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

**IN RE INITIAL PUBLIC OFFERING
SECURITIES LITIGATION**

21 MC 92 (SAS)

This document relates to all actions

**PLAINTIFFS’ MEMORANDUM OF LAW IN SUPPORT
OF THEIR OMNIBUS MOTION FOR CLASS CERTIFICATION**¹

Lead Plaintiffs (“Plaintiffs”) submit this memorandum in support of their omnibus motion pursuant to Rule 23 of the Federal Rules of Civil Procedure, for an order determining that the actions coordinated under the above caption (the “Actions”) may each be certified individually as a separate class action with respect to Plaintiffs’ claims against the Underwriter Defendants named in each complaint.²

PRELIMINARY STATEMENT

The facts relevant to each of the Actions are fully set forth in the individual constituent

¹ This motion covers 303 of the constituent IPO cases. Plaintiffs’ Executive Committee is requesting leave to seek new class representatives for the outstanding cases. Plaintiffs have entered into a Memorandum of Understanding to settle with all Issuer corporations (the “Issuers”) and Individual Defendants named, and not otherwise dismissed, in the Actions. In connection with that proposed partial settlement, the Court will be asked to certify settlement classes.

² The definitions of each proposed class, stated in each of the constituent complaints, are similar in each of the Actions. For instance, in *In re Cacheflow, Inc. Initial Public Offering Securities Litigation*, 01 Civ. 5143 (SAS) (MGL) (“*Cacheflow*”), the class is defined as “all persons and entities who purchased or otherwise acquired the common stock of the Issuer [Cacheflow] during the Class Period and were damaged thereby (the “[*Cacheflow*] ‘Class’). Excluded from the Class are Defendants herein, Defendants’ legal counsel, members of the immediate family of the Individual Defendants, any entity in which any of the Defendants has a controlling interest, and the legal representatives, heirs, successors or assigns of any of the Defendants.” *Cacheflow* Compl. ¶ 23. The Class Period in each constituent complaint, other than *In re DoubleClick, Inc. Initial Public Offering Securities Litigation*, 01 Civ. 3980 (SAS) (DC) (“*DoubleClick*”), commences on the date of the respective IPO and concludes on December 6, 2000. The Class Period in *DoubleClick* commences on the date of the Secondary Offering and concludes on December 6, 2000.

complaints, and summarized in this Court's decision with respect to defendants' motions to dismiss. See *In re Initial Public Offering Sec. Litig. ("IPO")*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003). Plaintiffs, therefore, will not repeat those facts here. Despite the unprecedented scope of these coordinated proceedings, this motion for class certification when viewed on an individual case basis, is routine. Neither the breadth of the alleged "massive scheme to inflate stock prices," *In re IPO*, 241 F. Supp. 2d at 380, nor the relatively large number of individual Actions which are coordinated before this Court, has any relevance to whether certification of each of the individual Actions is proper under Rule 23. Rather, as shown below, when each of the constituent Actions is analyzed under the relevant standards, it is clear that each is well-suited to be a class action, and all of the Actions can and should be seen as the same for class certification purposes.³

The proposed class representatives in each of the Actions are similarly situated with the members of the individual classes each seeks to represent: each purchased securities of the subject Issuer during the relevant class period; each suffered damages caused by unlawful conduct "characterized by Tie-in Agreements, Undisclosed Compensation, and analyst conflicts, and concealed by misrepresentations and omissions," *In re IPO*, 241 F. Supp. 2d at 293; each overpaid for shares of the subject Issuer due to the artificial inflation of the Issuer's stock price caused by the subject Underwriter Defendants' misconduct, *see id.*, at 378; and each possesses claims under the federal securities laws. For these reasons, certification of each of the classes is appropriate.

³ Each proposed class representative is identified in *Appendix 1*. For the convenience of the parties and the Court, a select number of proposed class representatives have been proffered based upon Plaintiffs' Executive Committee's belief that these movants will likely satisfy the requisite criteria. In the event that any of the proposed class representatives are found to be insufficient, Plaintiffs reserve the right to proffer additional proposed representatives. Indeed, in many of the Actions, Plaintiffs' counsel represent additional individuals and/or entities who are willing to serve as class representatives, if necessary.

ARGUMENT

I. THE STANDARDS APPLICABLE TO CLASS CERTIFICATION DETERMINATION UNDER RULE 23

A plaintiff seeking class certification must meet all four requirements of Rule 23(a), as well as one of the subsections of Rule 23(b). *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 290 (2d Cir. 1992). The four requirements of Rule 23(a) - generally referred to as numerosity, commonality, typicality and adequacy - as well as the predominance and superiority requirements of Rule 23(b)(3), are easily satisfied in each of the Actions in this coordinated litigation. “[T]he Second Circuit has directed district courts to apply Rule 23 according to a liberal rather than a restrictive interpretation.” *In re Lloyd’s Am. Trust Fund Litig.*, No. 96 Civ. 1262 (RWS), 1998 WL 50211, at *5 (S.D.N.Y. Feb. 4, 1998) (citations omitted); *see also Korn v. Franchard Corp.*, 456 F.2d 1206, 1209 (2d Cir. 1972) (noting that when deciding an issue of class certification, courts must be “mindful of the admonition of liberality toward demands for class suit status in securities litigation”). Additionally, the Second Circuit has stated a “preference for the use of class actions in securities law claims,” *In re Indep. Energy Holdings PLC Sec. Litig.*, 210 F.R.D. 476, 479 (S.D.N.Y. 2002), and has recognized that a class action may be the only viable method by which shareholders may obtain recovery. *Green v. Wolf Corp.*, 406 F.2d 291, 296 (2d Cir. 1968).

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.” *In re Indep. Energy*, 210 F.R.D. at 479 (citation omitted). Thus, courts in this judicial district routinely certify securities cases for class action treatment. *See, e.g., Milman v. Box Hill Sys. Corp.*, 192 F.R.D. 105, 109 (S.D.N.Y. 2000); *Saddle Rock Partners, Ltd. v. Hiatt*, No. 96 Civ. 9474, 2000 WL 1182793 (S.D.N.Y. Aug. 17, 2000); *Dietrich v. Bauer*, 192 F.R.D. 119 (S.D.N.Y. 2000); *In re Oxford Health Plans, Inc. Sec. Litig.*, 191 F.R.D. 369 (S.D.N.Y. 2000); *In re Blech Sec. Litig.*,

187 F.R.D. 97, 102 (S.D.N.Y. 2000).

Moreover, “[t]he district court must accept all of the allegations in the pleadings as true on a motion for class certification, and avoid conducting a preliminary inquiry into the merits.” *Dunnigan v. Metropolitan Life Ins. Co.*, 214 F.R.D. 125, 133 (S.D.N.Y. 2003). See also *Shelter Realty Corp v. Allied Maint. Corp.* 574 F.2d 656, 661 n.15 (2d Cir. 1978). Indeed, in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Supreme Court specifically stated that there is “nothing in either the language or history of Rule 23 that 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 . . .” *Id.* at 177.

Although “[p]laintiffs bear the burden of establishing compliance with of the requirement of Rule 23 [and a] class action ‘may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied,’” *In re Oxford*, 191 F.R.D. at 373 (quoting *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982)), “[i]n 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.” *In re VISA Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 133 (2d Cir. 2001); see also *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 58 (2d Cir. 2000).

“Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice.” See *Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994) (citing *Falcon*, 457 U.S. at 157-59). Here, “throughout the Complaints and in the Master Allegations, Plaintiffs allege that Defendants ‘carried out a plan, scheme and course of conduct which was intended to artificially inflate and maintain the market price and trading volume of

Issuer's common stock; and [] induce Plaintiffs . . . to purchase or otherwise acquire the Issuer's common stock at artificially inflated prices.” *In re IPO*, 241 F. Supp. 2d at 389 (emphasis in the original) (citation omitted). Since the proposed class representatives are all members of the classes they seek to represent, and all were the subject of the same illegal common course of conduct by the subject Underwriter Defendants, class treatment is appropriate. *See In re Prudential Ins. Co. of Am. Sales Prac. Litig.*, 148 F.3d 283, 312 (3d Cir. 1998).

II. **THE REQUIREMENTS OF RULE 23(a) HAVE BEEN MET**

Rule 23(a) permits one or more members of a class to sue as representative parties if “(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses 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.” Fed. R. Civ. P. 23(a). Each of these four requirements is met here.

A. **Rule 23(a)(1): The Proposed Classes Are Each So Numerous That Joinder Of All Members Is Impracticable**

Rule 23(a)(1) requires that the class be “so numerous that the joinder of all members is impracticable” Fed. R. Civ. P. 23(a)(1). “Impracticability does not mean impossibility of joinder, but refers to difficulty or inconvenience of joinder.” *In re Indep. Energy*, 210 F.R.D. at 479. *See also In re Avon Sec. Litig.*, No. 91 Civ. 2287 (LMM), 1998 WL 834366, at *5 (S.D.N.Y. Nov. 30, 1998) (“[J]oinder of all members need not be impossible, but only impracticable in the sense that joinder would ‘needlessly complicate and hinder efficient resolution of the litigation.’”) (quoting *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 198 (S.D.N.Y. 1992)).

Plaintiffs need not establish the exact number of people in each class, but only demonstrate that the members of each class are sufficiently numerous. *See, e.g., Robidoux v.*

Celani, 987 F.2d 931, 935 (2d Cir. 1993); *Open Hous. Ctr. Inc. v. Samson Mgmt. Corp.*, 152 F.R.D. 472, 475 (S.D.N.Y. 1993) (reasonable estimates of class size can be sufficient to establish numerosity needed to certify the suit as a class action); *Somerville v. Major Exploration, Inc.*, 102 F.R.D. 500, 503 (S.D.N.Y. 1984) (“It is permissible for the court to rely on reasonable inferences drawn from available facts.”); *Dunnigan*, 214 F.R.D. at 136. Moreover, “[i]n securities fraud actions brought against publicly owned and nationally listed corporations, the numerosity requirement may be satisfied by a showing that a large number of shares were outstanding and traded during the relevant period.” *In re Frontier Ins. Group, Inc. Sec. Litig.*, 172 F.R.D. 31, 40 (E.D.N.Y. 1997).

Each of the Actions involves millions of shares traded on national securities exchanges. In such circumstances, courts have held that the “numerosity” requirement is readily satisfied. *See, e.g., Somerville*, 102 F.R.D. at 503 (“Because of the large number of outstanding shares . . . sold within the period specified, it is reasonable to infer that at least thousands of persons can be identified as owners of such stock”). Thus, the Underwriter Defendants’ violations of the federal securities laws inflicted injury upon thousands of geographically dispersed persons with respect to the securities of each Issuer. *See In re Drexel*, 960 F.2d at 290-91; *Dolgow v. Anderson*, 43 F.R.D. 472, 483-84 (E.D.N.Y. 1968).⁴ Because “[f]orty investors have been said to represent a sufficiently large group 'where the individual members of the class are widely scattered and their holdings are generally too small to warrant undertaking individual actions,'" *Korn*, 456 F.2d at 1209 (finding class of 77 to 212 investors met the numerosity requirement) (citations omitted),

⁴ For example, the *Cacheflow* complaint alleges that 5,000,000 shares of common stock were sold on or about November 19, 1999, and that those shares were actively traded on the NASDAQ National Market, which is a national securities exchange. *Cacheflow* Compl. ¶¶ 30, 76. In addition, *Cacheflow* common stock was actively traded in the aftermarket during the *Cacheflow* class period. *Id.* at ¶ 24(a). Therefore, the members of the *Cacheflow* Class number in the thousands. The same is true for each of the other classes that seek certification.

the numerosity requirement is clearly met in these Actions. *See also In re Indep. Energy*, 210 F.R.D. at 479; *Trief*, 144 F.R.D. at 198.

B. Rule 23(a)(2): Questions of Law and Fact Common To Each Class Exist

Rule 23(a)(2) provides that a suit may be maintained as a class action if “there are questions of law or fact common to the class.” In determining whether common questions exist, Rule 23(a)(2) “requires only that there be ‘a common nucleus of operative fact,’ not that there be an absolute identity of facts.” *Gerber v. Computer Assocs. Int’l, Inc.*, No. 91 Civ. 3610 (SJ), 1995 WL 228388 (E.D.N.Y. Apr. 7, 1995). *See also In re Indep. Energy*, 210 F.R.D. at 479 (“Under Rule 23(a)(2), plaintiffs must show that ‘common issues of fact or law affect all class members.’”) (internal citation omitted).

It is not required that all questions be common or that all issues be identical. *See Avon*, 1998 WL 834366, at *5; *Tedesco v. Mishkin*, 689 F. Supp. 1327, 1334 (S.D.N.Y. 1998) (“not every question of fact or law raised need be common to every member of the [C]lass”); *In re Methyl Tertiary Butyl Ether Prods. Litig. (“MTBE”)*, 209 F.R.D. 323, 336 n.19 (S.D.N.Y. 2002) (“Defendants appear to concede that plaintiffs have identified at least one common question of law or fact, and have thus satisfied the commonality requirement.”); *Cutler v. Perales*, 128 F.R.D. 39, 44 (S.D.N.Y. 1989) (commonality “does not mean that all issues must be identical as to each [class] member, but it does require that plaintiffs identify some unifying thread among the members’ claims that warrants class treatment”) (*quoting Kamean v. Local 363, Int’l Bhd. of Teamsters*, 109 F.R.D. 391, 394 (S.D.N.Y. 1986)). Where, as here, there exists a common nucleus of operative facts affecting all class members, common questions unquestionably predominate. *See, e.g., Green*, 406 F.2d at 301; *Shankroff v. Advest, Inc.*, 112 F.R.D. 190, 192-93 (S.D.N.Y. 1986).

Each of the constituent complaints adequately demonstrates common issues of law and

fact applicable to all members of each of the classes. For instance, plaintiffs in *Cacheflow* allege that:

[a]mong the questions of law and fact common to the [*Cacheflow*] 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.

Cacheflow Compl. ¶ 28. See also Appendix 1.

Virtually identical common questions have been found sufficient in numerous securities law class actions. See, e.g., *In re Drexel*, 960 F.2d at 290-91; *In re Indep. Energy*, 210 F.R.D. at 480; *In re Oxford*, 191 F.R.D. at 374-75. Indeed, where "issues are 'central' to [Plaintiffs'] cause[s] of action under [the federal securities laws,] the commonality requirement is satisfied." See *Dunnigan*, 214 F.R.D. at 137.

C. Rule 23(a)(3): Plaintiffs' Claims Are Typical of Those of The Classes They Seek To Represent

The proposed class representatives' claims satisfy the typicality requirement of Rule 23(a)(3) because the claims of each person who purchased or otherwise acquired the shares of each Issuer "arise from the same course of conduct that gives rise to the claims of other Class members, where the claims are based on the same legal theory." *In re Indep. Energy*, 210 F.R.D. at 480 (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 172 F.R.D. 119, 126-27

(S.D.N.Y. 1997)).⁵ “Typicality does not require that the situations of the named representatives and the class members be identical.” *In re Oxford*, 191 F.R.D. at 375 (citing *Trief*, 144 F.R.D. at 200). *See also Robidoux*, 987 F.2d at 936-37 (“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.”); *Daniels v. City*, 198 F.R.D. 409, 418 (S.D.N.Y. 2001) (“it is well settled that the mere existence of individualized fact questions with respect to the named plaintiff’s claims will not bar class certification”).

