

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

**Engage Technologies, Inc.**

---

IN RE INITIAL PUBLIC OFFERING SECURITIES  
LITIGATION

---

:  
: Master File No. 21 MC 92 (SAS)  
:

---

IN RE ENGAGE TECHNOLOGIES, INC. INITIAL  
PUBLIC OFFERING SECURITIES LITIGATION

---

:  
: 01 Civ. 8404 (SAS)  
:  
: SECOND CONSOLIDATED  
: AMENDED CLASS ACTION  
: COMPLAINT FOR VIOLATIONS  
: OF THE FEDERAL SECURITIES  
: LAWS

Plaintiffs, by their undersigned attorneys, individually and on behalf of the Classes 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 12 applicable to the named Plaintiffs which is alleged upon personal knowledge, bring this Second 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 on or about July 20, 1999 (the “IPO” or the “Offering”) of 6,000,000 shares of Engage Technologies, Inc. (now known as Engage Inc. and herein referred to as “Engage” or the “Issuer”) and the trading of Engage common stock in the aftermarket from the date of the IPO through December 6, 2000, inclusive (the “Class Period”).

2. In connection with the IPO, the underwriters named as Defendants herein participated in a scheme to improperly enrich themselves through the manipulation of the aftermarket trading in Engage common stock following the IPO.

3. In this regard, these underwriters created artificial demand for Engage stock by conditioning share allocations in the IPO upon the requirement that certain customers agree to purchase shares of Engage in the aftermarket and, in some instances, to make those purchases at prearranged, escalating prices (“Tie-in Agreements”).

4. As part of the scheme, these underwriters required certain customers to repay a material portion of profits obtained from selling IPO share allocations in the aftermarket 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 these underwriters, including, but not limited to, secondary (or add-on) offerings that would not be purchased but for the unlawful scheme alleged herein. (Transactions “(a)” through “(c)” above will be, at varying times, collectively referred to hereinafter as “Undisclosed Compensation”).

5. In connection with the IPO, Engage filed with the SEC a registration statement (“Registration Statement”) and a prospectus (“Prospectus”). The Registration Statement and Prospectus will be, at varying times, collectively referred to hereinafter as the “Registration Statement/Prospectus.” The Registration Statement/Prospectus was declared effective by the SEC on or about July 19, 1999.

6. The Registration Statement/Prospectus was materially false and misleading in that it failed to disclose, among other things further described herein, that the underwriters named as

Defendants herein had required from certain customers Tie-in Agreements in allocating shares in the IPO and/or would receive Undisclosed Compensation in connection with the IPO.

7. Unbeknownst to investors, as part and parcel of the scheme alleged herein, certain of the underwriters named as Defendants herein improperly utilized their analysts to artificially inflate or maintain the price of Engage stock by issuing favorable recommendations in analyst reports.

8. The Issuer and Additional Persons (defined below) benefited from the manipulative and deceptive schemes described herein and knew of or recklessly disregarded the conduct complained of herein through their participation in, among other things, the “Road Show” process by which underwriters generate interest in public offerings.

### **JURISDICTION**

9. 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.

10. Plaintiffs bring this action pursuant to Section 11 of the Securities Act (15 U.S.C. § 77k) and Section 10(b) of the Exchange Act as amended (15 U.S.C. § 78j(b)), and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5). Venue is proper in this District as many of the material acts and injuries alleged herein occurred within the Southern District of New York.

11. 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**

12. Plaintiffs Krikor Kasbarian, Stathis Pappas and Eva Marie Roberto (collectively “Plaintiffs”) purchased or otherwise acquired shares of Engage common stock 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.

**DEFENDANTS**

**THE UNDERWRITER DEFENDANTS**

13. Plaintiffs hereby incorporate by reference the “Underwriter Defendants” section of the Amended Master Allegations (“Master Allegations”), as if set forth herein at length.

14. The following investment banking firms acted in the following capacities with respect to the Offering and substantially participated in the unlawful conduct alleged herein:

**POSITION**

**NAME OF UNDERWRITER**

LEAD MANAGER

Goldman Sachs

CO-MANAGER

J.P. Morgan (as successor-in-interest to H&Q)

H&Q

Bear Stearns

SYNDICATE MEMBERS

RBC Dain Rauscher (as successor-in-interest to Dain Rauscher)

Dain Rauscher

DB Alex. Brown (as successor-in-interest to Deutsche Bank)

Deutsche Bank

CSFB (as successor-in-interest to DLJ)

DLJ

Prudential

15. The defendants identified in the preceding paragraph will be, at varying times, collectively referred to hereinafter as the “Underwriter Defendants.”

**THE ISSUER DEFENDANT**

16. At the time of the Offering, Defendant Engage was a Delaware corporation with its principal executive offices located in Andover, Massachusetts. Engage described itself in the Registration Statement/Prospectus as a company that “provides products and services that enable customers to create and use profiles of individual Web visitors to target advertisements, content and e-commerce offerings.” On or about April 28, 2000, Engage changed its name from Engage Technologies, Inc. to Engage, Inc.

