



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

**Merrill Lynch B2B Internet HOLDERS**

IN RE INITIAL PUBLIC OFFERING SECURITIES  
LITIGATION

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Master File No. 21 MC 92 (SAS)

IN RE B2B INTERNET HOLDERS INITIAL PUBLIC  
OFFERING SECURITIES LITIGATION

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01 Civ. 2858 (SAS)

CONSOLIDATED AMENDED  
CLASS ACTION COMPLAINT  
FOR VIOLATIONS OF THE  
FEDERAL SECURITIES LAWS

Plaintiffs, by their undersigned attorneys, individually and on behalf of the Class described below, upon information and belief, based upon, *inter alia*, the investigation of counsel, which includes a review of public announcements made by Defendants, interviews with individuals with knowledge of the acts and practices described herein, Securities and Exchange Commission ("SEC") filings made by Defendants, press releases, and media reports, except as to Paragraph 11 applicable to the named Plaintiffs which is alleged upon personal knowledge, bring this Consolidated Amended Complaint (the "Complaint") against the Defendants named herein, and allege as follows:

**NATURE OF THE ACTION**

1. This is a securities class action alleging violations of the federal securities laws in connection with the initial public offering conducted beginning on or about February 23, 2000 and proceeding on a continuous basis thereafter (the "IPO" or the "Offering") of Depository Receipts

issued by B2B Internet HOLDERS Trust, and referred to as B2B Internet HOLDERS depositary receipts ("B2B Internet HOLDERS"), and the trading of B2B Internet HOLDERS in the aftermarket through December 6, 2000, inclusive (the "Class Period").

2. The B2B Internet HOLDERS are "basket securities." Each round lot of 100 B2B Internet HOLDERS represents an undivided beneficial ownership interest in 20 specified "B2B" Internet, or "Business to Business" Internet companies (the "Underlying Securities"). The initial offering price of the B2B Internet HOLDERS was calculated based on the price of the Underlying Securities at the close of trading the day before the IPO, and thereafter the B2B Internet HOLDERS price moved in response to changes in the prices of the Underlying Securities. Merrill Lynch, Pierce, Fenner & Smith, Incorporated ("Merrill Lynch") created the issuer, B2B Internet HOLDERS Trust. Merrill Lynch and its corporate parent, Merrill Lynch & Co., Inc. ("ML & Co.") also underwrote and distributed B2B Internet HOLDERS, selling 3,500,000 B2B Internet HOLDERS in the initial distribution.

3. The Complaint alleges that the Registration Statement/Prospectus (defined below) was materially false and misleading because it failed to disclose that the aftermarket prices for a material proportion of the stocks making up the B2B Internet HOLDERS' initial portfolio were inflated by manipulation of the type alleged in these coordinated actions.

4. In this regard, Merrill Lynch acted as a lead-manager or co-manager of the initial public offerings of the two Underlying Securities which were the largest components of B2B Internet HOLDERS. As alleged with respect to these offerings, Merrill Lynch, along with other underwriters named as Defendants in these coordinated actions, created artificial demand for those stocks by conditioning share allocations upon the requirement that customers agree to

purchase shares of those stocks in the aftermarket and, in some instances, to make those purchases at pre-arranged, escalating prices ("Tie-in Agreements").

5. In connection with the IPO, Merrill Lynch filed with the SEC a registration statement ("Registration Statement") and a prospectus ("Prospectus"). The Registration Statement and Prospectus will, at varying times, be collectively referred to hereinafter as the "Registration Statement/Prospectus." The Registration Statement/Prospectus was declared effective by the SEC on or about February 23, 2000.

6. The Registration Statement/Prospectus was materially false and misleading in that it failed to disclose, among other things further described herein, that the market price of B2B Internet HOLDERS was inflated by virtue of the fact that a material proportion of the Underlying Securities had been manipulated.

7. As part and parcel of the scheme alleged herein, Merrill Lynch also improperly utilized its analysts, who were compromised by conflicts of interest, to artificially inflate or maintain the price of certain of the Underlying Securities by issuing favorable recommendations in connection therewith, as set forth in the "Use of Analysts" section of the Master Allegations.

### **JURISDICTION**

8. This Court has jurisdiction over the subject matter of this action pursuant to Section 22 of the Securities Act of 1933 (the "Securities Act") (15 U.S.C. § 77v) and Section 27 of the Securities Exchange Act of 1934 (the "Exchange Act") (15 U.S.C. § 78aa) and 28 U.S.C. § 1331.

9. Plaintiffs bring this action pursuant to Sections 11 and 15 of the Securities Act (15 U.S.C. § 77k and §77o) and Sections 10(b) and 20(a) of the Exchange Act as amended (15

U.S.C. § 78j(b) and § 78t(a)), and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5).

