]

3. Firepond

a. The Firepond IPO

Firepond held its IPO on February 4, 2000, with Robertson Stephens acting as lead underwriter, offering approximately 5,000,000 shares at $22.00 per share. [FN61] On that date, 27,751,713 unregistered shares were already outstanding. [FN62] On the first day of trading, Firepond's stock opened at $52.00, peaked at $102.31 and closed at $100.25, an increase of 356% over its offering price. By the end of the first day of trading, 9,284,900 shares had changed hands. [FN63]

Plaintiffs allege that 152 of the institutional allocants in the Firepond IPO, to whom 3,153,100 shares were allocated, entered into tie-in agreements with the allocating underwriter. [FN64] Plaintiffs further allege that purchase orders from these allocants made up 3,965,100 of the 4,125,100 million total purchase orders placed during the pre-open bidding session, during which the opening price for Firepond rose to $30.00 above the offering price. [FN65] During the ten business days from February 4 through February 17, 2000, Firepond allocants purchased a total of 13,970,988 shares in the aftermarket. The same investors sold a total of 12,611,116 shares during that time. [FN66]

***8** Following the IPO, Firepond's stock fell slightly, closing at $71.00 on February 17, 2000. The price then rebounded, reaching a high of $97.44 on February 29, only to rapidly decline to $15.88 by April 17. [FN67] Defendants claim that the number of outstanding shares increased by nearly 2,000,000 between the IPO and April 30, 2000. [FN68] The stock once again rebounded, peaking at $40.69 on June 29, 2000, but soon resumed its decline, trading

in the upper teens again by August 1. [FN69] On August 2, 2000, Firepond's 180-day lock-up expired, and more than 26,000,000 shares became tradeable. [FN70] The price of the stock began to fall dramatically in the fall of 2000, declining from over $17.00 a share on September 14 to a closing price of $6.69 on December 6, 2000. [FN71] Fischel asserts that Firepond underperformed when compared to various market benchmarks by 27 to 63 percentage points from February 4, 2000 to December 6, 2000, and 33 to 65 points thereafter. [FN72] On July 31, 2001, when the first Firepond case, *Barrett v. FirePond, Inc.*, No. 01 Civ. 7048, was filed, Firepond closed at $0.66. [FN73]

b. Firepond Class Representatives

(1) Zitto Investments

Zitto Investments ("Zitto") purchased 345 shares of Firepond stock between February and April of 2000. It sold 100 shares in February for a profit but sold 245 shares in August 2000 for less than $20.00 per share, resulting in a net loss of $7,258.75. [FN74]

(2) James and Diane Collins

James and Diane Collins ("the Collinses") made four purchases of Firepond stock between March 14 and May 1, 2000, totaling 500 shares for $24,300.00. The Collinses had not sold any shares of Firepond stock prior to December 6, 2000, when the stock closed at $6.69 per share. [FN75] Had the Collinses sold their shares that day, they would have suffered a $20,955.00 loss on the transaction.

(3) Joseph Zhen

Between February 11 and March 17, 2000, Joseph Zhen purchased 2,600 Firepond shares for $192,956.25 and sold 1,600 shares for $126,725.00, resulting in a gain of $7,982.69. Zhen still held 1,000 shares when the price dropped dramatically in late March. He sold his remaining shares on April 17, 2000 for $16,093.80, bringing his total pre-December 6, 2000 loss to $50,137.45. [FN76] Zhen omitted thirteen of his seventeen Firepond trades, some of which resulted in profits, from his September 20, 2001 PSLRA certification. [FN77] During discovery, Zhen failed to produce trading records for transactions in securities other than Firepond. [FN78]

4. iXL

a. The iXL IPO

iXL held its IPO on June 2, 1999, with Merrill Lynch serving as lead underwriter, offering close to 7,000,000 shares at $12.00 per share. [FN79] The iXL IPO Prospectus notes that "no restricted securities will be eligible for immediate sale on the date of this prospectus," and that "121,828 restricted securities issuable pursuant to stock options will be eligible for sale 90 days after the date of this prospectus [on August 31, 1999.]" [FN80] During the first day of trading, the stock opened at $15.13, peaked at $24.50 and closed at $17.88, an increase of 49% above the offering price. On the first day of trading, 14,008,117 shares changed hands. [FN81]

***9** Plaintiffs allege that thirty-seven of the institutional allocants in the iXL IPO, to whom 1,222,750 shares were allocated, entered into tie-in agreements with the allocating underwriter. [FN82] During the ten business days from June 3 through June 16, 1999, iXL allocants purchased a total of 3,080,089 shares in the aftermarket. The same investors sold a total of 2,956,325 shares during that time. [FN83]

In the weeks following the iXL IPO, the share price rose slightly, closing at $19.13 on June 28, 1999. [FN84] That day, 4,000,000 shares were registered with the SEC for use in future acquisitions. [FN85] A month later, on July 27, 1999, iXL issued a positive earnings announcement, [FN86] and Merrill Lynch upgraded the stock from near-term "accumulate/buy" to near-term "buy/buy." [FN87] The following day, shares closed at $29.13. In August 1999, the price dropped to $22.00. Shares rebounded to $37.00 in mid-November and, on January 20, 2000, the price reached $58.75, the stock's high-water mark. [FN88]

In February 2000, more than 50,000,000 shares became tradeable due to the expiration of a lock-up that had taken effect shortly after the IPO. [FN89] Between mid-February and late June, 2,400,000 shares that had been subject to lock-up agreements were sold. [FN90] On February 18, 2000, Merrill downgraded iXL to "accumulate" and warned of the risk of sales of unlocked shares. [FN91] Merrill re-classified its long-term rating to "buy" on March 20, 2000. [FN92] In September 2000, Merrill downgraded iXL first to "accumulate" [FN93] and then to "neutral." [FN94] The price of iXL shares closed at $1.25 on December 6, 2000. [FN95] Fischel asserts that iXL underperformed when compared to various market benchmarks by 63 to 99 percentage points from June 2, 1999 to December 6, 2000, and by 36 to 62 points thereafter. [FN96] On October 25,

2001, when the first iXL case, *Turner v. iXL Enterprises, Inc.*, No. 01 Civ. 9417, was filed, iXL closed at $0.32 per share. [FN97]

b. iXL Class Representatives

(1) John Miles

Between August 19, 1999 and November 2, 2000, John Miles purchased 16,400 iXL shares for $138,233.41. Miles sold 2,400 shares by August 16, 2000 for $53,452.04, but still held 14,000 shares as of December 6, 2000. [FN98] Had he sold his remaining shares that day, when the stock closed at $1.25 per share, he would have suffered a total pre-December 6, 2000 loss of $67,281.37.

(2) John Rowe

Between June 4 and August 31, 1999, John Rowe purchased 1,335 iXL shares for $25,685.23. He sold 335 shares between September 17 and November 22, 1999 for $12,029.82, at a profit, leaving him with 1,000 unsold shares as of December 6, 2000. [FN99] Had he sold his remaining shares that day, when the stock closed at $1.25 per share, Rowe would have suffered a total pre-December 6, 2000 loss of $12,405.41.

5. Sycamore

a. The Sycamore IPO

Sycamore held its IPO on October 21, 1999, with Morgan Stanley acting as the co-lead underwriter, offering 7,475,000 shares at $38.00 per share. [FN100] On the first day of trading, Sycamore shares opened at $270.88, the day's high price, and closed at $184.75, an increase of 386% above the offering price. Almost 10,000,000 shares changed hands on the first day of trading. [FN101]

***10** Plaintiffs allege that eighty-seven institutional allocants in the Sycamore IPO, to whom 1,077,625 shares were allocated, entered into tie-in agreements with the allocating underwriter. [FN102] Plaintiffs further allege that purchase orders from these allocants made up 561,900 of the 2,868,035 total purchase orders placed during the pre-open bidding session, during which the opening price for Sycamore rose to $232.88 above the offering price. [FN103] During the first ten days following Sycamore's IPO, Sycamore allocants purchased a total of 2,297,115 shares. The same investors sold a total of 745,832 shares during that time. [FN104]

Defendants assert that on the first day of public trading, 5,734,183 previously issued non-IPO Sycamore shares were not subject to lock-up. [FN105] At least 368,587 of these shares became tradeable 90 days after the Sycamore IPO--*i.e.*, on January 19, 2000. [FN106] Following the IPO, the price of Sycamore stock climbed steadily, closing at $203.00 on October 26, 1999. [FN107] On January 19, 2000, millions of additional shares that had been issued prior to the Sycamore IPO were released from lock-up, [FN108] and by the end of that week, the stock price reached $280.00. [FN109] The stock split three for one on February 14, 2000. [FN110] On March 2, 2000, the stock soared to a price of $569.81 per share, [FN111] and the next day 8,985,186 more shares, issued one year earlier, were released from lock-up. [FN112] A secondary offering of 10,200,000 Sycamore shares occurred on March 14, 2000. [FN113] On April 18, 2000, 26,965,355 additional shares were released from lock-up. [FN114] After rising and falling several times, the stock price eventually declined, trading around $300.00 per share in October of 2000, and closing at a split-adjusted price of $169.31 per share on December 6, 2000. [FN115] Fischel asserts that Sycamore underperformed when compared to various market benchmarks by 32 to 68 percentage points from October 21, 1999 to December 6, 2000, and by 32 to 64 points thereafter. [FN116] On July 2, 2001, when the first Sycamore case, *Pond Equities v. Sycamore Networks, Inc.*, No. 01 Civ. 6001, was filed, Sycamore closed at $8.63 per share. [FN117]

b. Sycamore Class Representatives

(1) Barry Lemberg

Barry Lemberg purchased 100 Sycamore shares for $175.00 per share on March 3 and an additional 100 shares on April 13, 2000 for $71.13 per share. [FN118] Lemberg had not sold those shares as of December 6, 2000, when the stock closed at $56.44 per share. [FN119] Had Lemberg sold the shares that day, he would have suffered a $13,325.00 loss on the transaction. While Lemberg alleges that he is entitled to damages relating to 1,200 shares, he purchased only 200 shares before December 6, 2000. [FN120]

Lemberg's testimony and questionnaire responses conflict as to whether he received an IPO allocation, [FN121] and although Lemberg alleged that he had never personally bought and sold the same stock on the same day, the record reveals that he had conducted a same day transaction on at least one

occasion. [FN122] He testified that he does not remember having any involvement in preparing the Complaint. [FN123] Moreover, defendants claim that he "does not understand financial markets well," and is "unable to describe the specific behavior of Morgan Stanley that was improper." [FN124]

(2) Vasanthakumar Gangaiah

***11** Vasanthakumar Gangaiah purchased and sold 11,600 shares of Sycamore stock between March 1 and December 6, 2000, resulting in a $69,276.21 loss. [FN125] Defendants assert that Gangaiah provided "conflicting and false" testimony about his investment accounts, [FN126] and "falsely claimed never to have received an IPO allocation." [FN127] Defendants also question Gangaiah's understanding of the litigation, noting that he does not know what kind of damages are being sought in the case or which people are members of the class. [FN128]

(3) Frederick Henderson

Frederick Henderson received an IPO allocation of 50 shares of Sycamore stock at $38.00 per share, which he flipped on October 22, 1999 for $200.00 per share. [FN129] Between May 2 and October 13, 2000, Henderson purchased an additional 14,000 shares for $1,550,081.25. He sold 4,000 shares on November 16, 2000 for $266,675.00, for a loss, leaving him with 10,000 unsold shares as of December 6, 2000. Had he sold them that day, when the stock closed at $56.44, Henderson would have suffered a total pre-December 6, 2000 loss of $710,906.25. [FN130]

Henderson does not recall seeing the Amended Complaint before it was filed. [FN131] He acknowledges that he "has no idea how or why December 6, 2000 was selected as the end of the class period, nor ... whether it should be the end of the class period." [FN132]

6. VA Linux

a. The VA Linux IPO

VA Linux held its IPO on December 9, 1999, with CSFB serving as its lead underwriter, offering 5,060,000 shares at $30.00 per share. [FN133] At that time, VA Linux had already issued 35,301,586 unregistered shares. [FN134] The VA Linux Prospectus notes that VA Linux's "directors and officers as well as other stockholders and optionholders" had agreed to subject themselves to a 180-day lock-up on their unregistered shares, but does not explicitly state whether each and every one of the 35,301,586 unregistered shares was subject to lock-up. [FN135] VA Linux registered 24,863,635 additional shares simultaneously with its IPO as part of its various stock option benefit plans. VA Linux's filings for these stock option benefit plans explicitly incorporate the contents of the VA Linux IPO Prospectus and set their prices at $30, the same as the IPO price. [FN136] On the first day of trading, VA Linux stock opened at $299.00 and peaked at $320.00, with a trading volume of 7,685,600 shares. Shares closed that day at $239.25, an increase of 698% over the offering price. [FN137]

Plaintiffs allege that 147 of the institutional allocants in the VA Linux IPO, to whom 2,174,850 shares were allocated, entered into tie-in agreements with the allocating underwriter. [FN138] Plaintiffs further allege that purchase orders from these allocants made up 294,230 of the 426,230 total purchase orders placed during the pre-open bid session, when the opening price was set at $299.00, $269.00 above the offering price. [FN139] During the first ten days following VA Linux's IPO, VA Linux allocants purchased a total of 1,572,138 shares in the aftermarket. The same investors sold a total of 165,473 shares during that time. [FN140]

***12** On February 3, 2000, VA Linux announced its acquisition of Andover.net, Inc. in a $913,300,000 stock deal. [FN141] In March and April 2000, VA Linux announced acquisitions, using stock and cash, of Trusolutions, Inc., NetAttach and Precision Insight, Inc. [FN142] On June 7, 2000, a total of 22,940,202 shares became tradeable at the end of a lock-up period. [FN143] On November 6, 2000, the company announced that it would miss its earnings estimates. [FN144] That day, four firms monitoring VA Linux issued analyst reports, and the stock plummeted from $30.00 to $17.38. [FN145] The stock closed at $7.94 on December 6, 2000. [FN146] Fischel asserts that VA Linux underperformed when compared to various market benchmarks by 30 to 66 percentage points from December 9, 1999 to December 6, 2000, and by 26 to 58 points thereafter. [FN147] On January 11, 2001, when the first VA Linux case, *Makaron v. VA Linux Sys., Inc.*, No. 01 Civ. 0242, was filed, VA Linux closed at $9.031 per share. [FN148]

b. VA Linux Class Representatives

(1) Harold Zagoda

On December 9, 1999, Harold Zagoda purchased 10,000 shares of VA Linux stock at $300.00 per share and received an allocation of 300 shares at $30.00 per share. He sold 800 shares on December 13, 1999 for $200.06 per share. On June 3, 2000, he purchased 1,000 shares at $61.50 per share; on July 31, he purchased 1,500 shares at $32.00 per share; and on October 27, he purchased 1,000 shares at $27.50 per share. He held 13,000 shares on December 6, 2000, when the stock closed at $7.94 per share. [FN149] Had he sold his remaining shares that day, Zagoda would have suffered a total pre-December 6, 2000 loss of $2,882,732.00. [FN150]

(2) Spiros and Mary Gianos

Spiros and Mary Gianos purchased 3,000 shares of VA Linux stock on December 10, 1999 for $764,180.00 and an additional 1,000 shares on December 13, 1999 for $200,000.00. Between December 13, 1999 and April 6, 2000, the Gianoses sold their 4,000 shares for $367,183.00, resulting in a loss of $596,997.00. [FN151]

(3) Anita Budich

Anita Budich purchased 13 shares of VA Linux stock on December 15, 1999, at $230.63 per share, which she still owned on December 6, 2000. [FN152] Had she sold them that day, when the stock closed at $7.94 per share, Budich would have suffered a $2,894.97 loss on the transaction.

F. Industry-Wide Events Affecting All Focus Cases During the Class Period

In opposition to these motions, defendants note that throughout the class period, various events affected the markets for each of the six focus cases, and indeed for all of these 310 consolidated actions. *First,* the market for Internet and technology stock underwent an unprecedented boom in the late 1990s, ignited by the emergence and visibility of the Internet coupled with a streak of economic optimism and experimentation. [FN153] Stock prices soared. [FN154] Eventually, though, the "huge market bubble in Internet stocks burst, propelling prices of those stocks down 90% in a few months," [FN155] prompting a period of "market chaos." [FN156]

***13** *Second,* various reports were published describing the use of tie-in agreements by some allocating underwriters in IPOs. In mid-June of 1999, amidst a period of staggering decline in many Internet stock prices, MSNBC published an investigative report stating that underwriters had employed "a widely practiced marketing scheme known as a 'tie-in' " to artificially inflate the price of Internet IPO stock. [FN157] According to the MSNBC article, this practice extended to "the industry's leading, most prestigious firms." [FN158] The article described a scheme whereby "the opportunity to get in on IPO offerings at cheap, pre-market prices" was "conditioned on an unwritten, oral agreement" that the customer would "give back to the underwriters what amounts to a blank check to buy many more shares ... the minute the deal goes public." [FN159] The MSNBC article attained some notoriety within the investment industry. [FN160] Then, on July 14, 2000, the *Wall Street Journal* published a front page article reporting that Gary Tanaka, a partner in the growth-oriented mutual fund group Amerindo, had made an "agreement to buy shares [of an internet company] in the aftermarket" to increase his fund's allocation in the IPO and that "market experts" believed such agreements "raise regulatory questions." [FN161]

On August 25, 2000, the SEC's Division of Market Regulation issued Staff Legal Bulletin No. 10, warning securities distributors that "solicit[ing] their customers to make additional purchases of the offered security after trading in the security begins" violates Regulation M, promulgated pursuant to the Exchange Act. [FN162] The Bulletin called tie-in agreements "a particularly egregious form of solicited transaction" that "undermine the integrity of the market as an independent pricing mechanism for the offered security." The Bulletin explained that "[u]nderwriters have an incentive to artificially influence aftermarket activity because they have underwritten the risk of the offering, and a poor aftermarket performance could result in reputational and subsequent financial loss."

The release of the SEC Bulletin prompted *Barron's* to publish an article on September 11, 2000, stating that despite its "tame" tone, "[t]he bulletin targets one of the main grease guns now lubricating the IPO machine." [FN163] *The Wall Street Journal* followed suit on December 6, 2000, publishing an article detailing the "new IPO playbook on Wall Street," in which investors who agree to buy in the aftermarket are the ones who receive the largest allocations. [FN164] The article also acknowledged that while the SEC, in its August Bulletin, was "blowing the whistle" to quell the practice of using tie-in agreements, the understandings between investors and brokers were usually informal and unwritten, making them difficult to police. However,

despite their "limited and implicit" nature, claimed some investors, "tie-ins ... have a significant market impact ... provid[ing] the rocket fuel that sometimes boosts IPO prices into orbit on the first trading day." [FN165] Prices for all six of the focus stocks remained depressed, and never returned to their offering levels. [FN166]

***14** *Finally,* defendants note that various press reports described apparent conflicts of interest among analysts and underwriters. [FN167] SEC Chairman Arthur Levitt acknowledged the problem on April 13, 1999, issuing an "early warning signal" that the high number of "rosy stock analyses appear to be shaped by the lucrative investment banking ties that analysts' firms have with the companies they're supposed to watch with a critical eye." [FN168] Following Levitt's warning, allegations of analyst conflicts continued to appear in the press. For example, the British *Sunday Times* reported on April 23, 2000, that "[t]he 'Chinese Walls' that once separated researchers and bankers have all but disappeared in today's banking world and researchers have often become blatant pitchmen for bank deals," [FN169] and an August 1, 2000 article in *The Philadelphia Inquirer* quoted a finance professor to the effect that the analyst conflict problem "seems to have gotten worse in recent years," with analysts issuing approximately fifty "buy" recommendations for every "sell" recommendation, a far cry from the six to one ratio that existed in the early 1990s. [FN170]

III. LEGAL STANDARD

A. The Requirements of Rule 23

Federal Rule of Civil Procedure 23 governs class certification. To be certified, a putative class must meet all four requirements of Rule 23(a) as well as the requirements of one of the three subsections of Rule 23(b). In this case, as in most cases seeking money damages, plaintiffs bear the burden of demonstrating that the class meets the requirements of Rule 23(a)-- referred to as numerosity, commonality, typicality, and adequacy [FN171]-- and that the action is "maintainable" under Rule 23(b)(3). [FN172] Under Rule 23(b)(3)--the only applicable subsection of Rule 23(b)--"common" issues of law or fact must "predominate over any questions affecting only individual members," and a class action must be demonstrably "superior" to other methods of adjudication. [FN173]

1. Rule 23(a)

a. Numerosity

Rule 23 requires that the class be "so numerous that joinder of all members is impracticable." [FN174] "Impracticability does not mean impossibility of joinder, but refers to the difficulty or inconvenience of joinder." [FN175] Although precise calculation of the number of class members is not required, and it is permissible for the court to rely on reasonable inferences drawn from available facts, numbers in excess of forty generally satisfy the numerosity requirement. [FN176] The numerosity of plaintiffs' proposed classes, each of which includes thousands of investors, is undisputed.

b. Commonality

Commonality requires a showing that common issues of fact or law affect all class members. [FN177] A single common question may be sufficient to satisfy the commonality requirement. [FN178] "The critical inquiry is whether the common questions are at the core of the cause of action alleged." [FN179]

***15** The commonality requirement has been applied permissively in securities fraud litigation. [FN180] In general, where putative class members have been injured by similar material misrepresentations and omissions, the commonality requirement is satisfied. [FN181]

c. Typicality

The typicality requirement "is not demanding." [FN182] A named plaintiff's claims are "typical" pursuant to Rule 23(a)(3) where each class member's claims arise from the same course of events and each class member makes similar legal arguments to prove the defendants' liability. [FN183] "The rule is satisfied ... if the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." [FN184]

In addition, a putative class representative's claims are not typical if that representative is subject to unique defenses. [FN185] The test is whether the defenses will become the focus of the litigation, overshadowing the primary claims and prejudicing other class members. [FN186] Accordingly, the commonality and typicality requirements " 'tend to merge' because '[b]oth serve as guideposts for determining whether ... the named plaintiff's claim and the class claims are so inter-related that the

interests of the class members will be fairly and adequately protected in their absence." ' [FN187]

d. Adequacy

Plaintiffs must also show that "the representative parties will fairly and adequately protect the interests of the class." [FN188] To do so, plaintiffs must demonstrate that the proposed class representatives have no "interests [that] are antagonistic to the interest of other members of the class." [FN189] Courts have also considered "whether the putative representative is familiar with the action, whether he has abdicated control of the litigation to class counsel, and whether he is of sufficient moral character to represent a class." [FN190]

Class representatives cannot satisfy Rule 23(a)(4)'s adequacy requirement if they "have so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interest of the attorneys." [FN191] However, it is well established that "in complex litigations such as securities actions, a plaintiff need not have expert knowledge of all aspects of the case to qualify as a class representative, and a great deal of reliance upon the expertise of counsel is to be expected." [FN192]

The requirements of adequacy and typicality tend to bleed into one another. But "[r]egardless of whether the issue is framed in terms of the typicality of the representative's claims ... or the adequacy of [their] representation ... there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to [her]." [FN193]

e. Ascertainability

Although " 'Rule 23(a) does not expressly require that a class be definite in order to be certified[,] a requirement that there be an identifiable class has been implied by the courts.' " [FN194] "This implied requirement is often referred to as 'ascertainability.' " [FN195]

***16** "An identifiable class exists if its members can be ascertained by reference to objective criteria." [FN196] "Class members need not be ascertained prior to certification, but 'the exact membership of the class must be ascertainable at some point in the case.' " [FN197] It must thus be "administratively feasible for a court to determine whether a particular individual is a member" of the class. [FN198] "The Court must be able to make this determination without having to answer numerous fact-intensive questions." [FN199]

2. Rule 23(b)

If plaintiffs can demonstrate that the proposed class satisfies the elements of Rule 23(a), they must then establish that the action is "maintainable" as defined by Rule 23(b). Rule 23(b) provides that "an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition" one of three alternative definitions of maintainability is met. Plaintiffs argue that these putative class actions are maintainable under subsection (b)(3), which requires "that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." [FN200] Rule 23(b)(3) thus has two elements: "predominance" and "superiority."

a. Predominance

"In order to meet the predominance requirement of Rule 23(b)(3), a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole ... predominate over those issues that are subject only to individualized proof." [FN201] "The 23(b)(3) predominance requirement is 'more stringent' and 'far more demanding than' the commonality requirement of Rule 23(a)." [FN202] Courts frequently have found that the requirement was not met where, notwithstanding the presence of common legal and factual issues that satisfy the commonality requirement, individualized inquiries predominate. [FN203] Nonetheless, the Supreme Court has noted that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud...." [FN204]

b. Superiority

The superiority prong of Rule 23(b)(3) requires a court to consider whether a class action is superior to other methods of adjudication. [FN205] The court should consider, *inter alia,* "the interest of the members of the class in individually controlling the prosecution or defense of separate actions" and "the difficulties likely to be encountered in the management of a class action." [FN206]

3. Rule 23(g)

Rule 23(g) requires a court to assess the adequacy of proposed class counsel. To that end, the court *must* consider the following: (1) the work counsel has done in identifying or investigating potential claims in the action, (2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, (3) counsel's knowledge of the applicable law, and (4) the resources counsel will commit to representing the class. [FN207] The court *may* also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." [FN208]

***17** Defendants do not contest the qualifications of class counsel, who easily meet the requirements of Rule 23(g).

B. The Standard of Proof

All of these requirements are aimed at answering two questions: *Can* the claims be managed as class actions, and *should* they be managed as class actions? In this regard, the term "claims" encompasses not only plaintiffs' claims, but also any affirmative defenses that defendants may assert. [FN209]

Courts must therefore exercise their judgment to further Rule 23's goals of promoting judicial economy and providing aggrieved persons a remedy when it is not economically feasible to obtain relief through multiple individual actions. [FN210] The Second Circuit requires a "liberal" construction of Rule 23. [FN211] Thus, "to deny a class action simply because all of the allegations of the class do not fit together like pieces in a jigsaw puzzle [ ] would destroy much of the utility of Rule 23." [FN212] Accordingly, in securities cases, "when a court is in doubt as to whether or not to certify a class action, the court should err in favor of allowing the class to go forward." [FN213]

Notwithstanding the general liberality in this circuit towards class certification motions, the Supreme Court unequivocally requires district courts to undertake a "rigorous analysis" that the requirements of Rule 23 have been satisfied. [FN214] The burden rests on plaintiffs to make this showing. [FN215]

The question remains, however, as to what constitutes a rigorous analysis. Must plaintiffs prove their case? Must a district court make factual and legal findings that the proposed class satisfies the Rule? Given that class certification decisions only became appealable in 1998, [FN216] and that the Supreme Court did not even articulate the "rigorous analysis" standard until 1982, the guidance from higher courts is scant.

In *Eisen v. Carlisle & Jacquelin,* a securities and antitrust suit that originated in this district, the Supreme Court made its first significant pronouncement on class certification. In that case, the district court, after conducting a hearing on the merits of plaintiffs' claims, imposed 90% of the cost of the class notice on defendants. Finding fault in the lower court's approach, the Supreme Court explained that "nothing in either the language or history of Rule 23 ... gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule...." [FN217]

Many lower courts have understood this passage in *Eisen* to mean that on a Rule 23 motion, as on a Rule 12(b)(6) motion, a court must assume the allegations contained in the complaint to be true and draw all inferences in plaintiffs' favor. In several cases decided shortly after *Eisen,* for instance, the Second Circuit held that on a Rule 23 motion, "the facts will be taken as alleged in the complaint or as they appear without dispute in the record before us." [FN218]

***18** But such a view--if it was ever correct--is no longer the prevailing view. As Judge Frank Easterbrook recently stated, "[t]he proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it." [FN219]

Just four years after *Eisen,* the Supreme Court explained in *Coopers & Lybrand v. Livesay* that although district courts should avoid weighing the merits of a plaintiff's claims at class certification, "class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " [FN220] Four years later, the Court imposed its "rigorous analysis" test. [FN221] Repeating the just-quoted language from *Livesay,* Justice Stevens wrote in *General Telephone Company of the Southwest v. Falcon* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.... [A]ctual, not presumed, conformance with Rule 23(a) remains ... indispensable." [FN222] In light of this language, it would be error to presume plaintiffs' allegations to be true.

The tricky question that remains, however, is: If a court may not take the allegations of the complaint as true, what showing must plaintiffs make in support of their class certification motion? On this question, the Supreme Court has been silent.

At least two Courts of Appeal have implied that plaintiffs' showing on a class certification motion must satisfy the requirements of Rule 23 by a *preponderance of the evidence* or a similar standard. In *Szabo v. Bridgeport Machines, Inc.,* the Seventh Circuit held that where it is necessary to make legal or factual inquiries on a Rule 23 motion, the court should "receive evidence (if only by affidavit) and resolve the disputes before deciding whether to certify the class," even if such a resolution requires a "preliminary inquiry into the merits." [FN223] *Szabo* likened a district court's finding under Rule 23 to the sorts of "inquiries routinely [undertaken] under Rule 12(b)(1) and 12(b)(2) before deciding whether [the courts] possess jurisdiction over the subject matter of the case and the persons of the defendants, the location of the proper venue, application of *forum non conveniens,* and other preliminary issues." [FN224] If such situations are truly analogous to class certification, then a district court would need to find that the proposed class satisfies each of the elements of Rule 23 by a preponderance of the evidence. [FN225]

Even more recently, the Fourth Circuit held--in a securities fraud case--that a district court must make "findings" in resolving a Rule 23 motion, even if such findings overlap with the merits. [FN226] The court explained:

> The ... concern that Rule 23 findings might prejudice later process on the merits need not lead to the conclusion that such findings cannot be made. The jury or factfinder can be given free hand to find all of the facts required to render a verdict on the merits, and if its finding on any fact differs from a finding made in connection with class action certification, the ultimate factfinder's finding on the merits will govern the judgment. A model for this process can be observed in the context of the preliminary injunction practice. Courts make factual findings in determining whether a preliminary injunction should issue, but those findings do not bind the jury adjudging the merits, and the jury's findings on the merits govern the judgment to be entered in the case. [FN227]

***19** The court's analogy to a preliminary injunction hearing suggests that on a class certification motion in the Fourth Circuit, a plaintiff must establish the elements of Rule 23 by evidence sufficient to establish a "likelihood of success on the merits"--a burden similar to the Seventh Circuit's apparent requirement that plaintiffs prove that they satisfy Rule 23 by a preponderance of the evidence. [FN228]

Both the Supreme Court and the Second Circuit, however, have suggested that requiring a plaintiff to establish the elements of Rule 23--especially when those elements are "enmeshed" in the merits--by a preponderance of the evidence would work an injustice. In *Eisen,* the Court noted that

> a preliminary determination of the merits may result in substantial prejudice to the defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant. [FN229]

More recently, in *Caridad v. Metro-North Commuter Railroad,* the Second Circuit reminded district courts that they "must not consider or resolve the merits of the claims of the purported class." [FN230] Rather, a plaintiff is only required to make "some showing." [FN231] Differing from the Seventh and Fourth Circuits, the Second Circuit clearly held that "a weighing of the evidence is not appropriate at this stage in the litigation." [FN232] If a district court is forbidden to weigh the evidence on class certification, *a fortiori,* plaintiffs need not establish the elements of Rule 23 by a preponderance of the evidence.

Even more recently, in *In re VISA Check/Master Money Antitrust Litigation,* the Second Circuit reiterated the "some showing" standard. Juxtaposing the requirements of *Falcon* and *Caridad,* the court held that "[a]lthough a trial court must conduct a 'rigorous analysis' to ensure that the prerequisites of Rule 23 have been satisfied before certifying a class, 'a motion for class certification is not an occasion for examination of the merits of the case.' " [FN233] In the context of expert reports, for example, *VISA Check* teaches that a district court "may not weigh conflicting expert evidence or engage in 'statistical dueling' of experts." [FN234] Instead, the *sole* job of a district court in assessing expert evidence on a class certification motion is to "ensure that the basis of the [plaintiff's] expert opinion is not so flawed that it would be inadmissible as a matter of law." [FN235]

In sum, under the binding caselaw in this Circuit, a district court may not simply accept the allegations of

plaintiffs' complaint as true. Rather, it must determine, after a "rigorous analysis," whether the proposed class comports with all of the elements of Rule 23. In order to pass muster, plaintiffs-- who have the burden of proof at class certification--must make *"some showing."* That showing may take the form of, for example, expert opinions, evidence (by document, affidavit, live testimony, or otherwise), or the uncontested allegations of the complaint.

IV. DISCUSSION

A. Rule 23(a)

1. Commonality

***20** The common issues of liability presented in these six class actions are overwhelming. Any plaintiff seeking damages--whether proceeding individually or as a class member--will have to establish the following facts, all of which defendants vigorously dispute: [FN236]

. The participation of each defendant in the alleged scheme.
. The existence and terms of tie-in agreements, and the process by which defendants induced allocants to enter into tie-in agreements.
. Defendants' failure to disclose the existence, extent and purpose of the tie-in agreements, and the materiality of that omission.
. The existence and magnitude of excess compensation, and how such payments were induced. If excess compensation was paid in unusual forms, such as wash sales, that those actions amounted to payment of excess compensation.
. Defendants' failure to disclose excess compensation, and the materiality of defendants' omission.
. Where defendants conducted a secondary public offering ("SPO") (*e.g.*, Corvis, Sycamore and iXL), that the SPO offering price was derived from prices that were artificially inflated through market manipulation, that defendants failed to disclose the price inflation, and the materiality of that omission.
. That plaintiffs are entitled to a presumption of reliance.
. That plaintiffs bought their shares in an efficient market.
. That analysts reporting on the specific securities had conflicts of interest, that the analysts failed to disclose such conflicts, and that such omissions were material.
. That analyst coverage was used in the marketing of defendants' IPOs.
. That price-targets set in analyst reports were the product of manipulated prices.
. That tie-in agreements and analyst reports materially affected stock prices.
. That defendants acted with scienter in manipulating stock prices.
. That defendants' manipulation actually caused inflation of stock prices.
. That the artificial inflation of stock prices caused by the unlawful scheme dissipated over time.
. The true value and actual price of the stock at the time plaintiffs purchased and sold stock.
. That press reports and regulatory announcements were neither sufficiently clear nor specific to place plaintiffs on inquiry notice of the alleged scheme with respect to each issuer. [FN237]

Proof of these facts may require extensive discovery and expert testimony, and, if the three and one-half years that have elapsed since the filing of the first suit in these consolidated actions, *Makaron v. VA Linux,* are any indication, the disposition of *all* of the 310 consolidated class actions will take years.

By contrast, only a few authentically individualized issues remain. Most prominent is the need to calculate damages individually, but even that may be accomplished by applying a common formula to each individual claim. [FN238] Indeed, the quantum of damages is the *only* element *plaintiffs* must prove on an individual basis. All other individual questions (*e.g.*, actual knowledge and inquiry notice) will arise because of issues *defendants* choose to raise. In fact, many of defendants' anticipated defenses will require proof that is relevant to large groups within the class; for example, if defendants assert that a plaintiff's claim is barred because the June 16, 1999, MSNBC article placed that plaintiff on notice that the IPO market was tainted by fraud, the determination of that issue is relevant to all plaintiffs who purchased after the MSNBC article. Similarly, if defendants argue that a plaintiff's claim is barred because her trading history shows the payment of undisclosed compensation through "wash" sales, the questions of whether the wash sale constitutes undisclosed compensation and whether a particular pattern of trading activity constitutes a wash sale bear on all similarly situated class members.