To challenge typicality, defendants must demonstrate that the “putative class representative is subject to unique defenses which threaten to become the focus of the litigation.” *In re Indep. Energy*, 210 F.R.D. at 480 (citing *Baffa*, 222 F.3d at 59). Importantly, “this rule has not been rigidly applied in this Circuit. . . .” *Dietrich*, 192 F.R.D. at 125 (citations omitted). For this reason, inevitable differences among the proposed class representatives and other members of the classes do not defeat typicality, because “when inquiring into the typicality requirement under Rule 23(a)(3), the focus must be on the defendants’ behavior and not that of plaintiffs.” *In re Sumitomo Copper Litig.*, 194 F.R.D. 480, 482 (S.D.N.Y. 2000). As the court in *Dura-Bilt* explained:

Typicality refers to the nature of the claim of the class representatives, and not to the specific facts from which the claim arose or relief is sought. 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. Factual differences will not defeat class certification where the various claims arise from the same legal theory. Thus, a difference in the amount of damages, date, size, or manner of purchase, the type of purchaser, and even the

⁵ The typicality prerequisite overlaps with the commonality requirement of Rule 23(a)(2) and the adequacy requirement of Rule 23(a)(4). *See, e.g., Herbst v. International Tel. and Tel. Corp.*, 495 F.2d 1308, 1320 n.6 (2d Cir. 1974); *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 99 (S.D.N.Y. 1981).

specific document influencing the purchase will not render the claim atypical in most securities actions.

89 F.R.D. at 99 (citations omitted). *See also In re Baldwin-United Corp. Litig.*, 122 F.R.D. 424, 428 (S.D.N.Y. 1986) (factual differences do not “destroy typicality if each class member was the victim of the same material omissions and the same consistent course of conduct.”).

“The commonality provided by the alleged misstatements and omissions and defendants' purportedly fraudulent scheme far outweighs any particular distinctions in the fact patterns surrounding the investments made by given class members.” *In re Energy Sys. Equip. Leasing Sec. Litig.*, 642 F. Supp. 718, 751-52 (E.D.N.Y. 1986). Since “the mere existence of individualized factual questions’ as to the claims of class representatives does not bar class certification,” *In re Frontier*, 172 F.R.D. at 41, “the possible availability of a unique defense does not foreclose class certification.” *Moskowitz v. Loop*, 128 F.R.D. 624, 631 (E.D. Pa. 1989) (construing *Basic v. Levinson*, 485 U.S. 224 (1988)). In sum, “the class certification stage of the litigation is an inappropriate time to inquire into the merits of plaintiffs’ claims and, by extension, defendants’ affirmative defenses.” *In re Deutsche Telekom*, 229 F. Supp. 2d 277, 284 (S.D.N.Y. 2002) (citing *In re VISA*, 280 F.3d at 135).⁶

Thus, with respect to Plaintiffs' Section 10(b) claims, disputes, for example, as to whether Plaintiffs typically relied on the integrity of the market in making their purchases of shares of the Issuers’ stock are not determinable at the class certification phase because “even if, as defendants assert, they can prove non-reliance as an affirmative defense, this goes to the merits of the case

⁶ *See also Dura-Bilt*, 89 F.R.D. at 96 (“This court will not speculate, in deciding this motion, whether defendants can maintain any affirmative defenses. Rule 23 was not intended to encourage such conjecture.”); *In re Baldwin-United*, 122 F.R.D. at 427 (“Camouflaged as an attack on commonality, this argument in fact invites the Court to examine and accept in the course of these class certification motions an affirmative defense that is potentially dispositive of several claims in this litigation. Such inquiry is outside the scope of Rule 23 and indeed defies the principle enunciated in *Eisen . . .*”).

and cannot be considered by the court on a certification motion.” *In re Data Access Sys. Sec. Litig.*, 103 F.R.D. 130, 139 (D.N.J. 1984) (citing *Eisen*, 417 U.S. at 178). As a result, as to typicality, “possible individual questions of reliance do not preclude class certification.” *Dura-Bilt*, 89 F.R.D. at 98 (citing *Green*, 406 F.2d at 301) (“the need for proof of reliance . . . [c]arried to its logical end . . . would negate any attempted class action under Rule 10b-5 . . .”).

The proposed class representatives’ claims in this case are undeniably typical of the claims of the Classes they seek to represent in that they arise out of the same uniform pattern of conduct, including the Underwriter Defendants’ manipulative activities and consistent false and misleading representations included in widely disseminated public filings and analyst reports, and are based on the same legal and remedial theories. Thus, the proposed class representatives stand in the same position as do other purchasers of the relevant securities during the respective Class Periods.

D. Rule 23(a)(4): Plaintiffs Will Fairly And Adequately Protect The Interests Of The Classes They Seek To Represent

Adequacy of representation under Rule 23(a)(4) requires: (1) the absence of any conflict of interest between the representative and the class members; and (2) that the representative’s attorney be qualified, experienced, and capable. *See, e.g., Baffa*, 222 F.3d at 60; *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968), *vacated and remanded on other grounds*, 417 U.S. 156 (1974); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 112 F.R.D. 383, 387 (S.D.N.Y. 1986); *Ross v. A.H. Robins Co., Inc.*, 100 F.R.D. 5, 7 (S.D.N.Y. 1982).

In order to deny class certification, the court must find 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). Courts reject “efforts to defeat certification by raising the possibility of hypothetical conflicts or antagonisms among class members, especially regarding damages.” *Id.* at 513 (citations

omitted). *See also Blackie v. Kushner*, 524 F.2d 891, 909 (9th Cir. 1975).

Because variations in legal standards between Plaintiffs' Securities Act and Exchange Act claims do not conflict, courts routinely certify single classes for both claims. *See, e.g., In re Deutsche Telekom*, 229 F. Supp. 2d at 283. Likewise, the timing of Plaintiffs' purchases of the subject securities during the class periods is irrelevant as long as the representatives' claims arise from the same practice and course of conduct that forms the basis of the class claims. *See e.g., Robbins v. Moore Med. Corp.*, 788 F. Supp. 179 (S.D.N.Y. 1992) ("whether plaintiff and other class members bought early in the Class Period or late, they are all alleged to have been injured by the inter-related misstatements and omissions . . .").