Venue is proper in this District as Merrill Lynch and ML & Co. have offices in the Southern District of New York, conduct business in the Southern District of New York and many of the wrongful acts engaged in by all Defendants and alleged herein took place or originated in the Southern District of New York,

10. In connection with the acts alleged in the Complaint, Defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including, but not limited to, the mails, interstate telephone communications and the facilities of the national securities markets.

### **PARTIES**

#### **PLAINTIFFS**

11. Plaintiffs Fenyong Tan, Duan Wen Tan, and Tia Ying Mo (collectively "Plaintiffs") purchased or otherwise acquired B2B Internet HOLDRS traceable to the IPO, in the open market or otherwise during the Class Period, at prices that were artificially inflated by defendants' misconduct and were damaged thereby.

#### **DEFENDANTS**

12. Defendant ML & Co. is a holding company headquartered in New York that provides, through its subsidiaries and affiliates, investment banking, insurance and related services.

13. Defendant Merrill Lynch is the principal subsidiary of ML & Co., a licensed broker/ dealer in the United States, does business worldwide, and is controlled by ML & Co. through stock ownership, contracts, related officers and directors, and dictated or influenced the

activities of Merrill Lynch, its direct and indirect subsidiaries, affiliates and employees. According to the Report on Form 10-K405 filed by ML & Co. with the SEC for the year ended December 31, 2000, Merrill Lynch sometimes does business as "Merrill Lynch & Co."

14. Defendant Ahmass L. Fakahany ("Fakahany") was, all relevant times herein, Chief Financial Officer and Controller of Merrill Lynch. Fakahany signed the Registration Statement.

15. Defendant John L. Steffens ("Steffens") was, at all relevant times herein, Chief Executive Officer and Chairman of the Board of Merrill Lynch. Steffens signed the Registration Statement.

16. Defendant E. Stanley O'Neal ("O'Neal") was a director of Merrill Lynch. O'Neal signed the Registration Statement.

17. Defendant George A. Schieren ("Schieren") was a director of Merrill Lynch. Schieren signed the Registration Statement.

18. Defendants Fakahany, Steffens, O'Neal, and Schieren will be, at varying times, referred to herein collectively as the "Individual Defendants."

### **CLASS ACTION ALLEGATIONS**

19. Plaintiffs bring this action as a class action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of a class consisting of all persons and entities who purchased or otherwise acquired the B2B Internet HOLDRS Depository Receipts during the Class Period and were damaged thereby (the "Class").

20. Members of the Class are so numerous that joinder of all members is impracticable. Specifically:

(a) There were 3,500,000 B2B Internet HOLDERS sold in the initial distribution pursuant to the Registration Statement/Prospectus; and

(b) While the exact number of Class members is unknown to the Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe that there are hundreds, if not thousands of Class members who purchased or otherwise acquired B2B Internet HOLDERS during the Class Period.

21. Plaintiffs' claims are typical of the claims of the other members of the Class. Plaintiffs and the other members of the Class have sustained damages because of Defendants' unlawful activities alleged herein. Plaintiffs have retained counsel competent and experienced in class and securities litigation and intend to prosecute this action vigorously. The interests of the Class will be fairly and adequately protected by Plaintiffs. Plaintiffs have no interests which are contrary to or in conflict with those of the Class which Plaintiffs seek to represent.

22. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Plaintiffs know of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action. Furthermore, since the damages suffered by individual members of the Class may be relatively small, the expense and burden of individual litigation make it economically impracticable for individual litigation make it economically impracticable for the members of the Class to seek redress individually for the wrongs they have suffered.

23. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

- (a) Whether the federal securities laws were violated by Defendants' misconduct as alleged herein;
- (b) Whether the Registration Statement/Prospectus omitted and/or misrepresented material facts;
- (c) Whether Defendants participated in the course of conduct complained of herein;
- (d) Whether, solely with respect to claims brought under the Exchange Act, the Defendants named thereunder acted with scienter; and
- (e) Whether the members of the Class have sustained damages as a result of Defendants' conduct, and the proper measure of such damages.

### **SUBSTANTIVE ALLEGATIONS**

24. Plaintiffs hereby incorporate by reference the "Introductory" and "Underwriter Defendants" sections of the Master Allegations as if set forth herein at length. Plaintiffs also adopt and incorporate herein by reference the allegations set forth in the Master Allegations that specifically relate to Merrill Lynch as if set forth herein at length. Also incorporated by reference herein are the allegations contained in the Consolidated Amended and Amended Complaints filed in these coordinated proceedings regarding the initial public offerings of Internet Capital Group, Inc. (01 Civ. 3975), Ariba, Inc. (01 Civ. 2359), Commerce One, Inc. (01 Civ. 5575), VerticalNet, Inc. (01 Civ. 5241), Freemarkets, Inc. (01 Civ. 7039), Vestro Corporation (01 Civ. 3450), Agile Software Corporation (01 Civ. 9413), PurchasePro.com, Inc. (01 Civ. 10867), SciQuest.com, Inc. (01 Civ. 7415), and Retek, Inc., (01 Civ. 5225).