***21** As a result, plaintiffs have satisfied the Rule 23(a) commonality requirement. Defendants' contention that individual issues will predominate at trial is addressed in the discussion of the Rule 23(b)(3) predominance requirement. [FN239]

2. Typicality

"When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." [FN240] "The factual background of each named plaintiff's claim need not be identical to that of all the class members as long as 'the disputed issue of law or fact occup[ies] essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." ' [FN241] For example, where plaintiffs allege a market manipulation scheme, typicality may be satisfied despite fluctuations in the amount of inflation over time, even though such fluctuations create differences between class members and class representatives in terms of how much, if any, of their loss was caused by an alleged scheme. [FN242]

Plaintiffs' proposed class representatives allege that they were harmed in the same "unitary scheme" as the rest of the class. [FN243] All class members, including the proposed class representatives, bought shares allegedly inflated by defendants' wrongdoing, and each was damaged thereby. [FN244] The disputed issues are central to the claims of all proposed class representatives and the class members they seek to represent. [FN245]

However, even where a class representative's motivation to prove the underlying fraud is typical of all class members, she may nonetheless be excluded as atypical if she is "subject to unique defenses which threaten to become the focus of litigation." [FN246] Defendants contend that some of plaintiffs' proposed class representatives are subject to unique defenses, and thus atypical, because they: (1) were allocants, engaged in tie-in agreements, or were knowledgeable institutional investors, and thus can be charged with knowledge of the alleged scheme; [FN247] (2) purchased stock after publication of certain articles or after the SEC Bulletin, and thus were on inquiry notice of the alleged scheme; [FN248] (3) were short sellers, momentum traders or day traders, and therefore cannot avail themselves of a presumption of reliance on stock prices; [FN249] or (4) purchased stock after the close of the class period or after filing suit, and therefore cannot be said to have relied on the integrity of the market, because they were willing to buy after learning of the alleged scheme. [FN250]

Defendants' arguments are unavailing. The question of participation resulting in actual knowledge is adequately addressed by the revised class definition. [FN251] The question of whether any particular publication placed a class representative on inquiry notice of the alleged scheme early enough that her claim would be barred under the section 10(b) statute of limitations is itself a question common to all class members. Defendants may also choose to challenge the rebuttable presumption of reliance with respect to any individual class representative on the grounds that some publication (*e.g.*, the MSNBC article or the SEC Bulletin) placed her on inquiry notice of the alleged scheme. This will not raise a unique defense. To the contrary, a determination that such publications were not sufficient to place the class representative on inquiry notice would inure to the benefit of all class members who, like the class representative, bought after the publication was issued. [FN252] Conversely, if defendants succeed in rebutting the presumption of reliance as to any class representative, then each similarly situated class member would be forced to prove reliance individually, thereby causing individual questions to predominate for those investors and mandating amendment of the class definition or decertification.

***22** Similarly, defendants' attacks on the proposed class representatives' reliance on the integrity of the market because of "unique" investment strategies do not defeat typicality. [FN253] The classes as pled include many investors with similar investment strategies, so any "unique defenses" based on those strategies are in fact common questions. [FN254] Finally, defendants' argument that class representatives who purchased after the close of the class period should be excluded because the "fact that [the] proposed plaintiff purchased shares both after learning of the fraud and after filing suit rebuts the fraud-on-the-market presumption" [FN255] makes no sense. Just because a stock is manipulated at one point in its trading history does not mean that the stock is forever tainted; a plaintiff may legitimately believe that, although his past losses were caused by market manipulation, the effect of that manipulation has dissipated and the stock price once again reflects all available information about its true value.

Plaintiffs' proposed class representatives' claims arise from the same course of events, and require the same legal arguments, as those of the class at large. Consequently, because defendants have not established that any proposed class representative in the six focus cases will assert atypical claims or be subject to unique defenses that "overshadow[ ] the primary claims and prejudic [e] other class members," plaintiffs have satisfied the Rule 23(a) typicality requirement with respect to their Exchange

Act claims. [FN256] However, certain proposed class representatives are atypical with respect to plaintiffs' section 11 classes because they are subject to the unique defense that they cannot trace their shares to an allegedly defective registration statement, as discussed in Part IV.B.4.b. below.

3. Adequacy

a. Antagonistic Interests

Defendants attack as inadequate any proposed class representative who is either a proposed class representative or a class member in another of these consolidated actions. [FN257] Defendants submit that this dual role creates a conflict of interest because plaintiffs with interests in multiple cases may seek to increase any settlement designation in favor of one action at the expense of another.

Defendants cite two cases in support of their theory, but both are inapposite. *First,* in *duPont v. Wyly,* the court found duPont to be an inadequate class representative because he was also the plaintiff in a personal action he brought against University Computing Company ("UCC"), a defendant in *Wyly.* [FN258] Given that recovery in either case could have rendered UCC judgment-proof, the court found that duPont could not represent the class as he would have an interest in ensuring his own recovery in his personal law suit. [FN259] *Second,* in *Boro Hall v. Metropolitan Tobacco Co.,* Jamaica Tobacco, a proposed class representative, had not only brought a personal antitrust action against Metro Tobacco, but was also a competitor of other class members. [FN260] Furthermore, Metro Tobacco counterclaimed against Jamaica Tobacco, giving Jamaica Tobacco an incentive to settle that other class members would not share. [FN261]

***23** It is overwhelmingly likely that the interests of the proposed class representatives, even in a settlement posture, will be in maximizing the possible recovery of all classes in which the class representative is a member. For a class representative to profit by reducing the recovery of the class she represents for the sake of another class, her monetary interest in the benefitted class would have to be many times greater than her interest in the class she represents, because the money sacrificed by one class is likely to be distributed among three hundred different classes, each with thousands of class members. There is no evidence that any class representative has such a disproportionately small interest in the class that he, she, or it seeks to represent. Furthermore, this Court will review the fairness of any settlement to ensure that it is reasonable and adequate, and to prevent inequitable distribution. [FN262] For these reasons, membership in more than one of these consolidated classes does not result in an interest so antagonistic as to prevent the adequate representation of absent class members.

b. Familiarity with the Action

Defendants argue that the proposed Sycamore class representatives cannot fulfill their roles as fiduciaries to class members because they are unfamiliar both with their case and their duties as class representatives. [FN263] For example, defendants claim that Henderson, a Sycamore class representative, "does not understand the scheme alleged" in the Complaint. [FN264] However, at his deposition Henderson described the alleged laddering, biased analyst reporting, and the inflated commissions allegedly received by underwriter defendants. [FN265] Henderson also described his responsibilities as class representative to include retaining the best available counsel, remaining involved in the litigation, and ensuring that class members are kept informed about the litigation and that their interests are protected. [FN266] Given his familiarity with the case and his responsibilities, Henderson satisfies Rule 23(a)(4)'s adequacy requirement. Gangaiah's testimony demonstrates a similar level of familiarity with the case and an understanding of his responsibilities. [FN267] Lemberg, on the other hand, is clearly not a sophisticated investor and was unable to describe the operation of the alleged market manipulation. [FN268] "Regardless, 'it is unreasonable to expect an ordinary investor ... to have the requisite sophistication and legal background to assist counsel in assessing liabilities under the securities laws.' " [FN269] Even Lemberg, with his basic understanding of the case, satisfies Rule 23(a)(4)'s adequacy requirement. [FN270] No evidence suggests that any proposed class representative is so lacking in her understanding of and involvement in her case that she is inadequate.

c. Abdication of Control to Class Counsel

Defendants argue that the proposed class representatives have abdicated to class counsel their roles as fiduciaries for the class and so are inadequate to serve as representatives. [FN271] Essentially, defendants raise the concern that by relinquishing responsibility for prosecuting the case to class counsel, the proposed representatives will be unable

to protect the class members should a conflict of interest arise between class counsel and class members.

***24** Defendants' concern is unwarranted. To the extent that it relates to the representatives' purported lack of participation or control, this argument is merely an extension of the familiarity objection, which I have already rejected. Even if, as defendants claim, counsel and the class representatives have conflicting views of the case, "a great deal of reliance upon the expertise of counsel is to be expected." [FN272] For this reason, "[t]he ultimate responsibility to ensure that the interests of class members are not subordinated to the interests of either the class representatives or class counsel rests with the district court"--not the proposed class representatives. [FN273]

d. Moral Character

"Although credibility may warrant denying certification, 'it is generally inappropriate to deny certification based on questions going to the credibility of named plaintiffs.' " [FN274] Defendants assert that certain class representatives are inadequate because of their failure to disclose all transactions in the relevant security, inconsistencies in their sworn statements and testimony, and, in the case of Kasbarian, destruction of trading records after learning of the alleged fraud (but prior to filing suit). [FN275]

Defendants' argument has no merit. There is no evidence that any of the conduct here was the result of bad faith or an attempt to deceive defendants or the court. For example, Kasbarian's destruction of trading records occurred before he was aware of the possibility of a lawsuit; he had no reason to believe he would need those records. [FN276] Such conduct does not render Kasbarian inadequate to prosecute the interests of the class. Furthermore, none of the inconsistencies or omissions complained of by defendants, such as failing to disclose certain specific transactions, affect the merits of the class representatives' manipulation claims. Given the complexity of these actions, minor testimonial inconsistencies and omissions are likely to occur. Only if "the problems alleged call the validity of the plaintiffs' entire case into question" do such credibility issues merit denial of class certification. [FN277] The temporary omission of certain transactions from class representatives' disclosures does not call into question the overall validity of their claim that they lost money because of defendants' manipulation of securities markets. Denial of certification on credibility grounds is not warranted. [FN278]

4. Ascertainability

Ascertainability, not ascertainment, is a prerequisite to class certification. [FN279] Accordingly, at this stage of the proceedings, plaintiffs need not present an airtight method of identifying every class member who may be entitled to a recovery. Rather, the goal at this stage is to define a class that excludes, with broad strokes, segments of the proposed class that are not so entitled. Precise identification of every class member may be accomplished at a later stage. [FN280]

***25** Defendants impliedly argue that because the Federal Rules of Civil Procedure were revised in 2003 to eliminate the availability of "conditional certification," perfect ascertainment of class members should be a prerequisite of class certification. [FN281] This is not so. The 2003 revisions to Rule 23 do not require identification of every class member prior to certification. Rather, to certify a class, a court must simply be "satisfied that the requirements of Rule 23 have been met." [FN282] The court may alter or amend the certification order, or even decertify the entire class, at any point before final judgment if the need arises. [FN283] To require the identification of all class members at the class certification stage would impermissibly require a determination, on the merits, of the validity of each proposed class member's claim. [FN284]

"[I]t is axiomatic that one cannot commit a fraud ... against oneself." [FN285] This truism takes on special importance when the participation of certain investors (*i.e.,* those who engaged in laddering and paid undisclosed compensation) is integral to the alleged scheme. It should be noted that this inquiry--which seeks to ascertain which investors *could not have been defrauded* because of their actual knowledge of the alleged scheme--is not the same as the question of which investors knew enough that they *could not have relied* on the market price of securities as an accurate measure of their intrinsic value. [FN286] That question is one of predominance, not ascertainability. [FN287] Plaintiffs concede that investors who knowingly participated in the alleged scheme have no right to recover. [FN288] Plaintiffs' revised class definition seeks to exclude these investors. [FN289]

The first and most important inquiry in determining

which groups of investors to exclude on the basis of actual knowledge is the question of what the scheme entails. In this case, plaintiffs have alleged that defendants engaged in the following scheme to manipulate the market:

> 15. The Underwriter Defendants set about to ensure that there would be large gains in aftermarket trading on shares following initial public offerings by improperly creating artificial aftermarket demand. They accomplished this by conditioning share allocations in initial public offerings upon the requirement that customers agree to purchase, in the aftermarket, additional shares of stocks in which they received allocations, and, in some instances, to make those additional purchases at pre-arranged, escalating prices ("Tie-in Agreements").
>
> ...
>
> 16. By extracting agreements to purchase shares in the aftermarket, the Underwriter Defendants created artificial demand for aftermarket shares, thereby causing the price of the security to artificially escalate as soon as the shares were publicly issued.
>
> 17. Not content with record underwriting fees obtained in connection with new offerings, the Underwriter Defendants sought, as part of their manipulative scheme, to further enrich themselves by improperly sharing in the profits earned by their customers in connection with the purchase and sale of IPO securities. The Underwriter Defendants kept track of their customers' actual or imputed profits from the allocation of shares in the IPOs and then demanded that the customers share a material portion of the profits obtained from the sale of those allocated IPO shares through one or more of the following types of transactions: (a) paying inflated brokerage commissions; (b) entering into transactions in otherwise unrelated securities for the primary purpose of generating commissions; and/or (c) purchasing equity offerings underwritten by the Underwriter Defendants, including, but not limited to, secondary (or add-on) offerings that would not be purchased but for the Underwriter Defendants' unlawful scheme. (Transactions "(a)" through "(c)" above will be, at varying times, collectively referred to hereinafter as "Undisclosed Compensation"). [FN290]

***26** Clearly, the laddering scheme plaintiffs allege includes three necessary components: the tie-in agreements, the undisclosed compensation, and the escalation in share prices caused by artificial demand. Accordingly, an investor can only be said to have full knowledge of the alleged laddering scheme if she is aware of all three components.

Defendants complain that "[i]dentifying claimants with knowledge would be a massive undertaking in light of plaintiffs' assertion that thousands of [investors] participated in the alleged manipulation in hundreds of offerings." [FN291] Defendants base their assertion of widespread participation on plaintiffs' own allegations, which read in pertinent part:

> 30. Institutional and retail investors, who have received allocations in initial public offerings from various firms, have noted that it was common knowledge that the clients who were forced to pay Undisclosed Compensation to the underwriters, in the form of commissions or otherwise, and who agreed to purchase in the aftermarket received allocations in IPOs.
>
> 31. This industry-wide understanding was sometimes expressed by the Underwriter Defendants and other times implied, but nevertheless invariably communicated between those with the power to make allocations of shares in initial public offerings (the underwriters) and customers seeking the allocations. [FN292]

Defendants' concerns are unfounded. *First,* a close look at these paragraphs is absolutely necessary in view of defendants' argument. Paragraph 30 reveals that the allegation is only that "investors [who are allocants] have noted that...." Thus, the pleading is not that "everyone knew of the scheme" but rather that some allocants "noted" that certain information was common knowledge. This is not a judicial admission by plaintiffs that "everyone knew of the scheme." [FN293] In addition, one must look closely at what these investors say was common knowledge. They say that it was common knowledge that investors who paid undisclosed compensation and agreed to purchase in the aftermarket received allocations. This is not surprising. But they do not say that it was common knowledge that the price of stock was artificially inflated through illegal tie-in arrangements that *required* a large percentage of allocants to pay undisclosed compensation and to agree to make a certain number of purchases in the aftermarket at escalating prices *in order to obtain* an allocation. That is the guts of the scheme now alleged and nothing in paragraph 30 pleads that such a scheme was commonly known by the investing public.

The same is true of paragraph 31. The paragraph begins with the words "this industry-wide understanding." This raises the question--to what does the word "this" refer? The natural reading is that

it refers back to the immediate prior paragraph so that "this industry-wide understanding" is that investors who paid undisclosed compensation and agreed to purchase in the aftermarket received allocations. Paragraph 31 merely pleads that the underwriters made it known that those who paid undisclosed compensation and agreed to purchase stock in the aftermarket received allocations--not that such investors were aware of an illegal scheme to inflate stock prices.

***27** *Second,* even if plaintiffs' allegations are construed as broadly as possible, they do not suggest that many investors knew of the *entire scheme alleged.* Nowhere do plaintiffs allege that allocants were aware that such agreements were part of an industry-wide scheme to inflate share prices through the creation of artificial demand. Many allocants may have been defendants' unwitting tools, each performing certain acts (*i.e.,* paying undisclosed compensation and agreeing to purchase in the aftermarket) that only when aggregated constituted a cohesive scheme to defraud investors. Even to the extent that allocants might have suspected illegality, that wrongdoing could be ascribed a clear and direct goal--the enrichment of the Underwriter defendants through payment of excessive compensation and increased business ensured by tie-in agreements--*not* the indirect scheme to defraud investors by artificially driving up securities prices alleged here. As plaintiffs' counsel has noted, it is unlikely indeed that investors who had full knowledge of the alleged scheme would retain their shares for any length of time after the securities' immediate price gains if they knew that the heavy demand had *artificially* inflated the price, and that the artificial inflation would inevitably dissipate over time. [FN294]

Finally, plaintiffs' counsel has explained that, contrary to defendants' assertions that the *scheme* was "common knowledge" and "invariably communicated" to allocation-seekers, only a limited population of allocants actually paid undisclosed compensation or consummated tie-in agreements:

> MR. WEISS: We're not saying that all allocants were subjected to this kind of requirement for laddering and kickbacks. There's a certain small universe, but we say that the universe was sufficient to be able to doctor this market and to create huge additional compensation that was undisclosed for these underwriters; a scheme, information that was never disclosed by ... the defendants throughout the class period. The population of those allocants who participated is a relatively small population.... [FN295]

This position is more consistent with information gleaned through the discovery process than is the notion that every customer who ever expressed an interest in an allocation somehow became privy to the alleged scheme. [FN296]

After reviewing plaintiffs' new proposed class definition, and considering the traits most likely to separate investors who knew of the alleged scheme from those who did not know, the following represents an ascertainable class: [FN297]

> The Class consists of all persons and entities that purchased or otherwise acquired the securities of [Specific Issuer] during the Class Period and were damaged thereby. Excluded from the Class are:
> (1) Defendants herein, each of their respective parents, subsidiaries, and successors, and each of their respective directors, officers and legal counsel during the Class Period, and each such person's legal representatives, heirs, and assigns, members of each such person's immediate family, and any entity in which such person had a controlling interest during the Class Period;
> ***28** (2) all persons and entities that, with respect to [Specific Issuer's] initial public offering: (a) received an allocation, (b) placed orders to purchase shares of that issuer's securities in the aftermarket within four weeks of the effective date of the offering, (c) paid any undisclosed compensation to the allocating underwriter(s), and (d) made a net profit (exclusive of commissions and other transaction costs), realized or unrealized, in connection with all of such person's or entity's combined transactions in [Specific Issuer's] securities during the Class Period; and
> (3) all persons and entities who satisfy all of the requirements of subparagraph (2) with respect to any of the 309 initial public offerings that are the subject of these coordinated actions, if that offering occurred prior to [Specific Issuer's] offering. [FN298]

As I have previously noted, the ascertainability inquiry does not demand ascertainment at the class certification stage. Certain investors not automatically stricken by the class definition may later prove to have actual knowledge of the alleged scheme. Any securities fraud class action runs the risk of including individual investors who may be ineligible for recovery for any number of reasons, including actual knowledge of the alleged fraud. [FN299] If the possibility that certain class members might eventually be excluded were sufficient to preclude class certification, there could *never* be a securities fraud class action. At trial, defendants may

choose to bear the burden and the cost of proving that any particular investor had access to nonpublic information that gave that investor actual knowledge of the alleged scheme. [FN300]

The class definition broadly excludes those investors who exhibit the hallmarks of full participation in the alleged scheme. Defendants are alleged to have defrauded investors by manipulating the conduct of allocants, both in terms of the compensation they paid and their aftermarket activity, thereby creating a market where the aggregate demand caused by tie-in agreements artificially inflated the price of the stock. [FN301] The class excludes those who engaged in the acts alleged to have driven up securities prices, and who exhibited their knowledge of the overall scheme by selling their shares for a profit before the effects of the scheme dissipated. The class definition further excludes those who had knowledge of the scheme in one case from participating in the classes for *any* subsequent IPOs in these consolidated actions, because an investor who has knowledge of the alleged fraud in one offering cannot erase that knowledge thereafter.

Defendants assert that applying plaintiffs' proposed exclusions, which are similar (although not identical) to those just enumerated by the Court, will present serious manageability problems because the information to be gathered with respect to each allocant "would be scattered in multiple formats among many firms" and "would have to be repeated for each of the few thousand allocants in a single case, and for each of the thousands in 309 cases." [FN302] However, the requirement is ascertainability--not ascertainability with ease. Plaintiffs in a class action meet their burden by pleading a class whose membership is ascertainable, even if actual ascertainment might prove "slow and burdensome." [FN303] Here, plaintiffs note that the class definition factors "are all mathematically certain and objectively determinable," and that the documentary evidence required to apply the proposed definition "is legally required to be retained by broker-dealers" and includes "customer monthly statements, trade confirmations, and order tickets." [FN304]

***29** Although defendants mount several attacks on whether the proposed class definition will successfully exclude those with actual knowledge of the alleged scheme, only three require comment. *First,* defendants complain that the class definition "is based only on investor conduct in the '309' IPOs and thus fails to account for knowledge acquired or shown through participation in [ ] the 87 follow-on offerings" conducted by 82 issuers in these consolidated actions. [FN305] Defendants make a good point. An investor who participated in an IPO or traded in its aftermarket in ignorance of the alleged scheme, but later exhibited knowledge of the alleged scheme in connection with a follow-on offering, should be charged with knowledge of the scheme only after her knowing participation. Consequently, the class exclusions apply to participants in follow-on offerings, but only exclude those participants with respect to trades executed *after* they satisfy the class exclusion criteria.

Second, defendants claim that the class definition does not adequately exclude investors who had knowledge of the fraudulent scheme through participation in "the 'more than 900' IPOs that plaintiffs allege were manipulated as part of this purported industry wide scheme," but 600 of which are not part of these consolidated actions. [FN306] I note, however, that defendants have vehemently opposed suggestions that they produce any discovery whatsoever with respect to any IPOs other than those consolidated here. [FN307] Defendants may not now have it both ways; if plaintiffs do not obtain full discovery in the IPOs that are not in suit, then defendants are barred from making this argument. On the other hand, if defendants now believe that it would be beneficial to alter the boundaries of this case to give plaintiffs access to discovery in the approximately 600 remaining IPOs, this issue can be revisited. Otherwise, defendants' argument is without merit.

Third, defendants note that "the proposal would not exclude those participants who supposedly paid undisclosed compensation through 'churned' or 'wash' transactions or high volume trades [ ] or those who allegedly obtained allocations by purchasing shares in 'undesired add-on offerings.' " [FN308] Defendants are simply wrong. Allocants who paid undisclosed compensation--in whatever form--are excluded if they also purchased in the aftermarket and profited from their investments. The only question is whether such transactions amount to undisclosed compensation. That is a common question of law, not an ascertainability problem.

Accordingly, plaintiffs' class is ascertainable.

B. Rule 23(b): Predominance

Defendants challenge plaintiffs' proposed class on the grounds that individualized questions will

predominate at trial. Defendants' predominance arguments fall into four major categories: transaction causation, loss causation, damages, and section 11 liability. As discussed earlier, plaintiffs' cases offer a wealth of common issues. [FN309] With the exception of defendants' arguments regarding section 11 tracing (which are limited to the duration of the section 11 classes), none of defendants' arguments defeat plaintiffs' showing of predominance.

1. Transaction Causation

***30** "Like reliance, transaction causation refers to the causal link between the defendant's misconduct and the plaintiff's decision to buy or sell securities. It is established simply by showing that, but for the claimed misrepresentations or omissions, the plaintiff would not have entered into the detrimental securities transactions." [FN310] Plaintiffs may avail themselves of a rebuttable presumption of reliance under the following theories.

a. The *Affiliated Ute* Presumption

"In securities fraud claims, reliance is presumed when the claim rests on the omission of a material fact." [FN311] This presumption of reliance is not conclusive. [FN312] Rather, "once the plaintiff establishes the materiality of the omission ... the burden shifts to the defendant to establish ... that the plaintiff did not rely on the omission in making the investment decision." [FN313] To satisfy this burden, a defendant must prove "that 'even if the material facts had been disclosed, plaintiff's decision as to the transaction would not have been different from what it was.' " [FN314]

Defendants attempt to distinguish *Affiliated Ute* on the following grounds: "*Affiliated Ute* was not a class action, did not involve alleged market manipulation, was not deemed applicable to the manipulation and misrepresentation claims asserted in *Basic,* and would [still] require" that plaintiffs demonstrate the materiality of the omissions and their ignorance of the omitted facts. [FN315] While a court need not address every argument it rejects, a few observations are in order. The Second Circuit has applied *Affiliated Ute* in the class action context. [FN316] Moreover, while *Basic* adopted the "fraud on the market" presumption, it contains no language disfavoring *Affiliated Ute* where both market manipulation and material omissions are alleged. Rather, *Basic* approved the *Affiliated Ute* presumption and presented the "fraud on the market" presumption alongside it in the panoply of securities fraud-related presumptions. [FN317] Finally, the materiality of the alleged omissions here (*i.e.,* the total nondisclosure of the alleged scheme) has not been disputed. Plaintiffs are entitled to an *Affiliated Ute* presumption of reliance to the extent their 10b-5 claims derive from material omissions.

b. The Fraud on the Market Presumption

Plaintiffs may also avail themselves of a presumption of reliance, under the "fraud on the market" theory, for claims arising from alleged misrepresentations and market manipulation.

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business.... Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.... The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations. [FN318]

***31** "The fraud-on-the-market doctrine, as described by the Supreme Court in *Basic v. Levinson,* creates a rebuttable presumption that (1) misrepresentations by an issuer affect the price of securities traded in the open market, and (2) investors rely on the market price of securities as an accurate measure of their intrinsic value." [FN319] A defendant, of course, may rebut the fraud on the market presumption by showing that it made no material misrepresentations because the alleged misrepresentations were already known to the market--a so-called "truth on the market" defense. [FN320]

(1) Market Efficiency

The fraud on the market presumption only applies if the market for the security is open and developed enough that it quickly incorporates material information into the price of the security--in other words, the market must be an "efficient" one. [FN321] Defendants object that plaintiffs have not met their evidentiary burden of showing that the markets for the stocks in the focus cases were efficient. [FN322]

The Second Circuit has not adopted a test or method for determining whether the market for a security is efficient. [FN323] Nonetheless, the record in this case contains several strong indications that the market in which the focus stocks traded was efficient.

Three facts stand out as particularly probative: *first,* all the focus stocks were traded on the NASDAQ National Market; [FN324] *second,* the focus stocks were traded actively at high volumes throughout the class period; and *third,* the focus stocks were the subjects of numerous analyst reports and extensive media coverage. Under any conceivable test for market efficiency, these three facts are sufficient to meet plaintiffs' Rule 23 burden to make "some showing" that the stocks in question traded on an efficient market.

Ultimately, whether the relevant markets were efficient is a question of fact to be resolved at trial. [FN325] The present finding--that plaintiffs have made "some showing" that the focus markets were efficient--is solely for the purposes of adjudicating the pending motion for class certification, and is not binding on the finder of fact. Based on the evidence presented at trial, the finder of fact may conclude that the relevant markets were efficient, in which case all class members will benefit from a presumption of reliance. On the other hand, the finder of fact may conclude that one or more of the relevant markets was inefficient, [FN326] in which case those plaintiffs who traded in such markets would be required to make individual showings of reliance.

(2) Investment Strategies

"[I]t has been noted that 'it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?' " [FN327] Defendants believe there are such investors. Indeed, they claim that so many reckless gamblers engaged in a 'crooked crap game,' and that exposing their folly would be such an arduous task, that any adjudication of their claims would require innumerable individual inquiries.

***32** Defendants assert that "thousands of day and momentum traders [ ] were not concerned about the integrity of a stock's market price," and argue that "[f]or both types of traders the integrity of the market price was irrelevant to the investor's decision to purchase." [FN328] According to defendants, "subjective inquiries" into whether these traders actually relied on market integrity would cause individual issues to predominate. [FN329] But day and momentum traders have the same incentives to prove defendants' liability as all other class members, and their presence in a securities class does not create intra-class conflicts. [FN330]

Similarly, defendants challenge plaintiffs' proposed classes on the grounds that they may contain short sellers, [FN331] and that, "[b]ecause short sellers do not rely on the market price, they do not enjoy a presumption of reliance." [FN332] Defendants cite the Third Circuit's decision in *Zlotnick v. TIE Communications* in support of this contention. [FN333] But *Zlotnick* does not control. Not only is *Zlotnick* a Third Circuit case (and therefore not binding on this Court), it pre-dates the Supreme Court's seminal opinion in *Basic.* Indeed, in cases like this one, courts in the Third Circuit and elsewhere have almost unanimously rejected the *Zlotnick* exception. [FN334] One such court noted that:

> Moreover, under defendants['] view of the case, any plaintiff seeking to represent a class of investors of a large, publicly traded corporation would be unable to satisfy reliance, and, hence, typicality, as a matter of law.... It can be stated without fear of gainsay that the shareholders of every large, publicly traded corporation includes [sic] institutional investors, short-sellers, arbitragers etc. The fact that these traders have divergent motivations in purchasing shares should not defeat the fraud-on-the-market presumption absent convincing proof that price played *no* part whatsoever in their decision making. If defendants believe that this stretches the concept of reliance beyond the intent of the statute, their course of attack is to overrule *Basic,* not render its holding meaningless. [FN335]

This analysis is far more persuasive than defendants' application of the *Zlotnick* exception, and it comports with the policy and practice of certifying securities class actions in this Circuit. [FN336] Accordingly, the presence of short sellers does not undermine plaintiffs' showing of predominance.

(3) Knowledge of Fraudulent Scheme

A presumption of reliance may be rebutted by a showing that the plaintiff had knowledge of the omitted fact or fraudulent scheme. "[I]f the plaintiff has been furnished with the means of knowledge and he is not prevented from using them he cannot say that he has been deceived by the misrepresentations of the other party." [FN337]

Defendants note that "pervasive press reports mirrored the allegations in these cases," [FN338] pointing to several occasions exposing class members, through the national media or official releases, to information which, defendants claim, "would have made any reader aware of the

allegations here and put them on notice to inquire further." [FN339] Defendants maintain that determining "which purchasers knew what, and when ... will require ... subjective inquiry into each claimant's state of mind." [FN340]

***33** However, the question of whether publicly available information "would have made any reader aware of the allegations here" [FN341] presents an important class-wide common issue. [FN342] If any of defendants' proffered publications is determined to have been so relevant, clear and widely disseminated that knowledge of the alleged scheme must be imputed to the universe of investors in the stock market, then reliance cannot be proven individually or collectively. [FN343] Furthermore, differences among class members in terms of access to publicly available information (*e.g.*, whether certain investors *actually* saw all publicized materials, or whether they had access to sophisticated investment advice in interpreting the releases) are insufficient to defeat certification or rebut plaintiffs' presumed reliance. [FN344]

2. Loss Causation

In addition to transaction causation, plaintiffs must prove loss causation; that is, they must show a "causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff." [FN345] Plaintiffs may submit an expert report suggesting a methodology for determining such a link. [FN346] "A district court must ensure that the basis of [such an] expert opinion is not so flawed that it would be inadmissible as a matter of law." [FN347] At the class certification stage, the question "is whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive;" a district court should therefore refrain from "weigh[ing] conflicting expert evidence or engag[ing] in 'statistical dueling' of experts." [FN348] Under Rule 23(b)(3), plaintiffs must present a methodology for determining loss causation that may be commonly applied to all members of the class. [FN349]

Unlike damages, which require a showing of the quantum of loss, loss causation requires only that there be a causal connection between the alleged wrongdoing and plaintiffs' loss. [FN350] In a market manipulation case, plaintiffs can satisfy their burden by presenting a means to determine that the scheme caused an increase in price that dissipated throughout the class period. [FN351] To satisfy Rule 23 in the context of loss causation, plaintiffs need not precisely quantify the proportion of each plaintiff's loss attributable to dissipation; they need only provide a mechanism showing that the alleged scheme actually caused *some* loss to all class members. [FN352] Plaintiffs must, however, provide a mechanism for proving that inflation dissipation occurred throughout the class period. Otherwise, investors who purchased after all artificial inflation created by the alleged scheme had dissipated would be differently situated (*i.e.*, they would be forced to prove loss causation individually using alternatives to the class method of proof), and individual questions would dominate the loss causation inquiry.

***34** Plaintiffs submit the expert opinion of Professor Fischel to provide a method of proving that the alleged scheme inflated stock prices as early as the beginning of trading, and that the inflation dissipated throughout the class period. [FN353] Fischel's methodology for proving loss causation depends on two separate analyses: *first,* an analysis of the initial inflation caused by alleged tie-in agreements; and *second,* an analysis of the dissipation of that inflation over time.

Fischel empirically demonstrates the effect of tie-in agreements on demand and price through an analysis of the pre-open bid sessions for five of the six focus cases. [FN354] During the pre-open bid session, in which a new issue takes dealer quotes before actual trading begins, the lead underwriter opens the bidding and investors may enter bids to purchase shares. The level of demand in the pre-open bid session affects bid prices. [FN355] Fischel describes and analyzes price changes in the "inside bid"--the highest bid at any given time--with respect to the bidding activity of the lead underwriter and investors alleged to have executed tie-in agreements. [FN356] Institutional investors with alleged tie-in agreements constituted much of the demand for shares in each pre-open bid session, and purchase orders executed after these sessions accounted for a substantial portion of all shares issued in the IPO. [FN357] Demand by investors with tie-in agreements remained strong throughout the pre-open bid session. [FN358] Fischel notes that, "consistent with the substantial purchase orders at the end of the pre-open bid session, the opening price for each of the focus case stocks was substantially higher than the offer price." [FN359]

Fischel also observes that the lead underwriter in each pre-open bid session set the initial bid substantially higher than the offering price, and that

"[t]his is consistent with ... knowledge of the volume of pending purchase orders." [FN360] Fischel asserts that:

> The literature has documented that even before the opening of trading, significant price discovery takes place and that a large proportion of the change in price from the offer price to the opening price is captured in the first quote entered by the lead underwriter. This evidence supports the conclusion that the alleged tie-in agreements affected prices before trading began. [FN361]

Fischel also notes that "activity in the lead underwriter's bid during the pre-open bid session was [frequently] followed by an increase in the inside [best] bid." [FN362]

Trading activity of allocants with alleged tie-ins was not limited to purchase orders executed at the beginning of trading. Rather, Fischel notes that allocants "purchased substantial quantities of shares in each focus [stock's] aftermarket." [FN363] Fischel also undertakes a regression analysis to show that the size of each allocation correlates to the quantity of stock that allocant purchased in the aftermarket. [FN364] To explain how such purchases might inflate prices, Fischel notes that "Keim and Madhavan ... find that a buyer-initiated trade of only 0.16 percent of a company's outstanding stock is associated with a *permanent* price increase of 4.7 percent in the stock price." [FN365]

***35** Having thus established a mechanism for proving that the alleged scheme caused artificial inflation, Fischel turns to the problem of how to determine the duration of that inflation and its rate of dissipation. Fischel adopts the "Comparable Index Approach," in which the overall performance of an issue is compared to a benchmark index averaging the price movements of comparable stocks. [FN366] Defendants' expert asserts, and Fischel concedes, that the Comparable Index Approach is usually invoked to determine *damages,* not loss causation. [FN367] Specifically, "[t]he premise of the Comparable Index Approach is that all changes in the price of a company's stock not accounted for by movements in the comparable company stock prices and not accounted for by movements in the general market are attributed to the alleged fraud." [FN368] Thus, as generally applied, the Comparable Index Approach is used to calculate damages where loss causation has already been proven or is assumed; that is, it *"assumes loss causation rather than detects it."* [FN369]

However, Fischel has already provided a method to show that the alleged scheme artificially inflated stock prices. Plaintiffs' loss causation calculation does not depend on the Comparable Index Approach. It is, however, a component of the analysis. Once artificial inflation has been established by the mechanisms discussed earlier (*i.e.,* by a lead underwriter making a high initial bid in the pre-open bid session and raising its own bid; by creation of artificial demand through tie-in agreements, which causes prices to rise; and by permanent changes in beliefs caused by buyer-initiated trading), all that remains is detecting the dissipation of that inflation. Here, each of the focus stocks ultimately plummeted in value to levels far below their offering prices and not far above zero, the lowest possible value. Some loss causation may be inferred simply from the disappearance of the original inflation. [FN370] After all, when an artificially inflated stock tumbles to a fraction of its offering price, it is logical to assume that the artificial inflation has dissipated. The Comparable Index Approach need not carry the load of proving the *existence* of inflation or dissipation.

Fischel proposes only to use the Comparable Index Approach to determine the *duration* of dissipation. [FN371] Under this framework, Fischel finds that each of the focus stocks significantly overperformed on the first day of trading and underperformed in the long term when compared to various benchmark indices. [FN372] Fischel attributes the securities' initial overperformance to artificial inflation in the immediate aftermarket and their later underperformance, at least in part, to a gradual dissipation of that inflation. The rate of dissipation, and its existence, can be inferred from the fact that, in the long run, the focus stocks consistently declined further in price than comparable market benchmarks, which presumably reflected the same market-wide variables. Fischel notes that the markets for the six focus cases significantly underperformed market benchmarks even after December 6, 2000, implying that the stock price continued to shed inflation throughout and after the close of the class period. [FN373] As a result, Fischel has established a method by which a finder of fact could conclude both that stock prices were artificially inflated and that the inflation dissipated throughout the class period, continuing even after December 6, 2000. [FN374]

***36** Fischel's theory is not fatally flawed. Although defendants present a cadre of experts clamoring to apply alternative methods of determining loss causation, [FN375] now is not the time to "weigh conflicting evidence or engage in 'statistical dueling' of experts." [FN376] Defendants are free to attack

Fischel's theory at trial or present alternative theories if they choose.

Plaintiffs have satisfied their burden at this stage to articulate a theory of loss causation that is not fatally flawed. Moreover, because plaintiffs' theory posits protracted dissipation throughout the proposed class period, it presents common questions of liability--namely, whether tie-in agreements artificially inflated stock prices and the duration of any such inflation (*i.e.*, whether the inflation dissipated abruptly or over the course of the entire class period). Defendants' alternative theories of loss causation, which generally require intensive trade-by-trade analysis of transitory price effects, would, if adopted by the jury, answer that question in the negative. [FN377] Defendants provide various criticisms of Fischel's "methodology," but these attacks go to the weight of Fischel's conclusions and must be reserved for trial. [FN378] Defendants also point out that Fischel's analysis may not be able to quantify the amount of inflation or dissipation at any given time. [FN379] However, as I have already noted, loss causation only requires that plaintiffs establish *some* inflation and dissipation, not the precise size of the inflation or amount of the loss. That inquiry relates to damages, not loss causation, and is therefore addressed in the next section.

3. Damages

If plaintiffs are successful in proving liability, they will have to provide a methodology for calculating damages. In any publicly traded securities market, some investors own many shares and some own only a few; some maintain their portfolios for years, and some trade shares daily. Thus, the extent of the harm suffered by each class member as a result of the alleged misconduct is, by definition, an individualized inquiry. [FN380]

However, where common questions otherwise predominate, the need for individualized damages inquiries is not enough to scuttle the class action. [FN381] Rather, the Second Circuit has recognized several methods by which a court may address the problem of individual damages while securing the benefits of the class action device for common issues of liability:

> There are a number of management tools available to a district court to address any individualized damages issues that might arise in a class action, including: (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class. [FN382]

***37** "Particularly where damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods, the fact that damages must be calculated on an individual basis is no impediment to class certification." [FN383] Although there are extreme cases in which calculation of damages may present such an intolerable burden that it renders class certification inappropriate, [FN384] "such cases rarely, if ever, come along." [FN385]

"Before and after the enactment of the PSLRA, absent class members in securities fraud cases have been awarded a common fund of damages computed by the trier of the fact, based usually on expert testimony...." [FN386] For example, a jury may be asked to compute the "true value" of a stock over time, including fluctuations due to various price-affecting events, and consequently determine by what degree the stock was inflated at any given time during the class period. [FN387] Thus, important common questions regarding damages, as well as loss causation, may be resolved by asking the jury to trace a "graph delineating the actual value of the stock throughout the class period. When compared with a comparable graph of the price the stock sold at, the determination of damage will be a mechanical task for each class member." [FN388]

Plaintiffs suggest just such an approach. [FN389] Plaintiffs have proposed using both the "Event Study Approach" and the "Comparable Index Approach" to determine the effect that any given event during the class period had on stock prices. [FN390] While assessing the effect of each salient event over hundreds of days in any given class period may be a laborious and time-consuming task, it nonetheless provides a common basis for calculating the damages of all class members. By contrast, an alternative approach that would force each class member to prove in individual proceedings how various events impacted the stock price when she purchased and sold stock would be staggeringly inefficient, would provide countless opportunities for juries to render inconsistent verdicts, and, if the cost were placed on individual class members seeking to prove damages, would likely present a formidable (if not complete) barrier to recovery. [FN391]

Accordingly, by suggesting a method by which a jury could determine the true value of securities over time, plaintiffs present the common question of magnitude of damages. At this stage of the proceedings, plaintiffs have met their burden to establish that common questions predominate. [FN392]

4. Section 11 Claims

a. Tracing

"Aftermarket purchasers who can trace their shares to an allegedly misleading registration statement have standing to sue under § 11 of the 1933 Act." [FN393] A plaintiff successfully traces her shares if she demonstrates that her stock was actually "issued pursuant to a defective [registration] statement;" it is "insufficient that [her] stock 'might' have been issued pursuant to a defective [registration] statement." [FN394] This requirement has been strictly applied, even where its application draws arbitrary distinctions between plaintiffs based on the remote genesis of their shares. [FN395]

***38** Tracing may be established either through proof of a direct chain of title from the original offering to the ultimate owner (*e.g.*, if the owner was an allocant in the IPO, or took actual physical possession of share certificates directly from an allocant), or through proof that the owner bought her shares in a market containing only shares issued pursuant to the allegedly defective registration statement. [FN396] The modern practice of electronic delivery and clearing of securities trades, in which all deposited shares of the same issue are held together in fungible bulk, makes it virtually impossible to trace shares to a registration statement once additional unregistered shares have entered the market. [FN397] Even where the open market is predominantly or overwhelmingly composed of registered shares, plaintiffs are not entitled to a presumption of traceability. [FN398]

Defendants assert that the actual tracing of each plaintiff's stock is "a necessarily individualized inquiry." [FN399] Furthermore, defendants proclaim that, insofar as each class member must individually prove that her shares were issued pursuant to the relevant registration statement, the necessity of trying individual issues should disqualify the class under the Rule 23(b)(3) predominance requirement. [FN400]

Defendants are correct. If the classes for each of the focus cases are to extend from the date of the IPO to the last day of plaintiffs' proposed class period, December 6, 2000, then each class will include plaintiffs who purchased their shares after untraceable shares entered the market. While some individual class members who purchased after the end of the class period might be able to trace their shares successfully, the resulting inquiry would fragment the class action into myriad mini-trials on the subject of tracing. Plaintiffs' proposed section 11 classes are suitable only for those periods in which class members' ability to trace their shares is susceptible to common proof. [FN401] Such generalized proof is possible if plaintiffs' section 11 class periods are limited to exclude all purchases made after untraceable securities entered the market. As a result, the section 11 class periods for each of the focus cases must end at the time when unregistered shares became tradeable. [FN402]

For each focus case, the filed registration statement summarizes the number and status of outstanding shares, and tells investors when outstanding shares will qualify to enter the market, including information as to when lock-ups will expire and at what point previously issued shares become eligible for trading under Rule 144, promulgated pursuant to the Securities Act. [FN403] Rule 144 provides, in pertinent part, that affiliated holders of restricted securities who have satisfied the statutory holding period must wait until the issuer "has been subject to the reporting requirements of [either] section 13 ... or section 15(d) of the [Exchange Act] ... for a period of at least 90 days" and "has filed all the reports required to be filed thereunder during the 12 months preceding such sale...." [FN404] In either case, the issuer becomes subject to the filing requirements of the Exchange Act when its filed registration statement becomes effective. [FN405]

***39** In the Corvis and VA Linux cases, additional stock offerings were consummated before the 90-day Rule 144 holding period expired. [FN406] Where there are multiple public offerings of a security, a plaintiff is entitled to a presumption that she has satisfied the tracing requirement of section 11 only if every such offering was defective. [FN407] However, in both cases, the additional offerings explicitly incorporated the contents of the IPO prospectuses. [FN408] Thus, to the extent that the IPO registration statements are defective, so are the additional registration statements.

Under Rule 144(k), non-affiliates who hold unregistered shares may sell their shares without restriction after they have held the shares for a period of two years. [FN409] Defendants imply that some

unregistered shares might have been tradeable at the time of the IPOs in Corvis, Firepond and Sycamore. No such inference is supported by the facts. In Corvis, all outstanding shares issued before 1999 (and therefore tradeable under Rule 144(k) before 2001) were issued to affiliates, and defendants have produced no evidence that such shares were ever transferred to non-affiliates. [FN410] In Firepond, all Rule 144(k) shares were subject to 180-day lock-up agreements. [FN411] In Sycamore, the company did not exist two years prior to the IPO, making it impossible for any non-affiliate to have held unregistered shares for the two years required by Rule 144(k). [FN412]

Shares issued in the context of stock-based acquisitions (like those in the VA Linux case) cannot circumvent the required holding periods of Rule 144. Before trading unregistered stock, a recipient must hold the stock for "[a] minimum of one year...." [FN413] Thus, a recipient of stock in VA Linux's first acquisition--of Trusolutions, Inc., on March 28, 2000--would not have been able to sell that stock until March 28, 2001, well after the end of plaintiffs' proposed class period.

Accordingly, plaintiffs' section 11 class periods are appropriately limited to the periods between each IPO and the time when unregistered shares entered the market. In Corvis, Engage, Firepond, iXL and Sycamore, unregistered shares became tradeable 90 days after the IPO pursuant to Rule 144. In VA Linux, all outstanding shares appear to have been subject to 180-day lock-up agreements, [FN414] so the VA Linux section 11 class period extends for 180 days after the IPO. Thus, plaintiffs' section 11 class periods are limited to the following: Corvis, July 28, 2000 to October 26, 2000; Engage, July 20, 1999 to October 18, 1999; Firepond, February 4, 2000 to May 4, 2000; iXL, June 2, 1999 to August 31, 1999; Sycamore, October 21, 1999 to January 19, 2000; and VA Linux, December 9, 1999 to June 12, 2000.

b. Adequacy and Typicality of Section 11 Class Representatives

A class representative's lack of standing under section 11 qualifies as a "unique defense" sufficient to defeat the typicality of a proposed class representative. [FN415] Moreover, because section 11 grants a right of recovery only to plaintiffs who sold their securities below the offering price, and limits that recovery to the difference between the sale and offering prices (or the difference between the offering price and the value of shares still held at time of suit), plaintiffs who sold all their traceable stock at prices above the offering price have no right to recover under section 11. [FN416] Defendants posit that any proposed class representative who sold her shares at a price in excess of the offering price should be excluded because, absent any possibility of section 11 recovery, her claims are not typical of section 11 class members who have a right to recover damages. [FN417] Defendants are correct. Besides the fact that such a class representative would be subject to unique defenses with respect to her section 11 claims, the foreclosure of any hope for recovery calls into question her motivation to fairly and adequately protect the interests of the class. [FN418]

***40** Consequently, representatives of plaintiffs' proposed section 11 classes must (1) have purchased shares during the appropriate class period, and (2) have either sold the shares at a price below the offering price or held the shares until the time of suit.

Accordingly, the following class representatives are appropriate representatives for their section 11 classes: for Corvis, Huff and Rooney; for Engage, Pappas; for Firepond, the Collinses, Zhen and Zitto; and for VA Linux, Budich and Zagoda. Because plaintiffs have no suitable class representatives for their iXL and Sycamore section 11 classes, their motion to certify those classes must be denied.

C. Rule 23(b)(3): Superiority

Plaintiffs must show that a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." [FN419] Rule 23 suggests a number of nonexclusive factors the trial judge can weigh to determine superiority, including "the interest of members of the class in individually controlling the prosecution." [FN420] In a case with thousands or millions of claimants, though, a class member's interest in *aggregating* the claims substantially outweighs her interest in individual control of the litigation. "The more claimants there are, the more likely a class action is to yield substantial economies in litigation." [FN421] "[I]n enacting Rule 23(b)(3), 'the Advisory Committee had dominantly in mind vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.' " [FN422] In a securities class action where millions of shareholders are damaged by fraudulent conduct, none but the very largest individual investors have the capital to prosecute their claims individually. This is especially true in a case such as this one, where expert reports, voluminous briefing

and vast discovery are par for the course. [FN423] However, when investors' claims are aggregated, even an investor who bought a single share has the chance to recover for defendants' alleged wrongdoing. This benefit of the class action form is not easily overcome. [FN424]

Any consideration of superiority must be framed in this context. Thus, the mere possibility of complexity or unmanageability does not defeat a class action. [FN425] Because a securities fraud class action offers the opportunity for redress of wrongs where victims would otherwise be unable to press their claims, "a class action has to be unwieldy indeed before it can be pronounced an inferior alternative--no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied--to no litigation at all." [FN426]

Moreover, the superiority of the class action form to alternative means of adjudication cannot--and should not--be considered in a vacuum. "In many respects, the predominance analysis ... has a tremendous impact on the superiority analysis ... for the simple reason that, the more common issues predominate over individual issues, the more desirable a class action lawsuit will be as a vehicle for adjudicating the plaintiffs' claims." [FN427] Any consideration of superiority must therefore be subjective; it must weigh the benefits and costs of allowing the class action to proceed *versus* the benefits and costs of individual adjudication. [FN428]

***41** In this case, class adjudication is clearly superior to any other form of adjudication. Although preparation and trial of 310 class actions, each of which includes the multitude of common questions presented here, is daunting, preparation and trial of 310 *million* individual suits with virtually identical allegations would be impossible for all participants--plaintiffs, defendants and the courts. Rule 23 is intended to facilitate, *not prevent,* litigation of a multitude of claims with substantially identical allegations. [FN429]

Defendants make little effort to propose alternative means of adjudication that might be superior to the class action form. The two alternative forms defendants suggest--individual prosecution of claims and NASD arbitration [FN430]--are both impractical for the reasons just described. Because of the costs arbitration or litigation impose on small-stakes securities fraud plaintiffs, neither could result in any recovery for the vast majority of investors included in the class definition, even if defendants' liability is ultimately proved. As neither the defendants nor the Court can suggest a means of adjudicating plaintiffs' claims that would be superior or even comparable to the efficiency and fairness of a class action, plaintiffs have satisfied the superiority requirement of Rule 23(b)(3).

V. CONCLUSION

Accordingly, plaintiffs' motion for class certification is granted in part and denied in part for each of the six focus cases. Plaintiffs' Exchange Act classes are certified to the extent they include investors who acquired shares between the date of the IPO and December 6, 2000 and who satisfy the Court's revised class definition. Plaintiffs' section 11 classes for Corvis, Engage, Firepond and VA Linux are certified as to all investors that satisfy the revised class definition and acquired shares before unregistered shares entered the market, and sold those shares for a loss at prices below the offering price. All of plaintiffs' proposed class representatives except Pappas are suitable to prosecute the Exchange Act claims. Huff, Rooney, Pappas, the Collinses, Zhen, Zitto, Budich and Zagoda are appropriate class representatives for their respective section 11 classes. Because plaintiffs have proposed no suitable class representatives for their iXL or Sycamore section 11 classes, those classes cannot be certified.

SO ORDERED:

FN15. *See* Corvis Corp. IPO Facts, Ex. A to 2/24/04 Declaration of Fraser L. Hunter, Jr. in Support of Corvis Opposition ("Hunter Corvis Decl.").

FN16. Corvis Mem. at 20 n.19.

FN17. *See* 7/27/00 Form S-1/A filed by Corvis ("Corvis Form S-1/A"), Ex. N to Hunter Corvis Decl. at II-2-5.

FN18. *See id.*

FN19. *See* Corvis Corp. (CORV) Market-Wide Trading Data for Day One, Ex. D to Hunter Corvis Decl.

FN20. *See* Summary of Alleged Tie-In Agreements ("Fischel Tie-In Summary"), Ex. A to 7/12/04 Fischel Report.

FN21. *See* Purchase Orders for the Focus Case Stocks in the Pre-Open Bid Session ("Fischel Purchase Order Summary"), Ex. B

to 7/12/04 Fischel Report.

FN22. *See* Aftermarket Trading in Corvis Corp. by CSFB Allocated Accounts, Ex. D-1 to 7/12/04 Fischel Report.

FN23. *See* Corvis Corp. Chronology of Events from July 28, 2000 to December 6, 2000 ("Corvis Chronology"), Ex. F to Hunter Corvis Decl., at 1.

FN24. *See id.* at 3.

FN25. *See* 10/2/00 Form S-8 for Corvis ("October 2, 2000 Prospectus"), Ex. N to Hunter Corvis Decl.

FN26. *See id.* at II-1.

FN27. *See* Corvis Chronology at 5-6.

FN28. *See id.* at 6.

FN29. *See* 1/20/04 Fischel Report ¶ ¶ 26, 29. "Underperformed" and "overperformed," as the terms are used by Fischel, mean that stock prices either declined or rose relative to the price movements of various benchmark indices. *See* 1/20/04 Fischel Report ¶ ¶ 23-26. For example, if the benchmark suggests that the market lost 50% of its value during the period, and a stock lost 80% of its value, then the stock is said to have "underperformed" the benchmark by 30 percentage points. Conversely, if another stock lost only 20% of its value over that period, it "overperformed" by 30 percentage points. As discussed in Part IV.B.2., *infra,* plaintiffs assert that price underperformance after December 6, 2000 shows that price dissipation continued throughout and after the class period.

FN30. *See* NASDAQ: Charts, http://quotes.nasdaq.com/quo te.dll? page=charting & mode=bas ics & intraday =off & timeframe=4y & charttype=ohlc & splits=off & earnings =off & movingaverage=None & lowerstudy =volume & comparison =off & index = & drilldown=off & symbol=CORV & selected=CORV (Aug. 20, 2004).

FN31. The Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub.L. No. 104-67, 109 Stat. 737 (1995), amended the Securities Act and Exchange Act to require that "[e]ach plaintiff seeking to serve as a representative party" in a class action under those sections submit a certification containing information about the proposed representative's claim and capacity to serve. *See* 15 U.S.C. § 77z-1(a)(2)(A); 15 U.S.C. § 78u-4(a)(2)(A). There are discrepancies between the transactions reported by the proposed class representatives in their PSLRA Lead Plaintiff Certifications and the transactions listed by defendants in their submission entitled Proposed Class Representative Transactions in Corvis During 92 Trading Days of the Proposed Class Period ("Corvis Transactions Data"), Ex. K to Hunter Corvis Decl. For example, Michael Huff lists only five purchases of Corvis stock while the Corvis Transactions Data reveals fifteen purchases. *Compare* 6/26/01 Huff PSLRA Lead Plaintiff Certification, Ex. K to Hunter Corvis Decl., *with* Corvis Transactions Data. For purposes of this Opinion, I rely on the Corvis Transactions Data.

FN32. *See* Corvis Transactions Data.

FN33. *See id.* Unrealized losses may serve as the basis for a securities fraud claim. *See Federman v. Empire Fire and Marine Ins. Co.*, 597 F.2d 798, 801-02 n. 1 (2d Cir.1979) (acknowledging that where "[t]he amended complaint alleged that ... [o]n the stock retained, Federman sustained an unrealized loss of approximately $900.00, ... [t]here is no question ... that the plaintiffs complied with the purchaser-seller standing requirement").

FN34. *See* Corvis Transactions Data.

FN35. *See* 11/25/03 Deposition of Sean P. Rooney, Ex. M to Hunter Corvis Decl., at 77:25-78:10.

FN36. *S* ee 7/19/99 Engage Prospectus, Ex. B to 2/24/04 Declaration of Gandolfo V. DiBlasi ("DiBlasi Decl."), at 5 n.1.

FN37. *See id.* The prospectus also notes that, under Rule 144 promulgated pursuant to the Securities Act, 17 C.F.R. § 230.144,

beneficial owners of pre-IPO Engage stock became eligible to trade their shares on the open market 90 days after the IPO--*i.e.*, on October 18, 1999. *See id.*

FN38. *See* CBS MarketWatch: Historical Quote, http:// cbs.marketwatch.com/tools/quotes/historical.asp?date=7(R)20(R)99 & symb=ENGA & siteid=mktw (Sept. 3, 2004).

FN39. *See* Fischel Tie-In Summary.

FN40. *See* Fischel Purchase Order Summary.

FN41. *See id.*

FN42. *See* Aftermarket Trading in Engage Technologies, Inc. by Goldman Sachs Allocated Accounts July 20, 1999--August 2, 1999, Ex. D-2 to 7/12/04 Fischel Report.

FN43. *See* Engage Mem. at 5.

FN44. *Id.* at 26. *See also* DiBlasi Decl. ¶ 11.

FN45. *See* Engage Mem. at 5. *See also* Engage Price Chart, Ex. C to DiBlasi Decl.

FN46. *See* Summary of Trading by Kasbarian ("Kasbarian Trading Summary"), Ex. C to 2/24/04 Declaration of David M.J. Rein ("Rein Decl."), at 2.

FN47. *See* Engage Price Chart.

FN48. *See* 1/20/04 Fischel Report ¶ ¶ 26, 29.

FN49. *See* NASDAQ: Charts, http://quotes.nasdaq.com/quo te.dll? page=charting & mode=bas ics & intraday =off & timeframe=4y & charttype=ohlc & splits=off & earnings =off & movingaverage=None & lowerstudy =volume & comparison =off & index = & drilldown=off & symbol=ENGA & selected=ENGA (August 20, 2004).

FN50. *See* Pappas PSLRA Lead Plaintiff Certification, Ex. F to Rein Decl.

FN51. *See* 12/9/03 Deposition of Stathis Pappas ("Pappas Dep."), Ex. B to Rein Decl., at 214:4-7 ("[I]f I sold the 30 cent stock or whatever it is today, I haven't looked at it because it depresses me.").

FN52. *See* Engage Mem. at 31.

FN53. *See* Kasbarian Trading Summary at 2.

FN54. *See* Engage Mem. at 35 ("His lead plaintiff certifications omitted many of his trades in Engage as well as other securities on which he is suing in this litigation, and his sworn explanations for those omissions are inconsistent."); *see also* Comparison of PSLRA Certifications of Krikor Kasbarian to His Trading Records, Ex. E to Rein Decl. For example, Kasbarian failed to disclose that on August 25, 2000 he purchased 10,000 shares for $113,687.50, which he sold on August 29, 2000 for $117,562.50, resulting in a profit of $3,875.00 on the transaction.

FN55. *See* 12/10/03 Deposition of Krikor Kasbarian, Ex. A to Rein Decl., at 110:21-111:9.

FN56. *See* Kasbarian Trading Summary at 2.

FN57. *See id.*

FN58. *See* 12/10/03 PSLRA Lead Plaintiff Certification for Kasbarian, Ex. D to Rein Decl., at 1.

FN59. *See* Kasbarian Trading Summary at 2.

FN60. *See* Engage Mem. at 31.

FN61. *See* 2/4/00 Firepond Prospectus, Ex. A to 2/24/04 Declaration of Brendan J. Dowd ("Dowd Decl."), at 1.

FN62. *See id.* at 58. With respect to the number of unregistered shares eligible for trading after the IPO, the Firepond Prospectus bizarrely states that "4,486,242 shares will be available for resale in the public market in reliance on Rule 144(k) immediately following this offering, of which 4,552,074 shares are subject to lock-up agreements." *Id.* This remarkable calculation leaves considerably fewer than zero unregistered shares eligible for trading

on the date of the IPO. However, the Prospectus also notes that, under Rule 144, thousands of shares would become tradeable 90 days after the IPO--*i.e.,* on May 4, 2000. *See id.*

FN63. *See* CBS MarketWatch: Historical Quote, http:// cbs.marketwatch.com/tools/quotes/historical.asp?date=2(R)4(R)00 & symb=FIRE & siteid =mktw (Sept. 3, 2004).

FN64. *See* Fischel Tie-In Summary.

FN65. *See* Fischel Purchase Order Summary.

FN66. *See* Aftermarket Trading in Firepond, Inc. by Robertson Stephens Allocated Accounts, Ex. D-3 to 7/12/04 Fischel Report.

FN67. *See* Firepond, Inc. Closing Prices 2000, Ex. B to Dowd Decl.

FN68. *See* Firepond Mem. at 38.

FN69. *See* Firepond, Inc. Closing Prices 2000.

FN70. *See* 2/4/00 Firepond Prospectus at 53.

FN71. *See* Firepond, Inc. Closing Prices 2000.

FN72. *See* 1/20/04 Fischel Report ¶ ¶ 26, 29.

FN73. *See* Bigcharts--Historical Quotes, http:// bigcharts.marketwatch.com/historical/default.asp?d etect=1 & symbol=fire & close_date=7(R)31(R)01 & x=0 & y=0 (August 20, 2004).

FN74. *See* Class Representative Trading Summary, App. B to Firepond Mem, at 1.

FN75. *See id.*

FN76. *See id.*

FN77. *See* Firepond Mem. at 36.

FN78. *See* 12/5/03 Deposition of Joseph Zhen, Ex. D to Dowd Decl., at 96:15-97:10.

FN79. *See* 6/2/99 iXL Prospectus, Ex. E to 2/24/04 Declaration of Robert G. Houck ("Houck Decl."), at E2.

FN80. *See* 6/2/99 iXL IPO Prospectus at 97.

FN81. *See* iXL Enterprises Daily Stock Prices and Volume, Ex. I to Houck Decl., at I2.

FN82. *See* Fischel Tie-In Summary. Fischel states that he was not provided with any pre-opening bid information for iXL. *See* 7/12/04 Fischel Report ¶ 6.

FN83. *See* Aftermarket Trading in iXL Enterprises, Inc. by Merrill Lynch Allocated Accounts, Ex. D-4 to 7/12/04 Fischel Report.

FN84. *See* iXL Enterprises Daily Stock Prices and Volume at I2.

FN85. *See* 6/28/99 Form S-4 for iXL, Ex. E to Houck Decl., at E24-E26.

FN86. *See* 7/27/99 iXL Press Release: "iXL Enterprises Reports Record Revenue Sequential Quarterly Revenue [sic] for iXL, Inc. Subsidiary Increases 41 Percent," Ex. D to Houck Decl., at D8-D11.

FN87. 7/28/99 Merrill Lynch Report for iXL, Ex. G to Houck Decl., at G14.

FN88. *See* iXL Enterprises Daily Stock Prices and Volume at I2-I4.

FN89. *See* iXL Mem. at 10-11.

FN90. *See id.* at 11.

FN91. 2/18/00 Merrill Lynch Report for iXL, Ex. G to Houck Decl., at G68.

FN92. 3/20/00 Merrill Lynch Report for iXL, Ex. G to Houck Decl., at G72.

FN93. 9/1/00 Merrill Lynch Report for iXL, Ex. G to Houck Decl., at G84.

FN94. 9/5/00 Merrill Lynch Report for iXL, Ex. G to Houck Decl., at G86.

FN95. *See* iXL Mem. at 11.

FN96. *See* 1/20/04 Fischel Report ¶ ¶ 26, 29.

FN97. *See* http://bigcharts.marketwatch.com/print/print.asp?frames=0 & time=100 & freq= 1 & compidx=aaaaa:0 & comp=NO_SYMBOL_CHOSEN & ma=0 & maval =9 & uf=0 & 1f=1 & 1f2=0 & 1f3=0 & type=64 & style =320 & size =3 & sid=149463 & o_symb =DE:922795 & startdate=12(R)6(R)00 & enddate=10(R)25(R)2001 & show= & symb =DE:922795 & draw.x=43 & draw.y= 14 & default=true & backurl=(R)intchart(R)frames(R)framesCopr.asp & prms=qcd (Oct. 11, 2004).

FN98. *See* John Miles iXL Trades, Ex. J to Houck Decl., at J18.

FN99. *See* J. Chris Rowe iXL Trades, Ex. J to Houck Decl., at J29. Rowe actually sold the remaining shares on December 29, 2000 for $938.71. *See id.*

FN100. *See* 10/21/99 Sycamore Prospectus, Ex. 6 to 2/24/04 Declaration of Brant W. Bishop ("Bishop Decl.").

FN101. *See* CBS MarketWatch: Historical Quote, http:// cbs.marketwatch.com/tools/quotes/historical.asp?date=10(R)22(R)99 & symb=SCMR & siteid=mktw (Sept. 3, 2004).

FN102. *See* Fischel Tie-In Summary.

FN103. *See* Fischel Purchase Order Summary.

FN104. *See* Aftermarket Trading in Sycamore by Morgan Stanley Allocated Accounts, Ex. D-5 to 7/12/04 Fischel Report.

FN105. *See* 10/21/99 Sycamore Prospectus at 53 (explaining that 65,471,542 of the 71,205,725 shares issued and sold by Sycamore were subject to lock-up, leaving 5,734,183 free shares).

FN106. *See id.* at 52. In fact, millions of shares otherwise subject to 180-day lock-up agreements became tradeable on January 19, 2000, because Sycamore shares had traded at more than twice the IPO price, satisfying a release condition of many of the Sycamore lock-up agreements. *See id.;* Sycamore Mem. at 37; 3/14/00 Secondary Prospectus filed by Sycamore, Ex. 7 to Bishop Decl., at 54 (noting that nearly 30 million restricted shares were eligible for trading on January 19, 2000).

FN107. *See* Sycamore Significant Days Summary, Ex. 13 to Gompers Report, at 2.

FN108. *See* 10/21/99 Sycamore Prospectus at 52 (noting that the expiration of the lock-up would occur 180 days following the 10/21/99 Sycamore IPO).

FN109. *See* Sycamore Significant Days Summary at 3.

FN110. *See id.* at 45. The stock prices in this subsection are adjusted for the 3-1 stock split.

FN111. *See id.* at 8.

FN112. *See* 3/14/00 Sycamore Prospectus, Ex. 7 to Bishop Decl., at 54 (noting that 8,985,186 shares were freed from lock-up on March 3, 2000).

FN113. *See id.*

FN114. *See id.* at 67.

FN115. *See* Sycamore Significant Days Summary at 39-42.

FN116. *See* 1/20/04 Fischel Report ¶ ¶ 26, 29.

FN117. *See* http://cbs.marketwatch.com/tools/quotes/historical.asp?date=7(R)2(R)01 & symb=SCMR & siteid=mktw (Oct. 11, 2004).

FN118. *See* 7/20/01 PSLRA Lead Plaintiff Certification of Barry Lemberg.

FN119. This price reflects the stock's closing price without adjusting for the 3-1

stock split on February 14, 2000.

FN120. *See* Deposition of Barry Lemberg ("Lemberg Dep."), Ex. 8 to Bishop Decl., at 72:6-73:6. Lemberg purchased 1,000 shares on February 15, 2001. *See id.* at 73:7-10.

FN121. *Compare* 9/12/03 Questionnaire of Barry I. Lemberg ("Lemberg Questionnaire"), Ex. 1 to Ex. 8 to Bishop Decl., at 3 (answering "No" when asked whether he received any allocation of stock relating to the current litigation), *with* Lemberg Dep. at 42:5-10 (answering "Yes" to the same question).

FN122. *Compare* Lemberg Questionnaire at 3 (answering "No" when asked whether, from 1998 to 2000, he had ever engaged in "buying and selling same stock [sic] on the same trading day"), *and* Lemberg Dep. at 27:14-16 (same), *with* Active Assets Account Report for Barry Lemberg, Ex. 2 to Lemberg Dep., at 8 (reporting that Lemberg both bought and sold CacheFlow stock on 11/24/99), *and* Lemberg Dep. at 32:16-33:11 (acknowledging the discrepancy between Lemberg's previous affirmation and the CacheFlow transaction).

FN123. *See* Lemberg Dep. at 94:17-96:11.

FN124. Sycamore Mem. at 49.

FN125. *See* 3/01/00 to 12/31/00 E*Trade Account Statements for Vasanthakumar Gangaiah, Ex. 6 to 11/30/03 Deposition of Vasanthakumar Gangaiah ("Gangaiah Dep."), Ex. 9 to Bishop Decl.

FN126. Sycamore Mem. at 46. When initially asked when he opened his first investment account in the United States, Gangaiah responded that his first account, an E*Trade account, was opened in 1999. *See* Gangaiah Dep. at 21:9-14. However, Gangaiah later testified that he had opened a DLJ Direct account in 1998, prior to the E*Trade account, which he claimed had been closed after a couple of months. *See id.* at 27:1-9. Defendants observe that Gangaiah's documents show that his DLJ Direct account had not been closed in 1998, but was active as late as June 2000. *See* Sycamore Mem. at 46. Defendants allege that while Gangaiah claimed that he held only the E*Trade and DLJ investment accounts, he actually held another account with BancBoston Robertson Stephens ("BancBoston"). *See id.*

FN127. Sycamore Mem. at 47. Gangaiah testified that he had never received an IPO allocation. *See* Gangaiah Dep. at 40:10-12. Defendants assert, however, that Gangaiah's BancBoston account was "opened for the express purpose of receiving 750 shares in the Stamps.com IPO (one of the IPOs at issue in this litigation)." Sycamore Mem. at 46-47.

FN128. *See* Sycamore Mem. at 47.

FN129. *See id.* at 19, 38.

FN130. *See* 8/14/01 PSLRA Lead Plaintiff Certification of Frederick B. Henderson. This result factors in the $8,100 profit Henderson made when he flipped his 50 allocated shares.

FN131. *See* 12/2/03 Deposition of Frederick Henderson, Ex. 3 to Bishop Decl., at 40:4-11.

FN132. *Id.* at 176:18-177:7.

FN133. *See* 12/9/99 VA Linux Prospectus, Ex. H to 2/24/04 Declaration of Fraser L. Hunter, Jr. in Support of VA Linux Opposition ("Hunter VA Linux Decl.").

FN134. *See id.* at 65.

FN135. *Id.*

FN136. *See id.*

FN137. *See* CBS MarketWatch: Historical Price, http:// cbs.marketwatch.com/tools/quotes/historical.asp?date=12(R)9(R)99 & symb=LNUX & siteid=mktw (Sept. 3, 2004).

FN138. *See* Fischel Tie-In Summary.

FN139. *See* Fischel Purchase Order Summary.

FN140. *See* Aftermarket Trading in VA

Linux Systems, Inc. by CSFB Allocated Accounts, Ex. D-6 to 7/12/04 Fischel Report.

FN141. *See* VA Linux Chronology of Events from December 9, 1999 to December 6, 2000 ("VA Linux Chronology"), Ex. I to Hunter VA Linux Decl., at 6. The Andover.net, Inc. deal closed on June 7, 2000. *See* VA Software Corp. 10-Q filed on 6/12/00, ex. H to Hunter VA Linux Decl., at 9.

FN142. *See id.* at 9, 11.

FN143. *See* 12/9/99 VA Linux Prospectus at 65.

FN144. *See* VA Linux Chronology at 28.

FN145. *See id.* at 28-29.

FN146. *See* CBS MarketWatch: Historical Price, http:// cbs.marketwatch.com/tools/quotes/historical.asp?date=12(R)6(R)00 & symb=LNUX & siteid=mktw (Sept. 13, 2004)

FN147. *See* 1/20/04 Fischel Report ¶ ¶ 26, 29.

FN148. *See* NASDAQ: Charts, http://quotes.nasdaq.com/quote.dll? page=charting & mode=basics & intraday =off & timeframe=5y & charttype=ohlc & splits =off & earnings=off & movingaverage=None & lowerstudy =volume & comparison=off & index = & drilldown=off & symbol=LNUX & selected=LNUX (August 20, 2004).

FN149. *See* Proposed Class Representative Transactions in VA Linux During 252 Days of the Proposed Class Period ("VA Linux Transactions Data"), Ex. L to Hunter VA Linux Decl.

FN150. Based on the record before the Court, Zagoda continued to hold these shares until January 11, 2001, the date when *Makaron v. VA Linux Sys., Inc.*, No. 01 Civ. 0242, was filed.

FN151. *See id.*

FN152. *See id.* Budich reported on her PSLRA Certification that she purchased 23 shares of VA Linux stock for $227.00 per share. *See* 1/16/01 PSLRA Lead Plaintiff Certification of Anita J. Budich. However, for purposes of this Opinion I rely on the values provided in the VA Linux Transactions Data.

FN153. *See* Gompers Report ¶ ¶ 12, 13.

FN154. *See* Selected Internet Related Indices 10/22/99-12/29/00, Ex. 6 to Gompers Report.

FN155. iXL Mem. at 29.

FN156. *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 289 F.Supp.2d 416, 419 (S.D.N.Y.2003).

FN157. Christopher Byron, *IPO Quid Pro Quo Squeezes Investors,* MSNBC, June 16, 1999, Ex. A to Houck Decl., at A2.

FN158. *Id.* at A3.

FN159. *Id.* at A2.

FN160. Byron reiterated the claims made in his MSNBC article on television during a CNBC interview held on June 18, 1999. *See* Bill Griffeth, *Interview with Christopher Byron on Possible Price Manipulation of Internet Stocks,* CNBC, June 18, 1999, Ex. A to Houck Decl., at A12. That same day, the well-visited financial website *Raging Bull* featured Byron's article as the second listing on its "News Links of the Week" page. *See* Lycos Finance's Raging Bull: News Links of the Week for June 18, 1999, Ex. A to Houck Decl., at A8. A discussion of the article also appeared as a post in a Yahoo! chat room. *See* MSFT_Sux, Yahoo Groups Internet Stock Talk: *Potential Dangers of Playing Internet IP,* June 18, 1999, Ex. A to Houck Decl., at A10.

FN161. Greg Ip et al., *The Color Green: The Internet Bubble Broke Records, Rules and Bank Accounts,* Wall St. J., July 14, 2000, Ex. A to Houck Decl., at A1.

FN162. SEC Div. of Market Reg.: Staff Legal Bulletin No. 10 (Aug. 25, 2000), Ex.

A to Houck Decl., at A25.

FN163. Jack Willoughley, *Pump It Up: The Dirty Little Secret Behind the IPO Boom,* Barron's, Sept. 11, 2000, Ex. A to Houck Decl., at A28.

FN164. Susan Pulliam and Randall Smith, *Trade-Offs: Seeking IPO Shares, Investors Offer to Buy More in After-Market,* Wall St. J., Dec. 6, 2000, at A1, Ex. K to 1/20/04 Fischel Report.

FN165. *Id.*

FN166. *See generally* http://bigcharts.marketwatch.com (Oct. 11, 2004).

FN167. *See* Press Reports on Analyst Conflicts, Ex. B to Houck Decl., at B1 (documenting fifteen articles discussing analyst conflicts published from October 27, 1985 through August 1, 2000).

FN168. *A Briefing for Investors: Analysts' Rosy Reports Draw SEC Chief's Fire,* L.A. Times, Apr. 14, 1999, at C4, Ex. B to Houck Decl., at B46.

FN169. Garth Alexander, *The Tipsters Who Never Say Sell,* Sunday Times (of Britain), Apr. 23, 2000, at 8, Ex. B to Houck Decl., at B59.

FN170. Miriam Hill, *Even Research Comes With Spin,* The Philadelphia Inquirer, Aug. 1, 2000, at C1, Ex. B to Houck Decl., at B66.

FN171. *See Caridad v. Metro-North Commuter R.R.,* 191 F.3d 283, 291 (2d Cir.1999).

FN172. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 614, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

FN173. Fed.R.Civ.P. 23(b)(3).

FN174. Fed.R.Civ.P. 23(a)(1).

FN175. *In re Independent Energy Holdings PLC Sec. Litig.,* 210 F.R.D. 476, 479 (S.D.N.Y.2002) (citing *In re Avon Sec. Litig.,* No. 91 Civ. 2287, 1998 WL 834366, at *5 (S.D.N.Y. Nov.30, 1998)).

FN176. *See Trief v. Dun & Bradstreet Corp.,* 144 F.R.D. 193, 198 (S.D.N.Y.1992).

FN177. *See* Fed.R.Civ.P. 23(a)(2); *see also Trief,* 144 F.R.D. at 198.

FN178. *See German v. Federal Home Loan Mortgage Corp.,* 885 F.Supp. 537, 553 (S.D.N.Y.1995).

FN179. *D'Alauro v. GC Services Ltd. P'ship,* 168 F.R.D. 451, 456 (E.D.N.Y.1996) (quotation omitted). *See also In re "Agent Orange" Prod. Liab. Litig.,* 818 F.2d 145, 166-67 (2d Cir.1987).

FN180. *See In re Blech Sec. Litig.,* 187 F.R.D. 97, 104 (S.D.N.Y.1999).

FN181. *See, e.g., Blackie v. Barrack,* 524 F.2d 891, 902 (9th Cir.1975) ("Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable...."); *In re Baldwin-United Corp. Litig.,* 122 F.R.D. 424, 426 (S.D.N.Y.1986) ("The nub of plaintiffs' claims is that material information was withheld from the entire putative class in each action, either by written or oral communication. Essentially, this is a course of conduct case, which as pled satisfies the commonality requirement of Rule 23....").

FN182. *Forbush v. J.C. Penney Co.,* 994 F.2d 1101, 1106 (5th Cir.1993) (citing *Shipes v. Trinity Indus.,* 987 F.2d 311, 316 (5th Cir.1993)).

FN183. *See Robinson v. Metro-North Commuter R.R. Co.,* 267 F.3d 147, 155 (2d Cir.2001).

FN184. *Marisol A. v. Giuliani,* 929 F.Supp. 662, 691 (S.D.N.Y.1996), *aff'd,* 126 F.3d 372 (2d Cir.1997).

FN185. *See Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 222 F.3d 52, 59 (2d

Cir.2000).

FN186. *See* *Landry v. Price Waterhouse Chartered Accountants*, 123 F.R.D. 474, 476 (S.D.N.Y.1989).

FN187. *Caridad*, 191 F.3d at 291 (alterations in original) (quoting *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

FN188. Fed.R.Civ.P. 23(a)(4). *See also* *Banyai v. Mazur*, 205 F.R.D. 160, 164 (S.D.N.Y.2002).

FN189. *Baffa*, 222 F.3d at 60. An antagonistic interest arises when there is a "fundamental conflict or inconsistency between the claims of the proposed class members" that is "so palpable as to outweigh the substantial interest of every class member in proceeding with the litigation." *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 514-15 (S.D.N.Y.1996). *See also* *Robinson*, 267 F.3d at 170 (holding that Rule 23(a)(4) requires "absence of conflict" between named representatives and class, as well as "vigorous prosecution").

FN190. *Noble v. 93 University Place Corp.*, No. 02 Civ. 1803, 2004 WL 944543, at *4 (S.D.N.Y. May 3, 2004) (citations omitted).

FN191. *Baffa*, 222 F.3d at 61 (quotations and citation omitted).

FN192. *In re AM Int'l Inc., Sec. Litig.* 108 F.R.D. 190, 196-97 (S.D.N.Y.1985).

FN193. *Gary Plastic Packaging Corp. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir.1990).

FN194. *In re MTBE*, 209 F.R.D. at 336 (quoting *Zapka v. Coca-Cola Co.*, No. 99 Civ. 8238, 2000 WL 1644539, at *2 (N.D.Ill. Oct.27, 2000)).

FN195. *Id.* (citing *Van West v. Midland Nat'l Life Ins. Co.*, 199 F.R.D. 448, 451 (D.R.I.2001); *In re Copper Antitrust Litig.*, 196 F.R.D. 348, 358 (D.Wis.2000)).

FN196. *Id.* at 337 (quoting *Zapka*, 2000 WL 1644539, at *2). *See also* *Clay v. American Tobacco Co.*, 188 F.R.D. 483, 490 (S.D.Ill.1999); *Gomez v. Illinois State Bd. of Educ.*, 117 F.R.D. 394, 397 (N.D.Ill.1987).

FN197. *Id.* (quoting *Rios v. Marshall*, 100 F.R.D. 395, 403 (S.D.N.Y.1983)).

FN198. *Rios*, 100 F.R.D. at 403 (citing 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Fed. Prac. & Proc. § 1760 at 581 (1972)).

FN199. *Daniels v. City of New York*, 198 F.R.D. 409, 414 (S.D.N.Y.2001) (quotation omitted). A plaintiff's failure to plead a class that can be ascertained without subjective individual inquiries may cause individual issues (*i.e.*, whether each individual class member belongs in the class) to predominate. Consequently, the question of ascertainability takes on great importance in 23(b)(3) class actions, which may only be certified if common questions--not individual inquiries--predominate. *See infra* Part IV.B.1.

FN200. Fed.R.Civ.P. 23(b)(3).

FN201. *In re VISA Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir.2001) (quotation marks and citation omitted).

FN202. *Maneely v. City of Newburgh*, 208 F.R.D. 69, 76 (S.D.N.Y.2002) (quoting *Amchem Prods.*, 521 U.S. at 623-24).

FN203. *See, e.g.*, *Augustin v. Jablonsky*, No. 99-CV-3126, 2001 WL 770839, at *13 (E.D.N.Y. Mar.8, 2001) (finding individualized issues of proximate causation predominate despite plaintiffs' showing of commonality under Rule 23(a)(2)); *Martin v. Shell Oil Co.*, 198 F.R.D. 580, 592- 93 (D.Conn.2000) (finding individualized proof of breach, causation, and trespass predominates where commonality was not contested); *In re MTBE*, 209 F.R.D. at 350 (finding individual issues predominate although defendants conceded commonality).

FN204. *Amchem Prods.*, 521 U.S. at 625.

FN205. *See* Fed.R.Civ.P. 23(b)(3); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

FN206. Fed.R.Civ.P. 23(b)(3).

FN207. *See Noble*, 2004 WL 944543, at *5 (citing Rule 23(g)(1)(C)(i)). *See also In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir.1992) ("[C]lass counsel must be qualified, experienced and generally able to conduct the litigation.") (quotation marks and citation omitted).

FN208. Rule 23(g)(1)(C)(ii).

FN209. *See Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir.2000) ("[A]ffirmative defenses should [also] be considered in making class certification decisions."); *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir.1996) (explaining that "a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues").

FN210. *See Califano v. Yamasaki*, 442 U.S. 682, 701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). *See generally* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.03 (3d ed. 2004) ("Rather than attempting to interpret Rule 23 through a 'liberal' or 'strict' construction, the best policy is to take a flexible approach, and to interpret Rule 23 so as to promote the purposes underlying the rule. The class action device was designed to promote judicial efficiency and to provide aggrieved persons a remedy when individual litigation is economically unrealistic, as well as to protect the interests of absentee class members. The underlying purposes of Rule 23 may supply meaningful guidance for courts called on to resolve disputes concerning the proper interpretation of the Rule.").

FN211. *See Korn v. Franchard Corp.*, 456 F.2d 1206 (2d Cir.1972); *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 1998 WL 50211, at *5 (S.D.N.Y. Feb. 6, 1998) ("The Second Circuit has directed district courts to apply Rule 23 according to a liberal rather than a restrictive interpretation.").

FN212. *Green v. Wolf Corp.*, 406 F.2d 291, 300 (2d Cir.1968).

FN213. *In re Indep. Energy*, 210 F.R.D. at 479 (citation omitted). To that end, the Second Circuit has recently reaffirmed that while class certification decisions are reviewed for abuse of discretion, it is " 'noticeably less deferential to the district court when that court has denied class status than when it has certified a class.' " *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir.2002) (quoting *Caridad*, 191 F.3d at 291).

FN214. *Falcon*, 457 U.S. at 161.

FN215. *See Caridad*, 191 F.3d at 291.

FN216. *See* Fed.R.Civ.P. 23(f) and Advisory Committee Note.

FN217. 417 U.S. at 177. *See also Miller v. Mackey Int'l, Inc.*, 452 F.2d 424, 427 (5th Cir.1971) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.") *quoted in Eisen*, 417 U.S. at 178.

FN218. *Shayne v. Madison Square Garden Corp.*, 491 F.2d 397, 398 (2d Cir.1974). *Accord Shelter Realty Corp. v. Allied Maint. Corp.*, 574 F.2d 656, 661 n. 15 (2d Cir.1978) ("[W]e have previously held that it is proper to accept the complaint allegations as true in a class certification motion."). *See also Green*, 406 F.2d at 294 n. 1 (stating, in a case decided prior to *Eisen*: "We have assumed for the purpose of this appeal, as we are required to do, that the 'facts' stated in the complaint and accompanying papers submitted to Judge Ryan are true.").

FN219. *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir.2001). *See id.* at 677 (explaining that *Eisen* does not require a court to accept the allegations of a complaint as true, but only prohibits a court from

saying something like "I'm not going to certify a class unless I think that the plaintiffs will prevail."); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir.2004) ("*Eisen* simply restricts a court from expanding the Rule 23 certification analysis to include consideration of whether the proposed class is likely to prevail ultimately on the merits."); *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 186- 89 (2d Cir.2001) (finding it "not only ... appropriate, but also necessary" to look beyond the pleadings at class certification); *Waste Mgmt. Holdings*, 208 F.3d at 298 ("[A] district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate."); *Castano*, 84 F.3d at 744 (holding that *Eisen* does not suggest "that a court is limited to the pleadings when deciding on certification.... A district court certainly may look past the pleadings to determine whether the requirements of Rule 23 have been met.").

FN220. 437 U.S. 463, 469, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558, 83 S.Ct. 520, 9 L.Ed.2d 523 (1963)). In a footnote, the Court quoted with approval a leading civil procedure treatise:
Evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims. The typicality of the representative's claims or defenses, the adequacy of the representative, and the presence of common questions of law or fact are obvious examples. The more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits....
15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3911, at p. 485, n. 45 (1976) *quoted in Livesay*, 437 U.S. at 469 n. 12.

FN221. *Falcon*, 457 U.S. at 161.

FN222. *Id.* at 160.

FN223. 249 F.3d at 676.

FN224. *Id.*

FN225. *See, e.g., Luckett v. Bure*, 290 F.3d 493, 496-97 (2d Cir.2002) (noting that a district court must find the existence of subject matter jurisdiction by a preponderance of the evidence); *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir.1996) (same, for personal jurisdiction); *GTFM Inc. v. International Basic Source, Inc.*, No. 01 Civ. 6203, 2002 WL 42884, at *2 (S.D.N.Y. Jan.11, 2002) (same, for change of venue); *Ultra Sucro Co. v. Illinois Water Treatment Co.*, 146 F.Supp. 393, 398 (S.D.N.Y.1956) (I.Kaufman, J.) (same, for *forum non conveniens*).

FN226. *Gariety*, 368 F.3d at 366.

FN227. *Id.*

FN228. In the Fourth Circuit, a preliminary injunction may be granted only where the court finds that "the moving party clearly establishes entitlement to the relief sought." *Hughes Network Sys. Corp. v. Interdigital Communications Corp.*, 17 F.3d 691, 693 (4th Cir.1994). While such a determination entails some fact-finding, the moving party need not establish her claims by a preponderance of the evidence; rather, "a probable right, and a probable danger that such right will be defeated, without the special interposition of the court, is all that need be shown." *United States v. Fang*, 937 F.Supp. 1186, 1197 (D.Md.1996) (construing *Hughes*) (citations omitted).

FN229. 417 U.S. at 178.

FN230. 191 F.3d at 293 (citing *Eisen*, 417 U.S. at 177).

FN231. *Id.* at 292.

FN232. *Id.* at 293.

FN233. 280 F.3d at 134-35 (quoting *Caridad*, 191 F.3d at 291).

FN234. *Id.* at 135 (quoting *Caridad*, 191 F.3d at 292).

FN235. *Id.* (citing cases).

FN236. The following is a list of common issues for all plaintiffs asserting claims under section 10(b) and Rule 10b-5. Those plaintiffs who also fall into plaintiffs' section 11 classes will need to prove additional common issues with respect to those claims, including whether class members who bought in the aftermarket can trace their shares to a defective registration statement and whether class members who bought after a 12- month earnings statement had been issued can prove that the earnings statement failed to cure the registration statement's misrepresentations and omissions.

FN237. *See* Trial Plan. This list includes some of the common questions anticipated by plaintiffs and the Court. Defendants, of course, may present defenses that raise issues common to all class members and that can be decided based on common proof.

FN238. *See infra* Part IV.B.3.

FN239. *See infra* Part IV.B.

FN240. *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir.1993).

FN241. *In re Worldcom*, 219 F.R.D. at 280 (alteration in original) (quoting *Caridad*, 191 F.3d at 293).

FN242. *See In re Worldcom*, 219 F.R.D. at 280; *cf. In re Sumitomo Copper Litig.*, 262 F.3d 134, 140-41 (2d Cir.2001);

FN243. Plaintiffs' Reply at 15.

FN244. Pappas, one of plaintiffs' proposed Engage class representatives, was an allocant and did not purchase shares in the aftermarket. He is clearly qualified to serve as plaintiffs' Engage section 11 class representative. *See infra* Part IV.B.4. Pappas will therefore likely be preoccupied by showing that the omission of the alleged scheme (*i.e.*, tie-in agreements, undisclosed compensation and analyst conflicts) from the registration statement was material, and *not* that the alleged scheme actually drove up prices in the aftermarket. Similarly, to the extent that Pappas asserts market manipulation claims, defendants may challenge his ability to prove loss causation (because he bought shares before any artificial inflation created by tie-in agreements affected the market price). Accordingly, Pappas is not a suitable 10b-5 class representative.

FN245. Some class representatives, though, are not qualified to represent plaintiffs' section 11 classes because they would be preoccupied by the unique defense that they cannot trace their shares to a defective registration statement. *See infra* Part IV.B.4.b.

FN246. *Gary Plastic*, 903 F.2d at 180. While *Gary Plastic* also found that a holder of certificates of deposit ("CDs") who discovered that interest on those CDs was being fraudulently underpaid but nevertheless allowed the CDs to roll over several times was subject to such a unique defense, *id.*, such a finding is not mandated here for proposed class representatives who purchased shares after the close of the class period. In an efficient stock market--as opposed to the market for CDs--information that share prices have been fraudulently manipulated is immediately reflected in share prices, and the resulting artificial inflation disappears. *See infra* Part IV.B.1.

FN247. *See* Engage Mem. at 24; Firepond Mem. at 28-31; VA Linux Mem. at 40 n.39.

FN248. Defendants argue that such notice would both bar some class representatives' claims under the section 10(b) statute of limitations, *see* iXL Mem. at 18-19, and prevent others from enjoying a presumption of reliance, *see* Corvis Mem. at 18-19.

FN249. *See* Firepond Mem. at 31-32.

FN250. *See* Engage Mem. at 33-34.

FN251. *See infra* Part IV.A.4.

FN252. *See infra* Part IV.B.1.b.(3).

FN253. *See, e.g., In re Worldcom*, 219 F.R.D. at 281-82 (rejecting similar arguments, noting that "[e]ach of these methods of making investment decisions is

representative of methods used by many other investors. Each of the methods reflects an evaluation of the publicly available information about Worldcom....").

FN254. *See infra* Part IV.B.1.b.(2).

FN255. Engage Mem. at 34 (construing *Rolex Employees Ret. Trust v. Mentor Graphics Corp.*, 136 F.R.D. 658, 664 (D.Or.1991)).

FN256. *In re MTBE*, 209 F.R.D. at 338 n. 22..

FN257. *See* Engage Mem. at 31-32. These representatives include Pappas and Kasbarian, who seek to represent the Engage class, *see id;* Zitto, a class representative in Firepond, *see* Firepond Mem. at 35; and Basu, a class representative in Corvis, *see* Corvis Mem. at 17.

FN258. 61 F.R.D. 615, 624 (D.Del.1973).

FN259. *See id.*

FN260. 74 F.R.D. 142, 144 (E.D.N.Y.1977).

FN261. *See id.*

FN262. *See Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir.2000).

FN263. *See* Sycamore Mem. at 44-50 (discussing the inadequacies of class representatives Gangaiah, Henderson, and Lemberg). Sycamore's claim that class representatives have "conflicting views of the theory of [the] case," *id.*, is essentially identical to their claim that the representatives do not understand the nature of the litigation or their responsibilities.

FN264. *Id.* at 47.

FN265. *See* Henderson Dep. at 107-11, 121-34.

FN266. *See id.* at 165-66.

FN267. *See* Gangaiah Dep. at 59-66, 98-99.

FN268. *See* Lemberg Dep. at 89.

FN269. *In re College Bound Consol. Litig.*, No. 93 Civ. 2348, 1994 WL 236163, at *4 (S.D.N.Y. May 31, 1994) (quoting *Klein v. A.G. Becker Paribas Inc.*, 109 F.R.D. 646, 651-52 (S.D.N.Y.1986)).

FN270. *See* Lemberg Dep. at 89, 145.

FN271. *See* Firepond Mem. at 32-36.

FN272. *In re AM Int'l.*, 108 F.R.D. at 196-97.

FN273. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir.1995). The foregoing discussion also disposes of defendants' concern that the "class representatives and their own counsel have conflicting views of the theory of this case." Sycamore Mem. at 44.

FN274. *Saddle Rock Partners v. Hiatt*, No. 96 Civ. 9474, 2000 WL 1182793, at *5 (S.D.N.Y. Aug.21, 2000) (quoting *In re Frontier Ins. Group, Inc. Sec. Litig.*, 172 F.R.D. 31, 41 (E.D.N.Y.1997)).

FN275. *See, e.g.*, Engage Mem. at 35 (discussing Kasbarian); Firepond Mem. at 36-37 (discussing Zhen); Sycamore Mem. at 46-50 (discussing Gangaiah and Lemberg).

FN276. *See* Kasbarian Dep. at 113.

FN277. *Harrison v. Great Springwaters of Am., Inc.*, No. 96 Civ. 5110, 1997 WL 469996, at *6 (E.D.N.Y. June 18, 1997).

FN278. A number of courts have reached the same conclusion. *See, e.g.*, *Saddle Rock Partners*, 2000 WL 1182793, at *5; *In re Frontier Ins. Group*, 172 F.R.D. at 41; *Kalodner v. Michaels Stores, Inc.*, 172 F.R.D. 200, 210 (N.D.Tex.1997); *In re Consumers Power Co. Sec. Litig.*, 105 F.R.D. 583, 605-06 (E.D.Mich.1985); *see also* Plaintiffs' Reply at 111- 18.

FN279. *See, e.g., Dunnigan v. Metropolitan Life Ins. Co.*, 214 F.R.D. 125, 135 (S.D.N.Y.2003) ("Class members need not be ascertained prior to certification, but must be ascertainable at some point in the case.").

FN280. *See id.; Dorchester Investors v.*

Peak Trends Trust, No. 99 Civ. 4696, 2002 WL 272404, at *6 (S.D.N.Y. Feb. 26, 2002) (acknowledging that class members who knew of the alleged scheme cannot recover); *id.* at 6 n. 6 (certifying class even in light of "Defendants['] argu[ment] that because neither those who sell short nor those who knew about the short selling scheme can be readily identified, the class should not be certified," stating that "[t]he Court rejects this argument because, as discussed above, certifying the class is the most efficient method available for [a securities] class action. The parties must use the available discovery mechanisms to determine who falls in or out of the class....").

FN281. *See* Class Def. Opp. at 2 n.1 (challenging plaintiffs' citation of *Dorchester,* 2002 WL 272404, on the ground that *Dorchester* "merely held--when conditional certification was still permissible--that questions about the class period and the knowledge of a small number of investors should not bar an initial certification ruling that would be modified as appropriate in light of discovery").

FN282. Fed.R.Civ.P. 23(c)(1)(C) Advisory Committee Note.

FN283. *See id.* ("[F]or example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class.... A determination of liability after certification ... may show a need to amend the class definition. Decertification may be warranted after further proceedings.").

FN284. *See In re MTBE,* 209 F.R.D. at 337 n. 20 (quoting *Forbush,* 994 F.2d at 1104-06).

FN285. *In re RCS Engineered Products Co., Inc.,* 102 F.3d 223, 226 (6th Cir.1996). *See also Gurary v. Winehouse* 190 F.3d 37, 45 (2d Cir.1999) (a plaintiff "must establish that he or she engaged in a securities trade in ignorance of the fact that the price was affected by the alleged manipulation.").

FN286. *See Hevesi v. Citigroup, Inc.,* 366 F.3d 70, 77 (2d Cir.2004).

FN287. *See infra* Part IV.B.1.b.(3).

FN288. *See* Plaintiffs' Reply at 5 ("As a result, the Class definition eliminates anyone who knowingly participated in the alleged misconduct.").

FN289. Of course, plaintiffs' suggestion is not binding; it is the Court, not plaintiffs, that ultimately decides what class to certify. *See, e.g., Gibson v. Local 40, Supercargoes & Checkers of the ILWU,* 543 F.2d 1259, 1264 (9th Cir.1976) (narrowing proposed class definition); *Taylor v. Safeway Stores, Inc.,* 524 F.2d 263, 269 (10th Cir.1975) (same) *overruled on other grounds by Ruckelshaus v. Sierra Club,* 463 U.S. 680, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983); *Martin v. American Med. Sys., Inc.,* No. IP 94- 2067-C-H/G, 1995 WL 680630, at *6 (S.D.Ind. Oct.25, 1995) ("The court need not merely accept or reject plaintiffs' proposed class definition without considering modifications of that definition.").

FN290. MA ¶ ¶ 14, 16-17.

FN291. Defendants' Sur-Reply at 5. Defendants assert that exclusion of class members who had actual knowledge of the alleged scheme would require "claimant-by-claimant inquiry at trial." *Id.* at 6. This argument involves elements both of ascertainability and predominance. Essentially, defendants argue that if plaintiffs cannot at this stage provide a means for excluding *all* class members with actual knowledge, then trial of these actions will be dominated by individual inquiries into whether *each* class member had knowledge. However, if plaintiffs can plead an ascertainable class, then individual determinations of actual knowledge--ultimately inquiries into who belongs in the class--will not predominate at trial. Whether the analysis is denominated as "ascertainability" or "predominance," the outcome is the same.

FN292. MA ¶ ¶ 30-31.

FN293. Indeed, even the broadest reading of paragraphs 30 and 31 does not support a conclusion that *analyst conflicts*--one part of the coherent fraudulent scheme alleged--

were common knowledge.

FN294. *See* Transcript of 6/17/04 Hearing, 49:3-8 ("[MR. BROWER:] Simply, persons who participated in the scheme, those who had knowledge are unlikely to have lost money net trading in the stock in which they received an allocation, because even if they did aftermarket transactions as part of tie-in agreements, they still wouldn't trade themselves to a loss.").

FN295. *Id.* at 54:10-19.

FN296. *See* Plaintiffs' Reply at 47 ("[T]he uncontroverted testimony of all 17 [named] Plaintiffs [several of whom received allocations] is that each was entirely ignorant of the manipulation when each purchased his or her shares.").

FN297. The structure of the class definition is based on that of the proposed definition submitted by plaintiffs in response to my June 21 Order. *See* Class Def. Letter at 1. However, the content of this definition differs substantially from plaintiffs' proposal.

FN298. This definition applies equally to plaintiffs' section 11 classes, because knowledge also precludes recovery under that statute. *See* 15 U.S.C. § 77(k)(a) (granting right of recovery to "any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission)").

FN299. It is well-established that defendants in a class action may contest the claims of individual class members even when they are included within the class definition. *See, e.g., Basic Inc. v. Levinson,* 485 U.S. 224, 249, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988) (acknowledging possibility of rebutting presumption of reliance as to individual class members); *In re Ski Train Fire in Kaprun, Austria on November 11, 2000,* 220 F.R.D. 195, 208 (S.D.N.Y.2003) (certifying wrongful death class action, noting "[t]he determination of which heir (or heirs) of the decedents is entitled to a judgment can be decided during the damages phase of the trial.").

FN300. One of the interesting side effects of the class action form is that, in some cases, it effectively transfers the burden of proving individual facts from plaintiffs to defendants. As the Supreme Court has noted, "the Advisory Committee had dominantly in mind [in enacting Rule 23(b)(3)] vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem Prods.,* 521 U.S. at 617 (quotation marks and citation omitted); *accord Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 813, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) ("The plaintiff's claim may be so small ... that he would not file suit individually...."). Just as a *plaintiff* who suffered a small loss may not have the resources or motivation to bring an individual suit, a *defendant* in a 23(b)(3) class action is forced to make the difficult decision whether it is worth expending resources to prove that a small-stake class member should be excluded from recovery. In either situation, the inevitable cost of litigating an issue forces a party to weigh the expected benefit (subtracting transaction costs) against the cost of losing if she does not litigate the issue. Rule 23 simply transfers that cost-benefit analysis from the alleged victim to the alleged wrongdoer.

FN301. *See* MA ¶ ¶ 14-17.

FN302. Class Def. Opp. at 4. Defendants also launch other attacks on the class exclusions, noting particularly that "plaintiffs propose no method to count 'repeat conduct' by multi-faceted 'entities,' " and that some non-party brokers may no longer retain records of allocants' trading behavior. *Id.* However, plaintiffs are not required to anticipate and address all possible problems that may arise as discovery continues; all that is required at this stage is a method of ascertaining class members that can be manageably applied. If defendants' predictions come true, and the effect is disabling, then they may properly move to amend this certification order or to decertify the class. *See* Fed.R.Civ.P. 23(c)(1)(C).

FN303. *Dunnigan,* 214 F.R.D. at 136.

FN304. Class Def. Letter at 2.

FN305. Class Def. Opp. at 3 n.3 (quoting Plaintiffs' Reply at 2).

FN306. *Id.*

FN307. *See, e.g.*, Transcript of 3/5/03 Hearing at 46:3-6 ("MR. DiBLASI: Your Honor, the notion that [plaintiffs' counsel] intends to introduce discovery issues relating to the [6]00 other IPOs makes absolutely no sense to any of the underwriters, and we will oppose that every way we can."); 10/29/03 Letter from DiBlasi to Weiss at 2 ("The burdens associated with Plaintiffs' proposed change in approach [*i.e.*, requiring defendants to provide additional discovery outside the 309 cases] would be enormous and unfair."); Transcript of 12/11/03 Hearing at 25:16- 18 ("MR. ICHEL: The parties are spending incredible amounts of time on discovery in just six class focus cases. So by bringing in additional IPOs beyond the 310 it makes it unmanageable."). Plaintiffs have also relied on the limitation to the 309 consolidated actions. *See, e.g.*, 8/19/03 Letter to the Court from Stanley Bernstein, counsel for plaintiffs; 8/23/03 Letter from Bernstein; 10/14/03 Letter from Bernstein. It makes no sense to allow defendants to offer evidence that potential class members participated in the alleged scheme in the 600 IPOs not at issue here while simultaneously precluding plaintiffs from taking discovery on those IPOs to determine the extent of each defendant's participation in the alleged scheme.

FN308. Class Def. Opp. at 4 n.3 (quoting MA ¶¶ 42-43).

FN309. *See supra* Part IV.A.1.

FN310. *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 197 (2d Cir.2003) (citations omitted).

FN311. *In re Worldcom*, 219 F.R.D. at 291 (citing *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972). *Accord Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 186 (2d Cir.2001); *Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 539 (2d Cir.1999)).

FN312. *See DuPont v. Brady*, 828 F.2d 75, 78 (2d Cir.1987).

FN313. *Id.* at 76.

FN314. *Id.* at 78 (quoting *Rochez Bros. v. Rhoades*, 491 F.2d 402, 410 (3d Cir.1974)).

FN315. Class Def. Opp. at 5 n.5.

FN316. *See Handwerger v. Ginsberg*, 519 F.2d 1339, 1341-42 (2d Cir.1975) (holding, in class action context, that *Affiliated Ute* eliminated "[t]he requirement of proving individual reliance ... at least as to claims of fraudulent omissions brought under s 10(b) and Rule 10b-5.").

FN317. *See Basic*, 485 U.S. at 243 ("There is, however, more than one way to demonstrate the causal connection. Indeed, we previously have dispensed with a requirement of positive proof of reliance, where a duty to disclose material information had been breached, concluding that the necessary nexus between the plaintiffs' injury and the defendant's wrongful conduct had been established. *See Affiliated Ute Citizens v. United States* ...."); *id.* at 245 ("Requiring a plaintiff to show a speculative state of facts, *i.e.*, how he would have acted if omitted material information had been disclosed, see [*Affiliated Ute*] ..., would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market.").

FN318. *Id.* at 241-42 (quotation marks and citation omitted, alterations in original).

FN319. *Hevesi*, 366 F.3d at 77. In *Hevesi*, the Second Circuit noted that "[a]lthough the fraud-on-the-market doctrine clearly applies to statements made by *issuers*, as in *Basic*, we have never addressed whether it also applies to reports by *analysts*." *Id.* (emphasis in original). In this case, plaintiffs' allegations that conflicts of interest led analysts to issue improperly glowing reports on the manipulated securities do not reflect the whole of plaintiffs' theory of liability;

rather, such fraudulent reports are alleged in connection with a larger scheme to artificially inflate prices. Accordingly, plaintiffs' claims are not dependent upon a finding that they are entitled to a presumption of reliance on analyst reports; if plaintiffs prove that the scheme as a whole artificially inflated prices, then they may employ the fraud-on-the-market presumption to prove that they relied on those prices "as a measure of their intrinsic value." *Id.*

FN320. *See* Ganino v. Citizens Utils. Co., 228 F.3d 154, 167 (2d Cir.2000) ("Under [the truth on the market theory], a misrepresentation is immaterial if the information is already known to the market because the misrepresentation cannot then defraud the market. A defendant may rebut the presumption that its misrepresentations have affected the market price of its stock by showing that the truth of the matter was already known. However, the corrective information must be conveyed to the public 'with a degree of intensity and credibility sufficient to counter-balance effectively any misleading information created by' the alleged misstatements.") (citing *Provenz v. Miller*, 102 F.3d 1478, 1492 (9th Cir.1996); *Associated Randall Bank v. Griffin, Kubik, Stephens & Thompson, Inc.*, 3 F.3d 208, 213-14 (7th Cir.1993)).

FN321. *See, e.g., Freeman v. Laventhol & Horwath*, 915 F.2d 193, 197 (6th Cir.1990) ("The fraud on the market theory rests on the assumption that the price of an actively traded security in an open, well-developed, and efficient market reflects all the available information about the value of a company.") (citation omitted). Definitions of the relevant economic terms are provided in *Cammer v. Bloom*, 711 F.Supp. 1264, 1276 n. 17 (D.N.J.1989): " 'An open market is one in which anyone, or at least a large number of persons, can buy or sell.... A developed market is one which has a relatively high level of activity and frequency, and for which trading information (e.g., price and volume) is widely available.... An efficient market is one which rapidly reflects new information in price. These terms are cumulative in the sense that a developed market will almost always be an open one. And an efficient market will almost invariably be a developed one.' " (quoting BROMBERG & LOWENFELS, 4 SECURITIES FRAUD AND COMMODITIES FRAUD, § 8.6 (Aug.1988)).

FN322. *See* 6/8/04 Letter from DiBlasi to the Court at 2 ("Plaintiffs have offered the Court no evidence that the relevant markets were efficient at the time of the offerings or later in the 'internet bubble' environment.").

FN323. The *Cammer* court identified five factors that would be useful in proving an efficient market: (1) a large weekly trading volume; (2) the existence of a significant number of analyst reports; (3) the existence of market makers and arbitrageurs in the security; (4) the eligibility of the company to file an S-3 registration statement; and (5) a history of immediate movement of the stock price caused by unexpected corporate events or financial releases. See 711 F.Supp. at 1286-87. Several courts have used this approach. *See Binder v. Gillespie*, 184 F.3d 1059, 1065 (9th Cir.1999) (adopting the *Cammer* approach); *Hayes v. Gross*, 982 F.2d 104, 107 (3d Cir.1992) (same); *Freeman*, 915 F.2d at 199 (same); *Krogman v. Sterritt*, 202 F.R.D. 467, 474 (N.D.Tex.2001) (employing three factors from *O'Neil v. Appel*, 165 F.R.D. 479 (W.D.Mich.1996), in addition to the *Cammer* approach); *O'Neil*, 165 F.R.D. at 503 (suggesting additional factors from the economic literature to supplement the *Cammer* approach). *But see In re PolyMedica Corp. Sec. Litig.*, No. CIV.A. 00-12426-REK, 2004 WL 1977530, at *14 (D.Mass. Sept.7, 2004) (rejecting *Cammer* and similar cases for unfairly reading economic definitions into *Basic'* s efficient market requirement, noting that "the relevant question is whether the market ... is one in which market professionals generally consider most publicly announced material statements about [the issuer], thereby affecting [its] stock market price") (quotation marks, alterations and citations omitted). Here, whether the *Cammer* test or the broader definition of efficiency adopted by *In re PolyMedica* is applied, the outcome is the same.

FN324. Federal courts have repeatedly held that a listing on NASDAQ or a similar national market is a good indicator of efficiency. *See, e.g., Stevelman v. Alias Research, Inc.*, No. 5:91-CV-682, 2000 WL 888385, at * 4 (D.Conn. June 22, 2000) ("For stocks ... that trade on a listed exchange such as NASDAQ, [the] reliance element of a 10b-5 cause of action is presumed."); *Levine v. Skymall, Inc.*, No. CIV. 99-166-PHX-ROS, 2002 WL 31056919, at *5 (D.Ariz. May 24, 2002) ("Although not dispositive, the fact that SkyMall stock is traded on the NASDAQ stock market's National Market System also contributes to finding that the market is efficient."); *RMED Intern., Inc. v. Sloan's Supermarkets, Inc.*, 185 F.Supp.2d 389, 404-05 (S.D.N.Y.2002) ("Indeed, research has failed to reveal any case where a stock traded on the AMEX was found not to have been traded in an open and efficient market.... Rather, to the contrary, numerous courts have held that stocks trading on the AMEX are almost always entitled to the presumption.") (citations omitted); *O'Neil*, 165 F.R.D. at 504 ("The market system upon which a particular stock trades provides some insight as to the likelihood that the market for that stock is efficient....").

FN325. *See, e.g., Basic*, 485 U.S. at 249 n. 29 ("Proof [rebutting a presumption of reliance] is a matter for trial, throughout which the District Court retains the authority to amend the certification order as may be appropriate. *See* Fed.R.Civ.P. 23(c)(1) and (c)(4). *See* 7B C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE 128-132 (1986). Thus, we see no need to engage in the kind of factual analysis the dissent suggests that manifests the 'oddities' of applying a rebuttable presumption of reliance in this case."); *In re Ashanti Goldfields Sec. Litig.*, No. CV 00-0717, 2004 WL 626810, at *16 (E.D.N.Y. Mar.30, 2004) ("[P]roof of market inefficiency ... or rebuttal of the presumption of reliance is best left to the trial phase of litigation.") (citing *Basic*, 485 U.S. at 248 n. 29); *RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.*, No. 94 Civ. 5587, 2002 WL 31780188, at *4 (S.D.N.Y. Dec.11, 2002) ("Whether or not a market for a stock is open and efficient is a question of fact.") (citing *In re Laser Arms Corp. Sec. Litig.*, 794 F.Supp. 475, 490 (S.D.N.Y.1989) (holding that "[w]hether in fact Laser Arms traded in an efficient market is a question of fact. Therefore, resolution of that issue must await presentation of further proof at trial."), *aff'd*, 969 F.2d 15 (2d Cir.1992)). While these cases all pre-date the 2003 amendments to Rule 23 forbidding conditional certification, the new Rule still permits a court to decertify a class or amend the certification as necessary.

FN326. For example, the finder of fact might accept defendants' suggestion that the relevant markets were inefficient because they were part of the "internet bubble." *See* 6/8/04 DiBlasi Letter at 2.

FN327. *Basic*, 485 U.S. at 246-47 (quoting *Schlanger v. Four-Phase Sys. Inc.*, 555 F.Supp. 535, 538 (S.D.N.Y.1982)).

FN328. iXL Mem. at 20-21 (quotations omitted). Defendants define "day traders" as follows: "Day traders ... focus solely on price volatility. They 'hope that their stocks will continue climbing or falling in value for the seconds to minutes they own the stock.' " iXL Mem. at 12-13 (quoting SEC, Day Trading: Your Dollars at Risk, http://www.sec.gov/investor/pubs/daytips.htm (Aug. 23, 2004)). Defendants define "momentum traders" by comparison: " 'Momentum traders' likewise buy 'stocks simply because they're going up in price.' ... Though they may hold stock longer than a day trader, they similarly wish to take advantage of price movement--even movement due to a bubble or manipulation." *Id.* at 13 (quoting Perkins & Perkins, *The Internet Bubble* 25 (1999)).

FN329. *Id.*

FN330. *See, e.g., In re Oxford Health Plans, Inc.*, 191 F.R.D. 369, 377 (S.D.N.Y.2000) (rejecting purported intra-class conflicts between in-and-out investors and those that held their shares throughout the period, noting that " 'common questions [of fact and law] ... bind class members with more force than the varying questions related to price inflation drive them apart.' " (quoting *In re*

Gaming Lottery Sec. Litig., 58 F.Supp.2d 62, 69-71 (S.D.N.Y.1999)) (alterations in original); *Saddle Rock Partners*, 2000 WL 1182793, at *5 (addressing defendants' concerns that a proposed day trading class representative would not adequately assert the element of reliance, stating that "the fact that he may have traded Maybelline shares on the basis of short term price drops which he believed to reflect market inefficiencies indicates that he may have been relying on the integrity of the market to establish the more stable, longer term price.").

FN331. "Short selling is accomplished by selling stock which the investor does not yet own; normally this is done by borrowing shares from a broker at an agreed upon fee or rate of interest. At this point the investor's commitment to the buyer of the stock is complete; the buyer has his shares and the short seller his purchase price. The short seller is obligated, however, to buy an equivalent number of shares in order to return the borrowed shares. In theory, the short seller makes this covering purchase using the funds he received from selling the borrowed stock. Herein lies the short seller's potential for profit: if the price of the stock declines after the short sale, he does not need all the funds to make his covering purchase; the short seller then pockets the difference. On the other hand, there is no limit to the short seller's potential loss: if the price of the stock rises, so too does the short seller's loss, and since there is no cap to a stock's price, there is no limitation on the short seller's risk. There is no time limit on this obligation to cover. 'Selling short,' therefore, actually involves two separate transactions: the short sale itself and the subsequent covering purchase." *Zlotnick v. TIE Communications*, 836 F.2d 818, 820 (3d Cir.1988).

FN332. iXL Mem. at 21.

FN333. *See id.* at 21 (citing *Zlotnick*, 836 F.2d at 823).

FN334. *See Argent Classic Convertible Arbitrage Fund L.P. v. Rite Aid Corp.*, 315 F.Supp.2d 666, 676 n. 13 (E.D.Pa.2004); *Moskowitz v. Lopp*, 128 F.R.D. 624, 630-31 (E.D.Pa.1989) (citing *Zlotnick* for its discussion of the elements of the fraud-on-the-market presumption, but nevertheless applying the presumption to a class including short-sellers); *In re W. Union Sec. Litig.*, 120 F.R.D. 629, 637 (D.N.J.1988) ("While *Zlotnick* can arguably be seen as a cutting-back on the potential scope of [*Peil v. Speiser*, 806 F.2d 1154 (3d Cir.1986), in which the Third Circuit accepted the fraud on the market theory], we find its validity somewhat questionable in light of *Basic, supra.* Not only is *Basic* a later opinion of a superior court, it also makes several positive references to *Peil, supra,* the scope of which *Zlotnick* arguably constricts."). Defendants proffer only one recent case applying the *Zlotnick* exception, and that case used the exception solely to reject a proposed class representative whom the court had already found inadequate because he was subject to the unique defense that he had sold all of his shares for a profit. *See Wiekel v. Tower Semiconductor Ltd.*, 183 F.R.D. 377, 392 (D.N.J.1998).

FN335. *Moskowitz*, 128 F.R.D. at 631 (emphasis in original).

FN336. *See, e.g., In re Ames Dep't. Stores Inc. Stock Litig.*, 991 F.2d 953, 967 (2d Cir.1993) (noting the general applicability of the fraud-on-the-market presumption to all investors, stating that "[b]ecause the fraud on the market may taint each purchase of the affected stock, each purchaser who is thereby defrauded (and, since the presumption is rebuttable, not all purchasers necessarily are defrauded by the information) is defrauded by reason of the publicly disseminated statement."); *In re Worldcom*, 219 F.R.D. at 296 ("The existence of short selling, even voluminous short selling ... does not suggest that the presumption of reliance should not apply to those [short sellers] who purchased the [securities] and lost money.").

FN337. *Frigitemp v. Financial Dynamics*, 524 F.2d 275, 282 (2d Cir.1975) (applying common law principles of fraud in the context of Rule 10b-5) (citing *Shappirio v. Goldberg*, 192 U.S. 232, 241-42, 24 S.Ct. 259, 48 L.Ed. 419 (1904)).

FN338. *Id.* at 7. Defendants also assert that

determining which class members had actual knowledge of the scheme through their participation in various IPOs will require subjective individual inquiries. This argument was addressed at Part IV.A.4., *supra.*

FN339. *Id.* While there is no debate regarding the content and distribution of these publications, which are described in Part II.F., *supra,* determining whether they placed investors on inquiry notice is a task better left to the finder of fact. Indeed, I note that the MSNBC article, while it includes the language cited by defendants, also features a flat denial from defendant Goldman Sachs that its firm engaged in any unlawful tie-in schemes. *See* Ex. A to Houck Decl., at A5-A6 ("An official at Goldman, which also underwrote the eToys IPO, would say only that the firm 'does not make the allocation of IPO securities conditional on an undertaking to buy securities in the aftermarket.' "). Finally, the words "Corvis," "Engage," "Firepond," "iXL," "Sycamore" and "VA Linux" do not appear in this article; nor do defendants cite any other articles specifically connecting any of the six focus cases to the alleged scheme. *See* Defendants' Sur-Reply at 7; Exs. A, B to Houck Decl. (comprising various articles purportedly alluding to the alleged scheme).

FN340. Defendants' Sur-Reply at 8.

FN341. *Id.* at 6.

FN342. The issue of when plaintiffs were placed on inquiry notice by publicity is also a common question in the context of defendants' statute of limitations arguments. *See* iXL Mem. at 18-19. Although the two arguments have different ramifications (*i.e.,* a finding that a plaintiff knew of the fraud forces the plaintiff to prove reliance individually, while a finding that the plaintiff was on inquiry notice so long before suit that her claim is time-barred precludes recovery completely), the common questions they present are exactly the same. This situation is easily distinguished from that considered by the Second Circuit in *Moore,* 306 F.3d 1247, 1253, which (1) concerned fraudulent misrepresentations in connection with individual insurance contracts (and thus did not invoke any securities fraud-related presumptions of reliance), and (2) concerned *oral* misrepresentations agents made directly to customers, not the market-wide public dissemination of written information. Similarly, *Zimmerman v. Bell,* 800 F.2d 386, 390 (4th Cir.1986) (holding that, where specific information regarding the alleged fraud was abundant, "individual class members must demonstrate that the omitted information was not otherwise available to them") is inapposite. Not only is *Zimmerman* a Fourth Circuit case, it pre-dated the fraud on the market presumption of reliance created in *Basic,* and concerned a situation where the alleged fraud was *explicitly* revealed by numerous publications.

FN343. Defendants cite a number of cases in support of their contention that, because some of the proposed class members may be charged with knowledge of the alleged scheme, the class should not be certified. *See* Defendants' Sur-Reply at 7 n.3. Defendants' citations are inapposite. *See, e.g., Seibert v. Sperry Rand,* 586 F.2d 949, 952 (2d Cir.1978) (finding that alleged scheme was a "matter[ ] of public knowledge" where "[a]ffidavits submitted by both parties show that [defendants'] difficulties were reported countrywide in the press and on radio and television, were discussed in Congress, and were analyzed in published administrative and judicial opinions[, and] that a nationwide consumer boycott was being conducted against [defendant], accompanied by massive media advertising"); *Frigitemp,* 524 F.2d at 282 (rejecting appellant plaintiffs' claims based on the fact that "shareholders gave up shares in the belief that the financial structure of the corporate entity would be strengthened," where "[t]he defendants did nothing to induce that belief, the truth of which was peculiarly within the knowledge of the appellants."). In fact, defendants' citation to *Siebert,* which involved vast dissemination of the facts underlying each plaintiff's claim, demonstrates the value of adjudicating common facts (*e.g.,* whether all plaintiffs should be charged with knowledge based on publicly available information) in a single proceeding. *Siebert* held, at the summary

judgment stage, that publicity regarding an alleged fraud was so widely disseminated that plaintiffs could not avail themselves of a presumption of reliance based on material omissions; here, the Court or a finder of fact may similarly determine that such publicity placed class members on constructive notice of the scheme, and thus bar the class, or members of the class who purchased after such reports were disseminated, from invoking a presumption of reliance.

FN344. *See, e.g., In re Data Access Sys. Sec. Litig.*, 103 F.R.D. 130, 139 (D.N.J.1984) ("There will always be some individuals who read the financial statements directly, others who read secondary analyses ... and many others who relied on advice of stockbrokers or friends. If defendants' argument were to prevail that factual differences of this nature were sufficient to defeat class action certification, there could never be a class action of securities purchasers.").

FN345. *Emergent Capital*, 343 F.3d at 197.

FN346. *See VISA Check*, 280 F.3d at 134-35 (examining submission of expert report to show loss causation in the antitrust class action context). In an antitrust case, "a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent"--a requirement akin to the loss causation requirement in securities fraud cases. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562, 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981).

FN347. *VISA Check*, 280 F.3d at 135.

FN348. *Id.* (citing *Caridad*, 191 F.3d at 292-93).

FN349. *See id; see also In re Sumitomo Copper*, 182 F.R.D. at 91 (granting class certification upon finding that "plaintiffs' econometric methodologies have a reasonable probability of establishing" plaintiffs' claims by common proof). *But see Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 189 (3d Cir.2001) (where determining the existence of loss would require individual analysis of each investor's trades, "[t]he individual questions ... are overpowering.").

FN350. *See Emergent Capital*, 343 F.3d at 197.

FN351. *See In re IPO*, 297 F.Supp.2d at 675 ("It is that dissipation--and not the inflation itself--that caused plaintiffs' loss."). In this case, the alleged "misstatements and omissions did nothing more than conceal the Underwriters' alleged market manipulation;" hence, plaintiffs need not proffer separate loss causation methodologies for their misstatement and omission allegations. *Id.* Defendants' complaint that plaintiffs' methodology only links tie-in agreements, but not analyst conflicts or undisclosed compensation, to loss causation is also rejected. If the alleged scheme, taken as a whole, caused plaintiffs' loss, then there is no need to parse the scheme into its component parts and determine whether *each alleged component* caused inflation.

FN352. *See, e.g., Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189, 192 (N.D.Cal.2004) (finding that even where plaintiffs' expert "conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking," report was nonetheless admissible to prove that stereotyped thinking *caused* plaintiffs' injuries).

FN353. *See* 1/20/04 Fischel Report; 4/15/04 Fischel Report; 7/12/04 Fischel Report.

FN354. *See* 7/12/04 Fischel Report. Fischel did not have access to data regarding the iXL pre-open bid session. *See id.* ¶ 6.

FN355. *See* Sirri Report ¶ ¶ 14-16.

FN356. *See* 7/12/04 Fischel Report ¶ ¶ 7-12.

FN357. *See id.* ¶ 8 (using FirePond as an example, "[i]nstitutional allocants with alleged tie-in agreements accounted for 95 percent of the total demand for FirePond stock [as measured by the proportion of purchase orders from those with alleged tie-in agreements] at the beginning of the pre-

open bid session ... amounting to 52 percent of the 5,666,666 shares issued in the FirePond IPO").

FN358. *See id.* ¶ 10 (by the end of the session, purchase orders from allocants with alleged tie-in agreements constituted 96% of the total demand at that time, which amounts to 70% of the total number of shares issued). By comparison, only 55.6% of the Firepond IPO shares were actually allocated to investors with alleged tie-in agreements. *See id.* ¶ 5.

FN359. *Id.* ¶ 11. *See also supra* Part II.D. (noting, for example, that Sycamore stock was offered at $38 per share, but opened at $270.88).

FN360. 7/12/04 Fischel Report ¶ 9.

FN361. *Id.* (footnote omitted).

FN362. *Id.* ¶ 12. Although Fischel does not fully explain the import of this observation, it seems to reflect the same type of "price discovery"--that is, knowledge of expected demand--he infers with respect to the initial underwriter bids.

FN363. *Id.* ¶ 13. Fischel does not clarify whether this reference is to allocants with tie-in agreements, or to the entire population of allocants.

FN364. *See id.* ¶ 15. Of course, this analysis tends more to show the existence of tie-in agreements than the existence of artificial inflation. Nonetheless, it does highlight the possible breadth of the alleged scheme.

FN365. *Id.* ¶ 23 (citing Keim, Donald B. & Ananth Madhavan, *The upstairs market for large-block transactions: analysis and measurement of price effects,* 9 Rev. Fin. Studies (Spring 1996), 1-36, at 19) (emphasis in original). Defendants' expert, Dr. O'Hara, challenges Fischel's assertion of a permanent price increase, noting that, in the market microstructure field, "[p]ermanent effects refer to the impact of the trade on beliefs," not to indelible or long-enduring price effects. 7/23/04 O'Hara Report at 4 n.2. This is *exactly* what Fischel intends to show--that the alleged tie-ins changed investors' beliefs in the true value of the securities and that, over time, the artificial price inflation dissipated. The quantity of alleged tie-in purchases distinguishes this case from *West v. Prudential Sec., Inc.,* 282 F.3d 935 (7th Cir.2002), in which the Seventh Circuit rejected plaintiffs' allegation that the purchasing behavior of eleven investors privy to secret information raised market prices. Here, the number of alleged tie-in purchases as a proportion of overall share demand is considerable, and Fischel offers a method to detect inflation attributable to those tie-in purchases.

FN366. *See* 1/20/04 Fischel Report ¶ ¶ 16-19; 4/15/04 Fischel Report ¶ ¶ 6-7. Fischel proposes that the rate of dissipation can be shown using either the Comparable Index Approach or the "Event Study Approach," both of which compare the observed fluctuations in a security's price to the expected returns if that stock had not been manipulated (*i.e.,* was neither undergoing artificial inflation, and thus overperforming its expected value, nor dissipating that inflation, and thus underperforming). Both theories adopt the same formula for determining the degree of variation from expected returns. Through this mechanism, they quantify performance deviations over time, creating a "value line" that can be compared to the actual "price line" of a stock to show the existence of loss and degree of damages to investors at any given time.

FN367. *See* Cornell Report ¶ ¶ 4-8; 4/15/04 Fischel Report ¶ 6 (the Comparable Index Approach "could be used to compute the *value line"* of a stock) (emphasis added).

FN368. Cornell Report ¶ 4.

FN369. *Id.* (emphasis in original).

FN370. *See In re IPO,* 297 F.Supp.2d at 674 ("In market manipulation cases, therefore, it may be permissible to infer that the artificial inflation will inevitably dissipate."). For example, of the focus cases, Engage, Firepond and iXL all traded below $10 per share on December 6, 2000. The stocks continued to underperform after the close of

the class period (*e.g.,* on the date the first suit was filed in each case, Corvis closed at $7.38, Engage at $0.19, Firepond at $0.66, Sycamore at $8.63 and VA Linux at $9.031). *See supra* Part II.E.

FN371. *See* 7/12/04 Fischel Report ¶ ¶ 20-22.

FN372. *See id.* ¶ 21; 1/20/04 Fischel Report ¶ ¶ 23-29; 4/15/04 Fischel Report ¶ 22.

FN373. *See* 7/12/04 Fischel Report ¶ 20 ("The fact that underperformance continued for each of the six focus case stocks after December 6, 2000 strongly suggests that the inflation that existed at the time of each stock's IPO had not fully dissipated by the end of the class periods.").

FN374. Dr. O'Hara notes that, in fact, Corvis occasionally overperformed market benchmarks well after its IPO but during the class period, when a simplistic application of Fischel's underperformance measure of dissipation would imply constant underperformance. *See* 7/23/04 O'Hara Report ¶ 17. However, there could be any number of reasons for such an unexpected price increase, including materially misleading analyst reports. While quantifying the actual amount of inflation at every point during the class period is a necessarily fact-intensive inquiry, it is not one that plaintiffs must undertake to prove loss causation. Plaintiffs must merely show *some* loss, and the significant protracted underperformance of the focus stocks throughout and after the class period satisfies plaintiffs' burden at this stage.

FN375. It seems unusual that defendants in a securities fraud case would go to such trouble to provide methods for measuring and detecting the harm caused by their alleged wrongdoing. Clearly, though, defendants' efforts to adduce their own theories of loss causation seek to persuade the Court that any valid theory of loss causation--like those defendants proffer--would require intensive trade-by-trade analysis and be characterized by instantaneous dissipation of artificial inflation. Defendants' alternative theories of loss causation, then, are offered to serve twin goals: *first,* to challenge manageability and predominance by presenting a laborious and time-consuming method for detecting inflation; and *second,* to provide a method that assumes an almost instantaneous rate of dissipation that, if adopted, would exclude most class members from recovery. The class certification decision is not the appropriate place to choose the winning theory of loss causation. The only issue now is whether plaintiffs' theory must be rejected as a matter of law.

FN376. *VISA Check,* 280 F.3d at 135. *But see Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 259 F.3d 154, 178-79 (3d Cir.2001) (affirming finding that individual loss causation inquiries predominated where securities broker-dealers were accused of failing to procure the best price possible for their clients). *Newton,* however, dealt with very different conduct from that alleged here. In *Newton,* the district court found "that defendants' practice did not detrimentally affect the value of plaintiffs' securities across the entire market [and that there was] no resemblance to cases where economic injury naturally flowed from defendant's alleged conduct." *Id.* at 178. Here, plaintiffs allege a coordinated scheme that artificially inflated prices throughout the entire market.

FN377. *See* Kleidon Report ¶ ¶ 44-71; 2/24/04 O'Hara Report ¶ ¶ 23-47; Sirri Report ¶ ¶ 34-37; Stultz Report ¶ ¶ 8-43.

FN378. *See Emergent Capital,* 343 F.3d at 197 ("Of course, if the loss was caused by an intervening event, like a general fall in the price of Internet stocks, the chain of causation will not have been established. But such is a matter of proof at trial...."). For example, defendants argue that: Fischel's benchmark comparisons may suffer from selection bias, *see* 7/23/04 O'Hara Report ¶ 14; that Fischel's theory does not explain the lack of correlation between amount of wrongdoing (as a percentage of shares issued) and magnitude of initial overperformance, *see* 7/23/04 O'Hara Report ¶ 28; and that Fischel ignores possible confounding factors and important events both in the course of focus case trading and

in the larger context of the Internet bubble, *see generally* Barry Report; Gompers Report. *See also* Sycamore Mem. at 13 ("Sycamore's price performance over the proposed class period is readily explained by market forces that impacted stocks in general, and the optical networking sector in particular...."). However, to prove loss causation, plaintiffs need not show that the alleged scheme was the *sole* cause of loss. Plaintiffs may satisfy their burden by showing that, because of the alleged scheme, they lost *more* than they would have lost had the stock price been affected only "by market forces that impacted stocks in general." *Id.*

FN379. *See, e.g.,* 7/23/04 O'Hara Report at 6 n.5, ¶ ¶ 17, 18, 31, 34- 36.

FN380. *See Blackie,* 524 F.2d at 905 ("The amount of damages [in a 10b-5 class action] is invariably an individual question ...."); *see also In re Rent-Way Sec. Litig.,* 218 F.R.D. 101, 119 (W.D.Pa.2003) ("The problems presented by 'in and out sellers' are bound to inhere in any securities action alleging a fraud on an open securities market. This is all the more true in cases such as this one where the alleged fraudulent scheme was of longer duration and/or involved a multiplicity of alleged misrepresentations.").

FN381. *See VISA Check,* 280 F.3d at 139 ("Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues."); *In re Worldcom,* 219 F.R.D. at 302 ("When liability can be determined on a class-wide basis, individualized damage issues are not ordinarily a bar to class certification."); *see also* Fed.R.Civ.P. 23(b)(3) Advisory Committee Note ("[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class.").

FN382. *VISA Check,* 280 F.3d at 141 (footnotes omitted).

FN383. *Klay v. Humana, Inc.,* No. 02-16333, 2004 WL 1938845, at * 13, --- F.3d ---- (11th Cir. Sept.1, 2004) (footnotes omitted); *see also id.* ("In assessing whether to certify a class, the Court's inquiry is limited to whether or not the proposed methods for computing damages are so insubstantial as to amount to no method at all[.] Plaintiffs need only come forward with plausible statistical or economic methodologies to demonstrate impact on a class-wide basis.") (citation and alterations omitted).

FN384. *See, e.g., Windham v. Am. Brands, Inc.,* 565 F.2d 59, 70 (4th Cir.1977) ("The district court estimated--conservatively, we think-- that in the absence of a practical damage formula, determination of damages in this case would consume ten years of its time. The propriety of placing such a burden on already strained judicial resources seems unjustified."). Nonetheless, the *Windham* court noted that "in cases where the fact of injury and damage breaks down in what may be characterized as 'virtually a mechanical task,' 'capable of mathematical or formula calculation,' the existence of individualized claims for damages seems to offer no barrier to class certification on grounds of manageability." *Id.* at 68 (citing, *inter alia, Blackie,* 524 F.2d at 905). *Windham* was a complicated antitrust case where "plaintiffs could plead no common impact or injury from an alleged conspiracy to control prices in tobacco auctions. Such an allegation was precluded by the great variety of geographical markets, daily price fluctuations and individualized systems for grading product quality." *Rios,* 100 F.R.D. at 408 n. 13. Unlike the plaintiffs in *Windham,* though, plaintiffs here seek to prove damages for each class member through a common formula that their expert says can be developed after the completion of discovery. *See* 4/15/04 Fischel Report ¶ ¶ 4-7.

FN385. *Klay,* 382 F.3d 1241, 2004 WL 1938845, at *14.

FN386. *In re Oxford Health Plans,* 244 F.Supp.2d at 251.

FN387. This type of damages calculation is

common in securities cases. *See, e.g.*, Sirota v. Solitron Devices, Inc., 673 F.2d 566, 576-77 (2d Cir.1982); *In re Seagate Tech II. Sec. Litig.*, 843 F.Supp. 1341, 1348-49 (N.D.Cal.1994); *Effective Use of Damages Experts in Securities Class Actions,* 1332 Practicing Law Institute, Corporate Law and Practice Course Handbook Series 805, 811 (Sept.-Oct.2002) (discussing use of expert testimony to determine the "ribbon" of artificial inflation between the true value and market price of shares over time).

FN388. *Blackie,* 524 F.2d at 909 n. 25; *see also In re Rent-Way,* 218 F.R.D. at 119 (granting class certification and noting that plaintiffs "will be able to present a workable framework for determining aggregate damages and price inflation at ... trial through the use of expert witnesses who will extrapolate these figures based on trading data during the class period.").

FN389. *See* Plaintiffs' Reply at 83-87 ("The difference between the two lines [representing true value and actual price] shows the amount that a purchaser paid above the actual value of the stock, and therefore the damages that the purchaser incurred by paying more for the stock than it was worth.") (citing *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1344-45 (9th Cir.1976) (Sneed, J. concurring)).

FN390. For an explanation of these theories, *see supra* n. 29.

FN391. *See, e.g., Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir.2004) (Posner, J.) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

FN392. However, I note that although plaintiffs have presented a method by which damages could be commonly proved in the same trial as the remainder of plaintiffs' claims, the Court is not bound to limit the proceedings to a single trial. If, as the case develops, it becomes apparent that another method of determining or apportioning damages would be superior to a unitary proceeding, then other avenues of adjudication may be pursued. *See VISA Check,* 280 F.3d at 141.

FN393. *Demaria v. Andersen,* 318 F.3d 170, 178 (2d Cir.2003) (citing *Barnes v. Osofsky,* 373 F.2d 269, 272 (2d Cir.1967)).

FN394. *Lorber v. Beebe,* 407 F.Supp. 279, 287 (S.D.N.Y.1975). *Accord Krim v. pcOrder.com,* 210 F.R.D. 581, 586 (W.D.Tex.2002); *Harden v. Raffensperger, Hughes & Co.*, 933 F.Supp. 763, 766 (S.D.Ind.1996); *In re Quarterdeck Office Sys. Sec. Litig.*, No. CV 92-3970, 1993 WL 623310, at *2 (C.D.Cal. Sept.30, 1993); *Kirkwood v. Taylor,* 590 F.Supp. 1375, 1379 (D.Minn.1984).

FN395. *See Barnes,* 373 F.2d at 272-73 (strictly applying tracing requirement despite acknowledging "that this construction gives § 11 a rather accidental impact as between one open-market purchaser of a stock already being traded and another"); *see also In re Crazy Eddie Sec. Litig.*, 792 F.Supp. 197, 202 (E.D.N.Y.1992) ("If Congress wishes to ease the burden on securities holders such as plaintiffs, it can do so.").

FN396. *See Lorber,* 407 F.Supp. at 287; *Abbey v. Computer Memories, Inc.*, 634 F.Supp. 870, 873 (N.D.Cal.1986). Similarly, the presence of identical shares that were traded before an offering and remain in the market after the offering forecloses the possibility of a section 11 class. *See Klein v. Computer Devices, Inc.*, 591 F.Supp. 270, 273 n. 7 (S.D.N.Y.1984) ("The open-market purchaser ... must be able to trace his particular securities to the registration statement when it covered additional securities of an outstanding class. If the purchaser bought identical securities already being traded on the open market, he must look elsewhere for relief.") (citations omitted).

FN397. *See Lorber,* 407 F.Supp. at 287; *Abbey,* 634 F.Supp. at 873-75; *see also* 2/20/04 Declaration of Jeffrey Waddle, Senior Counsel and Vice President of the Depository Trust & Clearing Corporation, in support of iXL Mem. ("Waddle Decl.") at 1-2.

FN398. *See* Barnes, 373 F.2d at 273 ("an action under § 11 may be maintained 'only by one who comes within a narrow class of persons, i.e. those who purchase securities that are the direct subject of the prospectus and registration statement' ") (quoting *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783, 786 (2d Cir.1951)); *see also* Barnes, 373 F.2d at 272 ("[I]t seems unlikely that the section developed to insure proper disclosure in the registration statement was meant to provide a remedy for other than the particular shares registered.... Beyond this, the over-all limitation of § 11(g) that 'In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public,' and the provision of § 11(e) whereby ... an underwriter's liability shall not exceed 'the total price at which the securities underwritten by him and distributed to the public were offered to the public,' point in the direction of limiting § 11 to purchasers of the registered shares, since otherwise their recovery would be greatly diluted when the new issue was small in relation to the trading in previously outstanding shares."). *See generally* Krim, 210 F.R.D. at 586 (even where market consisted of 91% IPO stock, court held named plaintiffs seeking class certification did not have standing because "[p]laintiffs must demonstrate *all* stock for which they claim damages was actually issued pursuant to a defective statement, not just that it might have been, probably was, or most likely was, issued pursuant to a defective statement.") (emphasis in original); *In re Quarterdeck*, 1993 WL 623310, at *2-3 (same result where 97% of market was IPO stock); *Abbey*, 634 F.Supp. at 874-75 (same result where 82% of market was IPO stock).

FN399. Sycamore Mem. at 35. *See also* Corvis Mem. at 20; Engage Mem. at 26; Firepond Mem. at 38-39; iXL Mem. at 35-37; VA Linux Mem. at 42.

FN400. *See, e.g.*, Corvis Mem. at 20.

FN401. *See, e.g., Harden*, 933 F.Supp. at 766-67 (only those with section 11 standing "may properly be considered members of the class"); *In re Quarterdeck*, 1993 WL 623310, at *2-4 (denying class certification, finding that named plaintiffs lacked standing because they could not trace their shares to the allegedly defective registration statement, and finding that named plaintiffs' lack of standing constituted a "unique defense" violating the typicality requirement of Rule 23(a)(3)).

FN402. Because of the impossibility of tracing shares once they have mingled with unregistered shares, reserving the tracing issue until a future claims process would be of limited utility. *See* Waddle Decl.; *In re Crazy Eddie*, 792 F.Supp. at 201-02. Class members who purchased when only registered shares existed in the market would automatically satisfy the tracing requirement, and class members who purchased shares once untraceable shares entered the market would, because of the anonymity of fungible bulk storage, almost certainly be unable to satisfy their requirement. Thus, common sense requires limitation of section 11 classes to those periods in which plaintiffs will be able to satisfy their burden to show traceability and to exclude potential plaintiffs whose claims would almost invariably be futile. Plaintiffs' counsel has noted bitterly the possible unfairness of this standard:
MR. WEISS: Because most people today keep their stock at the brokerage firm, the street name, they throw it all into this common fungible account. So [the underwriters'] conduct is designed to make it virtually impossible, once they introduce new shares into the market through [Rule] 144, to be able to distinguish one share from the other.... [Y]ou are giving them an incentive to avoid section 11 liability. THE COURT: What do I do about the case law, which according to the defense, whether it's one percent or less than one percent, once that problem occurs, the cases, they ... uniformly say it's over. MR. WEISS: ... [T]his is different from the other cases because the conduct of the underwriter[s] ... they are creating an environment that makes it impossible for somebody to take advantage of [ ] section 11.... I am trying to couple the conduct of the underwriters, who are actually in charge of handling the shares physically.... THE COURT: Has any court adopted this theory? MR. WEISS: I don't think so.

Transcript of 6/17/04 Hearing at 108:15-109:23. The advent of fungible bulk storage has made plaintiffs' tracing requirement a stringent one indeed; however, it is not the domain of this Court to abrogate such a requirement. That is a job for Congress.

FN403. *See* 10/2/00 Form S-8 filed by Corvis ("Corvis Form S-8"), Ex. N to Hunter Corvis Decl., at 2; 7/19/99 Engage Prospectus at 5; 2/4/00 Firepond Prospectus at 58; 6/2/99 iXL IPO Prospectus at 97; 10/21/99 Sycamore Prospectus at 52; 12/9/99 VA Linux Prospectus at 65.

FN404. 17 C.F.R. § 230.144(c)(1).

FN405. *See* 15 U.S.C. § § 78m, 78o(d).

FN406. *See* Corvis Mem. at 20 n.19 (shares issued pursuant to employees' exercise of stock options); VA Linux Mem. at 43 n.41 (same).

FN407. *See, e.g., Bernstein v. Crazy Eddie, Inc.*, 702 F.Supp. 962, 972 (E.D.N.Y.1988); *In re Eagle Computer Sec. Litig.*, No. C-84-20382(A), 1986 WL 12574, at *9 (N.D.Cal. Mar.31, 1986).

FN408. *See* Corvis Form S-8 at 2; S-8 Forms filed by VA Linux on 12/9/99, Ex. H to Hunter VA Linux Decl.

FN409. *See* 17 C.F.R. § 230.144(k).

FN410. *See* Corvis Form S-1/A at II-2-5. It is possible that some shares held by Corvis affiliates were sold to non-affiliates more than two years before the Corvis IPO. It unjustifiedly aggravates an already onerous burden to force plaintiffs to prove a negative (*i.e.*, that no such shares were transferred prior to the expiration of the Rule 144 90-day holding period). If, however, defendants can prove that such transfers occurred and unregistered shares were tradeable earlier, then the Corvis section 11 class will be shortened accordingly.

FN411. *See* 2/4/00 Firepond Prospectus at 58.

FN412. Sycamore's web page shows that the company was founded in February 1998. *See* Sycamore Networks: Corporate Information: News & Events, http://www.sycamorenetworks.com/corporate/news/index.asp?id=fastfacts (August 8, 2004).

FN413. 17 C.F.R. § 230.144(d)(1).

FN414. *See* 12/9/99 VA Linux Prospectus at 65.

FN415. *See In re Quarterdeck*, 1993 WL 623310, at *4.

FN416. *See In re IPO*, 241 F.Supp.2d at 351.

FN417. *See* Sycamore Mem. at 40.

FN418. *See* Fed.R.Civ.P. 23(a)(4).

FN419. Fed.R.Civ.P. 23(b)(3). *See also Eisen*, 417 U.S. at 164.

FN420. Fed.R.Civ.P. 23(b)(3)(A).

FN421. *Carnegie*, 376 F.3d at 661. *See also id.* ("It would hardly be an improvement to have in lieu of [a] single class action 17 million suits each seeking damages of $15 to $30."). While individual plaintiffs here seek substantially more money (*e.g.*, Spiros and Mary Gianos, proposed class representatives for VA Linux, lost $597,085.00 in connection with their purchases of VA Linux stock), the cost of litigating a securities fraud action against multiple well-funded defendants is staggering. *See, e.g., In re Cendant Corp. Litig.*, 243 F.Supp.2d 166, 172-74 (D.N.J.2003) (finding that class counsel's 35,000 hours of attorney time and $55,000,000 requested fee were "not clearly excessive" in a securities fraud class action that the Third Circuit found was "a simple case in terms of liability") (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 285 (3d Cir.2001)).

FN422. *Klay*, 382 F.3d 1241, 2004 WL 1938845, at *23 (quoting *Amchem Prods.*, 521 U.S. at 617) (internal quotation omitted).

FN423. *Cf. In re Worldcom*, 219 F.R.D. at 304 ("Few individuals could even contemplate proceeding with this litigation

in any context other than through their participation in a class action, given the expense and burden that such litigation would entail.").

FN424. *See, e.g.*, *Castano*, 84 F.3d at 748 (stating that the "most compelling rationale for finding superiority in a class action [is] the existence of a negative value suit"); *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 348 (N.D.Ohio 2001) ("Negative value claims are claims in which the costs of enforcement in an individual action would exceed the expected individual recovery.").

FN425. *See In re MTBE*, 209 F.R.D. at 349 ("[a] court may not decline to certify a class for the sole reason that it may become unmanageable.")

FN426. *Carnegie*, 376 F.3d at 661.

FN427. *Klay*, 382 F.3d 1241, 2004 WL 1938845, at *22.

FN428. *See id.* at *27 ("[W]e are not assessing whether this class action will create significant management problems, but instead determining whether it will create *relatively more* management problems than any of the alternatives (including, most notably, 600,000 separate lawsuits by the class members).") (emphasis added).

FN429. *See id.* at *23; Fed.R.Civ.P. 23(b)(3) Advisory Committee Note (acknowledging that class action is an appealing tool for adjudicating cases of "fraud perpetrated on numerous persons by the use of similar misrepresentations").

FN430. *See* iXL Mem. at 40.

2004 WL 2297401 (S.D.N.Y.), Fed. Sec. L. Rep. P 93,014

Motions, Pleadings and Filings (Back to top)

. 2004 WL 1635575 (Trial Order) Order (Jun. 23, 2004)

. 2002 WL 32495945 (Trial Motion, Memorandum and Affidavit) Plaintiff Mdcm Holdings, Inc.'s Memorandum of Law in Opposition to Defendant Credit Suisse First Boston Corporation's Motion for an Order Limiting the Scope of Discovery (Feb. 06, 2002)

. 2002 WL 32595836 (Trial Motion, Memorandum and Affidavit) Plaintiff Mdcm Holdings, Inc.'s Memorandum of Law in Opposition to Defendant Credit Suisse First Boston Corporation's Motion for an Order Limiting the Scope of Discovery (Feb. 06, 2002)

. 2002 WL 32495877 (Trial Pleading) Amended Class Action Complaint (Feb. 04, 2002)

. 2002 WL 32595835 (Trial Pleading) Amended Class Action Complaint (Feb. 04, 2002)

. 1:01CV09417 (Docket) (Oct. 25, 2001)

. 1:21MC00092 (Docket) (Aug. 09, 2001)

. 1:01CV07048 (Docket) (Jul. 31, 2001)

. 1:01CV06001 (Docket) (Jul. 02, 2001)

. 1:01CV03857 (Docket) (May. 07, 2001)

. 1:01CV00242 (Docket) (Jan. 11, 2001)

END OF DOCUMENT

LEXSEE 2002 US DIST LEXIS 8799

Re: In re Lucent Technologies Inc. Securities Litigation

Civil Action No. 00-621 (JAP)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2002 U.S. Dist. LEXIS 8799

May 7, 2002, Decided
May 9, 2002, Entered on the Docket

SUBSEQUENT HISTORY: [*1] Affirming Order of July 15, 2002, Reported at: *2002 U.S. Dist. LEXIS 24973.*

DISPOSITION: Defendants' request to compel production of documents denied.

LexisNexis(R) Headnotes

COUNSEL: For ROBERT ELAN, plaintiff: JOSEPH E. SAUL, GELLERSTEIN & SAUL, ESQS., TEANECK, NJ.

For JOHN M. RAZZANO, WAYNE E. MEYER, consolidated plaintiffs: WILLIAM J. PINILIS, KAPLAN, KILSHEIMER & FOX, LLP, MORRISTOWN, NJ.

For ZIPORA BARON WEBER, DONALD PRESS, consolidated plaintiffs: JAMES V. BASHIAN, LAW OFFICE OF JAMES V. BASHIAN, PC, FAIRFIELD, NJ.

For OREN GISKAN, BERNICE BERNICE SEIDEN, consolidated plaintiffs: ANDREW ROBERT JACOBS, EPSTEIN, FITZSIMMONS, BROWN, RINGLE, GIOIA & JACOBS, PC, CHATHAM TOWNSHIP, NJ.

For JOHN P. CLIFFORD, JR., JAMES COURTRIGHT, MIRIAM SARNOFF, DAVID PLOTKIN, DENNIS PASPARAGE, DANIEL MURPHY, consolidated plaintiffs: GARY S. GRAIFMAN, KANTROWITZ, GOLDHAMER & GRAIFMAN, ESQS., MONTVALE, NJ.

For STEPHEN SCHOEMAN, RACHEL STERN, consolidated plaintiffs: ROBERT J. BERG, BERNSTEIN LIEBHARD & LIFSHITZ, LLP, FORT LEE, NJ.

For SUSAN KAUFMAN, FMWL ENTERPRISES, INC., ELLIOTT MAYERHOFF, DAVID PLOTKIN, THOMAS PEARLMAN, consolidated plaintiffs: ROBERT A. HOFFMAN, BARRACK, RODOS & BACINE, ESQS., HADDONFIELD, NJ. [*2]

For JAMES V. BIGLAN, JACQUELINE BRAGIN, JOHN J. WIZBICKI, NAOMI RAPHAEL, DAVID M. FEDER, consolidated plaintiffs: JOSEPH J. DEPALMA, LITE, DEPALMA, GREENBERG AND RIVAS, LCC, NEWARK, NJ.

For PETER S. POWERS, DOMINIE MORELLI, consolidated plaintiffs: LISA J. RODRIGUEZ, TRUJILLO, RODRIGUEZ & RICHARDS, LLC, HADDONFIELD, NJ.

For TOM CHAPLINSKI, consolidated plaintiff: LEO W. DESMOND, SPARTA, NJ.

For JEFFREY MARKS, RALPH M. STONE, THE PARNASSUS FUND, consolidated plaintiffs: ELLEN M. MCDOWELL, WHITTLESEY MCDOWELL & RIGA, MAPLE SHADE, NJ.

For HOWARD DAVIS, consolidated plaintiff: MICHAEL J. KANE, MAGER WHITE & GOLDSTEIN, LLP, WESTMONT, NJ.

For HOWARD DAVIS, consolidated plaintiff: BRUCE G. MURPHY, VERO BEACH, FL.

For MILTON ABOWITZ, consolidated plaintiff: PETER S. PEARLMAN, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, SADDLE BROOK, NJ.

For FLORIDA STATE BOARD OF ADMINISTRATION, consolidated plaintiff: ANDREW J. ENTWISTLE, ENTWISTLE & CAPPUCCI LLP, PRINCETON, NJ.

For LUCENT TECHNOLOGIES INC., RICHARD A. MCGINN, DONALD K. PETERSON, defendants: JOHN H. SCHMIDT, JR., LINDABURY, MC CORMICK & ESTABROOK, WESTFIELD, NJ.

JUDGES: Stanley R. Chesler, U.S.M.J. **[*3]**

OPINIONBY: Stanley R. Chesler

OPINION:

LETTER OPINION AND ORDER

Dear Counsel:

The Court writes to address a matter brought before the Court on the correspondence of the parties concerning a discovery dispute in the above-captioned case. Specifically, defendants (hereinafter collectively referred to as "Lucent") seek to compel all named plaintiffs to produce documents in response to Lucent's Third Request for Production of Documents and Things ("Third Request"). Lead plaintiffs have submitted a letter in opposition to this request. For the reasons discussed below, the Court denies Lucent's request to compel discovery of all named plaintiffs.

Lucent's Third Request seeks documents concerning plaintiffs' investment history. Lucent takes the position that the decision of plaintiffs' counsel to limit the response to the Third Request to documents from the files of Lead plaintiffs only shirks the discovery obligations owed by the 41 other named plaintiffs. See *In re Folding Carton Antitrust Litigation, 83 F.R.D. 260, 264 (N.D. Ill. 1979).* It argues that discovery as to the investment history and background of all named plaintiffs is necessary to rebut the presumption that arises **[*4]** in a fraud on the market case of an investor's reliance on misrepresentations as reflected in the market. See *Basic v. Levinson, 485 U.S. 224, 246-47, 99 L. Ed. 2d 194, 108 S. Ct. 978 (1988).* Lucent also contends that this discovery is relevant to any opposition that Lucent may file to a motion by plaintiffs for class certification.

In opposition, Lead plaintiffs contend that the named plaintiffs from whom discovery is sought are not proposed as class representatives and as such, remain on equal footing with absent class members, who are not generally not subject to discovery. See *In re Carbon Dioxide Industry Antitrust Litigation, 155 F.R.D. 209, 211-12 (M.D. Fla. 1993).* Discovery with respect to the behavior of this handful of plaintiffs, they contend, cannot shed any light on the overall issue of liability, in particular on whether the entire class acted in reliance on the market price of Lucent stock.

The Court agrees with Lead plaintiffs' position. Though one way to rebut the presumption of reliance involves "proving that an individual plaintiff purchased the stock despite knowledge of the falsity of a representation," *Jaroslawicz v. Engelhard Corp., 724 F. Supp. 294, 301 (D.N.J. 1989)* **[*5]** (quoting *Blackie v. Barrack, 524 F.2d 891, 906 (9th Cir. 1975)),* individualized questions of reliance will not in this case illuminate a determination of class-wide liability or bear on the inquiry into whether the class representative's claims are typical of the entire class. See *Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985).* In other words, discovery as to the investment behavior of the 41 named, non-lead plaintiffs is not be probative of the question of class-wide reliance on the market. Conclusions drawn from the experience of this handful of named parties cannot be extrapolated to represent the experience of a class of hundreds of thousands of individuals of which the putative class is comprised.

The situation presented in this case is distinct from that in *Easton & Co. v. Mutual Benefit Life Ins. Co., 1994 U.S. Dist. LEXIS 12308, No. 91-4012, 92-2095, 1994 WL 248172* (D.N.J. May 18, 1994). In Easton, the court allowed defendants to take discovery of absent class members' investment history and background in order to rebut the presumption of fraud-on-the-market reliance. In stark contrast to this case, Easton involved a total of 160 class members. **[*6]** The small class size established a strong possibility that discovery of individual class members would be probative of the overall class experience. This factor undoubtedly influenced the Easton court's finding that such discovery would be relevant to the issue of class-wide reliance.

In the Lucent matter, there is no basis for concluding that the 41 non-representative named plaintiffs could fulfill the same purpose as to a class of thousands. The discovery sought by Lucent instead may be appropriate at a later stage in the case, in which individualized rebuttal proceedings may be pursued to determine whether a claimant may recover, once the matter of liability has been adjudicated. See *Eisenberg, 766 F.2d at 786; Jaroslawicz, 724 F. Supp. at 302-303.*

Therefore, for the aforementioned reasons, the Court will treat the non-lead named plaintiffs as absent class

members and will not compel them to respond to Lucent's Third Request.

Accordingly, IT IS on this 7th day of May, 2002:

ORDERED that Lucent's request to compel the production of documents in response to the Third Request for Production of Documents and Things is DENIED.

Stanley R. Chesler, [*7] U.S.M.J.

LEXSEE 2004 U.S. DIST. LEXIS 16287

IN RE NEOPHARM, INC. SECURITIES LITIGATION

No. 02 C 2976

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2004 U.S. Dist. LEXIS 16287; Fed. Sec. L. Rep. (CCH) P92,893

August 17, 2004, Decided

PRIOR HISTORY: *In re Neopharm, Inc. Sec. Litig., 2004 U.S. Dist. LEXIS 5814 (N.D. Ill., Apr. 7, 2004)*

DISPOSITION: Motion for class certification granted.

LexisNexis(R) Headnotes

COUNSEL: **[*1]** For MARILYN CARSON, individually and on behalf of all others similarly situated, plaintiff: Christopher B Sanchez, Miller Faucher and Cafferty, LLP, Chicago, IL. Joel P Laitman, Jay P Saltzman, Schoengold and Sporn, P.C., New York, NY. Eric Belfi, Murray, Frank & Sailer LLP, New York, NY.

For LARSON CAPITAL MANAGEMENT, plaintiff: William S Lerach, David A Thorpe, Helen J Hodges, Steven W Pepich, Lerach Coughlin Stola & Robbins LLP, San Diego, CA. Eric Belfi, Murray, Frank & Sailer LLP, New York, NY.

For LOCAL 66 OPERATING ENGINEERS CONSTRUCTION INDUSTRY AND MISCELLANEOUS PENSION FUND - PITTSBURGH, plaintiff: William S Lerach, David A Thorpe, Helen J Hodges, Steven W Pepich, Lerach Coughlin Stola & Robbins LLP, San Diego, CA. Nicholas J Licato, Lerach Coughlin Stola & Robbins LLP, San Diego, CA.

For NEOPHARM INC, JOHN N KAPOOR, JAMES M HUSSEY, defendant: Leann Pedersen Pope, Burke, Warren, MacKay & Serritella, P.C., Chicago, IL. Lloyd Winawer, Wilson Sonsini Goodrich & Rosati, Palo Alto, CA. Dylan J Liddiard, Wilson, Soncini, Goodrich & Rosati, Palo Alto, CA. Stephen Ryan Meinertzhagen, Burke, Warren, MacKay & Serritella, Chicago, IL.

For AQUILUR RAHMAN, defendant: **[*2]** David H. Kistenbroker, Leah J. Domitrovic, Katten Muchin Zavis Rosenman, Chicago, IL.

JUDGES: JOAN HUMPHREY LEFKOW, United States District Judge.

OPINIONBY: JOAN HUMPHREY LEFKOW

OPINION:

MEMORANDUM OPINION AND ORDER

This case is a putative class action brought against defendants, NeoPharm, Inc. ("NeoPharm"), James M. Huffey ("Huffey"), and Inram Ahmad ("Ahmad") (collectively "defendants"), alleging violations of § 10(b) of the Securities Exchange Act of 1934 (the "Act"), *15 U.S.C. § 78j(b)*, *Rule 10b-5* promulgated under *§ 78j(b)*, and § 20(a) of the Act, *15 U.S.C. § 78t(a)*. Before the court is the renewed motion for class certification brought by lead plaintiff Operating Engineers Construction Industry and Miscellaneous Pension Fund, Local 66-Pittsburgh ("Operating Engineers"). Operating Engineers seeks an order certifying a class consisting of "all persons who purchased or otherwise acquired NeoPharm common stock between October 31, 2001 and April 19, 2002 and appointing Operating Engineers as class representative." n1 For the reasons set forth below, the motion is granted.

N1 Excluded from the proposed class are the defendants, members of the immediate family of each of the defendants, any person, firm, trust, corporation, officer, director, or other individual

> or entity in which any defendant has a controlling interest or which is related to or affiliated with any of the defendants, and the legal representatives, agents, affiliates, heirs, successors-in-interest or assigns of any excluded party.

[*3]

STANDARDS

"The Federal Rules of Civil Procedure ("the Rules") provide the federal district courts with 'broad discretion' to determine whether certification of a class-action lawsuit is appropriate." *Keele v. Wexler, 149 F.3d 589, 592 (7th Cir. 1998)*. Under the Rules, a determination of class certification requires a two-step analysis. First, the named plaintiff must demonstrate that the action satisfies the four threshold requirements of *Rule 23(a)*:

> (1) numerosity (the class must be so large 'that joinder of all members is impracticable'); (2) commonality (there must exist 'questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses 'are typical ... of the class'); and (4) adequacy of representation (the representative must be able to 'fairly and adequately protect the interests of the class').

Id. at 594; *Fed. R. Civ. P. 23(a)*. Additionally, the action must "qualify under one of the three subsections of *Rule 23(b)*." *Hardin v. Harshbarger, 814 F. Supp. 703, 706 (N.D. Ill. 1993)*. In this case, Operating Engineers seeks certification under [*4] *subsection 23(b)(3)*. *Rule 23(b)(3)* provides that an action may be maintained as a class action if "the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." When evaluating a motion for class certification, the court accepts as true the allegations made in support of certification, and does not examine the merits of the case. *Hardin, 814 F. Supp. at 706* (citing, *inter alia, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)*). The party seeking class certification bears the burden of showing that the requirements for class certification have been met. *Id.* (citing, *inter alia, Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982)*). Failure to establish any one of the requirements precludes class certification. *Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 596 (7th Cir. 1993)*.

BACKGROUND

The court previously gave extensive treatment [*5] to the factual allegations of this case in its opinion denying in part defendants' motion to dismiss. *See In re NeoPharm, Inc. Sec. Litig., 2003 U.S. Dist. LEXIS 1862, No. 02 C 2976, 2003 WL 262369 (N.D. Ill. Feb. 7, 2003)*. The factual background, therefore, will not be repeated again here.

DISCUSSION

A. *Rule 23(a)*

1. Numerosity-Rule 23(a)(1)

To meet the numerosity requirement, the class must be so large "that joinder of all members is impracticable." *Keele, 149 F.3d at 594*; *Fed. R. Civ. P. 23(a)(1)*. In order to establish numerosity, a plaintiff need not allege the exact number of members of the proposed class. *Johnson v. Rohr-Ville Motors, Inc., 189 F.R.D. 363, 368 (N.D. Ill. 1999)*. Generally, where the membership of the proposed class is at least 40, joinder is impracticable and the numerosity requirement is met. *Id.* (citing *Swanson v. American Consumer Indus., Inc., 415 F.2d 1326, 1333 (7th Cir. 1969)*). The court is entitled to make "common-sense assumptions that support a finding of numerosity." *Gaspar v. Linvatec Corp., 167 F.R.D. 51, 56 (N.D. Ill. 1996)*. [*6]

Defendants do not contest numerosity. Although Operating Engineers does not specify the exact number of proposed class members, the court is satisfied that the numerosity requirement is met. As Operating Engineers points out, NeoPharm stock trades on NASDAQ and more than 16 million shares are outstanding. It can be reasonably inferred that hundreds, if not thousands, of persons would be included in the proposed class. Because of this number of persons, it would be impracticable to join all individual class members in one suit. Accordingly, the court finds that the numerosity requirement has been satisfied.

2. Commonality-Rule 23(a)(2)

To meet the commonality requirement, "there must exist 'questions of law or fact' common to the class.'" *Keele, 149 F.3d at 594*; *Fed. R. Civ. P. 23(a)(2)*; *see also, Tylka v. Gerber Prods. Co., 178 F.R.D. 493, 496 (N.D. Ill. 1998)* (noting that if at least one question of law or fact is common to the class, then commonality is satisfied). "A common nucleus of operative fact is usually enough to satisfy the commonality requirement of *Rule 23(a)(2)*." *Keele, 149 F.3d at 594* [*7] (quotation omitted). A common nucleus of operative fact exists where "defendants have engaged in standardized conduct toward members of the proposed class." *Id.* "The

commonality requirement has been characterized as a 'low hurdle' easily surmounted." *Scholes v. Stone, McGuire & Benjamin, 143 F.R.D. 181, 185 (N.D. Ill. 1992).*

Defendants do not contest commonality. Operating Engineers points to several common questions of law and fact that exist as to all members of the proposed class, including (1) whether the defendants violated the Act; (2) whether the defendants omitted and/or misrepresented material facts; (3) whether defendants' statements omitted material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading; (iv) whether defendants knew or recklessly disregarded that their statements were false and misleading; (v) whether the price of NeoPharm's publicly traded securities were artificially inflated; and (vi) the extent of damage sustained by members of the putative class and the appropriate measure of damages. Based on these common questions of law and fact, the court finds that the commonality **[*8]** factor has been met.

3. Typicality-Rule 23(a)(3)

To meet the typicality requirement, the named plaintiff's claims or defenses must be "typical ... of the class." *Keele, 149 F.3d at 594*; *Fed. R. Civ. P. 23(a)(3)*. The typicality requirement, although closely related to the commonality question, focuses on the class representative. "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Id. at 595* (citing *De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983)*). "Typical does not mean identical, and the typicality requirement is liberally construed." *Gaspar, 167 F.R.D. at 57.*

Operating Engineers argues that its claims against defendants are typical with those of the putative class members insofar as it purchased NeoPharm stock during the class period when defendants were alleged to have been misleading the market. Operating Engineers states that, like other class members, it was damaged when it purchased **[*9]** NeoPharm stock at artificially inflated prices. In response, defendants argue that Operating Engineers may be subject to certain unique defenses because it was not involved in the decision to purchase or sell NeoPharm stock, and instead delegated that decision to an investment advisor or "money manager." This argument overlaps with defendants' objections to Operating Engineers' adequacy to serve as class representative and will be addressed below. Outside of this objection, the court sees no reason to question Operating Engineers' typicality and finds this factor satisfied.

4. Adequacy of representation--23(a)(4)

To meet the adequacy of representation requirement, "the representative must be able to fairly and adequately protect the interests of the class." *Keele, 149 F.3d at 594*; *Fed. R. Civ. P. 23(a)(4)*. Under *Rule 23(a)(4)*, the adequacy of representation determination "is composed of two parts: the adequacy of the named plaintiff's counsel, and the adequacy of protecting the different, separate, and distinct interest of the class members." *Retired Chicago Police Ass'n, 7 F.3d at 598* (quotation omitted). **[*10]** Defendants attack only the second part of the adequacy determination by arguing that Operating Engineers is an inadequate class representative because it (1) did not produce a qualified representative to testify on its own behalf and (2) was not involved in the decision to purchase or sell NeoPharm stock.

Defendants' argument number (1) focuses on the *Rule 30(b)(6)* deposition taken of Operating Engineers' representative, Dennis Manown. Defendants argue that Manown's deposition revealed that he has no knowledge about Operating Engineers' transactions in NeoPharm securities because such investment decisions were made by a money manager named Columbus Circle, which Operating Engineers engaged "to choose, monitor, and execute its securities trades." These facts also form the basis for defendants' argument (2), which, in essence, states that because Operating Engineers was not involved in the decision to purchase or sell NeoPharm stock and delegated the authority to make stock purchases with little input in those decisions, it should not serve as class representative.

Defendants rely principally on two cases to support their theory. In *Fry v. UAL Corp., 136 F.R.D. 626 (N.D. Ill. 1991),* **[*11]** the court found an individual to be an inadequate class representative where he allowed another person to have "complete discretionary authority" over his securities, never followed the affairs of the corporation and was not even aware that his funds had been invested in the corporation. *Id. at 635-36.* By contrast, the court in *Fry* allowed other individuals to serve as class representatives where third-parties gave investment advice or made investment decisions because the individuals had at least a minimal level of participation in the relevant stock transaction. *Id. at 635.* The class representatives that the court allowed in *Fry* either had discussions with the third-party advisor prior to the purchase of the stock at issue or had discussed the investments with the third-party advisor regularly. *Id.* Relying on *Fry*, the court in *In re Caremark Int'l Sec. Litig., 1996 U.S. Dist. LEXIS 8751, No. 94 C 4751, 1996 WL 351182 (N.D. Ill. June 24, 1996)*, went one step further and barred an individual from serving as a class representative because the decision to purchase the stock

in question was made by investment managers and not by the individual himself. **[*12]** *Id. at *5-6.* The court noted that the individual had "no input" into the decision to purchase the stock and learned of it only after it had occurred. *Id. at *6.*

In response, Operating Engineers points to several cases, most notably *Retsky Family Ltd. Pshp. v. Price Waterhouse LLP, 1999 U.S. Dist. LEXIS 11351, No. 97 C 7694, 1999 WL 543209 (N.D. Ill. July 23, 1999)*, which declined to follow the *Caremark* decision. The court in *Retsky* noted that the plaintiff at issue "was unaware of what types of securities were traded by the money managers and did not know what criteria the managers followed in making investment decisions." *Id. at *5.* The plaintiff also "did not have any input in the decision to buy or sell" the stock at issue. *Id.* Despite these failings, the *Retsky* court noted that the plaintiff was not "uninvolved" in the investments and had ongoing discussions with the investment advisor about the investments and, unlike the plaintiff in *Fry,* was not "completely unaware" of the relevant financial affairs of the stock at issue. *Id. at *6.* The court declined to follow *Caremark's* broader holding that those who rely on others to make investment decisions **[*13]** are inadequate. *Id.*

The court finds persuasive the analysis in the *Retsky* case. To the extent *Caremark* can be read to hold that those who rely on others to make investment decisions are unfit to serve as class representatives, this court would disagree. Contrary to both *Fry* and *Caremark,* which dealt with individuals, in this case Operating Engineers is an institutional investor, specifically a pension fund. Under the Private Securities Litigation Reform Act ("PSLRA"), *15 U.S.C. § § 78u-4 et seq.,* Congress "anticipated and intended" large institutional investors to oversee securities cases. *See e.g., In re Cendant Corp. Litig., 264 F.3d 201, 243-44 (3d Cir. 2001).* Because Operating Engineers is a pension fund, it lacks investment expertise and, more likely than not, its fiduciary duties would preclude it from making investment decisions on behalf of its beneficiaries. Thus, to prohibit such an institutional investor from serving as a class representative merely because it delegated investment responsibilities to a money manager would appear be in tension with the PSLRA. *See, e.g., In re WorldCom, Inc. Sec. Litig., 219 F.R.D. 267, 282 (S.D.N.Y. 2003)* **[*14]** (noting that institutional investors "are likely to use advisors ... to invest conservatively in securities they consider undervalued by the market" and a rule barring institutions from participating in securities class actions would be in conflict with the PSLRA's purpose to "increase the likelihood that institutional investors will serve as lead plaintiffs.").

Moreover, this is not a situation like *Fry* and *Caremark* in which the proposed class representative is "completely unaware" of the financial affairs at issue. Operating Engineers (1) promulgated detailed investment guidelines which its money managers followed when making investments on its behalf (Manown Dep. Exs. 3 & 5); (2) conducted periodic reviews of its money managers' investments so as to monitor and control their activity (Manown Dep. at 21:12-22:17.); (3) used an investment advisor to monitor the money managers, compare their performance and regularly report directly to the trustees of the Fund (*Id.* at 20:9-22:21.); and (4) retained counsel on an on-going basis to monitor its investment portfolio in order to gain advice as to any potential securities laws violations, (*Id.* at 76:22-25, 78:14-23.) The **[*15]** court finds this similar enough to *Retsky* and more than sufficient in the case of a institutional investor to illustrate involvement in and awareness of the financial affairs at issue.

Finally, to the extent the above discussion did not fully address defendants' argument concerning the witness Operating Engineers' made available to testify, the court concludes that such arguments do not preclude class certification in this case. The court is satisfied that Operating Engineers (1) has no claims that are antagonistic to or conflict with claims of other members of the class; (2) has sufficient interest in the outcome to ensure vigorous advocacy; and (3) its counsel is competent, experienced, qualified and generally able to conduct the proposed litigation vigorously. *See Gammon v. GC Servs. Ltd. P'ship, 162 F.R.D. 313, 317 (N.D. Ill. 1995)* (citations omitted). Accordingly, defendants' arguments are rejected.

B. *Rule 23(b)*

Operating Engineers seeks certification under *Rule 23(b)(3).* That section provides that a class action can be maintained if "questions of law or fact common to the members of the class predominate over any questions affecting only individual **[*16]** members, and ... a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Defendants do not argue that this action may not be brought under *Rule 23(b)(3).* The court is persuaded that questions common to the members of the class predominate over individual concerns. As Operating Engineers points out, the main question involved in this case is whether defendants' alleged false and misleading statements and material omissions violated *§ § 10(b) and (20)(a)* of the Act. This will be the focus of the litigation. Moreover, the court also finds that the class action method is superior to other methods for resolving this controversy. As with many securities law cases, this case involves a large number of investors who are likely

to be geographically dispersed. Many of these investors are also likely to have relatively small claims making it expensive to seek recovery through individual litigation. A class action would be the most efficient use of judicial resources in resolving the common issues alleged in this action. Thus, the court finds that both the predominance and superiority factors under *Rule 23(b)(3)* are satisfied.

CONCLUSION [*17]

Because the necessary elements of *Rule 23(a)* and *Rule 23(b)(3)* have been satisfied, the court grants Operating Engineers' renewed motion for class certification [# 87]. Enter attached order.

LEXSEE 1992 US DIST LEXIS 22144

In re SciMed Life Securities Litigation

Civil No. 3-91-575

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

1992 U.S. Dist. LEXIS 22144; Fed. Sec. L. Rep. (CCH) P97,220

November 20, 1992, Decided
November 20, 1992, Filed

LexisNexis(R) Headnotes

COUNSEL: [*1] STACEY L. MILLS, Esq., KARL L. CAMBRONNE, Esq., and J. GORDON RUDD, Esq., appeared for class Plaintiffs.

FRANK A. TAYLOR, Esq., BRYAN L. CRAWFORD, Esq., and CECILY HINES, Esq., appeared for Defendant SciMed.

ANDREW B. WEISSMAN, Esq., appeared for the individual Defendants.

JUDGES: LEBEDOFF

OPINIONBY: JONATHAN LEBEDOFF

OPINION:

ORDER

JONATHAN LEBEDOFF, United States Magistrate Judge

The above-entitled matter came on hearing before the undersigned Magistrate Judge of District Court on November 6, 1992, on Defendant SciMed's Motion to Compel Responses to Discovery, Plaintiffs' Motion for a Protective Order with Respect to Class Discovery and Plaintiffs' Motion for a Protective Order with Respect to Defendant SciMed's Subpoenas of Plaintiffs' Trading Records.

This case involves a consolidated class action brought on behalf of all persons and entities who purchased the common stock of SciMed Life Systems, Inc. ("SciMed") (which is publicly traded on the national over-the-counter market) during the period of June 26, 1991 through September 25, 1991, inclusive.

SciMed develops, manufactures, and markets disposable medical devices for interventional treatment of coronary heart disease, including wire-catheters [*2] and small balloons, used together to clear blocked coronary arteries. Such devices are commonly called balloon angioplasty catheters. See Complaint sec. 36-44.

Defendant asks the Court to order Plaintiffs to respond fully and fairly to SciMed's document requests and interrogatories, contending that Plaintiffs have only selectively disclosed information.

In turn, Plaintiffs seek two protective orders. First, Plaintiffs want a protective order with respect to class discovery. Second, Plaintiffs want a protective order with respect to Plaintiffs' trading records.

A. Defendant's Motion to Compel

Defendant SciMed moved this Court for an order to compel all named Plaintiffs to respond fully and fairly to written discovery. Only six Plaintiffs have partially responded to the Defendant's requests for production of documents and interrogatories. Defendant wants to depose all of the eleven named Plaintiffs.

Plaintiffs argue that Defendant is not entitled to take depositions of all named Plaintiffs. In turn, they seek a protective order, because deposing all of the named plaintiffs would "constitute an egregious waste of time, effort, and money." See Plaintiffs' Memorandum of [*3] Law in Support of their Motion For a Protective Order with Respect to Class Discovery, October 6, 1992," (P. Mem. Prot. Ord. #1) at 7.

Further, Plaintiffs argue that Defendant is not entitled to discovery on class certification. However, many courts have allowed discovery on class issues. See *In re One Bancorp Securities Lit., 134 F.R.D. 4 (D. Me. 1991); Orrison v. Balcor Co., 132 F.R.D. 202 (N.D. Ill. 1590); Gray v. First Winthrop Corp., 133 F.R.D. 39 (N.D. Cal. 1990);* and *Connett v. Justus Enter. of Kansas Inc., 1988 U.S. Dist. LEXIS 16393, 125 F.R.D. 166 (D. Kan. 1988).*

Plaintiffs also assert the "fraud on the market" theory, and therefore they do not need to prove reliance. They argue that this precludes the need for discovery of all the named Plaintiffs.

Further, Plaintiffs assert that if depositions are allowed then they should be taken at a location convenient for the Plaintiffs. In support of their argument, Plaintiffs cite *Hyam v. American Export Lines, 213 F.2d 221 (2nd Cir. 1954),* in which the court did **[*4]** not require the Bombay resident to come to New York to be deposed even though he chose it as a forum. The court found that:

> The Federal Courts are open to foreign suitors as to others, and procedural rules are not to be construed in such a fashion as to impose conditions on litigation which in their practical effect amount to a denial of jurisdiction.

Id. at 223. However, in the present case requiring the Plaintiffs to travel to Minneapolis to be deposed would not impose the same hardship as was present in Hyam. n1

> n1 This Court also acknowledges the current trend requiring even Plaintiffs who live in a foreign country to travel to their chosen forum. See *Clem v. Allied Van Lines Int'l Corp., 102 F.R.D. 938 (S.D.N.Y. 1984)* (Despite living in Iran, Plaintiff was required to be deposed in New York, because he had chosen New York as his forum).

Further, Plaintiffs voluntarily chose Minneapolis/St. Paul to be their forum, thus they are in no position **[*5]** to complain of costs of discovery. The court in *Orrison v. Balcor, 132 F.R.D. 202 (N.D.Ill. 1990),* found that:

> Having voluntarily selected N.D. of Illinois as a forum . . . In the absence of compelling circumstances or extreme hardship, a Plaintiff should appear for a deposition in the forum of his choice even if he is a non resident.

Id. at 203. Plaintiffs have presented no evidence of extreme hardship or compelling circumstances for Plaintiffs to be deposed in Minneapolis. This Court ORDERS that all named Plaintiffs be deposed in Minneapolis.

Defendant listed the categories of information it wished to obtain from Plaintiffs through Defendant's interrogatories and document requests.

1. Information Regarding Purchases and Sales of SciMed Securities

Defendant requests complete information concerning each named Plaintiffs' purchases and sales of SciMed Securities. It seeks information and documents which are relevant to class certification and the merits of the case.

Plaintiffs argue that they have fully and adequately responded to Defendant's discovery responses. The Court notes that Plaintiffs have a continuing **[*6]** obligation to produce any information that they may yet discover responsive to SciMed's Requests.

To the extent that Plaintiffs have complied with SciMed's requests, the motion is moot. To the extent that Plaintiffs have not complied with SciMed's requests, this Court compels all named Plaintiffs to disclose complete information concerning each named Plaintiffs' purchases and sales of SciMed securities; therefore, Plaintiffs must answer Interrogatories Nos. 5 and 9 (although the Court agrees that these are somewhat repetitive, Plaintiffs can incorporate some of their answers from No. 5 into No. 9), Nos. 7 and 8. Additionally, Plaintiffs must comply with Document Request Nos. 2, 4, 8, 9, 15, 16, 17, 18, 19, and 20, which pertain directly to each Plaintiffs' transactions in SciMed securities. The above-mentioned requests relate both to certification issues and the merits of the case.

2. Discovery of Investment History and Background

Defendant seeks discovery concerning Plaintiffs' investment history and background. It argues that these documents are highly relevant to Plaintiffs' reliance-based claims and should be produced.

Plaintiffs argue that Defendant is trying to obtain **[*7]** the documents to show that Plaintiffs are sophisticated investors. Plaintiffs correctly assert that sophistication is not a unique defense precluding the typicality requirement of class representation. *In re Control Data Corp. Sec. Litigation, 116 F.R.D. 216 (D. Minn. 1986).*

Further, Plaintiffs assert fraud on the market, thus dispensing with the need to prove causation. In *Basic, Inc. v. Levinson, 485 U.S. 224, 99 L. Ed. 2d 194, 108 S. Ct. 978 (1988),* the court held that when a Plaintiff asserts the theory of "fraud on the market" then a presumption of causation arises. However, the presumption is rebuttable. *Id. at 250.* Defendant SciMed should have an opportunity to rebut the presumption, using information obtained through discovery of investment history and background. In the seminal case in this area, *Blackie v. Barrack, 524 F.2d 891,* the court said that the fraud on the market case is rebuttable and that:

> Defendant may do so in at least two ways: (1) by disproving materiality, or by proving **[*8]** that despite materiality, an insufficient number of traders relied on the deception so as to inflate the price; or (2) by proving that an individual Plaintiff purchased despite knowledge of the falsity of a representation, or that he would have, had he known of it.

Id. at 906. Many courts have adopted the Blackie court's list of ways to rebut the presumption. See *Ross v. Bank South, N.A., 837 F.2d 980 (11th Cir. 1988); Peil v. Speiser, 806 F.2d 1154 (3d Cir. 1986)* (Defendant successfully rebutted the fraud on the market presumption); *Rosenberg v. Digilog Inc., 648 F. Supp. 40 (E.D. Pa. 1985); Grossman v. Waste Management, Inc., 589 F. Supp. 395 (N.D. Ill. 1984);* and *In re LTV Securities Litigation, 88 F.R.D. 134 (N.D. Tex. 1980).*

Additionally, Plaintiffs have also asserted the common law actions of fraud and negligent misrepresentation which requires a showing of actual reliance. See In re Employee Benefit Plans Securities Litigation, Civ. No. 4-92-41, slip op. 17-20 (D. Minn. July 27, 1992); **[*9]** and *Rosenberg, supra.*

This Court recognizes the importance of the Defendant's need to conduct discovery concerning Plaintiffs entire investment history and background. This case is similar to *Elster v. Alexander, 74 F.R.D. 503 (N.D. Ga. 1976),* in which the court said:

> . . . in view of Defendant's allegation regarding "strike" suit, inadequate class representation and absence of claims which were typical information concerning named Plaintiff's ownership of other securities was relevant and discoverable.

Id. at 505.