As the Second Circuit stated in rejecting various alleged hypothetical conflicts within a class:

The record unequivocally indicates that all members of [the class] (including appellants) share a common interest in showing that Drexel violated federal and state securities laws. All members of [the class] similarly wish to obtain the highest possible recovery for that [class]. In the absence of a showing of a genuine conflict between appellants and [the class], we reject appellants' argument that Rule 23(a)(4) has not been satisfied.

Drexel, 960 F.2d 285 at 291.

Here, each proposed class representative, like all other members of each proposed class, possesses claims under the federal securities laws against the Underwriter Defendants in connection with the purchase of the subject Issuer's shares. Each proposed class representative has the same interest in recovering damages caused as a result of the Underwriter Defendants' alleged unlawful conduct. No cognizable conflicts or antagonisms exist between Plaintiffs and the other members of the classes.

As to the second prong of Rule 23(a)(4), "the qualifications of class counsel are generally more important in determining adequacy than those of the class representatives." *In re Avon*, 1998 WL 834366, at *9; *see also In re TCW/DWN Am. Gov't Income Trust Sec. Litig.*, 941 F.

Supp. 326, 341 (S.D.N.Y. 1996) (“[I]n complex securities fraud cases, this Court is in agreement with ‘the recent trend in this district to assess the adequacy of the representative’s attorney rather than the personal qualifications of the named plaintiff.”) (quoting *Klein v. A.G. Becker Paribas, Inc.*, 109 F.R.D. 646, 651 (S.D.N.Y. 1986)); *see also In re Drexel*, 960 F.2d at 291; *In re Oxford*, 191 F.R.D. at 376 (“the qualifications of class counsel are generally more important in determining adequacy than those of class representatives.”).

Therefore, the particular educational or professional background or experience of the proposed class representatives are not determinative of their adequacy as class representatives. *See Daniels*, 198 F.R.D. at 419 (“the inquiry, then, into the representatives’ personal qualities is not an examination into their moral righteousness, but rather an inquiry directed at improper or questionable conduct arising out of or touching upon the very prosecution of the lawsuit.”) (quoting *Jane B. v. Dep’t of Social Servs.*, 117 F.R.D. 64, 71 (S.D.N.Y. 1987)). Indeed, the Second Circuit has cautioned that “a court must be wary of a defendant’s efforts to defeat representation of a class on grounds of inadequacy when the effect may be to eliminate any class representation . . .” *Kline v. Wolf*, 702 F.2d 400, 402 (2d Cir. 1983) (citation omitted).

The qualifications and experience of Plaintiffs’ counsel assure vigorous representation of each of the classes. The law firms representing the Plaintiffs and proposed classes, particularly the members of Plaintiffs’ Executive Committee, are well-known to the Court, have vigorously represented their clients in these coordinated Actions, have extensive experience and expertise in the securities class action field, and have successfully prosecuted literally thousands of class cases throughout the country. Accordingly, there can be no doubt that the proposed representatives, through their capable counsel, will vigorously represent the interests of each of the classes and that the prerequisites of Rule 23(a)(4) are satisfied.

III. THE REQUIREMENTS OF RULE 23(b)(3) HAVE BEEN SATISFIED

Once the requirements of Rule 23(a) have been established, the Court must then find that each of the Actions satisfies one of the three sub-paragraphs of Rule 23(b). Rule 23(b)(3) provides that an action may be maintained as a class action if: “[t]he 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.” As demonstrated below, each of the conditions of Rule 23(b)(3) is met in all the Actions.

A. Questions Of Law Or Fact Common To Each of the Classes Predominate

The Supreme Court has noted that “[p]redominance is a test readily met in certain cases alleging . . . securities fraud” *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625 (1997). It is well-established that “[i]n determining whether common questions of fact predominate, a court’s inquiry is directed primarily toward whether the issue of liability is common to members of the class.” *In re Indep. Energy*, 210 F.R.D. at 486. Further, “Rule 23(b)(3) does not require that all questions of law or fact be common; it only requires that the common questions predominate over individual questions.” *Dura-Bilt*, 89 F.R.D. at 93; *see also In re VISA*, 280 F.2d at 140 (“predominance requirement calls only for predominance, not exclusivity, of common questions”). As Judge Brieant explained in *In re Oxford*, “[c]ommon questions may predominate where there exists a common course of conduct even though there is not a complete identity of facts.’ Where, as here, there exists a common nucleus of operative facts affecting all members, common questions unquestionably prevail.” 191 F.R.D. at 374 (quoting *Shankroff*, 112 F.R.D. at 192-93). Indeed, the Second Circuit has held that “to deny a class action simply because all of the allegations of the class do not fit together like pieces in a jigsaw puzzle, we would destroy much of the utility of Rule 23.” *Green*, 406 F.2d at 300.

The critical issues of law and fact raised in each of the Actions include: whether the Underwriter Defendants engaged in the alleged unlawful manipulation of the subject Issuers' securities and made the omissions and misrepresentations alleged in the individual complaints; whether those omissions and misrepresentations were material; and whether, with regard to the fraud claims brought under Section 10(b), the Underwriter Defendants acted with scienter. These issues are common to all members of each of the proposed classes, and these issues will clearly predominate in each Action. Rule 23(b)(3)'s requirement that common questions of law or fact predominate is thus plainly satisfied "since the alleged misrepresentations . . . relate to all the investors, and the existence and materiality of such misrepresentations obviously present important common issues." *Korn*, 456 F.2d at 1210; *see also In re Indep. Energy*, 210 F.R.D. at 486 (holding that common questions clearly predominate where "the claims are based on a common legal theory of material misrepresentations and omissions").

In this coordinated litigation, at least two Underwriter Defendants agree that common issues will predominate here. In opposing remand of a related case back to the Superior Court of California in *Abe Nachom v. Morgan Stanley & Co.*, No. 02-CV-00299-AHM (RCx) (C.D. Cal. Jan. 11, 2002), Underwriter Defendants Morgan Stanley and Goldman Sachs judicially admitted that common questions of fact and law predominate over questions affecting individual Class members. In the joint brief, Morgan Stanley and Goldman Sachs explained:

This part of the [SLUSA] test asks whether "questions of law or fact common to those persons or members of the prospective class predominate over questions affecting only individual persons or members" [citation omitted]. The answer is yes because...the Complaint's allegations concern all WebMD investors, not just plaintiff alone.... This result is inevitable because, as Nachom admits, this Complaint copies the allegations of another Healtion/WebMD "class action" currently pending in the Southern District of New York.

See Defs. Joint Opposition to Plaintiffs' Motion to Remand (attached as Appendix 2 hereto) at

11-12.

Moreover, “[t]he existence and scope of the alleged [behavior] among the defendants is itself a common question to the class.” *Dura-Bilt*, 89 F.R.D. at 93. As this Court stated, “[t]aking the facts of the Complaints as true . . . Plaintiffs have alleged one coherent scheme to defraud . . . concealed by lies and omissions -- the *entire purpose* of which was to artificially drive up the price of the relevant securities.” *In re IPO*, 241 F. Supp. 2d at 378 (emphasis in the original). Since Plaintiffs have alleged “a single common thread to which all the fraudulent activity related, class certification is appropriate under Rule 23(b)(3).” *Tedesco*, 689 F. Supp. at 1334.

As the Second Circuit noted:

[Plaintiff's] action will set out the complex background common to all those who might have been injured, showing . . . the alleged use of the prospectuses to manipulate the price, any proof of intent to manipulate, etc. Moreover, [plaintiff] argues that [defendant], in making the interrelated misrepresentation in all three prospectuses, engaged in a common course of conduct designed to continually manipulate the market price of [defendant's] stock. Several courts have satisfied themselves that such a common and consistent course of conduct constitutes a common question under Rule 23.

Green, 406 F.2d at 300.⁷

⁷ See also *In re Sumitomo*, 194 F.R.D. at 482 (“Plaintiffs allege that the same course of events -- the same manipulation of market prices, the same continuing omissions to disclose material facts, and the same concealment efforts -- is at issue throughout the Class Period.”); *In re Arakis Energy Corp. Sec. Litig.*, No. 95-CV-3431 (AAR), 1999 WL 1021819, at *10 (E.D.N.Y. Apr. 30, 1999) (“In securities fraud class actions in which the fraud is alleged to have been carried out through public communications to a wide variety of market participants, common issues of law and fact will generally predominate over individual issues.”); *RMED Int’l, Inc. v. Sloan’s Supermarkets, Inc.*, No. 94 Civ. 5587 (PKL), 1996 WL 134757, at *7 (S.D.N.Y. Mar. 25, 1996) (The issue of “whether defendants failed to disclose material non-public information . . . thereby committing a fraud on the market . . . is the same for all class members, and therefore predominates over the class.”); *In re Saxon Sec. Litig.*, No. 82 Civ. 3103 (MJL), 1984 WL 2399, at *6 (S.D.N.Y. Feb. 23, 1984) (a class period of six years certified, finding that “while a number of different artifices and devices are alleged, they are all in furtherance of ‘a single inflammatory scheme,’ the artificial overvaluing of Saxon’s stock.”) (citation omitted.); *Dietrich* 192 F.R.D. at 128 (where “the complaint alleges that the defendants engaged in a scheme to defraud by manipulating and inflating the prices at which Scorpion shares were sold to the investing public,

Further, questions of reliance do not predominate in securities actions such as these. With respect to Plaintiffs' claims under the Securities Act, "plaintiffs do not need to allege reliance on a registration statement to plead a Section 11 claim." *In re IPO*, 241 F. Supp. 2d at 342 (citation omitted).

With respect to Plaintiffs' Section 10(b) claims, "reliance is presumed once the materiality of an omission is established, or the material misrepresentation affected the price of stock traded on the open market." *Ross v. A.H. Robins Co., Inc.*, 607 F.2d 545, 553 (2d Cir. 1979) (citation omitted). *See also Korn*, 456 F.2d at 1212-13. As to the nondisclosures alleged in the Actions, "[t]he Supreme Court has held that 'positive proof of reliance is not a prerequisite to recovery on a Rule 10b-5 claim involving a failure to disclose. . . . Instead, if the plaintiff proves that 'the facts withheld [are] material in the sense that a reasonable investor might have considered them important,' reliance will be presumed." *duPont v. Brady*, 828 F.2d 75, 78 (2d Cir. 1987) (citing *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-154 (1972)).⁸

and by deliberately offering unregistered shares for sale to the public. Such conduct constitutes a common course of conduct"); *Dura-Bilt*, 89 F.R.D. at 96 ("Where, as here, plaintiffs' allegations relate to a common course of conduct, namely defendants' sale of . . . [Issuer's] stock during the applicable period, while in possession of material inside information and without disclosing such to the public, common issues predominate over any individual issues which may be raised by the varying amounts of information available.").

⁸ *Affiliated Ute* involved the market manipulation of a non-publicly traded security. There, the defendants "devised a plan and scheme to acquire, for themselves and others, shares from . . . [plaintiffs] . . . [i]n violation of their duty to make a fair disclosure, [and] succeeded in acquiring shares . . . for less than fair value." 406 U.S. at 148. The Supreme Court found plaintiffs were presumed to have relied upon defendants' material omissions concerning the true value of the securities at issue inasmuch as defendants "were active in encouraging a market for the . . . stock . . . by soliciting and accepting standing orders . . . received increased deposits because of the development of this market. . . received commissions and gratuities from the expectant . . . buyers. . . 'were' entirely familiar with the prevailing market for the shares at all material times. . . sellers 'considered these defendants to be familiar with the market for the shares of stock and relied upon them when they desired to sell their shares,'" which constituted a "course of business" or a "device, scheme, or artifice" that operated as a fraud upon the plaintiffs. 406 U.S. at 152 (citations omitted).

Inasmuch as the *Dura-Bilt* court explained, “all misrepresentations are also nondisclosures, at least to the extent that there is a failure to disclose which facts in the representation are not true,” 89 F.R.D. at 97 (quoting *Little v. First Cal. Co.*, 532 F.2d 1302, 1304 n.4 (9th Cir. 1976)), and most importantly, because this Court has held that the Underwriter Defendants’ misrepresentations and omissions were material, the reliance of each member of each of the classes will be presumed with respect to the omissions alleged in each constituent complaint. *See In re IPO*, 241 F. Supp. 2d at 379-80.

With respect to Plaintiffs’ market manipulation claims, positive proof of reliance is also unnecessary because the alleged scheme involved conduct that this Court has already found material. Indeed, this Court has found that “market manipulation” itself “is a fact reasonable investors might have considered important in the making of their decisions.” *Id.* at 380 (citation omitted). “The gravamen of manipulation is deception of investors into believing that prices at which they purchase and sell securities are determined by the natural interplay of supply and demand, not rigged by manipulators.” *Gurary v. Winehouse*, 190 F.3d 37, 45 (2d Cir. 1999). *See also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976). Therefore, in cases such as those here where Plaintiffs have alleged market manipulation, Plaintiffs need only allege “reliance on the integrity of the market (*i.e.*, that they believed the market was *not* manipulated).” *In re IPO*, 241 F. Supp. 2d at 297 (emphasis in original).⁹ The Supreme Court noted in *Basic*, 485 U.S. 224, that “artificial manipulation tends to upset the true functions of an open market. . . .” *Id.* at 246 (citation omitted). Since “[a] purchaser on the stock exchanges . . .

⁹ *See also Internet Law Library v. Southridge Capital Mgmt., LLC*, 223 F. Supp. 2d 474, 487 (S.D.N.Y. 2002) (allegations that “[t]he individual plaintiffs were damaged by defendants’ manipulation, because all bought or sold stock during the time when the stock price was artificially depressed by that manipulation, in reasonable reliance on the market price for [ITIS] stock” found sufficient); *In re Blech Sec. Litig.*, 961 F. Supp. 569, 582 (S.D.N.Y. 1997) (to state a claim for market manipulation, plaintiff must plead reliance on the integrity of a market for securities).

relies generally on the supposition that the market price is validly set and that no unsuspected manipulation has artificially inflated the price,” *Blackie*, 524 F.2d at 907, in cases of market manipulation, reliance is presumed. This is because “[r]equiring a plaintiff to show a speculative state of facts, *i.e.*, how he would have acted if omitted information had been disclosed, or if the misrepresentation had not been made, would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market.” *Basic*, 485 U.S. at 245.¹⁰

Reliance is also presumed with respect to any affirmative misrepresentations in Section 10(b) cases by virtue of the fraud-on-the-market doctrine. As the Supreme Court explained in *Basic*:

An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor’s reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.

485 U.S. at 246-47 (citations and footnotes omitted). The fraud-on-the-market doctrine dispenses with the requirement that an investor even be aware of a particular misstatement or have directly relied on it. *Id.*, at 241-42. This Court has already found that the fraud-on-the-market doctrine is available to aftermarket purchasers. *See In re IPO*, 241 F. Supp. 2d at 375-77; *see, e.g., Cacheflow Compl.*, ¶76.¹¹

¹⁰ *See also Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 967 F.2d 742, 748 (2d Cir. 1992) (“To saddle a plaintiff with proving the ‘generally indeterminable fact of what would have happened but for the omission [or the misrepresentations that skewed the market value of stock] would reduce the protection against fraud afforded by Section 10(b)’”) (quoting *duPont*, 828 F.2d at 78); *Blackie*, 524 F.2d at 908 (same).

¹¹ The Supreme Court held in *Basic*, consistent with its holding in *Eisen*, 417 U.S. at 177, that the determination of whether the subject “securities traded on an efficient market,” is a question of fact which is “a matter for trial.” *Basic*, 485 U.S. at 249 n.29. *See also In re IPO*, 241 F. Supp. 2d at 377, and cases cited therein. Accordingly, any determination as to whether shares purchased in and after an IPO traded in an efficient market must await trial.