**ADDITIONAL PERSONS**

17. Paul L. Schaut (“Schaut”) served, at the time of the Offering, as the Issuer’s Chief Executive Officer, President and a member of the Board of Directors. Schaut signed the Registration Statement.

18. Stephen A. Royal (“Royal”) served, at the time of the Offering, as the Issuer’s Chief Financial Officer and Treasurer. Royal signed the Registration Statement.

19. David S. Wetherell (“Wetherell”) served, at the time of the Offering, as the Issuer’s Chairman of the Board. Wetherell signed the Registration Statement.

20. David Fish (“Fish”) served, at the time of the Offering, as the Issuer’s Chief Operating Officer.

21. Schaut, Royal, Wetherell and Fish are collectively referred to herein as the “Additional Persons.”

### **CLASS ACTION ALLEGATIONS**

22. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of a class consisting of all persons and entities that purchased or otherwise acquired shares of the Issuer Defendant in the aftermarket during the Class Period and were damaged, excluding any individual or entity that received from any of the underwriter defendants identified in the Master Allegations an allocation of shares in any of the initial public offerings listed in Exhibit C thereto. 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.

23. Plaintiffs also bring this action on behalf of a class consisting of all individuals and entities that purchased or otherwise acquired shares of the Issuer Defendant in the aftermarket during the Class Period, excluding any individual or entity that received from any of the underwriter defendants identified in the Master Allegations an allocation of shares from the “institutional pot” in any of the initial public offerings listed in Exhibit C thereto. Certification of this Class is sought with respect to issues pursuant to Rule 23(c)(4), including:

(a) Whether the federal securities laws were violated by Defendants;

(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, with respect to the 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.

24. Members of the Classes are so numerous that joinder of all members is impracticable.

(a) Millions of shares of common stock were sold in the IPO and the stock was actively traded during the Class Period; 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 the Issuer's common stock during the Class Period.

25. Plaintiffs' claims are typical of the claims of the other members of the Classes. Plaintiffs and the other members of the Classes 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 Classes will be fairly and adequately protected by Plaintiffs. Plaintiffs have no interests that are contrary to or in conflict with those of the Classes which Plaintiffs seek to represent.

26. 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 Classes may be relatively small, the

expense and burden of individual litigation make it economically impracticable for the members of the Classes to seek redress individually for the wrongs they have suffered.

27. The names and addresses of the record purchasers of the Issuer's common stock are available from the Issuer, its agents, and the underwriters who sold and distributed the Issuer's common stock in the IPO. Notice can be provided to Class members *via* a combination of published notice and first class mail using techniques and forms of notice similar to those customarily used in class actions arising under the federal securities laws.

### **SUBSTANTIVE ALLEGATIONS**

28. Plaintiffs hereby incorporate by reference the "Introductory" section 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 each of the Underwriter Defendants, as if set forth herein at length.

### **THE IPO**

29. Engage's IPO of 6,000,000 shares was priced at \$15.00 on or about July 19, 1999. The sale and distribution of this firm commitment offering was effected by an underwriting syndicate that included the Underwriter Defendants. Additionally, Engage granted the underwriting syndicate an option to purchase 600,000 additional shares at the initial offering price less underwriting discounts and commissions.

30. On the day of the IPO, the price of Engage stock shot up dramatically, trading as high as \$47.00 per share, or more than 213% above the IPO price on substantial volume. This "impressive" debut, however, was not the result of normal market forces; rather, it was the result of Defendants' unlawful practices more fully described herein.

31. The unlawful practices continued during the Class Period as the price of Engage rose dramatically. During the Class Period, Engage's common stock traded as high as \$189 per share, or more than 1160% above the IPO price.

**UNLAWFUL CONDUCT IN CONNECTION WITH THE IPO**

32. Consistent with their conduct in other initial public offerings, as set forth in the Master Allegations, the Underwriter Defendants engaged in manipulative and/or other unlawful practices described more fully herein in connection with the Engage IPO.

33. Certain customers of each of the Underwriter Defendants, as a condition to obtaining an allocation of stock in the IPO, were required or induced to enter into Tie-in Agreements and/or pay undisclosed Compensation.

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

34. In conducting the IPO, the Underwriter Defendants violated Regulation M promulgated pursuant to the Exchange Act. Rule 101(a) of Regulation M reads as follows:

*Unlawful Activity.* In connection with a distribution of securities, it shall be unlawful for a distribution participant or an affiliated purchaser of such person, directly or indirectly, to bid for, purchase, or attempt to induce any person to bid for or purchase, a covered security during the applicable restricted period.