## **THE IPO**

25. The B2B Internet HOLDERS IPO of 3,500,000 B2B Internet HOLDERS, sold only in round lots of 100 B2B Internet HOLDERS, was priced at \$95.09 per HOLDER on or about February 23, 2000. The sale and distribution of the IPO was effected by Merrill Lynch and/or ML & Co. The Prospectus identifies the underwriter as "Merrill Lynch & Co."

26. Following the IPO, the price of B2B Internet HOLDERS rose slightly, but within days began falling, dropping as the value of the Underlying Securities plummeted. By April, 2001, when the first of these consolidated actions was brought, the HOLDERS were trading at \$5.32 per share.

## **UNLAWFUL CONDUCT IN CONNECTION WITH UNDERLYING SECURITIES**

### **THE UNDERLYING SECURITIES**

27. According to the Prospectus, the Underlying Securities consist of the following:
- (a) Internet Capital Group, Inc.
  - (b) Ariba, Inc.
  - (c) Commerce One, Inc.
  - (d) VerticalNet, Inc.
  - (e) Freemarkets, Inc.
  - (f) Careinsite, Inc.
  - (g) Scient Corporation
  - (h) Chemdex Corporation (later called Ventro Corporation)
  - (i) Agile Software Corporation
  - (j) Checkfree Holding Corporation

- (k) Sterling Commerce, Inc.
- (l) PurchasePro.com, Inc.
- (m) Silknet Software, Inc.
- (n) SciQuest.com, Inc.
- (o) Proxicom, Inc.
- (p) Retek, Inc.
- (q) QRS Corporation
- (r) Harbinger Corporation
- (s) Pegasus Systems, Inc.
- (t) Imagex.com, Inc.

**UNLAWFUL CONDUCT IN CONNECTION WITH THE INITIAL PUBLIC OFFERINGS OF THE UNDERLYING SECURITIES**

28. Consistent with their conduct on other initial public offerings as set forth in the Master Allegations, Merrill Lynch and other underwriters of certain of the Underlying Securities engaged in manipulative and/or other unlawful practices described more fully herein in connection with the initial public offerings of certain of the Underlying Securities.

29. Customers of each of these underwriters including Merrill Lynch, as a condition to obtaining an allocation of stock in the initial public offerings of certain of the Underlying Securities, were required or induced to enter into Tie-in Agreements and/or pay Undisclosed Compensation.

**ARIBA, INC.**

30. Each round lot of 100 B2B Internet HOLDERS included 7 shares of Ariba, Inc. ("Ariba"), having 18.75% of the initial value of the B2B Internet HOLDERS, making Ariba the second largest component of B2B Internet HOLDERS. Ariba conducted its initial public offering on or about June 23, 1999. Merrill Lynch was a co-manager of the Ariba initial public offering, and manipulated Ariba's common stock, as set forth in the Ariba Complaint, which had the effect of artificially inflating Ariba's stock price.

31. Ariba's initial public offering was priced at \$23.00, and traded as high as \$90.31 per share on the first day (or more than 292% above the IPO price). Ariba's common stock traded as a high as \$331.00 per share, or more than 1,339% above the initial public offering price.

**INTERNET CAPITAL GROUP, INC.**

32. Each round lot of 100 B2B Internet HOLDERS included 15 shares of Internet Capital Group, Inc. ("ICG") having 19.22% of the initial value of the B2B Internet HOLDERS, making Internet Capital Group the single largest component of B2B Internet HOLDERS. ICG conducted its initial public offering on or about August 4, 1999, and a follow-on public offering on or about December 15, 1999. Merrill Lynch was the lead manager of both the initial public offering and the follow-on offering of ICG, and manipulated ICG's common stock, as set forth in the ICG Complaint, which had the effect of artificially inflating ICG's stock price.

33. ICG's initial public offering was priced at \$12.00, and traded as high as \$27.00 per share the first day (125% above the initial public offering price). ICG traded as high as \$245 per share, an incredible 1,941% above the \$12 IPO price.

34. Merrill Lynch was further motivated to manipulate the ICG offering in order to reap the benefit of future investment banking business with ICG. On February 24, 2000, just over two months after the ICG follow-on offering, ICG acquired eCredit.com in an all-stock deal valued at \$577 million at the time of the announcement (though the compensation was only worth \$198 million when the acquisition was completed in June, 2000). Merrill Lynch advised ICG in that transaction, and received substantial fees in connection therewith.