Furthermore, courts have also held that the fraud-on-the-market doctrine *a fortiori* dispenses with the requirement of showing subjective reliance in market manipulation cases. Indeed, “the fraud on the market theory is especially applicable in the market manipulation context. Market manipulation schemes which are intended to distort the price of a security, if successful, necessarily defraud investors who purchase the security in reliance on the market's integrity.” *Scone Invest., LP v. American Third Mkt. Corp.*, No. 97 Civ. 3802 (SAS), 1998 WL 205338 at *5 (S.D.N.Y. Apr. 28, 1998). Thus, reliance does not predominate over common questions with respect to any of Plaintiffs' claims.

Finally, individual damage issues do not prevent class certification, where, as here, a common nucleus of law and facts is shared by all class members, since such common questions of law and fact predominate over individual questions. *See Green*, 406 F.2d at 301; *Blackie*, 524 F.2d at 902-903, 905; *In re Indep. Energy*, 210 F.R.D. at 486 (“while damage amounts may vary, the claims are based on a common legal theory of material misrepresentations and omissions such that common questions clearly predominate.”). This is because “[t]he amount of damages is invariably an individual question and does not defeat class action treatment . . . should the class prevail the amount of the price inflation during the period can be charted and the process of computing individual damages will be virtually a mechanical task.” *Blackie*, 524 F.2d at 905 (citations omitted). Moreover, even if it develops that each class member's damages must be separately determined, class certification would still be appropriate. *In re NASDAQ*, 169 F.R.D. at 523-24.

Therefore, because common questions predominate in each of the Actions, the requirements of Fed. R. Civ. P. 23(b)(3) have been met.

B. Class Actions Are Superior To Other Available Methods of Adjudication

In recognizing the need for effective use of class actions in securities litigation, the

Second Circuit in *Green*, stated:

The last, and in many ways, the most important requirement to be met before this litigation can be allowed to proceed under Rule 23(b)(3) is that the class action device must be superior to other methods available for a fair and efficient adjudication of the controversy. If a class action is markedly superior to all the alternatives, then, at least at the early stages of the litigation, we should construe broadly the other elements of Rule 23, to permit the efficient enforcement of 10b-5 through class actions with appropriate safeguards.

406 F.2d at 301 (citations omitted). Courts in this Circuit have generally recognized that securities suits such as the Actions alleged here “easily satisfy the superiority requirement of Rule 23.” *See, e.g., In re Blech Sec. Litig.*, 187 F.R.D. at 107. Here, class treatment is without doubt “markedly superior to all other alternatives.”

Rule 23(b)(3) provides that matters pertinent to a finding of superiority 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; and (D) the difficulties likely to be encountered in the management of a class action.” Fed. R. Civ. P. 23(b)(3). Each of these factors supports certifying each of the Actions.

Plainly, “[t]he interest members of the class[es] have in individually controlling the prosecution . . . of separate actions” is minimal here. The costs and expenses of such individual actions, when weighed against the individual recoveries obtainable, would be prohibitive. There is “no question here that the class action device is superior to other methods of litigation. Class actions are generally well-suited in securities fraud cases, in large part because ‘they avoid the time and expense of requiring all class members to proceed individually.’” *In re Indep. Energy*, 210 F.R.D. at 486 (quoting *In re Dreyfus Aggressive Growth Mut. Fund Litig.*, No. 98 Civ. 4318, 2000 WL 1357509, *11 (S.D.N.Y. Sept. 20, 2000)). Indeed, the Supreme Court has repeatedly

recognized that “[c]lass action[s] . . . [;] permit the plaintiffs to pool claims which would be uneconomical to litigate individually . . . most of the plaintiffs would have no realistic day in court if a class action were not available.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). *See also Deposit Guar. Nat’l. Bank v. Roper*, 445 U.S. 326, 339 (1980).

Class certification of these Actions will also promote economy and uniformity of decisions by concentrating these Actions in this forum. *See, e.g., In re Arakis*, 1999 WL 1021819, at *11 (“In addition, were plaintiffs required to bring individual actions, the potential for duplicative litigation and consequent waste of judicial and party resources would be significant.”). Indeed, this Court has already impliedly recognized that concentration of the related claims asserted in these Actions in a single forum is a superior means of adjudication. “[G]iven the large number of potential plaintiffs and the commonality of their claims, certifying the class[es] will permit a fairer and more efficient adjudication of the controversy.” *In re Indep. Energy*, 210 F.R.D. at 486 (quoting *In re Dreyfus*, 2000 WL 1357509, at *11).

Finally, there is no reason to expect any difficulties in the management of these Actions as class actions so as to render any one of the proposed classes unsuitable for class certification. *See, e.g., In re LILCO Sec. Litig.*, 111 F.R.D. 663, 671 (E.D.N.Y. 1986); *In re Energy Sys.*, 642 F. Supp. at 752.

Certifying the proposed Actions will secure the rights of those investors whose rights cannot otherwise be redressed because it would not be economically feasible for them to retain individual counsel or otherwise pursue their individual actions. Class certification will also facilitate the vindication of the statutory objective of a fair, orderly, trustworthy, and reliable securities market. *See, e.g., Dolgow*, 43 F.R.D. at 483-84 (quoting *amicus* brief of SEC).