However, the Court finds that Defendant does not need to obtain Plaintiffs' financial statements (Document Request No. 5) or tax returns (Document Request No. 7), in order to discover Plaintiffs' investment history and background. The other documents requested will adequately provide the information sought by the Defendant.

This Court ORDERS the Plaintiffs to comply with Document Request Nos.: 1 (customer agreements), 2 (account statements), 3 (margin agreements), 4 (prospectus and official statements), 8 and 9 (correspondence concerning securities purchases) and 21 (documents **[*10]** concerning purchases and sales of securities); in addition, the Court DENIES request to compel Plaintiffs to respond to Defendant's Document Request Nos.: 5 (financial statements) and 7 (tax returns).

3. Information Pertaining to Prior Litigation

Defendant requests discovery concerning Plaintiffs prior litigation background. Defendant argues that its discovery requests are relevant and it needs to obtain the information to assess the credibility of Plaintiffs, and discover information that can be used for cross-examination purposes.

Plaintiffs argue that their prior litigation background is irrelevant and has no bearing on their ability to represent the class adequately. They also allege that their background has no bearing on the merits of the case.

This Court agrees with the Elster Court, which allowed discovery of information about the number of class actions filed by Plaintiffs, and the status of such cases. *Elster v. Alexander, 74 F.R.D. 503 (N.D. Ga. 1976).*

This Court ORDERS Plaintiffs to comply with Interrogatories No. 12 (seeking identification of prior litigation involving Plaintiffs as parties); and Document Request Nos. 10 (pleadings **[*11]** from previous actions involving Plaintiffs as parties), 11 (pleadings from actions in which plaintiffs have given sworn testimony), 12 (statements of Plaintiffs), and 13 (testimony of Plaintiffs).

4. Information Regarding Plaintiffs' Ability to Finance the Litigation

Defendant seeks information regarding the ability of the named Plaintiffs' ability to finance the litigation. Pursuant to this request, the Defendant wants to obtain responses to Interrogatory No. 14 and Document Nos. 5 (financial statements), 6 (bank statements) and 7 (tax returns).

Plaintiff argues that the information is not relevant because counsel, pursuant to Minnesota Rule of

Professional Conduct 1.8 (e) (1), "have agreed to advance costs and expenses of this litigation, the payment of which is contingent upon the outcome of the case." See Plaintiffs' Answer to Defendant SciMed, Inc.'s Interrogatory No. 14.

In the recent case, *In re Workers' Compensation, 130 F.R.D. 99 (D. Minn. 1990),* District Judge Rosenbaum said that:

> Defendant's final argument questioning Plaintiff's financial resources is baseless . . . Plaintiff's counsel's assurances satisfy the Court that the **[*12]** financial requirements which may be imposed upon the class representatives will be satisfied adequately. The Court finds this sufficient to meet the requisites of 23 (a) 4.

Id. at 108. Other courts have also refused to allow discovery of Plaintiffs' financial condition.

This Court orders that the Plaintiffs are not required to provide Defendant with information regarding their ability to finance the litigation. Therefore, Plaintiffs do not have to answer Interrogatory No. 14, nor produce documents in response to Requests for Production of Document Nos. 5 (financial statements), 6 (bank statements) and 7 (tax returns). n2

> n2 The Court notes that Plaintiffs object to Request for Production of Document No. 14 pertaining to telephone statements during the relevant time period, on page 10 of their "Memorandum of Law in Opposition to Defendant's Motion to Compel Responses to Discovery dated October, 30 1992." Plaintiffs discuss the document request in their objection to discovery of information regarding Plaintiff's ability to finance the litigation. The Court would characterize this information differently, but will address it here. Since Defendant does not specifically address Request for Production of Document No. 14, and particularly in light of Plaintiffs agreement to produce documents pertinent to SciMed, the Court finds no reason to compel production of Document Request No. 14.

[*13]

B. Plaintiffs' Motion for a Protective Order with Respect to Class Discovery

Plaintiffs seek a protective order regarding class discovery, on the grounds of expense and inconvenience. They allege that the Defendant is merely using the depositions as a harassment tool.

Defendant argues that depositions of named Plaintiffs in a class action are proper and common. Defendant asserts that the depositions are needed to respond to certification issues.

For the reasons addressed above pertaining to Defendant's Motion to Compel, the Court will order depositions of all named Plaintiffs to take place in Minneapolis. Thus the Plaintiffs' Motion for a Protective Order with respect to class discovery is DENIED.

C. Plaintiffs' Motion for a Protective order with Respect to Plaintiffs' Trading Records

Plaintiffs seek a protective order regarding their trading records. They argue that by asking for their brokerage accounts, the Defendant is either trying to harass them or prove that Plaintiffs are "sophisticated" investors.

Defendant argues that these documents pertain directly to class certification and the merits of the Plaintiffs case. n3 Defendant cites Rule 26 in support of its **[*14]** argument that "parties may obtain information regarding any matter, not privileged which is relevant to the subject matter involved in the pending action. . ." *Fed. R. Civ. P. 26 (a)(1)* (emphasis added). See Defendant's Memorandum in Opposition to Plaintiffs' Second Motion For Protective Order, at 5.

> n3 The Court notes Defendant's argument that the motion is untimely. *Federal Rule of Civil Procedure Rule 45 (b)* does state, ". . . the court, upon motion promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash." However, in the interests of justice the court will entertain the motion.

Discovery rules are to be afforded broad and liberal treatment. *Schlagenhauf v. Holder, 379 U.S. 104, 13 L. Ed. 2d 152, 85 S. Ct. 234 (1964).* Courts should allow discovery under the concept of relevancy unless it is clear that the information sought can have no possible bearing on the subject matter of the action. **[*15]** *Marshall v. Electric Hose and Rubber Co., 68 F.R.D. 287 (D. Del. 1975).*

This Court DENIES the Plaintiffs' request for a Protective Order for Plaintiffs' trading records.

Based on the foregoing, and all the files records and proceedings herein,

IT IS HEREBY ORDERED that:

1) Defendant SciMed's Motion for Discovery and Inspection is GRANTED IN PART and DENIED IN PART, as set forth above.

2) Plaintiffs' Motion for a Protective Order with Respect to Class Discovery is DENIED.

3) Plaintiffs' Motion for a Protective Order with Respect to Defendants' Subpoenas of Plaintiffs' Trading Records is DENIED.

Dated: November 20, 1992.

JONATHAN LEBEDOFF

United States Magistrate Judge

1 of 1 DOCUMENT

JOSEPH SEIDMAN, ET AL v. STAUFFER CHEMICAL CORP., ET AL

Civil No. B-84-543 (TFGD)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

1986 U.S. Dist. LEXIS 30264

January 17, 1986, Decided and Filed

LexisNexis(R) Headnotes

OPINIONBY: [*1]

MARGOLIS, Magistrate; DALY, U.S.D.J.

OPINION:

RECOMMENDED RULING GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

A. Procedural Background

Joan Glazer Margolis, United States Magistrate

This securities action was commenced on August 15, 1984 by purchasers of common stock of the Stauffer Chemical Company ("Stauffer") against Stauffer, several of its officers and directors, and its accountants, Deloitte, Haskins & Sells ("DH&S"). On December 10, 1984, Chief Judge Daly consolidated four similar suits into this action and therein designated Connecticut's liaison counsel and designated lead counsel. Pursuant to Chief Judge Daly's order, a Consolidated Amended Complaint ("Complaint") was filed on January 4, 1985. (One of the actions, Civil No. B84-614(TFGD), was dismissed by stipulation on June 14, 1984.) Another related action, Rensel v. Stauffer Chemical Co., Civil No. B85-183(TFGD), similarly was consolidated on December 10, 1985, by agreement of counsel. Still pending as an independent action is Louisiana State Employees Retirement System v. Stauffer Chemical Corp. ("Louisiana State"), Civil No. B85-41(TFGD), transferred from the United States [*2] District Court for the Southern District of New York. n1

n1 Named in the Louisiana State complaint were Stauffer, several of its officers and directors, and DH&S. The plaintiff there had purchased 20,000 shares of Stauffer's common stock. However, on November 5, 1985, the Magistrate's Recommended Ruling granted DH&S' motion to dismiss, unless an amended complaint is filed within ninety days of such ruling; this Recommended Ruling was approved by Chief Judge Daly on december 9, 1985, absent objection. See note 13 infra.

The Complaint alleges defendants violated § 10(b) of the Securities Exchange Act of 1934, as amended, *15 U.S.C. § 78j*(b), n2 and Rule 10b-5 promulgated thereunder by the Securities & Exchange Commission ("SEC"), *17 C.F.R. § 240.10b-5*, n3 by engaging in a course of fraudulent conduct, including misrepresentations and omissions with regard to the financial picture of Stauffer, and by failing to disclose allegedly material information. In addition, plaintiffs have alleged pendent common law claims of fraud, deceit, and negligent misrepresentation.

n2 Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--
>
> (b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. **[*3]**

n3 Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud.
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, notmisleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or decit upon any person, in connection with the purchase or sale of any security.

Presently pending before the Court is plaintiffs' motion for class certification, filed April 1, 1985. Plaintiffs purport to represent similarly situated persons who purchased Stauffer common stock during the period from October 19, 1982 through August 14, 1984. Plaintiffs and the Stauffer defendants have filed seven exhaustive briefs in support of or in opposition to this motion, reply briefs, surreply briefs, responses to surreply briefs, and post-argument briefs. On August 6, 1985, DH&S filed its **[*4]** brief in opposition to plaintiffs' motion, in which DH&S adopted the arguments set forth by the Stauffer defendants. In addition, on August 2, 1985, plaintiff's counsel in the Louisiana State action filed an affirmation of position, in which he suggested that the potential class members join in his action. Oral argument was heard on the pending motion on December 10, 1985. For the reasons stated herein, plaintiffs' motion for class certification is granted.

B. Factual Background

Plaintiffs' complaint alleges that commencing in the summer of 1982 and continuing throughout the class period, defendants entered into a scheme and common course of conduct to present a false and misleading picture of Stauffer's true financial condition to the investing public, and further, that defendants failed to disclose material information relating thereto. Plaintiffs allege that pursuant to this deceptive scheme, defendants engaged in certain accounting practices which were contrary to generally accepted accounting principles ("GAAP") and in violation of both federal securities law and the common law. Specifically, defendants are alleged to have (i) improperly restructured Stauffer's last-in, **[*5]** first-out ("LIFO") method of inventory valuation for Stauffer's domestic divisions; (ii) overstated net income based on intracompany inventory transfers; and (iii) changed Stauffer's Early Order Program ("EOP"), thereby prematurely recognizing revenue in 1982. Plaintiffs allege that the defendants' motives for conspiring to carry out these acts were to obtain performance related bonuses pursuant to Stauffer's Contingent Compensation Plan ("Compensation Plan"), to keep the price of Stauffer stock artificially inflated, and with respect to DH&S, to maintain the goodwill of Stauffer, thereby ensuring its fees. Plaintiffs claim that as a result of these illegal acts by defendants, plaintiffs and the putative class members were deceived into paying artificially inflated prices for their Stauffer stock and that certain of Stauffer's officers and directors wrongfully received bonuses under the Compensation Plan.

The class which plaintiffs seek to certify is:

> All persons and entities who purchased the common stock of Stauffer Chemical Company from October 19, 1982 through August 14, 1984, and were damaged thereby, but not including any defendants, subsidiaries, or affiliates of defendants, **[*6]** successors, or assigns of defendants or members of the immediate families of defendants.

October 19, 1982 is the date on which Stauffer first released its results of operations for the quarter ending September 30, 1982, which results plaintiffs allege were misleading; August 14, 1984 is the date on which the SEC filed a complaint against Stauffer for overstating or misstating its 1982 and 1983 earnings and sales and for using accounting methods which did not conform to GAAP and on which a consent decree was entered. The named plaintiffs, Joseph Seidman, Kurt I. Lewin, Morton B. Wapner, Edward Carlin, Abraham Ehrlich, Marilyn Ehrlich, and Jerome Rensel are all alleged to have

purchased Stauffer's common stock during the class period and were damaged thereby.

Defendants oppose the length of the class period as well as the number of plaintiffs named as representatives. Also, defendants challenge the putative class on the grounds that it fails to meet the adequacy, typicality and predominance requirements set forth in *F.R.Civ.P. 23*. Defendants contend that if the Court were at all inclined to certify a class of plaintiffs in this action, it should do so only on the basis of subclasses. **[*7]** Each of defendants' arguments will be addressed here at length.

II. RULE 23 REQUIREMENTS

Plaintiffs' motion is premised on Rule 23(a) n4 and 23(b) (3). n5 Although securities fraud actions may be particularly suitable for class action status, *Dolgow v. Anderson, 43 F.R.D. 472, 488 (E.D.N.Y. 1968)*, this Court must nevertheless be satisfied that the requirements of Rule 23 are met.

n4 Rule 23(a) provides:

> Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is no numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defense of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

n5 Rule 23(b) (3) provides:

> Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action. **[*8]**

In making its determination, the Court is mindful of the Supreme Court's directive as expressed in *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974)*, that the Court is not to conduct a preliminary inquiry into the merits of the plaintiffs' suit. Substantial factual questions going to the merits of the case should not be decided on a motion for class certification, *Sirota v. Solitron Devices, Inc., 673 F.2d 566, 572 (2d Cir. 1982)*, and this Court is to construe Rule 23 liberally. *Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968)*.

A. Numerosity

Rule 23(a) (1) requires that the class be so numerous that joinder of all members is impracticable. Defendants do not dispute numerosity, as plaintiffs have alleged that more than 60,000,000 shares of Stauffer common stock were publicly traded during the proposed class period. Thus, the numerosity requirement is satisfied.

B. Commonality and Predominance

Rule 23(a) (2) requires that there be questions of law and fact common to the members of the class, and Rule 23(b) (3) requires that these common questions of law and fact predominate over any questions affecting only individual members.

Plaintiffs **[*9]** base their justification for class certification on the "common course of conduct" theory, under which defendants are alleged to have issued various operating and financial statements over a period of time which overstated or misstated earnings and revenues, causing plaintiffs to have purchased Stauffer stock at inflated values. Plaintiffs further claim that during this period, defendants made no disclosure of allegedly material information relating to Stauffer's financial condition. It is plaintiffs' contention that defendants' illegal acts and failure to disclose were in furtherance of an inflationary scheme employed to artifically overvalue Stauffer's stock and to obtain bonuses under defendant's Compensation Plan. Accordingly, plaintiffs argue that common questions of law and fact exist as to (1) whether defendants engaged in a plan or course of conduct to inflate the market price of Stauffer stock; (2) whether the financial statements which defendants issued contained misrepresentations or omissions in violation of federal or state law; (3) whether such misrepresentations or omissions were material; and (4) whether defendants' actions were done willfully or recklessly.

The Second **[*10]** Circuit has held that a "common coarse of conduct" constitutes a common question under Rule 23. See *Green v. Wolf Corp., 406 F.2d 291, 300 (2d*

Cir. 1968), cert. denied sub nom. *Troster, Singer & Co. v. Green, 395 U.S. 977 (1969); Greene v. Emersons, Ltd., 86 F.R.D. 47, 56 (S.D.N.Y. 1980); Dolgow v. Anderson, supra, 43 F.R.D. at 489.* Class certification is appropriate where purchasers of securities allege that various financial statements issued by the company overstated earnings and revenues, causing them to purchase the securities at an inflated price. See *Greene v. Emersons, Ltd., supra, 86 F.R.D. at 59.* As the court in *Greene v. Emersons, Ltd., supra,* observed:

Like standing dominoes . . . one misrepresentation in a financial statement can cause subsequent statements to fall into inaccuracy and distortion when considered by themselves or compared with previous statements . . . [A] possible close causal relationship between the various alleged misrepresentations . . . leads to the conclusion that members of the class are interested in 'common questions of law and fact.'

Id. at 56, quoting *Fisher v. Kletz, 41 F.R.D. 377 (S.D.N.Y. 1966).* **[*11]**

Defendants dispute the existence of a common and continuing scheme to defraud plaintiffs and the class they seek to represent. Defendants argue that the misrepresentations which are alleged to have been made occurred in various earnings reports. Moreover, defendants point out that the events on which such misrepresentations are based relate to different and distinct sets of consequences and that plaintiffs have failed to allege that these misrepresentations were "interrelated and cumulative."

Defendants' arguments, however, are without merit. For purposes of a motion for class certification, this Court is to look at the allegations of plaintiffs' complaint. *Eisen v. Carlisle & Jacquelin, supra, 417 U.S. at 177.* In so doing, the Court finds numerous instances where plaintiffs allege a common plan, scheme or continuing course of conduct on defendants' part which operated as a fraud upon the plaintiffs. Whether in fact there was a common course of conduct is not for the Court to determine at this stage in the litigation, since this issue goes to the merits of the suit. *Steiner v. Equimark Corp., 96 F.R.D. 603, 612 (W.D. Pa. 1983).* It is sufficient that plaintiffs have alleged **[*12]** the existence of such a common plan or scheme; they need not establish its existence at this juncture.

Moreover, the fact that the alleged misrepresentations are contained in a number of different documents, each of which pertains to a different period of defendants' operation, or to a different accounting practice, does not preclude this Court from certifying the putative class. See, e.g. *Blackie v. Barrack, 524 F.2d 891, 903 n.19 (9th Cir. 1975)* (even when misrepresentations are unrelated, class members may show a common question of law or fact); *Green v. Wolf Corp., supra, 406 F.2d at 300* (distinctions in the allegations of misrepresentation contained In three different prospectuses are too fine to justify denying class certification at this stage); *Dolgow v. Anderson, supra, 43 F.R.D. at 489* (defendant's reliance upon the fact that a plethora of statements are involved, not all of which were necessarily brought to the attention of all investors, is unpersuasive).

In *Blackie v. Barrack, supra,* plaintiffs alleged that pursuant to a scheme to inflate the company's stock, defendants issued approximately 45 documents over a 27-month period, which materially misrepresented **[*13]** the company's financial condition. It was alleged further that throughout the class period, defendants' financial reports fraudulently failed to comply with generally accepted accounting principles, thereby injuring purchasers of the inflated stocks. Defendants argued that purchasers throughout the class period did not present common issues of law or fact because (1) the alleged misrepresentations were contained in different documents; (2) each document related to a different period of the company's operations; and (3) each purchaser would need to depend on proof of a different set of accounting facts in order to establish a violation of an accounting principle at the time he or she purchased.

Despite defendant's arguments, the Ninth Circuit found that plaintiffs had alleged a "common course of conduct" and certified the class. The Blackie court reasoned that:

[C]onfronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether the defendant's course of conduct is in its broad outlines actionable, which is not defeated **[*14]** by slight differences in class members' positions, and that the issue may profitably be tried in one suit.

Id. at 902 (citations omitted).

Plaintiffs need not allege that defendants' misrepresentations are "interrelated, interdependent and cumulative," as defendants inaccurately contend. Such allegations would more than satisfy the "common course of conduct" test. *Blackie v. Barrack, supra, 524 F.2d at 903.* However, it is sufficient that plaintiffs have alleged a consistent course of misconduct. *Dolgow v. Anderson, supra, 43 F.R.D. at 489.* Accord, *Green v. Wolf Corporation, supra. 406 F.2d at 300.* As the Second Circuit pointed out in *Green v. Wolf Corporation, supra:* "If we were to deny a class action simply because all of the allegations of the class do not fit together like pieces

to a jigsaw puzzle, we would destroy much of the utility of Rule 23." Id.

The Court also finds that the plaintiffs have satisfied the requirement of predominance, Defendants' arguments that individual questions will predominate over any common questions of law and fact are unpersuasive.

In *Dura-Bilt Corp. v. Chase Manhattan Corp., 89 F.R.D. 87 (S.D.N.Y. 1981),* it was **[*15]** noted that:

Courts generally focus on the liability issue in deciding whether the predominance requirement is met, and if the liability issue is common to the class, common questions are held to predominate over individual questions. (citations omitted). The rule requires predominance, not identity or unanimity of issues among class members.

Id. at 93.

Defendants contend that individual issues predominate because each plaintiff must show actual reliance on the alleged misrepresentations This argument was specifically rejected by the Second Circuit in *Green v. Wolf Corporation, supra,* where the Court stated:

Carried to its logical end, it would negate any attempted class action under rule 10b-5, since as the District Courts have recognized, reliance is an issue lurking in every 10b-5 action.

406 F.2d at 301. Also, to the extent that plaintiffs allege a failure to disclose, reliance is presumed, provided that the alleged omission is material.

Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-154 (1972).

Finally, under the "fraud on the market" doctrine, which has been adopted by this Circuit, direct proof of reliance "is unnecessary to **[*16]** establish a [Rule] 10b-5 claim for a deception inflating the price of stock traded in the open market." *Blackie v. Barrack, supra, 524 F.2d at 906.* An investor "relies generally on the supposition that the market price is validly set and that no unsuspected fraud has affected the price." *Panzirer v. Wolf, 663 F.2d 365, 368 (2d Cir. 1981),* vacated as moot sub nom. *Price Waterhouse v. Panzirer, 459 U.S. 1027 (1982).* See also *Ross v. A.H. Robins Co., 607 F.2d 545, 553 (2d Cir. 1979),* cert. denied, *446 U.S. 946 (1980); Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 374* (2d Cir.), cert. denied, *414 U.S. 910 (1973); Dura-Bilt v. Chase Manhattan Corp., supra, 89 F.R.D. at 97.*

Generally, in this context, the requirement of reliance has not been a bar to a class action suit. See, e.g., *Herbst v. IT&T Corp., 65 F.R.D. 13, 19 (D. Conn. 1973),* aff'd, *495 F.2d 1308 (2d Cir. 1974).* In any event, should the issue of reliance become an element of proof, the Court could order separate trials on this particular issue. *Green v. Wolf Corp., supra, 406 F.2d at 301; Dura-Bilt Corp. v. Chase Manhattan Corp., supra, 89 F.R.D. at 98.* **[*17]**

Likewise, the Court finds that possible individual questions on damages do not preclude class certification. As the Ninth Circuit observed in *Blackie v. Barrack, supra:*

[C]ourts have generally declined to consider conflicts, particularly as they regard damages, sufficient to defeat class action status at the outset, unless the conflict is apparent, imminent, and on an issue at the very heart of the suit.

524 F.2d at 909. The Court perceives no such conflict in this case where plaintiffs share an overriding common interest in establishing the existence and materiality of misrepresentations made in furtherance of an inflationary scheme to defraud. As with the issue of reliance, the Court is always free to hold separate trials on damages. See *Green v. Wolf Corp., supra, 406 F.2d at 301; Dura-Bilt Corp. v. Chase Manhattan Corp., supra, 89 F.R.D. at 98.*

C. Typicality

Rule 23(a) (3) requires that plaintiffs' claims be typical of the claims of the class. n6 In *Lake v. Speziale, 580 F. Supp. 1318, 1333 (D. Conn. 1984),* this District adopted the definition of typicality set forth in *Coca-Cola Bottling Co. v. Coca-Cola Co., 98 F.R.D. 254 (D. Del. 1983):*

A **[*18]** representative's claim should be considered typical if it arises from the same event, practice, or course of conduct that gives rise to the claims of the other class members and if the claims of the representative are based on the same legal theory.

Id. at 266. Accord *Dura-Bilt Corp. v. Chase Manhattan Corp., supra, 89 F.R.D. at 99.*

n6 Courts sometimes recognize that the typicality requirement overlaps with the commomality and adequacy requirements of Rule 23. See, e.g., *Dura-Bilt Corp. v. Chase Manhatttan Corp., supra, 89 F.R.D. at 99.*

Contrary to defendants' assertion, typicality does not require that the interests between the named representatives and the class members be "co-extensive." See *Dura-Bilt Corp. v. Chase Manhattan Corp., supra,*

89 F.R.D. at 99 n.12. "The proper inquiry is whether other members of the class have the same or similar injury, whether the action is based on conduct not special or unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id. at 99.* Provided that plaintiffs' claims arise from the same legal theory, factual differences will not defeat a class certification. **[*19]** Id.

Here, plaintiffs allege that they purchased Stauffer stock at an artifically inflated price. To the extent that all purchasers throughout the class period share a common interest in proving plaintiffs' allegation, this is sufficient to make the claims of the class representatives typical of those of the class members. See *Steiner v. Equimark Corp., supra, 96 F.R.D. at 609.* Plaintiffs' claims are also typical of the class members in that all purchasers will be required to show the materiality of defendants' misrepresentations or omissions and defendants' failure to disclose material information. Thus, plaintiffs satisfy the typicality requirement of Rule 23.

D. Adequacy

Rule 23(a) (4) requires that "the representative parties will fairly and adequately protect the interests of the class." Courts have held that in order to satisfy this requirement, "(a) the plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed legislation, and (b) the plaintiff must not have interests antagonistic to those of the class." *Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 247* (3d Cir.), cert. denied, *421 U.S. 1011 (1975).* See also **[*20]** *Steiner v. Equimark Corp., supra, 96 F.R.D. at 610; Dura-Bilt Corp. v. Chase Manhattan Corp., supra, 89 F.R.D. at 100-01.*

Defendants challenge plaintiffs' ability to satisfy the adequacy requirement on a number of grounds. n7 First, defendants contend that there is a conflict of interest between plaintiffs Carlin, Seidman and Rensel and the other class members because these three plaintiffs sold their stock during the class period. According to defendants, plaintiffs Carlin, Seidman and Rensel would have no incentive to prove that Stauffer stock was inflated at the time of sale and thus they would inadequately represent those class members who purchased Stauffer stock subsequent to plaintiffs' sales. The conflicts which defendants perceive do not warrant denying class certification. At most, any conflict between these three plaintiffs and the other class members relates to the measure of damages. In considering whether to create subclasses based on those purchasers who retained their stock and those who had already sold it, the court in *Dolgow v. Anderson, supra,* declined to do so, stating:

> These two groups can be differentiated only on the basis of their damages. This **[*21]** distinction bears no relation to the common questions relating to liability that will be tried as part of the class action so that a narrowing of the class for this reason at this stage of the litigation is not warranted.
>
> *Id. at 493.*

n7 In addition to defendants' attack on the adequacy of representation by the named plaintiffs, defendants also dispute counsel's ability to respresent this class because of a supposed conflict of interest, in that Hurwitz & Sagarin, P.C., Connecticut liasion counsel, is also representing plaintiff in a shareholder's derivative suit pending in this Court. According to the defendants, therefore, Hurwitz & Sagarin should be disqualified from representing the class. No motion for disqualification has been filed. In the absence of such a motion, the Court notes that the attorneys representing plaintiffs are highly qualified and experienced litigators who are capabile of adequately representing plaintiffs in this class action.

Therefore, the fact that plaintiffs Carlin, Seidman and Rensel sold their Stauffer stock does not render them inadequate representatives. In the event that irreconcilable differences arise in the future with regard to the **[*22]** allocation of damages, the Court can designate subclasses. See *Herbst v. IT&T Corp., supra, 495 F.2d at 1321; Green v. Wolf, supra, 406 F.2d at 295.* n8

n8 Although the the opinion in *Green v. Wolf, supra,* discusses this issue in the context of the typicality requirement, it is generally recognized that the typicality and adequacy requirement overlap to a certain extent. See note 6 supra.

Second, defendants argue that certain of the plaintiffs are inadequate class representatives because they are subject to atypical defenses. With respect to plaintiffs Carlin, Seidman and Rensel, defendants claim that these three are unable to show that the loss sustained by each of them was caused by Stauffer's alleged misrepresentations or omissions. With respect to plaintiffs Carl in, Ehrlich and Lewin, defendants claim that these plaintiffs failed to rely on any of Stauffer's disclosures prior to purchasing their stock. Defendants point out that neither plaintiff Carl in nor plaintiff Lewin purchased (and sold) Stauffer stock on their own. The purchase and sale of plaintiff Carlin's stock was effected

by his stockbroker, and the purchase and sale of plaintiff Lewin's stock **[*23]** was made by his son.

These named plaintiffs are not rendered inadequate representatives at this stage merely because defendants may later be able to demonstrate a lack of causation or reliance on their part. The Ninth Circuit's reasoning in *Blackie v. Barrack, supra,* is persuasive on the issues of causation and reliance. In Blackie, plaintiffs brought a purported class suit against the defendant company claiming violation of the federal securities laws based on defendant's misrepresentations as to the company's finances. Like the plaintiffs here, plaintiffs in Blackie relied on the "fraud on the market" doctrine. The Court held that plaintiffs need not establish proof of subjective reliance on particular misrepresentations because:

Proof of reliance is adduced to demonstrate the causal connection between the defendant's wrongdoing and the plaintiff's loss. We think causation is adequately established in the impersonal stock exchange context by proof of purchases and of the materiality of misrepresentations, without direct proof of reliance. Materiality circumstantially establishes the reliance of some market traders and hence the inflation in the stock price -- when **[*24]** the purchase is made the causational chain between defendant's conduct and plaintiff's loss is sufficiently established to make out a prima facie case. (citations omitted).

524 F.2d at 906. The Ninth Circuit then went on to hold that:

The [Rule] 10b-5 action is not predicated solely on a showing of economic damage (loss causation) . . . individual transactional causation can in these circumstances be inferred from the materiality of the misrepresentation (citations omitted), and shift to defendant the burden of disproving a prima facie case of causation.

Id.

For the foregoing reasons, class certification is not precluded merely because plaintiffs Carlin, Seidman and Rensel may be subject to certain defenses which are not typical of the entire class.

Also without merit is defendants third argument that plaintiffs Carl in and Lewin are inadequate representatives because their stock was purchased and sold without their knowledge. n9 Again, defendants overlook the fact that plaintiffs rely on a "fraud on the market" theory, which has been adopted by this Circuit. See *Panzirer v. Wolf, supra, 663 F.2d at 368; Ross v. A.H. Robins, supra, 607 F.2d at 554.* Thus, **[*25]** the requirement that plaintiffs prove direct reliance has been eliminated. As observed by the Ninth Circuit in Blackie v. Barrack:

A purchaser on the stock exchange may be either unaware of a specific false representation, or may not directly rely on it; he may purchase because of a favorable price trend, price earnings ratio, or some other factor . . . whether he is aware of it or not, the price he pays reflects material misrepresentation.

524 F.2d at at 907 (emphasis added).

n9 Neither would this render plaintiffs atypical representatives. See *Steiner v. Equimark Corp., supra, 96 F.R.D. at 609-610 n.13* (a shareholder's reliance on the advice of others does not mean that he will not be equally interested in showing that the stock value was artifically inflated).

In summary, a plaintiff is not an inadequate class representative merely because he relies on the advice of another. *Steiner v. Equimark Corp., supra, 96 F.R.D. at 611 n.15.*

Last, defendants also challenge the adequacy of plaintiffs Carlin, Ehrlich and Lewin to represent the other class members due to their "alarming unfamiliarity" with this lawsuit. Defendants make specific reference to **[*26]** portions of plaintiffs' deposition testimony to support their assertions that plaintiffs neither are aware of who they are suing, nor are they willing to bear the costs of this litigation. n10 After reviewing the deposition testimony of these individuals, the Court finds that defendants have mischaracterized plaintiffs' testimony. Plaintiffs' depositions evidence a general understanding of the nature of this lawsuit and the broad outlines of their claim. The Court finds nothing particularly "alarming" about the fact that at the time of their respective depositions plaintiffs Carlin and Lewin may not have been confident that DH&S was named as a defendant in the class action. Class representatives need not be highly sophisticated or knowledgeable with respect to the intricate details of a securities fraud case in order to prevail on their motion for class certification. See generally *Dura-Bilt Corp. v. Chase Manhattan Corp., supra, 89 F.R.D. at 103.*

n10 These deposition transcripts are attached as Exhibit D to plaintiffs' Reply Brief, filed September 23, 1985, and as Attachment B to the Stauffer defendants' Surreply Brief, filed November 18, 1985. Defendants argue that plaintiff Rensel is also unwilling to bear the litigation costs of this class action. **[*27]**

Furthermore, the Court finds no support for defendants' distinction between a "general" willingness to bear the costs of litigation and a "real" willingness to bear these costs. n11 Plaintiffs' deposition testimony sufficiently demonstrates an awareness of the potential costs involved and a willingness to bear these costs and expenses.

n11 In raising distinctions such as these, defendants lose sight of the factor which must be satisfied under the Rule 23(a) (4) requirement. The key question is whether plaintiffs' interests are antagonistic. *Wetzel v. Liberty Mutual Ins. Co., supra, 508 F.2d at 247.*

E. Superiority

In addition to the requirement of a predominance of common issues of law and fact, Rule 23(b) (3) also requires that a class action be superior to other methods for the fair and efficient adjudication of the controversy. This requirement is satisfied where a large number of persons is alleged to be injured by defendants conduct and where their claims are too small to warrant separate suits. *Green v. Wolf Corp., supra, 406 F.2d at 301; Steiner v. Equimark Corp., supra, 96 F.R.D. at 613; Dura-Bilt Corp. v. Chase Manhattan Corp., supra, 89 F.R.D.* **[*28]** *at 103.* Here, plaintiffs allege that more than 60,000,000 shares of Stauffer stock were publicly traded during the class period and that the damages suffered by individual class members may be relatively small. n12 Given the number of potential plaintiffs and the Court's willingness to ensure that meritorious claims are given redress, a class action is superior in this case. n13

n12 Complaint paras. 12-13.

n13 Defendants' suggestion that the Court employ the "test case" alternative to a class action is not now pertinent in light of the Recommended Ruling, filed November 5, 1985, which granted defendant DH&S' motion to dismiss in Louisiana State Employees Retirement System v. Stauffer Chemical, et al, Civil No. B85-41(TFGD). On December 9, 1985 Chief Judge Daly adopted the Recommended Ruling, absent objection. See note 1 supra.

III. CLASS DEFINITION

A. Length of Class Period and Number of Named Plaintiffs

Defendants argue that the purposed class period is too lengthy, thereby making this class action unmanageable. Defendants are concerned that because of the "disparate alleged misstatements and/or omissions" throughout the period, plaintiffs will need **[*29]** to prove distortion of the market price on numerous trading days during the class period; thus contends defendants, individuals who purchased at different times have incentives to minimize or emphasize the importance of different events. Also, defendants raise the probability of conflicts with regard to individuals who sold their Stauffer stock during the class period. Defendants' fears are unwarranted. The class which plaintiffs seek to certify runs from October 19, 1982 through August 14, 1984. There is nothing inherently unmanageable about a class action which spans approximately 22 months and involves thousands of potential members. n14 See, e.g., *Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975)* (class period of 27 months, involving some 45 documents, 120,000 transactions and 21,000,000 shares); *Green v. Wolf Corporation, 406 F.2d 291 (2d Cir. 1968)* (class period exceeding 2 years and involving three different prospectuses and 2,200 members); *Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968)* (involving approximately one hundred thousand purchases during the class period).

n14 It is not unclear how many purchasers are alleged to be members of this class although presumably the number would be quite large. Plaintiffs' Motion for Class Certification states that as of March 31, 1984 these were approximately 16,000 shareholders of record. **[*30]**

Defendant DH&S has put forth a separate objection to class certification. It argues that "there is no support in Rule 23 or elsewhere" for this Court to certify all five named plaintiffs and their seven law firms as class representatives. To do so, DH&S contends would inevitably result in a duplication of effort by counsel and inefficiency in case management. The quantity of named plaintiffs is not the determining factor; the test is the quality of representation. 3B Moore's Federal Practice para. 23.07[4], at 23-242 to -246 (2d ed. 1985). Furthermore, as previously mentioned, on December 10, 1984, Chief Judge Daly designated Connecticut liaison counsel and designated lead counsel; these attorneys have represented to the Court that they are coordinating their efforts so as to avoid duplication and inefficiency. (See Plaintiffs' Reply Memorandum of Law in Support of Their Motion for Class Certification, filed September 23, 1985, at 45 n.23). At this juncture, it is enough that plaintiffs' purported class satisfies the requirements of Rule 23. Should the class become unmanageable at a

later date, the problem can be eliminated by the use of subclasses.

B. Subclassification [*31]

Defendants would have this Court subdivide the proposed class into four distinct subclasses, as follows:

(1) October 19, 1982 (the date Stauffer announced its third quarter earnings for 1982, disclosing the restructuring of the LIFO inventory pools) through January 21, 1983 (the date Stauffer announced its earnings for fiscal year 1982);

(2) January 21, 1983 through April 20, 1983 (the date Stauffer announced its earnings for the first quarter of fiscal year 1983);

(3) April 20, 1983 through October 21, 1983 (the date Stauffer announced its earnings for the third quarter of 1983); n15

(4) October 21, 1983 through August 14, 1984 (the date on which Stauffer entered into a consent decree with the SEC).

n15 The financial report released that date was also Stauffer's report for a nine-month fiscal year commencing January 1, 1983. Thereafter, Stauffer's fiscal year ran from October 1 through September 30.

After narrowing the proposed class into these four subclasses, defendants proceed to eliminate the first and fourth periods on the basis that plaintiffs have not alleged any misrepresentations or omissions during these two subperiods. n16 The Court is not inclined [*32] to divide the putative class into the periods which defendants have defined for the following reasons.

n16 As to the first subclass, defendants contend plaintiffs allege no misrepresentations or omissions other than the LIFO change and plaintiffs would have much less of an incentive to focus on the LIFO change as opposed to the EOP changes.

First, plaintiffs complaint alleges a common scheme or course of conduct throughout the entire class period. To subdivide this class into periods which correspond to the separate generally accepted accounting principles alleged to have been violated would be to ignore the course of conduct theory upon which plaintiffs' complaint is premised. n17 Whether in fact a common scheme exists goes to the merits of plaintiffs' claim. *Steiner v. Equimark Corp., supra, 96 F.R.D. at 608-609.* At present the Court's focus is on the allegations of plaintiff's complaint. *Eisen v. Carlisle & Jacquelin, supra, 417 U.S. at 177.*

n17 The Ninth Circuit in *Blackie v. Barrack, supra,* found no inherent conflict with certifying as one class a securities suit alleging the abuse of more than one accounting principle. *524 F.2d at 904.*

Second, the court [*33] finds no convincing evidence to support the defendants' line drawing. Given the nature of the securities market, it is conceivable that defendants' allegedly illegal acts had a continuing effect on the market price of Stauffer stock and that such an effect carried over subsequent to defendants' issuing any corrective disclosures or reports. n18 It would be improper for this Court to make factual determinations as to the continuing market affect of defendants' allegedly fraudulent acts. If it subsequently becomes clear that defendants' alleged fraud can be so clearly demarcated, then the Court has the power to create appropriate subclasses.

n18 Defendants contend that Stauffer's report of its first quarter 1983 earnings offset "virtually all" of the alleged overstatement of fiscal year 1982 earnings.

IV. COMMON LAW CLAIMS

Plaintiffs have invoked the pendent jurisdiction of this Court over their common law claims for fraud, deceit and negligent misrepresentation. Defendants oppose class certification of these claims because individual issues of reliance will predominate and because a conflict of law problem is likely to arise.

Rule 10b-5 and common law fraud actions have similar [*34] issues of proof; in fact as one court observed, the similarities "outnumber the differences.". *Dekro v. Stern Bros. & Co., 540 F. Supp. 406, 418 (W.D. Mo. 1982).* Plaintiffs' state law claims are predicated on the same conduct which forms the basis of their federal securities claims. See *In Re Victor Tech. Securities Litigation, 102 F.R.D. 52, 59 (N.D. Cal. 1984).* In both the federal and state claims, plaintiffs will be required to prove that statements or omissions made by defendants were materially false and misleading. Certification of the present class will not dispense with plaintiffs' need to prove reliance or damages. However, these issues can be managed by conducting separate trials, without destroying the efficiency of class-wide proceedings on other issues. *Dekro v. Stern Bros. & Co., supra, 540 F.*

Supp. at 418-19. Where the basic issues of proof in plaintiffs' state claims are essentially the same as those in plaintiffs' federal claims, considerations of judicial efficiency and economy will be furthered by permitting this case to proceed as a class action.

Defendants' forecast with respect to the conflicts of law problem likewise does not mandate the denial **[*35]** of class certification. In assessing plaintiffs' pendent common law claims, it is the choice of law rules of the forum which control. *Klaxon Co. v. Stuntor Electric Manufacturing Co., 313 U.S. 487 (1941).* In tort actions Connecticut applies the lex loci delicti rule. *Gibson v. Fullin, 172 Conn. 407 (1977).* It is defendants' contention that were the Court to certify the proposed class to adjudicate plaintiffs' pendent claims then, under Connecticut's choice of law rules, this Court would need to examine the law of each state where an individual purchased Stauffer stock. At no point have defendants indicated to the Court the number of different states which would be involved. n19 In any event, the choice of law issue is not presently before this Court and it would be inappropriate were the Court to decide this issue incident to plaintiffs' motion for class certification. Moreover, if in fact, this Court were required to apply the law of other states, n20 it is unclear whether there would exist substantial variations among states with regard to common law claims of fraud, deceit or negligent misrepresentations.

n19 The Court presumes, however, that the number of states involved would be quite large given the plaintiffs' allegations that over 6 million shares were traded during the class period. **[*36]**

n20 Defendants maintain that the Supreme Court's holding in *Phillips Petroleum Co. v. Shutts, U.S. , 53 U.S.L.W. 4879 (1985)* prevents this Court from simply applying the substantive law of the forum. While both sides cite the Shutts decision, they are at issue as to whether it militates in favor or against class certification. Upon careful review of the Supreme Court's opinion in Shutts, however, the Court concludes that Shutts does not affect the class certification determination in this case.

Finally, the Court notes that many courts, including those within this Circuit, have certified pendent state law claims along with federal securities law claims, without discussion. See, e.g., *Steiner v. Equimark Corp., supra, 96 F.R.D. at 606 n.2; Dolgow v. Anderson, supra, 43 F.R.D. at 479.*

Accordingly, the Court finds it appropriate at this time to certify plaintiffs' pendent claims along with their federal securities claims.

V. CONCLUSION

For the foregoing reasons, the class as defined by the plaintiffs, will be certified for all claims, including those arising under state law. Under *Rule 23(c) (1), Federal Rules of Civil Procedure*, this **[*37]** determination may be altered or amended at anytime before a decision on the merits. Accordingly, defendants may subsequently move to subdivide or decertify this class should it become unmanageable or fail to meet the requirements of Rule 23(a) and 23(b) (3). n21

n21 *Fed.R.Civ.P. 23(c) (1)* provides:

> (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

Fed.R.Civ.P. 23(c) (4) provides:

> (4) when appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

Because this Recommended Ruling is subject to review, see *28 U.S.C. Section 636*(b); *F. R. Civ. P. 72*; Rule 2 of the Local Rules for United States Magistrates, United States District Court for the District of Connecticut; the Court will hold in abeyance all questions regarding the **[*38]** appropriate form of notice to the class members, see *F.R. Civ. P. 23(c) (2)*, pending review by Chief Judge Daly. n22

n22 Also to be held in abeyance is an issue not fully addressed by the parties here -- whether the Louisiana State Employees Retirement System should be considered as a potential class member in this action.

Dated at New Haven, Connecticut, this 17th day of January, 1986.

July 28, 1986.

Having carefully reviewed the Magistrate's recommended ruling and all of the papers submitted in connection therewith, the Court hereby ADOPTS, APPROVES, and RATIFIES the Magistrate's recommended ruling granting plaintiffs' motion for class certification. Counsel is to contact Magistrate Margolis' chambers by August 20, 1986 with regard to scheduling a conference for the purpose of arranging notice to class members pursuant to *Fed. R. Civ. P. 23(c)*.

1 of 2 DOCUMENTS

GEORGE TATZ, individually and on behalf of all others similarly situated, Plaintiff, v. NANOPHASE TECHNOLOGIES CORPORATION, JOSEPH CROSS JESS JANKOWSKI, DANIEL S. BILICKI, and GINA KRITCHEVSKY, Defendants.

No. 01 C 8440

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2003 U.S. Dist. LEXIS 9982

June 12, 2003, Decided
June 13, 2003, Docketed

PRIOR HISTORY: *Tatz v. Nanophase Techs. Corp., 2002 U.S. Dist. LEXIS 19467 (N.D. Ill., Oct. 9, 2002)*

DISPOSITION: **[*1]** Plaintiff's motion for class certification pursuant to *Federal Rule of Civil Procedure 23(b)(3)* granted.

LexisNexis(R) Headnotes

COUNSEL: For GEORGE TATZ, plaintiff: Lionel Z Glancy, Richard Rothenberg, Glancy & Binkow, LLP, Los Angeles, CA.

For GEORGE TATZ, plaintiff: Patrick Vincent Dahlstrom, Pomerantz Haudek Block Grossman & Gross LLP, Chicago, IL.

For GEORGE TATZ, plaintiff: Michael Goldberg, Law Offices of Lionel Z. Glancy, Los Angeles, CA.

For NANOPHASE TECHNOLOGIES CORPORATION, JOSEPH CROSS, defendants: Michael R. Dockterman, David L. Weinstein, Wildman, Harrold, Allen & Dixon, Chicago, IL.

For NANOPHASE TECHNOLOGIES CORPORATION, JOSEPH CROSS, defendants: Samuel Seth Cohen, Duane Morris LLC, Chicago, IL.

JUDGES: Wayne R. Andersen, United States District Judge.

OPINIONBY: Wayne R. Andersen

OPINION:

MEMORANDUM OPINION AND ORDER

Plaintiff, George Tatz, brings this putative class action on behalf of himself and those similarly situated against Defendants Nanophase Technologies Corp., Joseph Cross, Jess Jankowski, Daniel Bilicki, and Gina Kritchevsky. Plaintiff now moves for class certification pursuant to *Federal Rule of Civil Procedure 23(b)(3)*. For the following reasons, Tatz's motion for **[*2]** class certification is granted.

BACKGROUND

The following factual history is taken from our prior opinion in this case denying the defendants' motion to dismiss pursuant to *Federal Rules of Civil Procedure 9(b) and 12(b)(6)* and the *Private Securities Litigation Reform Act of 1995. See Tatz v. Nanophase Technologies Corp., 2002 U.S. Dist. LEXIS 19467, 2002 WL 31269485,* at *1-3 (N.D. Ill. Oct. 9, 2002).

Defendant Nanophase Technologies Corporation (hereinafter "Nanophase") is a Delaware Corporation, with headquarters in Romeoville, Illinois, that develops, manufacturers, and sells nanocrystalline materials for commercial use. Nanophase uses its extensive proprietary technology to engineer and produce nanocrystalline materials for specific applications, including environmental catalysts. Defendant Joseph Cross was at all relevant times the Chief Executive

Officer, president, and a director of Nanophase. The other individual defendants were, at all relevant times, senior executive officers of Nanophase.

On January 21, 2001, Cross told the *Wall Street Journal* that Nanophase had met each of the goals for the year 2000 and announced that the company's 2001 targets included "tripling revenues **[*3]** again." He stressed that Nanophase needed to "increase the revenue stream as quickly as possible," not only to become profitable but also to show that customers perceive that the company's technology has value. Shortly thereafter, Nanophase was notified by BASF, its largest customer, of an "unexpected delivery rescheduling for sunscreen materials." Under the new schedule, the company would ship product to BASF primarily in the third and fourth quarters, reducing shipments by 50% in the first quarter and 30% in the second quarter. According to the complaint, because Nanophase had already reduced its 2001 revenue forecast in February 2001, the defendants needed to find some way to replace the deferred BASF revenues.

Just before the close of the first quarter, on March 28, 2001, Nanophase issued a press release stating that Nanophase "received an order for approximately $ 400,000 for a new environmental catalyst application to be filled in the first quarter of 2001." While the company anticipated "significant" revenue in 2001 from this customer, quantities and timing would not be known for a few months. Also, for "competitive reasons," the customer was not named. As a result of this **[*4]** deal, Nanophase's release of first quarter results was positive. On April 5, 2001, Nanophase reported a 73% rise in revenues from the prior year and "robust" business development, "as evidenced by our recent announcement of a new customer for environmental catalyst."

Apparently as a result of shareholder confusion concerning the recording of the revenue from the new environmental catalyst sale, defendant Jankowski, the company's acting Chief Financial Officer, explained at the beginning of the April 26, 2001 conference call how the company was able to record the revenue in the first quarter. He stated:

> ". . . $ 400,000 of first quarter 2001 product revenue related to the catalyst order that we discussed in our March 28 press release. We had positive negotiations with that customer for some time prior to finalizing arrangements and were ready to fill the order immediately upon coming to terms. The timing of this revenue seems to have been a point of confusion to some of our shareholders."

Aside from accruing the revenue in the first quarter, which could only occur, according to the company's stated policy, if shipment had made been made, other defendants also suggested **[*5]** that the product had already been shipped. Specifically, Dan Bilicki, Vice President of Sales and Marketing, stated: "The nanocrystalline material provided will be used for large-scale tests." Similarly, Cross added, "For the catalyst order . . ., we also have deliveries scheduled for the second quarter."

Based in large part on these announcements, Nanophase's stock price rose from $ 6.44 to $ 11.81 on May 18, 2001. That day, and again on May 22 and May 24, when the closing price ranged from $ 10.60 to $ 11.81, defendants Bilicki, Jankowski, and Gina Kritchevsky, Vice President of Technology and Engineering, sold 53,228 shares of stock, 33.3% of all shares traded on those days.

One week later, Nanophase terminated its exclusive relationship with the unnamed customer of the environmental catalyst, based upon "concerns that the customer is not currently adequately capitalized to fulfill its remaining obligations." The company lowered expected second quarter revenues by $ 500,000 and 2001 projections by $ 2-2.5 million. However, the company never disclosed that it had not been paid for the first quarter sale. Nevertheless, this partial disclosure caused the stock price to drop **[*6]** $ 2.06, or 17.44%, on the next trading day (June 4, 2001), on the third highest trading day volume in the purported class period.

According to the amended complaint, shareholders' suspicions were again aroused by this announcement, especially as it came just days after three executives sold 53,000 shares of stock. During a July 26, 2001 conference call, defendants again explained their actions. Cross stated during the conference call that:

> "As many of you are aware, three Officers and one Director sold some stock this past quarter . . . Stock options are a form of compensation in this company. In each case, the Officers involved had personal reasons for their decisions, as is their right to manage their own compensation. While the timing turned out to be awkward, related to our decision to exit the relationship with the European customer, all the factors that led to that decision were not known until literally hours before the press release."

Regarding the termination of the agreement, Cross said that, although a memorandum of understanding had been executed setting forth quantities and delivery dates, the

customer did not sign a "legal agreement" because it was "undercapitalized. [*7] " Again, four months after the first quarter order had been filled, defendants still had not disclosed that the customer had not yet paid Nanophase. This partial disclosure still caused a price drop of 15%, from $ 7.74 on July 25 to $ 6.60 on July 26.

On October 25, 2001, Nanophase reversed the first quarter sale, reducing third quarter revenues from $ 1.1 million to $ 700,000. Revealing the customer's identity, Nanophase explained that not only had Celox failed to pay for the order, but Celox never gave shipping instructions to Nanophase, although it had been required to do so by July. Thus, even though Nanophase had "exited the relationship" with an "undercapitalized" Celox on June 1, 2001 and had never sent Celox any product, defendants claimed that only on October 16, 2001 was "significant uncertainty" first raised as to whether Celox would "ever pay for the product it bought," and for which revenue was accrued seven months earlier. Consequently, the stock's price fell 13.5% the next day, from $ 6.20 to $ 5.36.

On March 8, 2002, the plaintiff filed an amended two count complaint against the defendants alleging violations of *Sections 10(b) and 20(a)* of the Securities Exchange Act [*8] of 1934 and *Rule 10b-5* of the Code of Federal Regulations. By order dated January 29, 2002, Tatz was appointed Lead Plaintiff and his counsel, Glancy & Binkow LLP, was appointed Lead Counsel for the class. In the instant motion, the plaintiff requests that we certify a class defined as follows:

> All persons or entities who purchased or acquired Nanophase Technologies Corporation ("Nanophase" or "Corporation") common stock during the period from April 5, 2001, through and including October 24, 2001 (the "Class Period"), and were damaged thereby. Excluded from the class are the defendants, their affiliates and any officers or directors of Nanophase or its affiliates, and any members of immediate families and their heirs, successors and assigns (the "Class").

DISCUSSION

I. Class Certification is Particularly Appropriate in Securities Cases

The Seventh Circuit Court of Appeals has liberally construed *Rule 23* in shareholder suits. *See King v. Kansas City Southern Industries, Inc., 519 F.2d 20, 25-26 (7th Cir. 1975)*. Courts in this district recognize that:

> securities fraud cases are uniquely situated to class action treatment since the [*9] claims of individual investors are often too small to merit separate lawsuits. The class action is thus a useful device in which to litigate similar claims as well as an efficient deterrent against corporate wrongdoing.

Gilbert v. First Alert, Inc., 904 F. Supp. 714, 719 (N.D. Ill. 1995) (quoting *Ridings v. Canadian Imperial Bank of Commerce Trust Co. (Bahamas), Ltd., 94 F.R.D. 147, 150 (N.D. Ill. 1982)), opinion amended on other grounds, 165 F.R.D. 81 (1996)*. A class action is often the most fair and practicable means to address claims in securities cases. *Brosious v. Children Place Retail Stores, 189 F.R.D. 138, 147 (D.N.J. 1999)* ("class actions are often the most fair and practical vehicle for plaintiffs' claims in securities suits because 'those who have been injured are in a poor position to seek legal redress' . . . because individual claims might be small in monetary value, they might not be prosecuted on an individual basis due to the costs of litigation") (quoting *Zinberg v. Washington Bancorp. Inc., 138 F.R.D. 397, 410 (D.N.J. 1990)). See also Endo v. Albertine, 147 F.R.D. 164 (N.D. Ill. 1993)* [*10] (certifying plaintiff class under *§ 11 of the 1933 Act*).

II. The Requirements of *Rule 23(a)*

A party seeking to represent a class of similarly situated individuals has the burden of establishing that class certification is proper under *Federal Rule of Civil Procedure 23. Retired Chicago Police Assoc. v. City of Chicago, 7 F.3d 584, 596 (7th Cir. 1993)*. The Court must determine the propriety of class certification with reference to the requirements of *Rule 23* and not to whether the plaintiff will ultimately prevail on the merits of his claim. "Nothing in either the language or history of *Rule 23* . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)*. However, the Court may look beyond the pleadings to determine whether the requirements of *Rule 23* have been met. *Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 677 (7th Cir. 2001)*. The Court must "understand the claims, defenses, relevant facts and applicable substantive law in [*11] order to make a meaningful determination of certification issues." *Dhamer v. Bristol-Myers Squibb Co., 183 F.R.D. 520, 530 (N.D. Ill. 1998)*.

In determining whether class certification is proper under *Rule 23*, the Court must undertake a two-step analysis. The Court must first determine whether the initial requisites for class certification delineated in *Rule 23(a)* are satisfied: (1) that the class is so numerous that joinder of all members is impracticable (numerosity); (2) that there are questions of law or fact common to the class (commonality); (3) that the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) that the representative parties will fairly and adequately protect the interests of the class (adequacy of representation). Second, the Court must determine whether the proposed class satisfies one of the sub-parts of *Rule 23(b)*. In this case, Tatz seeks certification under *Rule 23(b)(3)*, which requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods **[*12]** for the fair and efficient adjudication of the controversy," *Fed.R.Civ.P. 23(b)(3)*. With these principles in mind, we turn to whether Tatz has satisfied the requirements under *Rule 23* for class certification.

A. The Effect of Defendants' Offer of Judgment

In its opposition to the motion for class certification, the defendants argue that the motion should be denied because Tatz's claims are moot because of an offer of judgment. The substance of this argument is that since the defendants offered, in a *Rule 68* offer of judgment, the full amount of damages Tatz could recover if he prevails on the merits, all of Tatz's claims as a putative class representative are moot. Thus, according to the defendants, the class certification motion should be denied. We disagree.

The relevant portions of *Rule 68* provide that "an offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs." *Fed.R.Civ.P. 68*. It is clear from the text of this rule that its terms are not self-executing. It is within the discretion of the party to whom the offer of judgment is made to accept the offer or not within 10 days. The record in this case is **[*13]** clear that Tatz did not respond to the offer of judgment within the requisite time period. Thus, Tatz's claims technically are not moot because no offer has been accepted and recorded with the Clerk of this Court.

Further, the Seventh Circuit has addressed the impact of an offer of judgment on class certification in cases such as this. In *Greisz v. Household Bank (Illinois), N.A., 176 F.3d 1012, 1015 (7th Cir. 1999)*, the court found that an offer of judgment made before a class is certified is not sufficient to moot the class representative's claim because "an offer to one is not an offer of the *entire* relief sought by the suit . . . ." (Emphasis in original) (citing *Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 341, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980)*; *Alpern v. Utilicorp United, Inc., 84 F.3d 1525, 1539 (8th Cir. 1996))*. The court also noted that an offer of judgment may moot a plaintiff's claim if it was made prior to a motion for class certification and "before the existence of other potential plaintiffs has been announced." *Id.* (citing *Holstein v. City of Chicago, 29 F.3d 1145, 1147 (7th Cir. 1994))*. **[*14]** While it is true that the defendants made the offer of judgment to Tatz two months before the instant motion for class certification was filed, it cannot be denied that "the existence of other potential plaintiffs" had been announced. *Id.* Plaintiff's counsel performed this function by not only filing a class action complaint which specifically contemplated the existence of hundreds of plaintiffs but also by persuading this Court to enter an order appointing Tatz as lead class plaintiff - a clear message to those interested in such things that a class certification motion would be filed forthwith. Thus, we find that the offer of judgment has not mooted Tatz's claims.

B. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all class members is impracticable." *Fed.R.Civ.P. 23(a)(1)*. Because there is no mystical number at which the numerosity requirement is established, courts have found this element satisfied when the putative class consists of as few as 10 to 40 members. *See Markham v. White, 171 F.R.D. 217, 221 (N.D. Ill. 1997)* (35-40 class members); *Hendricks-Robinson v. Excel Corp., 164 F.R.D. 667, 671 (C.D. Ill. 1996)* **[*15]** (38 class members); *Riordan v. Smith Barney, 113 F.R.D. 60, 62 (N.D. Ill. 1983)* (29 class members). Although the plaintiff need not allege the exact number or identity of the class members, the plaintiff ordinarily "must show some evidence or reasonable estimate of the number of class members." *Long v. Thornton Township High Sch. Dist., 82 F.R.D. 186, 189 (N.D. Ill. 1979)*. The Court is permitted to "make common sense assumptions in order to find support for numerosity." *Cannon v. Nationwide Acceptance Corp., 1997 U.S. Dist. LEXIS 3517, 1997 WL 139472,* at *2 (N.D. Ill. March 25, 1997) (quoting *Evans v. United States Pipe & Foundry, 696 F.2d 925, 930 (11th Cir. 1983))*.

Here, the putative class contains hundreds of potential persons or entities. Some 13,000,000 shares of Nanophase's common stock were publicly traded on the NASDAQ National Market during the Class Period. It is reasonable to conclude, and no one seriously contends otherwise, that these 13,000,000 shares were likely owned by hundreds of persons or entities throughout the

United States. Thus, the numerosity requirement is satisfied.

In addition, *Rule 23(a)(1)* provides that a class **[*16]** action may be maintained only if "joinder of all members is impracticable." To demonstrate that joinder is impracticable, the class representatives "only need to show that it is extremely difficult or inconvenient to join all members of the class." C.A. Wright, A. Miller & N. Kane, FEDERAL PRACTICE AND PROCEDURE, § 1762 at 159 (2d ed. 1986). In this case, it would be extremely difficult to join the hundreds of members of the class.

C. Commonality

Rule 23(a)(2) requires that there be a common question of law or fact among class members. This Court has characterized the commonality requirement as a "low hurdle, easily surmounted." *Scholes v. Stone, McGuire & Benjamin, 143 F.R.D. 181, 185 (N.D. Ill. 1992)*(citing *Wesley v. General Motors Acceptance Corp., 1992 U.S. Dist. LEXIS 3594, 1992 WL 57948,* at *3 (N.D. Ill. 1992)). Common questions exist when, despite the existence of individual issues among class members, there is a common nucleus of operative facts. *Rosario v. Livaditis, 963 F.2d 1013, 1017-18 (7th Cir. 1992); Beale v. Edgemark Financial Corp., 164 F.R.D. 649, 654 (N.D. Ill. 1995)*. This element is satisfied when each class member's **[*17]** claim hinges on the same conduct by the defendants. *Beale, 164 F.R.D. at 658.*

The present case involves several common questions that relate to the defendants' conduct including, but not limited to: 1) whether the federal securities law were violated by the defendants' acts and omissions; 2) whether the defendants participated in and pursued the common course of conduct; 3) whether financial statements, audit reports, press releases, and other statements disseminated to the investing public and Nanophase's shareholders omitted to state and/or misrepresented material facts about the business, products, financial condition, and business prospects of Nanophase; 4) whether the defendants acted willfully, knowingly, or recklessly; and 5) whether the market price of Nanophase's common stock was artificially inflated due to the alleged conduct by the defendants. Therefore, the commonality requirement of *Rule 23(a)(2)* is satisfied.

D. Typicality

The typicality requirement of *Rule 23(a)(3)* requires the Court to determine whether the representative plaintiff's claims have the same essential characteristics as the claims of the class at large. *De la Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983).* **[*18]** *See also Beale, 164 F.R.D. at 654.* A finding that commonality exists generally results in a finding that typicality also exists. *Arenson v. Whitehall Convalescent and Nursing Home, Inc., 164 F.R.D. 659, 664 (N.D. Ill. 1996).* The Rule does not require that each member of a class suffer exactly the same injury as the named class representative. *Tidwell v. Schweiker, 677 F.2d 560, 566 (7th Cir. 1982).* Even when factual differences exist, similarity of legal theory satisfies the requirement. *See De la Fuente, 713 F.2d at 232-33.*

In their opposition to the class certification motion, the defendants have argued that this *Rule 23(a)* requirement has not been met because Tatz is subject to unique defenses which make him serving as class representative inappropriate. Specifically, the defendants contend that Tatz cannot prove that he individually relied on the allegedly fraudulent misrepresentations of the defendants. Obviously, Tatz disagrees with this argument and he contends that he need not prove individual reliance in this case because he is entitled to the "fraud on the market" presumption.

To state a claim under **[*19]** *Section 10(b)* or *Rule 10b-5*, a plaintiff must ordinarily show that he relied on a material misstatement or omission in purchasing a security. *See In re HealthCare Compare Corp. Sec. Lit., 75 F.3d 276, 280 (7th Cir. 1996).* However, the "fraud on the market" theory of reliance permits a plaintiff to pursue a *Section 10(b)/Rule 10b-5* claim without showing direct reliance on the misstatement or omission; indirect reliance may be presumed. *See Basic, Inc. v. Levinson, 485 U.S. 224, 243, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988).* The theory holds that efficient trading markets automatically establish a causal link between material misstatements or omissions and a stock purchaser's injury, and manifest that link in the stock's price. *See Eckstein v. Balcor Film Investors, 8 F.3d 1121, 1129 (7th Cir. 1993).*

The defendants argue that the "fraud on the market" presumption should not apply because shares of Nanophase were not sold in an open, developed, and efficient securities market. While the Seventh Circuit has not formally done so, numerous courts have adopted the following five factors (the so-called *Cammer* factors) to aid in the determination **[*20]** of market efficiency: 1) whether the stock trades at a high weekly volume; 2) whether securities analysts follow and report on the stock; 3) whether the stock has market makers and arbitrageurs; 4) whether the company is eligible to file SEC registration form S-3, as opposed to form S-1 or S-2; and 5) whether there are empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price. *See, e.g., Binder v. Gillespie, 184 F.3d 1059, 1065 (9th Cir. 1999); Hayes v. Gross,*

982 F.2d 104, 107 (3d Cir. 1992); *Cammer v. Bloom, 711 F. Supp. 1264, 1286-87 (D.N.J. 1989)*.

In this case, the plaintiff has submitted a declaration as part of his class certification motion which, in our estimation, establishes that the market for Nanophase's share was open and efficient. Specifically, the declaration states that: 1) during the Class Period, Nanophase stock had a trading volume of nearly nine million share with a total dollar trading volume of $ 72.08 million; 2) Nanophase stock was addressed in written reports by securities analyst Robinson Humphrey and conference **[*21]** calls during the Class Period were monitored by sell-side analysts from, at least, Robinson Humphrey, Merrill Lynch, Morgan Stanley, Tucker Anthony and CIBC World Markets, and by buy-side analysts from, at least, Target Capital Management and NWQ Investment Management; 3) 11% to 13% of the total outstanding common stock of Nanophase was held by numerous large institutional investors during the Class Period, including mutual funds, insurance companies, pension plans, banks, and other professional investors who manage equity portfolios in excess of $ 100 million; 4) Nanophase was eligible to file a Form S-3 during the Class Period and did later file a Form S-3 on June 12, 2002, and an amended Form S-3/a on September 6, 2002; and 5) the market did react to unexpected news released during the course of and just after the Class Period (i.e. statistically significant price changes to Nanophase's stock price on at least April 5, 2001, June 4, 2001, June 25, 2001, July 26, 2001, October 3, 2001, and October 25, 2001). (Declaration of Michael Marek, at PP 24-26, 30-31, 33, 41, 46-57.) Based on this declaration, we conclude that the market for Nanophase stock was open and efficient. Accordingly, **[*22]** we find that the "fraud on the market" presumption is appropriate in this case.

In addition to their market efficiency argument, the defendants also attack the typicality requirement by suggesting that Tatz's securities trading practices have left him open to unique reliance defenses. We disagree. As a general matter, we must remind the defendants that a plaintiff's claim is typical under *Rule 23(a)(3)* "if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Rosario, 963 F.2d at 1018*; *De la Fuente, 713 F.3d at 232*. Tatz's *Section 10(b)* claims are typical of those of the class because he has alleged that he, like the class he purports to represent, relied to his detriment on the defendants' misrepresentations concerning Nanophase's business relationship with Celox. The fact that Tatz "may have used somewhat distinctive buying strategies does not render him atypical with respect to this claim of overarching fraud." *Danis v. USN Communications, Inc., 189 F.R.D. 391, 397 (N.D. Ill. 1999)*; *see also Gilbert, 904 F. Supp. at 720*; **[*23]** *Ridings, 94 F.R.D. at 152*. Therefore, we find that *Rule 23(a)(3)* has been satisfied.

E. Adequacy of the Representation

To satisfy the adequacy of representation requirement, a plaintiff must show that: 1) the proposed representative does not have "antagonistic or conflicting claims with other members of the class;" 2) the proposed representative has "sufficient interest in the outcome of the case to ensure vigorous advocacy;" and 3) its counsel is "competent, qualified, experienced and able to vigorously conduct the litigation." *Sebo v. Rubenstein, 188 F.R.D. 310, 316 (N.D. Ill. 1999)* (citation omitted). "Basic consideration[s] of fairness require that a court undertake a stringent and continuing examination of the adequacy of representation by the named class representative at all stages of the litigation where absent members will be bound by the court's judgment." *Susman v. Lincoln Am. Corp., 561 F.2d 86, 89-90 (7th Cir. 1977)*. "[A] court must in the broadest sense be satisfied that the fiduciary duties and responsibilities of the class representative and class counsel will be conscientiously, fairly, and justly discharged **[*24]** in order to protect the interests of the class." *Ballan v. Upjohn Co., 159 F.R.D. 473, 479 (W.D. Mich. 1994)*.

In their opposition to the motion for class certification, the defendants have primarily argued that the adequacy of representation requirement has not been satisfied through a variety of *ad hominem* attacks on Tatz. Specifically, the defendants contend that Tatz is not an adequate class representative because he supposedly lacks even basic knowledge and understanding of the case, he is only a sop for his class action attorneys, and he lacks the personal credibility necessary to properly represent the class. We disagree with the defendants' characterization of Tatz's potential representation of this putative class.

It is clear from the transcript of Tatz's deposition that he is fully aware and in control of this litigation. He indicated that he understood that he was bringing the suit on behalf of individuals like himself who allegedly were harmed when they relied on the purported misstatements and omissions of the defendants regarding the financial condition of Nanophase. He also established during his deposition that he was the individual who was primarily **[*25]** responsible for overseeing not only the progress of the lawsuit but also the actions of class counsel. Based on what we have seen in the pleadings, we are confident that Tatz has no interests with respect to this litigation that conflict with, or are antagonistic to, the interests of absent class members and that he will vigorously prosecute this action on behalf of the class. With respect

to the defendants' somewhat spurious argument that Tatz lacks the necessary credibility to represent the class, we trust that the plaintiff is an upstanding individual who will do his best to make sure the best interests of the class are properly represented and protected.

III. The Requirements of *Rule 23(b)(3)*

The proposed class also satisfies the requirements of *Rule 23(b)(3)* which provides:

> that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Each of these requirements is met in this case.

A. Common Questions Predominate

While common questions of law or fact **[*26]** must predominate, they need not be exclusive. *Scholes v. Moore, 150 F.R.D. 133, 138 (N.D. Ill. 1993)*. To determine whether common questions predominate, courts look to whether there is a "common nucleus of operative facts." *Ziemack v. Centel Corp., 163 F.R.D. 530, 535 (N.D. Ill. 1995)* (citing *Rosario, 963 F.2d at 1018*). A court should direct its inquiry primarily toward the issue of liability, rather than damages, in determining whether common questions predominate. *See Beale, 164 F.R.D. at 658.*

The defendants' alleged misstatements and omissions of material fact to members of the class are at the core of the complaint. The issues of law and fact that flow from the defendants' alleged misstatements and omissions predominate over any individual issue. Because the many common issues will unquestionably dominate this Court's attention, common questions of law and fact predominate. *Id. See also Rosario, 963 F.2d at 1018* ("[a] common nucleus of operative fact is usually enough to satisfy the commonality requirement") (citing *Franklin v. City of Chicago, 102 F.R.D. 944, 949-50 (N.D. Ill. 1984))*; **[*27]** *Scholes, 150 F.R.D. at 138* (finding predominance of common issues notwithstanding variance in material information)

B. A Class Action is Superior

A class action in this case is superior to other means of adjudication for several reasons. First, there is a common core of law and fact pertaining to the defendants' alleged misstatements and omissions in connection with its allegedly improper accounting of the Celox sale. Accordingly, class treatment is a more efficient means of adjudicating this matter than the myriad individual suits that potentially could be filed in the absence of class certification. *See Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 105 F.R.D. 506, 508 (S.D. Ohio 1985). See also Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497, 503 (N.D. Ill. 1969)*. Indeed, any alternative to this class action could create duplication of actions, the very "evil that *Rule 23* was designed to prevent." *Califano v. Yamasaki, 442 U.S. 682, 690, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)*. Such "separate actions by each of the class members would be repetitive, wasteful and an extraordinary **[*28]** burden on the courts." *Kennedy v. Tallant, 710 F.2d 711, 718 (11th Cir. 1983)*.

Second, class members will benefit from class treatment because litigation costs are high and it is, therefore, unlikely shareholders will prosecute individual claims. *See Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161, 1164-65 (7th Cir. 1974)*. A class action is a superior means to adjudicate claims of class members who would be overwhelmed by the defendants' resources if they attempted to prosecute their individual claims. *See Chandler v. Southwest Jeep-Eagle, Inc., 162 F.R.D. 302, 310 (N.D. Ill. 1995)*; *Alexander v. Centrafarm Group, N.V., 124 F.R.D. 178, 185 (N.D. Ill. 1988)*.

Third, principles of judicial economy and efficiency favor trying this case in one action rather than forcing class members to litigate identical claims individually. *See Scholes, 143 F.R.D. at 189* ("judicial economy and efficiency, as well as consistent judgments, are achieved by certifying the class"). Under these circumstances, class certification is the best way to manage this situation which could otherwise disintegrate into piecemeal **[*29]** adjudication of many individual actions involving essentially identical questions of law and fact.

Finally, this matter does not present significant management problems. *Rule 23* was designed for this exact type of case. In this case, there is no realistic alternative to class action treatment.

CONCLUSION

For the foregoing reasons, the plaintiff's motion for class certification pursuant to *Federal Rule of Civil Procedure 23(b)(3)* is granted. Mr. George Tatz is hereby appointed as class representative. The following class is certified:

> All persons or entities who purchased or acquired Nanophase Technologies Corporation ("Nanophase" or "Corporation") common stock during the period from April 5, 2001, through and including October 24, 2001 (the "Class Period"), and were damaged thereby.

Excluded from the class are the defendants, their affiliates and any officers or directors of Nanophase or its affiliates, and any members of immediate families and their heirs, successors and assigns (the "Class).

It is so ordered.

Wayne R. Andersen

United States District Judge

Dated: June 12, 2003