**SCIQUEST.COM, INC.**

35. Each round lot of 100 B2B Internet HOLDERS included 3 shares of SciQuest.com, Inc. ("SciQuest"), having 2.34% of the initial value of the B2B Internet HOLDERS.

36. SciQuest conducted its initial public offering of 7,500,000 shares on or about November 19, 1999. Merrill Lynch was a member of the underwriting syndicate of the SciQuest initial public offering and manipulated SciQuest's common stock, as set forth in the SciQuest Complaint, which had the effect of artificially inflating SciQuest's stock price.

37. SciQuest's initial public offering was priced at \$16.00, and traded on the first day as high as \$38.875 per share (or more than 142% above the initial public offering price). During the Class Period SciQuest's common stock traded as a high as \$91.625 per share, or more than 472% above the initial public offering price.

**COMMERCE ONE, INC.**

38. Each round lot of 100 B2B Internet HOLDERS included 6 shares of Commerce One, Inc. ("Commerce One"), having 11.87% of the initial value of the B2B Internet HOLDERS, making Commerce One, Inc. the third largest component of B2B Internet HOLDERS. Commerce One conducted its initial public offering of 3,300,000 shares on or about July 1, 1999. The sale

and distribution of the offering was effected by an underwriting syndicate consisting of, among others, DLJ and Piper Jaffray.

39. Commerce One's initial public offering was priced at \$21 per share, and traded as high as \$74.125 per share the first day (252% above the IPO price). Commerce One's common stock traded as a high as \$625.50 per share in December 1999, just five months after the Offering -- nearly 29 times the IPO price. After a 3-for-1 stock split, on December 28, 1999, Commerce One traded as high as \$933.00 per share (on a pre-split basis).

40. Merrill Lynch was a member of the underwriting syndicate in 9 manipulated offerings in which DLJ was the bookrunner, and in one manipulated offering in which Piper Jaffray was the bookrunner, and knew or was reckless as to the fact that the Commerce One initial public offering was manipulated.

#### **FREEMARKETS, INC.**

41. Each round lot of 100 B2B Internet HOLDERS included 3 shares of Freemarkets, Inc. ("Freemarkets"), having 6.51% of the initial value of the B2B Internet HOLDERS. Freemarkets conducted its initial public offering of 3,600,000 shares on or about December 9, 1999. The sale and distribution of this firm commitment offering was effected by an underwriting syndicate consisting of, among others, Goldman, Morgan Stanley, DLJ, Deutsche Bank and Robertson Stephens.

42. Freemarkets' initial public offering was priced at \$48.00 and traded as high as \$293.00 per share on the first day of trading (more than 510% above the offering price). During the Class Period, Freemarkets' common stock traded as a high as \$370 per share, or more than 670% above the initial public offering price.

43. Merrill Lynch was a member of the underwriting syndicate in 23 manipulated offerings in which Goldman was the bookrunner, 13 by Morgan Stanley, 9 by DLJ, 6 by Deutsche Bank and 2 by Robertson Stephens, and knew or was reckless as to the fact that the Freemarkets initial public offering was manipulated.

**RETEK, INC.**

44. Each round lot of 100 B2B Internet HOLDERS included 3 shares of Retek, Inc. ("Retek"), having 1.87% of the initial value of the B2B Internet HOLDERS. Retek, held an initial public offering of 5,500,000 shares on or about November 17, 1999. The sale and distribution of this firm commitment offering was effected by an underwriting syndicate consisting of, among others, CSFB, Robertson Stephens and Piper Jaffray.

45. Retek's initial public offering of was priced at \$15.00, and traded as high as \$40.00 per share the first day (more than 166% above the initial public offering price). During the Class Period, Retek's common stock traded as a high as 122.8125, or more than 718% above the IPO price. Retek was a spin-off from HNC Software, which retained approximately 40 million shares of common stock. At the \$87 per share trading price during early December, 1999, the stake in Retek owned by HNC was worth \$3.48 billion -- more than HNC's total market capitalization.

46. Merrill Lynch was a member of the underwriting syndicate in 14 manipulated offerings in which CSFB was the bookrunner, 2 by Robertson Stephens, and one by Piper Jaffray, and knew or was reckless as to the fact that the Retek initial public offering was manipulated.

## **VENTRO CORPORATION**

47. Each round lot of 100 B2B Internet HOLDERS included 2 shares of Chemdex Corporation, later known as Ventro Corporation ("Ventro"), having 3.55% of the initial value of the B2B Internet HOLDERS. Ventro conducted its initial public offering on or about July 26, 1999. The sale and distribution of the offering was effected by an underwriting syndicate consisting of, among others, Morgan Stanley and Robertson Stephens (BancBoston).

48. Ventro's initial public offering was priced at \$15 per share. On the day of the IPO, the stock traded as high as \$34.875 per share, or more than 132% above the IPO price. During the Class Period on February 25, 2000, Ventro's common stock traded as a high as \$243.50 per share, or more than 1,523% above the IPO price.

49. Merrill Lynch was a member of the underwriting syndicate in 13 manipulated offerings in which Morgan Stanley was the bookrunner, and two by Robertson Stephens, and knew or was reckless as to the fact that the Ventro initial public offering was manipulated.

## **PURCHASEPRO.COM, INC.**

50. Each round lot of 100 B2B Internet HOLDERS included 2 shares of PurchasePro.Com, Inc. ("PurchasePro") having 2.63% of the initial value of the B2B Internet HOLDERS. PurchasePro conducted its initial public offering on or about September 13, 1999 and a follow-on offering on February 10, 2000 of 3,000,000 shares of PurchasePro at \$80.00 per share. The sale and distribution of the offering was effected by an underwriting syndicate consisting of, among others, Prudential Securities, Jeffries, DLJ, J.P. Morgan and Salomon.

51. PurchasePro's initial public offering was priced at \$12 per share. On the day of the IPO, the stock traded as high as \$30.50 per share, or more than 154% above the IPO price.

During the Class Period on December 10, 1999, two months before the Secondary Offering, PurchasePro reached a high of \$199 per share, a staggering 1558% above the IPO price.

52. Merrill Lynch was a member of the underwriting syndicate in 9 manipulated offerings in which DLJ was the bookrunner and 7 by Salomon, and knew or was reckless as to the fact that the PurchasePro initial public offering was manipulated.

**AGILE SOFTWARE, INC.**

53. Each round lot of 100 B2B Internet HOLDERS included 2 shares of Agile Software, Inc. ("Agile") having 3.34% of the initial value of the B2B Internet HOLDERS. Agile conducted its initial public offering of 3 million shares on or about August 19, 1999, and a secondary offering, selling 2.5 million shares on December 13, 1999. The sale and distribution of the offering was effected by an underwriting syndicate consisting of, among others, Morgan Stanley, Deutsche Bank, and H&Q.

54. Agile's initial public offering was priced at \$21.00 per share. On the day of the IPO, the stock traded as high as \$55.25 per share, or more than 163% above the IPO price. During the Class Period, Agile traded as high as \$217.23 per share, or more than 934% above the IPO price.

55. Merrill Lynch was a member of the underwriting syndicate in 13 manipulated offerings in which Morgan Stanley was the bookrunner, 6 by DB Alex. Brown and 7 by Salomon, and knew or was reckless as to the fact that the Agile initial public offering was manipulated.

**VERTICALNET, INC.**

56. Each round lot of 100 B2B Internet HOLDERS included 3 shares of VerticalNet, Inc. ("VerticalNet"), having 6.72% of the initial value of the B2B Internet HOLDERS. VerticalNet held an initial public offering of 3,500,000 shares on or about February 10, 1999. The sale and distribution of this firm commitment offering was effected by an underwriting syndicate consisting of, among others, Lehman Brothers, H&Q and Volpe Brown.

57. VerticalNet's initial public offering of was priced at \$16.00, and traded as high as \$55.4375 per share the first day (more than 246% above the initial public offering price). During the Class Period, VerticalNet's common stock traded as a high as \$296.75 per share (or \$593.50 giving effect to a 2:1 split), or more than 3609% above the IPO price, on March 10, 2000.

58. Merrill Lynch was a member of the underwriting syndicate in 11 manipulated offerings in which Lehman was the bookrunner, and knew or was reckless as to the fact that the VerticalNet initial public offering was manipulated.

**MERRILL LYNCH USED ITS ANALYSTS TO MANIPULATE THE  
AFTERMARKET TRADING OF CERTAIN OF  
THE UNDERLYING SECURITIES**

59. On August 30, the date of the expiration of the "quiet period" with respect to the ICG initial public offering, Merrill Lynch issued a "NT Accumulate/LT Buy recommendation.

60. On July 19, 1999 shortly after the expiration of the "quiet period" with respect to the Ariba initial public offering, Merrill Lynch issued a "Near Term Accumulate/Long Term Buy" recommendation.

**THE REGISTRATION STATEMENT/PROSPECTUS  
WAS MATERIALLY FALSE AND MISLEADING**

61. The Registration Statement/Prospectus stated that "the initial public offering price for a round-lot of 100 B2B Internet HOLDERS will equal the sum of the closing market price on the primary trading market on February 23, 2000 for each deposited share multiplied by the share amount specified in this prospectus, plus an underwriting fee." This statement was materially false and misleading in that it failed to disclose that the price at which the B2B Internet HOLDERS were sold to the public was artificially inflated, and was the product of a manipulated market for some of the Underlying Securities. As set forth above, Merrill Lynch had required or induced customers to agree to Tie-in Agreements and/or pay Undisclosed Compensation in connection with the initial public offerings of certain of the Underlying Securities, thereby artificially inflating the price of those securities, and consequently the price of the B2B Internet HOLDERS.

**THE END OF THE CLASS PERIOD**

62. On December 6, 2000, The Wall Street Journal published an article concerning an investigation of various improper initial public offering practices.

**DEFENDANTS' UNLAWFUL CONDUCT  
ARTIFICIALLY INFLATED THE PRICE OF  
B2B INTERNET HOLDERS**

63. Defendants' conduct alleged herein had the effect of inflating the price of B2B Internet HOLDERS, above the price that would have otherwise prevailed in a fair and open market throughout the Class Period.

**VIOLATIONS OF THE SECURITIES ACT**

**FIRST CLAIM**

**(AGAINST ALL DEFENDANTS FOR VIOLATION OF  
SECTION 11 RELATING TO THE  
REGISTRATION STATEMENT)**

64. Plaintiffs repeat and reallege the allegations set forth above as if set forth fully herein, except to the extent that any such allegation may be deemed to sound in fraud.

65. This Claim is brought pursuant to Section 11 of the Securities Act, 15 U.S.C. § 77k, on behalf of Plaintiffs and other members of the Class who purchased or otherwise acquired B2B Internet HOLDERS traceable to the IPO against ML & Co., Merrill Lynch and the Individual Defendants and were damaged thereby.

66. As set forth above, the Registration Statement, when it became effective, contained untrue statements of material fact and omitted to state material facts required to be stated therein or necessary to make the statements therein not misleading.

67. Merrill Lynch and ML & Co. are each liable as an underwriter in connection with the IPO.

68. Each of the Individual Defendants, either personally or through an attorney-in-fact, signed the Registration Statement.

69. The Defendants named in this Claim are liable to Plaintiffs and other members of the Class who purchased or otherwise acquired B2B Internet HOLDERS traceable to the IPO.

70. By virtue of the foregoing Plaintiffs and other members of the Class purchased or otherwise acquired B2B Internet HOLDERS traceable to the IPO and did not know of the untrue statements or omissions of material facts complained of herein.

71. This Claim was brought within one year after discovery of the untrue statements and omissions in the Registration Statement, or after such discovery should have been made by the exercise of reasonable diligence, and within three years after the B2B Internet HOLDERS were first bona fide offered to the public.

**SECOND CLAIM**

**(AGAINST THE INDIVIDUAL DEFENDANTS  
FOR VIOLATION OF SECTION 15 RELATING TO  
THE REGISTRATION STATEMENT)**

72. Plaintiffs repeat and reallege the allegations set forth above in the First Claim as if set forth fully herein.

73. This Claim is brought against the Individual Defendants pursuant to Section 15 of the Securities Act, 15 U.S.C. § 77o, on behalf of Plaintiffs and other members of the Class who purchased or otherwise acquired B2B Internet HOLDERS traceable to the IPO.

74. Merrill Lynch is liable under Section 11 of the Securities Act as set forth in the First Claim herein with respect to the IPO.

75. Each of the Individual Defendants was a control person of Merrill Lynch with respect to the IPO by virtue of that individual's position as a senior executive officer and/or director of Merrill Lynch.

76. The Individual Defendants, by virtue of their managerial and/or board positions with Merrill Lynch, controlled Merrill Lynch as well as the contents of the Registration Statement at the time of the IPO. Each of the Individual Defendants was provided with or had unlimited access to copies of the Registration Statement and had the ability to either prevent its issuance or cause it to be corrected.

77. As a result, the Individual Defendants are liable under Section 15 of the Securities Act for Merrill Lynch's primary violation of Section 11 of the Securities Act.

78. By virtue of the foregoing, Plaintiffs and other members of the Class who purchased or otherwise acquired B2B Internet HOLDRS traceable to the IPO are entitled to damages against the Individual Defendants.

### **VIOLATIONS OF THE EXCHANGE ACT**

#### **APPLICABILITY OF PRESUMPTION OF RELIANCE: FRAUD-ON-THE-MARKET DOCTRINE**

79. Plaintiffs will rely, in part, upon the presumption of reliance established by the fraud-on-the-market doctrine in that:

(a) Defendants named under Claims brought pursuant to the Exchange Act made public misrepresentations or failed to disclose material facts during the Class Period regarding B2B Internet HOLDRS as alleged herein;

(b) The omissions and misrepresentations were material;

(c) Following the IPO and continuing throughout the Class Period, B2B Internet HOLDRS were traded on a developed national stock exchange, namely the American Stock Exchange, which is an open and efficient market, and the Underlying Securities each traded on the Nasdaq National Market, which is an open and efficient market;

(d) Merrill Lynch filed periodic reports with the SEC regarding B2B Internet HOLDRS;

(e) The Underlying Securities were followed by numerous securities analysts;

(f) The market rapidly assimilated information about the Underlying Securities, which were publicly available and communicated by the foregoing means and that information was promptly reflected in the price of the Issuer's common stock; and

(g) The misrepresentations and omissions and the manipulative conduct alleged herein would tend to induce a reasonable investor to misjudge the value of the Underlying Securities and of the B2B Internet HOLDERS.

### **THE DEFENDANTS ACTED WITH SCIENTER**

80. As alleged herein, the Defendants acted with scienter in that they: (a) knowingly or recklessly engaged in acts and practices and a course of conduct which had the effect of artificially inflating the price of some of the Underlying Securities, and therefore inflated both the initial offering price and the aftermarket price of B2B Internet HOLDERS; (b) knowingly or recklessly disregarded that the Registration Statement/Prospectus as set forth herein was materially false and misleading; and/or (c) knowingly or recklessly misused Merrill Lynch's analysts in connection with the Underlying Securities.

81. In addition, each of the Defendants named in this Claim violated the federal securities laws as they sold the HOLDERS in and/or after the IPO and/or recommended the Underlying Securities while in possession of material, non-public information which they failed to disclose.

82. As evidenced by the public statements of CSFB published by The Wall Street Journal on or about June 29, 2001, the practices employed by Merrill Lynch and the other underwriters of the initial public offerings of the Underlying Securities, were widespread throughout the financial underwriting community. In this regard, CSFB, which recently settled

regulatory claims of misconduct concerning its initial public offering allocation practices, stated during the pendency of the government's investigation, "[w]e continue to believe our [initial public offering] allocation policies are consistent with those employed by others in the industry."

83. Merrill Lynch knew from its direct participation in the manipulation of the Ariba and Internet Capital Group initial public offerings and others, or recklessly disregarded as a result of its experience with other manipulated offerings as set forth above and in the "Matrix" section of the Master Allegations, that the manipulations alleged herein were taking place with respect to the Underlying Securities and were not disclosed in the Registration Statement or Prospectus, in the registration statements or prospectuses issued in connection with the initial public offerings of the Underlying Securities, or elsewhere during the Class Period.

84. As required by NASD Conduct Rule 3010(c), Merrill Lynch had in place compliance procedures so as to better inform itself whether it was acting in the unlawful manner alleged herein.

85. Senior management of ML & Co. and Merrill Lynch, including Fakahany and Steffens had regular access to and received timely written reports tracking the account activity of each of its customers. By comparing the ratio of brokerage firm commission income per account with the amount of dollars invested by such account that received allocations of shares in the IPO, senior management including Fakahany and Steffens knew, or was reckless in not knowing, that such commissions were disproportionately high relative to that customer's total investment and imposed on management a duty of inquiry as is customary in the industry. Such inquiry would have revealed the illegal practices described herein. Any failure to conduct such inquiry was, at

the very least, reckless and further demonstrates that ML & Co. and Merrill Lynch knew or recklessly disregarded the misconduct alleged herein.

86. ML & Co., Merrill Lynch, Fakahany and Steffens also had the motive and opportunity to engage in the wrongful conduct described herein because such conduct permitted Merrill Lynch to receive an underwriting fee of 2% of the value of the IPO, or \$6,656,300 million based on the initial Distribution. In November, 2000, Merrill Lynch analyst Henry Blodget wrote in an internal e-mail that deals in which Merrill Lynch technology analysts had participated produced "about \$115mm of revenue (including \$25mm from the issuance of two HOLDRS baskets)."

### **THIRD CLAIM**

#### **(FOR VIOLATIONS OF SECTION 10(b) AND RULE 10b-5 THEREUNDER AGAINST ML & CO., MERRILL LYNCH, FAKAHANY AND STEFFENS BASED UPON MATERIALLY FALSE AND MISLEADING STATEMENTS AND OMISSIONS OF MATERIAL FACTS )**

87. Plaintiffs repeat and reallege the allegations set forth above as though fully set forth herein at length except for Claims brought pursuant to the Securities Act.

88. This Claim is brought pursuant to Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, on behalf of Plaintiffs and other members of the Class against ML & Co., Merrill Lynch, Fakahany and Steffens. This Claim is based upon materially false and misleading statements and omissions of material facts made by these Defendants during the Class Period.

89. The Defendants named in this Claim: (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of material fact and/or omitted to state material facts

necessary to make the statements not misleading; and (c) engaged in acts, practices and a course of business which operated as a fraud and deceit upon the Plaintiffs and other members of the Class in violation of Section 10(b) of the Exchange Act and Rule 10b-5.

90. During the Class Period, the Defendants named in this Claim carried out a plan, scheme and course of conduct which was intended to and, throughout the Class Period, did: (a) deceive the investing public, including Plaintiffs and other Class members, as alleged herein; (b) artificially inflate and maintain the market price of and demand for B2B Internet HOLDERS; and (c) induce Plaintiffs and other members of the Class to purchase or otherwise acquire B2B Internet HOLDERS at artificially inflated prices. In furtherance of this unlawful course of conduct, the Defendants named in this Claim took the actions set forth herein.

91. These Defendants, directly and indirectly, by the use of means or instrumentalities of interstate commerce and/or of the mails, engaged and participated in a continuous course of conduct to conceal material information as set forth more particularly herein, and engaged in transactions, practices and a course of business which operated as a fraud and deceit upon the Plaintiffs and other members of the Class.

92. The Defendants named in this Claim prepared and reviewed the Registration Statement/Prospectus. In addition, the Defendants each had access to drafts of the Registration Statement/Prospectus prior to the filing of said document with the SEC and the dissemination to the public.

93. The material misrepresentations and/or omissions were made knowingly or recklessly and for the purpose and effect of, *inter alia*: (a) securing and concealing the Tie-in Agreements; (b) securing and concealing the Undisclosed Compensation; (c) concealing that the

price and demand for the Secondary Offering was artificially inflated; and/or (d) concealing that certain of the Underwriter Defendants and their analysts who reported on the Issuer's stock had material conflicts of interest.

94. As a result of making affirmative statements in the Registration Statement/Prospectus, or otherwise, or participating in the making of such affirmative statements, the Defendants named in this Claim had a duty to speak fully and truthfully regarding such representations and to promptly disseminate any other information necessary to make the statements made, in the light of the circumstances in which they were made, not misleading.

95. The Defendants named in this Claim also had a duty to disclose the material, non-public information complained of herein and in the Complaints incorporated herein by reference for certain of the Underlying Securities, or to abstain from selling B2B Internet HOLDERS in the IPO or trading B2B Internet HOLDERS in the aftermarket while in possession of such information.

96. By reason of the foregoing, the Defendants named in this Claim violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.

97. As a result of the dissemination of materially false and misleading information described above, Plaintiffs and other members of the Class purchased or otherwise acquired B2B Internet HOLDERS during the Class Period without knowledge of the fraud alleged herein at artificially inflated prices and were damaged thereby.

#### **FOURTH CLAIM**

#### **(FOR VIOLATIONS OF SECTION 20(a) AGAINST FAKAHANY AND STEFFENS BASED UPON MATERIALLY FALSE AND MISLEADING STATEMENTS AND OMISSIONS OF MATERIAL FACTS)**

98. Plaintiffs repeat and reallege the allegations set forth above as though fully set forth herein at length except for Claims brought pursuant to the Securities Act.

99. Fakahany and Steffens acted as controlling persons of Merrill Lynch within the meaning of Section 20(a) of the Exchange Act as alleged herein and culpably participated in the wrongdoing. By virtue of their high-level positions, and their ownership and contractual rights, participation in and/or awareness of Merrill Lynch's operations and/or intimate knowledge of the underwriting of the IPO, these Defendants had the power to influence and control and did influence and control, directly or indirectly, the decision-making of Merrill Lynch, including the content and dissemination of the various documents that contain the materially false and misleading statements and/or omissions complained of herein. The Defendants named in this Claim were provided with or had unlimited access to copies of these documents prior to or shortly after they were filed with the SEC and/or disseminated to the public and had the ability to prevent their filing and/or dissemination or cause the documents to be corrected.

100. Each of the Defendants named in this Claim had direct and supervisory involvement in the day-to-day operations of Merrill Lynch and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the securities violations herein, and exercise the same.

101. By virtue of their positions as controlling persons of Merrill Lynch, Fakahany and Steffens are liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate result of this wrongful conduct, Plaintiffs and other members of the Class were damaged thereby.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs, on behalf of themselves and on behalf of the Class, pray for judgment as follows:

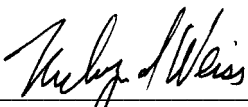
- A. Declaring this action to be a class action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure and certifying Plaintiffs as representatives of the Class and counsel as class counsel;
- B. Awarding damages to Plaintiffs and the Class;
- C. Awarding Plaintiffs and the Class, prejudgment and post-judgment interest, as well as their reasonable attorneys' and experts' witness fees and other costs;
- D. Awarding such other and further relief as this Court may deem just and proper.

**JURY DEMAND**

Plaintiffs demand a trial by jury.

DATED: April 19, 2002

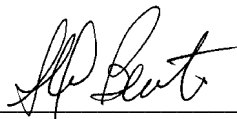
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