17 C.F.R § 242.101.

35. As explained by the SEC's Staff Legal Bulletin No. 10, dated August 25, 2000, tie-in agreements violate Regulation M:

**Tie-in agreements are a particularly egregious form of solicited transactions prohibited by Regulation M.** As far back as 1961, the Commission addressed reports that certain dealers participating in distributions of new issues had been making allotments to their customers only if such customers agreed to make some comparable purchase in the open market after the issue was initially sold. The Commission said that such agreements may violate the anti-

manipulative provisions of the Exchange Act, particularly Rule 10b-6 (which was replaced by Rules 101 and 102 of Regulation M) under the Exchange Act, and may violate other provisions of the federal laws.

**Solicitations and tie-in agreements for aftermarket purchases are manipulative because they undermine the integrity of the market as an independent pricing mechanism for the offered security.** Solicitations for aftermarket purchases give purchasers in the offering the impression that there is a scarcity of the offered securities. This can stimulate demand and support the pricing of the offering. Moreover, traders in the aftermarket will not know that the aftermarket demand, which may appear to validate the offering price, has been stimulated by the distribution participants. Underwriters 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. (Emphasis added).

36. In particular, the Registration Statement/Prospectus stated:

In connection with this offering, the underwriters may purchase and sell shares of common stock in the open market. These transactions may include short sales, stabilizing transactions and purchases to cover positions created by short sales. Short sales involve the sale by the underwriters of a greater number of shares than they are required to purchase in this offering. Stabilizing transactions consist of certain bids or purchases made for the purpose of preventing or retarding a decline in the market price of the common stock while this offering is in progress.

The underwriters also may impose a penalty bid. This occurs when a particular underwriter repays to the underwriters a portion of the underwriting discount received by it because the representatives have repurchased shares sold by or for the account of such underwriter in stabilizing or short covering transactions.

These activities by the underwriters may stabilize, maintain or otherwise affect the market price of the common stock. As a result, the price of the common stock may be higher than the price that otherwise might exist in the open market. If these activities are commenced, they may be discontinued by the underwriters at any time. These transactions may be effected on the Nasdaq National Market, in the over-the-counter market or otherwise.

37. The statements contained in the previous paragraph were materially false and misleading because the Underwriter Defendants required certain customers to commit to Tie-in Agreements and created the false appearance of demand for the stock at prices in excess of the IPO price and in violation of Regulation M. At no time did the Registration Statement/Prospectus disclose that the Underwriter Defendants would require certain customers seeking to purchase IPO shares to engage in transactions causing the market price of Engage common stock to rise in transactions that cannot be characterized as stabilizing transactions, over-allotment transactions, syndicate covering transactions or penalty bids.

38. Because the Undisclosed Compensation was, in reality, underwriter compensation, it was required to be disclosed in the Registration Statement/Prospectus. As Regulation S-K, Item 508 (e) provides:

Underwriter's Compensation. Provide a table that sets out the nature of the compensation and the amount of discounts and commissions to be paid to the underwriter for each security and in total. The table must show the separate amounts to be paid by the company and the selling shareholders. **In addition, include in the table all other items considered by the National Association of Securities Dealers to be underwriting compensation for purposes of that Association's Rules of Fair Practice.** (Emphasis added).

39. The NASD specifically addresses what constitutes underwriting compensation in NASD Conduct Rule 2710(c)(2)(B) (formerly Article III, Section 44 of the Association's Rules of Fair Practice):

**For purposes of determining the amount of underwriting compensation, all items of value received or to be received from any source by the underwriter and related persons which are deemed to be in connection with or related to the distribution of the public offering as determined pursuant to subparagraphs (3) and (4) below shall be included.** (Emphasis added).

40. NASD Conduct Rule 2710(c)(2)(C) specifically requires:

If the underwriting compensation includes items of compensation in addition to the commission or discount disclosed on the cover page of the prospectus or similar document, a footnote to the offering proceeds table on the cover of the prospectus or similar document shall include a cross-reference to the section on underwriting or distribution arrangements.

41. Contrary to applicable law, the Registration Statement/Prospectus did not set forth, by footnote or otherwise, the Undisclosed Compensation.

42. Instead, the Registration Statement/Prospectus misleadingly stated that the underwriting syndicate would receive as compensation an underwriting discount of \$1.05 per share, or a total of \$6,300,000, based on the spread between the per share proceeds to Engage (\$13.95) and the Offering price to the public (\$15.00 per share). This disclosure was materially false and misleading as it misrepresented underwriting compensation by failing to include Undisclosed Compensation.

43. In addition, the Registration Statement/Prospectus stated:

Shares sold by the underwriters to the public will initially be offered at the initial public offering price set forth on the cover of this prospectus [\$15.00]. Any shares sold by the underwriters to securities dealers may be sold at a discount. . .

44. The Registration Statement/Prospectus was materially false and misleading because in order to receive share allocations from the Underwriter Defendants in the Engage IPO, certain customers were required to pay an amount in excess of the IPO price set forth on the cover page in the form of Undisclosed Compensation and/or Tie-in Agreements.

45. NASD Conduct Rule 2330(f) further prohibits an underwriter from sharing directly or indirectly in the profits in any account of a customer:

