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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE INITIAL PUBLIC OFFERING
SECURITIES LITIGATION

Master File No. 21 MC 92 (SAS)

THIS DOCUMENT RELATES TO

IN RE CORVIS CORP. INITIAL PUBLIC
OFFERING SECURITIES LITIGATION

No. 01 Civ. 3857

IN RE FIREPOND, INC. INITIAL PUBLIC
OFFERING SECURITIES LITIGATION

No. 01 Civ. 7048

IN RE IXL ENTERPRISES, INC. INITIAL
PUBLIC OFFERING SECURITIES
LITIGATION

No. 01 Civ. 9417

IN RE SYCAMORE NETWORKS, INC.
INITIAL PUBLIC OFFERING SECURITIES
LITIGATION

No. 01 Civ. 6001

IN RE VA SOFTWARE CORP. F/K/A VA
LINUX, INC. INITIAL PUBLIC OFFERING
SECURITIES LITIGATION

No. 01 Civ. 242

**THE ISSUER DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION IN SIX FOCUS CASES**

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TABLE OF ABBREVIATIONS AND DEFINED TERMS

11/13/07 Haims Decl.	Declaration of Joel C. Haims dated November 13, 2007, filed in support of the Issuer Defendants' Motion to Dismiss The Second Consolidated Amended Complaints
2AC	Second Consolidated Amended Class Action Complaint for Violations of the Federal Securities Law
Bessembinder Rep.	Expert Report of Hendrik Bessembinder in <i>In re Initial Public Offering Securities Litigation</i> , dated December 19, 2007
Corvis	Corvis Corp.
Engage	Engage Technologies, Inc.
Ex.	Exhibit
Fischel	Daniel R. Fischel
Firepond	Firepond, Inc.
Fischel I	Report of Daniel R. Fischel in <i>In re Initial Public Offering Securities Litigation</i> , dated January 20, 2004
Fischel II	Rebuttal Report of Daniel R. Fischel in <i>In re Initial Public Offering Securities Litigation</i> , dated April 15, 2004
Fischel III	Supplemental Report of Daniel R. Fischel in <i>In re Initial Public Offering Securities Litigation</i> , dated July 12, 2004
Fischel IV	Second Supplemental Report of Daniel R. Fischel in <i>In re Initial Public Offering Securities Litigation</i> , dated September 27, 2007
Fischel Eff.	Report of Daniel R. Fischel: Market Efficiency in <i>In re Initial Public Offering Securities Litigation</i> , dated September 27, 2007
Focus Cases	<i>In re Corvis Corp. IPO Sec. Litig.</i> , S.D.N.Y. No. 01 Civ. 3857; <i>In re Engage Technologies, Inc. IPO Sec. Litig.</i> , S.D.N.Y. No. 01 Civ. 8404; <i>In re Firepond, Inc. IPO Sec. Litig.</i> , S.D.N.Y. No. 01 Civ. 7048; <i>In re iXL Enterprises, Inc. IPO Sec. Litig.</i> , S.D.N.Y. No. 01 Civ. 9417; <i>In re Sycamore Networks, Inc. IPO Sec. Litig.</i> , S.D.N.Y. No. 01 Civ. 6001; and <i>In re VA Software Corp. f/k/a VA Linux, Inc. IPO Sec. Litig.</i> , S.D.N.Y. No. 01 Civ. 242

Haims Decl.	Declaration Of Joel C. Haims, Esq. In Support Of The Issuer Defendants' Opposition To Plaintiffs' Motion For Class Certification In Six Focus Cases, dated December 21, 2007
IPO	Initial Public Offering
Issuer Defendants	The issuers of IPO securities named in each of the six Focus Cases, excluding Engage (<i>see infra</i> at 1 n.1.)
iXL	iXL Enterprises, Inc.
Pl. Mem.	Memorandum of Law in Support of Plaintiffs' Motion for Class Certification in Six Focus Cases, dated September 27, 2007
PSLRA	Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(4)
Section 10(b)	Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, 15 USC § 78j(b) and 17 C.F.R. § 240.10b-5
Securities Act	Securities Act of 1933, 48 Stat. 74, as amended
Spiegel Rep.	Report of Matthew Spiegel in <i>In re Initial Public Offering Securities Litigation</i> , dated December 20, 2007
Sycamore	Sycamore Networks, Inc.
Terra Networks	Terra Networks S.A., named as a defendant in <i>In re Terra Networks S.A. IPO Sec. Litig.</i> , No. 01 Civ. 6288 (D.N.J.)
Underwriter Defendants	The underwriters named as defendants in one or more of the 309 coordinated actions in <i>In re Initial Public Offering Securities Litigation</i> , 21 MC 92 (SAS)
Und. Opp. or Underwriter Defendants' Opposition Brief	Underwriter Defendants' Memorandum In Opposition To Plaintiffs' Motion For Class Certification In Six Focus Cases, dated December 21, 2007
VA Linux	SourceForge, Inc. (f/k/a VA Linux Systems, Inc.)

The Issuer Defendants¹ respectfully submit this memorandum in opposition to Plaintiffs' Motion for Class Certification in Six Focus Cases.²

PRELIMINARY STATEMENT

In this litigation “bristling with individual issues,” plaintiffs cannot meet their burden to show that the misrepresentation claims against the Issuer Defendants can be established through common proof. *Miles v. Merrill Lynch (In re IPO Sec. Litig.)*, 471 F.3d 24, 44 (2d Cir. 2006), *reh'g denied*, 483 F.3d 70 (2d Cir. 2007). To the contrary, plaintiffs' re-tooled pleadings and expert reports have not even put a dent in the individualized issues of knowledge and reliance identified by the Second Circuit that preclude class certification in these cases. *Id.* at 42-44. And while plaintiffs' notion that loss causation can be proven class-wide does not lack for imagination, their theory that, in a supposedly efficient market, price inflation would persist over the course of months is internally inconsistent, economically implausible, and refuted by empirical evidence. In any event, it has no application to the misrepresentation claims against the Issuer Defendants.

Indeed, common proof of injury caused by the Issuer Defendants' alleged misrepresentations would require both a corrective disclosure and a related price decline, neither

¹ Engage does not take part in this opposition. Engage is currently in bankruptcy proceedings in the U.S. Bankruptcy Court, District of Massachusetts, Western Division, and pursuant to that court's order, plaintiffs continue to be enjoined from proceeding against Engage. (*See* 11/13/07 Haims Decl. Ex. 7 ¶ 18.) Plaintiffs have indicated that claims against Engage are restated for purposes of appeal and that they do not intend to press the claims against Engage at this time.

² This opposition hereby incorporates by reference all legal arguments and standards set out in the Underwriter Defendants' Opposition Brief. To avoid duplication and to provide context, certain of the Underwriter Defendants' arguments are also explicitly referenced herein. These references are not intended to limit the Issuer Defendants' incorporation of the arguments raised in the Underwriter Defendants' Opposition Brief. The Issuer Defendants may offer additional briefing after Fischel's deposition or any rebuttal reports.

of which is even alleged in these cases. Plaintiffs have not proposed any other means of proving loss caused by the Issuer Defendants on a class-wide basis. Class certification should be denied on this basis alone.

The theory of loss causation that plaintiffs do offer concerns only the effect of the alleged manipulation. Plaintiffs assert that pre-open bidding and short-term aftermarket trading caused price inflation that took months (and in some cases, more than a year) to dissipate. Plaintiffs achieve this remarkable conclusion by, among other things, looking only at purchases by the alleged ladderers, but ignoring their sales and sales by others, and by ignoring their own claim that the markets for the Focus Case stocks were efficient. Instead, as the expert reports submitted by defendants show, any inflation caused by alleged tie-in trading would have been very short-lived. As a result, the proposed classes will necessarily include numerous plaintiffs who have suffered no loss, and establishing loss causation for any particular class member will require innumerable inquiries into individual purchases and sales, the existence and effect of tie-in trades at the relevant times (if any), as well as the duration and rate of dissipation of any such effect.

On the issues of knowledge and reliance, plaintiffs' new assertion that only "certain" investors allegedly knew of the manipulative scheme is not only evasive, but unavailing. Thousands of allocants, hundreds of issuers (and more than a thousand of their officers and directors who were previously named as defendants), along with dozens of underwriters are alleged *by plaintiffs* to have known of, or participated in, the manipulation of the Focus Case stocks. As the Second Circuit already held, it is "obvious[]" that knowledge would have spread far beyond those institutions or individuals to the "many thousands" of people employed by them, and onward to their families and friends. *Id.* at 43. Many others would have learned of the

scheme through media coverage or Internet postings. This viral spread of knowledge is not contained by plaintiffs' hopeful insertion of a qualifier ("certain") in their pleadings.

Knowledge defeats predominance because it precludes application of the *Basic* presumption of reliance. *Basic, Inc. v. Levinson*, 485 U.S. 224, 248-49 (1988). And if that were not enough, the Second Circuit has gone further and held that a presumption of reliance cannot apply in these cases because IPO markets are not efficient. *Miles*, 471 F.3d at 42-43. Plaintiffs' response is to submit yet another report by Fischel purporting to show that the Focus Case stocks "traded efficiently for their entire class periods." (Pl. Mem. at 52.) Given that Fischel's report does not even attempt to confront the Second Circuit's holding about IPO markets, plaintiffs have not come close to meeting their burden to establish market efficiency throughout the class periods.

As the Second Circuit held, the need for individual inquiries on knowledge, reliance and loss causation means that plaintiffs still "cannot satisfy the predominance requirement for a [Rule 23](b)(3) class action." *Miles*, 471 F.3d at 45. On their third attempt, plaintiffs have not proposed class definitions or methods of proof that avoid the fatal shortcomings identified by the Court of Appeals. Class certification should be denied, with prejudice.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Issuer Defendants respectfully refer the Court to the Underwriter Defendants' Opposition Brief for a complete statement of the facts and procedural history relevant to these proceedings. (*See* Und. Opp., "Background.")

STANDARDS FOR CERTIFICATION

The Issuer Defendants respectfully refer the Court to the Underwriter Defendants' Opposition Brief for a complete presentation of certification standards; plaintiffs' significantly

heightened burden as a result of recent decisions by the Second Circuit; the factual showings and determinations that must be made by a preponderance of the evidence for certification to be granted; and the heightened standards for expert opinion. (*See* Und. Opp., “Standard for Certification.”) The Issuer Defendants further refer the Court to the Underwriter Defendants’ discussion of the law of the case and its application to these proceedings. (*See* Und. Opp., Part I.)

ARGUMENT

I. **PLAINTIFFS’ SECTION 10(b) CLAIMS ARE NOT SUBJECT TO COMMON PROOF**

A. **Plaintiffs Cannot Prove Loss Causation On A Class-Wide Basis For The Section 10(b) Misrepresentation Claims.**

For any class to be certified in connection with the Section 10(b) misrepresentation claims against the Issuer Defendants, plaintiffs bear the burden of proving — in each Focus Case — that loss caused by alleged misrepresentations in the Issuer Defendants’ registration statements can be established through common proof. Fed. R. Civ. P. 23(b)(3); *Miles*, 471 F.3d at 42. Not only have plaintiffs made no attempt to meet this burden, but their own allegations and evidence preclude any finding in their favor.

In its prior opinion on class certification, the Court noted that “plaintiffs need not proffer separate loss causation methodologies for the misstatement and omission allegations” because “the alleged misstatements and omissions did nothing more than conceal the Underwriters’ alleged market manipulation.”³ *In re IPO Sec. Litig.*, 227 F.R.D. 65, 112 n.351 (S.D.N.Y. 2004). This reasoning should not apply, however, to the claims against the Issuer Defendants, which are

³ The Issuer Defendants were not party to the prior proceedings on class certification and neither plaintiffs nor the Underwriter Defendants briefed the distinction between loss caused by the alleged misrepresentations and loss caused by the alleged manipulation at that time.

for misrepresentation *only* — the Issuer Defendants are not alleged to have participated in the underlying manipulation in any way. In order to make out a Section 10(b) claim for misrepresentation, the PSLRA affirmatively requires loss causation to be proved. 15 U.S.C. § 78u-4(b)(4); *see also Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (PSLRA permits recovery “where, but only where, plaintiffs adequately allege and prove the traditional elements of causation and loss”).

Since the Court’s prior class certification decision, both the Supreme Court and the Second Circuit have ruled that to prove loss causation for a Section 10(b) misrepresentation claim, plaintiffs must establish a specific connection between the alleged misrepresentation and a decline in stock price. *Dura*, 544 U.S. at 346; *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 173-75 (2d Cir. 2005); *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147 (2d Cir. 2007). Accordingly, to establish loss causation in a misrepresentation case, plaintiffs must “*identify particular ‘disclosing events’ that corrected the false information, and tie dissipation of artificial price inflation to those events.*” *Liu v. Credit Suisse First Boston Corp. (In re IPO Sec. Litig.)*, 383 F. Supp. 2d 566, 580 (S.D.N.Y. 2005) (Scheidlin, J.) (emphasis added); *see also Dura*, 544 U.S. at 344; *see also Lentell*, 396 F.3d at 175 n.4 (concealed information “could not have caused a decrease in the value of those companies before the concealment was made public”); *In re eSpeed, Inc. Sec. Litig.*, 457 F. Supp. 2d 266, 296 (S.D.N.Y. 2006) (Scheidlin, J.) (“it is axiomatic” that a concealed fact cannot cause loss before disclosure); *Liu v. Credit Suisse First Boston Corp. (In re IPO Sec. Litig.)*, 399 F. Supp. 2d 261, 266 (S.D.N.Y. 2005) (Scheidlin, J.) (same). Yet, in these cases, “particular disclosing events” that are “tie[d to] dissipation of inflation” are not even *alleged*.⁴ *See, e.g., Sycamore 2AC ¶¶ 67-68; Pl. Mem.* at 58 (“disclosure

⁴ Under plaintiffs’ “information hypothesis,” the “truth is revealed” when the
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of the ‘truth’ does not come from a specific revelation”).⁵ Quite aside from plaintiffs’ pleading burden, however, plaintiffs must nevertheless establish some means to show how injury caused by the Issuer Defendants’ alleged misconduct may be proven on a class-wide basis if they hope to have the Court certify a class.

Plaintiffs offer nothing. Fischel asserts (without any analysis) that manipulative trading does not account for “all inflation” because plaintiffs also alleged “various disclosure defects which *could have* also affected prices.” (Fischel II ¶ 9 (emphasis added).) Fischel hypothesizes that “[h]ad market participants known [of the disclosure defects], they *would have likely* reduced their valuations of the issuers’ shares in the aftermarket.” *Id.* This is pure conjecture. Absent corrective disclosure, plaintiffs cannot show by common proof how the alleged misrepresentations affected the price of any Focus Case stock and caused loss to the classes they seek to certify.

Moreover, even if plaintiffs could somehow show that the alleged misrepresentations affected stock price (and they cannot), more would be required to certify the classes in these

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manipulation ceases, and “the information available to the market is the same as before” — *i.e.* the market is *not* made aware that any manipulation took place, but normal market forces simply resume and the securities return to their “true investment value.” *See* Pl. Mem at 57-58, citing *In re IPO Sec. Litig.*, 297 F. Supp. 2d 668, 674 (S.D.N.Y. 2003).

⁵ Fischel asserts that media coverage of the alleged scheme was *not* sufficient to inform the market of the alleged scheme and eliminate artificial inflation. (*See* Fischel IV ¶¶ 22-25.) Yet, at the same time, Fischel contends that dissipation of inflation can be measured using damages models based on “corrective information” (which is nowhere defined) entering the marketplace. (*Id.* ¶ 41ff.) Fischel states “because market participants revised their valuations downward in response to *a steady stream of adverse information about the companies’ prospects*, rather than in response to *specific admissions of wrongdoing*, the Tie-in Agreements led to long-run underperformance as inflation dissipated over time.” (*See id.* ¶ 48 (emphasis added).) Whatever this “adverse information” was, plaintiffs do not contend that it was *corrective* in the sense of informing the market that any particular Issuer Defendant had failed to disclose intended manipulation in their respective registration statements.

cases. Dissipation of inflation throughout the class period “may reflect not the earlier misrepresentation, but . . . changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some *or all* of that lower price.” *Dura*, 544 U.S. at 342-43 (emphasis added). Plaintiffs here allege an elaborate and multi-faceted scheme involving different misconduct by different defendants, most of which had absolutely nothing to do with the Issuer Defendants. Yet plaintiffs have not proposed any method to segregate, throughout the lengthy proposed class periods, the price effects of, for example, (i) tie-in agreements; (ii) undisclosed compensation; (iii) analyst conflicts and statements; (iv) purchases and sales made *without* any tie-in agreement; (v) the many risks that *were* disclosed (which included extreme price volatility);⁶ or (vi) myriad other factors affecting stock price from any price effect caused by alleged misrepresentations by the Issuer Defendants.⁷

⁶ See, e.g., Firepond Registration Statement and Prospectus at 13 (“OUR STOCK PRICE MAY BE VOLATILE WHICH MAY LEAD TO LOSSES BY INVESTORS AND RESULT IN SECURITIES LITIGATION” (capitalization in original)).

⁷ Segregating the many factors affecting price cannot be deferred until after trial as part of a damages calculation, since, as they concede, plaintiffs seeking class certification “must establish that the fraud caused at least some portion of their economic losses.” (Pl. Mem. at 57, citing *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189 (2d Cir. 2003).) In other words, this is not a matter of showing *how much* injury the Issuer Defendants’ alleged misconduct may have caused — it is a matter of showing that it caused injury *at all* (and that such injury can be proven class-wide), and such a showing must be made now. *Simon v. New Haven Board & Carton Co.*, 516 F.2d 303, 306 (2d Cir. 1975) (the “rule that uncertainty as to the *amount* of damages is to be cast on a wrongdoer does not extend to uncertainty as to the *fact* of damages.” (emphasis in original)). In addition, plaintiffs’ failure to offer any means of proving loss causation for the Issuer Defendants disregards how the case will have to be tried, a key class certification inquiry. Under the PSLRA, juries must make specific findings as to *each* defendant’s proportionate fault, including the amount of loss caused by *each* defendant. See Pub. L. No. 104-67 (codified as amended at 15 U.S.C. § 78u-4(f)). And even if it had some application to the Issuer Defendants, as discussed *infra*, Part I.B.1, the broad strokes of Fischel’s flawed comparisons to indices does not provide the jury the evidence it needs to answer the interrogatories the PSLRA requires and allocate responsibility for the class members’ losses

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Because of the “tangle of factors” affecting price in these cases (any or all of which may have caused all of plaintiffs’ alleged losses), plaintiffs must proffer some means to prove loss caused by the Issuer Defendants alleged misconduct, and such proof must function class-wide. *Dura*, 544 U.S. at 343. Where, as here, *no* evidence of either loss causation or predominance is proffered, class certification must be denied. *See, e.g., Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 180 (3d Cir. 2001) (class certification denied for lack of predominance on element of loss causation).

B. Plaintiffs Cannot Prove Loss Causation On A Class-Wide Basis For The Section 10(b) Manipulation Claims.

Rather than propose any method to establish loss caused by the alleged misrepresentations (class-wide or otherwise) — which is all that the Issuer Defendants are alleged to have done — plaintiffs instead lump all defendants together and advance a single theory of loss causation based on pre-open bidding and short-term aftermarket trading with long-term, dissipating inflationary effect. Even if this theory of loss causation had any bearing on the misrepresentation claims leveled at the Issuer Defendants (and it does not), it would not establish predominance for the element of loss causation. Instead, plaintiffs’ theory of persistent price inflation (i) is based on a methodology that lacks any scientific or evidentiary basis; and (ii) conflicts both with empirical studies of price impact and bedrock principles governing the operation of the financial markets (including the efficient market theory). As such, plaintiffs have failed to establish that common proof of loss causation will predominate.⁸

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among the issuer and multiple underwriters in each Focus Case.

⁸ Because, as discussed below and in the Underwriters’ Opposition Brief, plaintiffs cannot establish predominance for the Section 10(b) manipulation claims, no class should be certified for the Section 10(b) misrepresentation claims. However, even if the Court decides that plaintiffs have met their predominance burden for the manipulation claims, plaintiffs are not
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1. Fischel's Reports Are Unscientific.

Fischel recognizes that “[h]ow much a given Issuer’s stock price was inflated and how long the inflation lasted are empirical questions.” (Fischel I ¶ 19.) These questions require some kind of answer at the class certification stage, because if the proposed classes include plaintiffs who purchased stock after all — or before any — inflation had dissipated and suffered no loss, “individual questions would dominate the loss causation inquiry.” *In re IPO Sec. Litig.*, 227 F.R.D. at 112. And a scientifically valid answer would require, at a minimum: (i) identification of purchases made pursuant to tie-in agreements; (ii) analysis by statistically valid methods of the effect of each such purchase on stock price; and (iii) analysis by statistically valid methods of the rate at which any such effect subsequently dissipated. (*See Bessembinder Rep.* ¶ 11.)

Fischel offers none of this. Instead, he “assumes” the existence of tie-in agreements (Fischel I ¶ 8) (based on plaintiffs’ counsel’s determinations of alleged laddering trades and without any independent analysis or verification), and then asserts that tie-in purchases led to long-term price inflation that can be measured by comparing stock performance to various market and industry indices. (Fischel III ¶ 20.) For the reasons discussed below, Fischel’s analysis is not scientifically valid and thus should not be accorded any weight.⁹

First, Fischel offers no evidence of — or even a means to identify — trades that were conducted pursuant to alleged tie-in agreements. Fischel purports to analyze net purchasing activity by “allocants with alleged tie-in agreements.” (Fischel IV ¶¶ 31-32.) For all of his

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thereby relieved of establishing predominance for each element of their misrepresentation claims against the Issuer Defendants.

⁹ The many conceptual and analytical flaws in Fischel’s reports are examined at length in the reports of Dr. Hendrik Bessembinder and Dr. Matthew Spiegel, submitted herewith. (*See Haims Decl. Exs. 1, 2.*)

analyses, Fischel simply relied on plaintiffs' counsel to identify these allocants, and made no attempt to eliminate or control for alternative explanations for their aftermarket purchasing, including a genuine desire to own the stock.¹⁰ (Fischel III ¶ 4; Fischel IV ¶ 33 n.14.) The IPOs at issue were more than ten times oversubscribed; under these circumstances, investors necessarily received only a fraction of their desired holding through the allocation process. (Bessembinder Rep. ¶ 14.)¹¹ Fischel nevertheless assumes, without any stated basis, that *all* aftermarket purchasing by these allocants was due to tie-in agreements rather than interest in the stock.

Moreover, the majority of allocants identified by plaintiffs as having alleged tie-in agreements “did not actually make net share purchases in the aftermarket.” (*Id.* ¶ 15.) Instead, of these 946 allocants, only about 37% percent were net purchasers of stock in the first ten days following the offering. (*Id.*) As Dr. Bessembinder concludes, “[t]hese facts cast serious doubts as to whether the allocants identified by Professor Fischel as having alleged tie-in agreements actually entered tie-in agreements.” (*Id.*) Thus, Fischel has failed to provide any evidence of the actual size or nature of the trading activity that allegedly gave rise to such long-lived inflation, and his conclusion that “[t]he magnitude of the alleged tie-in agreements was substantial for each of the six [F]ocus [C]ase stocks,” is at best overstated, and at worst, baseless. (Fischel III ¶ 5; *see also id.* ¶¶ 6-15; Fischel IV ¶¶ 31-33.)

Similarly, Fischel points to a number of “descriptive statistics” that purportedly support his conclusion that the Focus Case stocks were affected by tie-in trading. (Bessembinder Rep.

¹⁰ Plaintiffs have not disclosed their basis for identifying allocants as purchasing pursuant to tie-in agreements.

¹¹ In fact, the 20 accounts with the largest net purchases in the first ten days of trading in the Focus Cases were allocated only 8.1 million IPO shares in those IPOs, though they had indicated an interest in purchasing 89.8 million shares. (Bessembinder Rep. ¶ 14.)

¶ 35.) For example, Fischel reports that (i) in each Focus Case, the underwriter’s first pre-opening bid exceeded the offer price (Fischel IV ¶¶ 29-30 and Ex. F); (ii) allocants with alleged tie-in agreements entered limit orders to buy shares in the aftermarket that were above the IPO offering price (Fischel IV ¶ 31 and Ex. H); and (iii) allocants who received larger IPO allocations purchased more shares in the aftermarket, indicating that the purchases were “in exchange for” IPO stock (Fischel III ¶ 15 and Ex. F). Fischel asserts that “one would expect” to see these results in the context of a laddering scheme. (*See, e.g.*, Fischel III ¶ 15; Fischel IV ¶ 29.)

The problem, of course, is that “one would expect” the exact same results even where no scheme exists. As Dr. Bessembinder notes, “it is well documented that IPOs . . . are issued with offer prices lower on average than prices supported in open market trading.” (Bessembinder Rep. ¶ 36.) Accordingly, any underwriter who sets the first bid close to the anticipated market open will naturally exceed the offer price. (*Id.*) Thus what “Fischel wishes to interpret as indicative of tie-in agreements . . . simply reflects that the offer prices were less than likely aftermarket prices,” which is true for IPOs both before and after the periods at issue in this litigation. (*Id.*) Similarly, the fact that allocants (and others) place aftermarket limit orders above the offer price is hardly unusual — it may reflect a genuine interest in owning the shares, and thus allocants placing limit orders would have to use prices in line with aftermarket trading in order to be filled. (*Id.* ¶ 37.) Finally, the notion that larger IPO allocants purchased more shares in the aftermarket “in exchange” for their allocations “makes the elementary error of assuming that an observed correlation must imply causation.” (*Id.* ¶ 38.)

Second, Fischel does not actually calculate the inflation caused by the alleged manipulation, but instead simply attributes all stock price changes not explained by change in an industry index to the alleged manipulation. Fischel fails to offer a method to establish a

relationship between tie-in trading on the one hand and Focus Case stock prices on the other. (*Id.* ¶ 40.) Instead, Fischel asserts, in a remarkable leap, that such inflation can be measured just by comparing the long-run performance of the Focus Case stocks to industry benchmarks. (Fischel III ¶¶ 20-22.) But there is *no connection* between this analysis and the alleged manipulative scheme. (*See* Bessembinder Rep. ¶ 43.) Because inflation is assumed, Fischel is just measuring the difference between individual stock returns and average, industry stock returns — *and nothing more* — and then asserting that 100% of the disparity is the result of the manipulation. (*Id.* ¶ 46.) Thus, Fischel’s method would find the exact same amount and duration of inflation whether there was one laddering trade, ten trades, a thousand, or even zero; whether each laddering trade involved one share of stock, ten shares or a thousand; and whether the alleged ladders maintained their positions in the stock for hours, days or weeks. (*Id.* ¶ 11.) To call this method “unscientific” is charitable indeed.

Similarly, Fischel makes no effort to exclude other possible explanations for the specific price movements of each of the six Focus Case stocks. For instance, Fischel’s method does not account for the effects of issuer-specific information on stock price, but instead attributes *all* stock price change not associated with an industry index to alleged laddering. *See West v. Prudential Sec., Inc.*, 282 F.3d 935, 939 (7th Cir. 2002) (Easterbrook, J.) (reversing class certification where, among other defects, plaintiffs’ expert did not account for price movements unrelated to alleged misconduct). In this respect, Fischel’s method directly contradicts his Report on Market Efficiency, which shows that positive news about an issuer is associated with statistically significant stock price increases. (Bessembinder Rep. ¶ 49.) By way of example, Fischel attributes the \$6.94 increase in VA Linux’s stock price on June 22, 2000 to StockTalkLive.com’s announcement that it had selected VA Linux to provide certain services.

(Fischel Eff. ¶ 130). At the same time, Fischel’s method implies that “artificial inflation” as a result of the alleged manipulation increased by \$7.29 on the same date. (See Bessembinder Rep. ¶¶ 50-51 and Ex. 6 (providing similar examples for each Focus Case stock).) But a given price increase cannot be attributed in full to additional inflation arising from defendants’ manipulation and in full to positive news about the company at the same time.¹² (*Id.* ¶ 51.)

Because Fischel’s methodology is entirely disconnected from the alleged laddering trades, it leads to inconsistent and spurious results. For example, Fischel’s methodology leads to the conclusion that in some instances the alleged laddering actually led to a *decrease* in the price of the issuer’s stock. (See *id.* ¶¶ 47-48 and Ex. 5F.) In other instances, Fischel concludes that enormous drops in stock prices over a period of months did not reduce the alleged inflation at all. (See *id.* ¶ 57 and Ex. 5A.) And the entire analysis is tainted by plaintiffs’ selection of an arbitrary ending date. (See *id.* ¶¶ 52-55 and Exs. 8A-E.)

Third, even if it were valid to use a comparison of the stocks to various indices, Fischel’s method of doing so is fundamentally unscientific. As Dr. Bessembinder reports, a scientifically valid assessment of investment performance commonly used in academic literature requires allowances for randomness in returns as well as appropriate controls for stocks’ risk characteristics. (*Id.* ¶ 77.) Fischel does not implement any of these controls. (*Id.* ¶ 78.) The simple comparison that Fischel instead proposes “is not scientifically valid to support a conclusion of significant underperformance.” (*Id.* ¶ 77.)

¹² Indeed, in 2003, Fischel opined in securities litigation involving Terra Networks, an issuer named in one of the more than 300 coordinated actions before this Court, that the steep decline in Terra Networks’ stock price from May 2000 through the end of October 2000 (during the class period in this litigation) was due to a merger announcement, and no mention is made in that report about the dissipating effect of price inflation caused by laddering. (See Haims Decl. Ex. 3 at ¶¶ 8, 13-15 (Report of Daniel R. Fischel in *IDT Corp. v. Telefonica, S.A.*, Civil Action No. 01-CV-471 (D.N.J.).)

Because Fischel fails to identify alleged tie-in purchases, or to measure or even to propose a method to detect the inflationary effect of such purchases, his reports cannot support a finding of predominance on the issue of loss causation for the manipulation claims — let alone for the attenuated misrepresentation claims. Plaintiffs have failed to provide the necessary evidentiary basis for this Court to conclude that loss causation is susceptible to class treatment.¹³

2. Plaintiffs’ Theory of Persistent Inflation Is Refuted By Basic Principles of Finance and Empirical Evidence.

Plaintiffs’ “persistent inflation” theory asserts that (i) pre-open bidding and “tie-in” trading acted as an “informational proxy” that misled investors and resulted in price inflation during the first ten days of trading; and (ii) that after this manipulative activity “ceased” and allowed the “true facts about the issuer to exert their natural pull on price,” the inflation nevertheless dissipated very slowly and lasted for months or longer in efficient markets (and always until at least December 6, 2000). (Pl. Mem. at 57-58; *see also* Fischel I at ¶ 15.) In addition to Fischel’s failure to offer any valid scientific method to measure such inflation or dissipation, plaintiffs’ theory is implausible because it ignores basic economic principles and empirical evidence concerning the price impact of trades that confirms those principles.

First, in an efficient market, demand for a stock (and price) is driven by information about the fundamental value of the issuer and expected returns from the investment. *West*, 282

¹³ The Issuer Defendants reserve the right to move to exclude Fischel’s reports and testimony following the close of expert discovery under *Daubert v. Merrill Dow Pharms.*, 509 U.S. 579 (1993) (expert testimony required to be both relevant and reliable). *Post-Miles*, *Daubert* examinations should properly take place at the class certification stage. *Miles*, 471 F.3d at 42 (“disavow[ing]” suggestion that expert testimony may establish Rule 23 requirement “simply by being not fatally flawed” and requiring district judge “to assess all of the *relevant* evidence” submitted at class certification stage (emphasis added)); *see also In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 245 F.R.D. 147, 168-70 (S.D.N.Y. 2007) (applying *Daubert* at class certification stage to determine admissibility of expert evidence).

F.3d at 939 (“fundamental attribute of efficient markets is that information, not demand in the abstract, determines stock prices”). Because price in an efficient market is determined by *informed* trading, the effect of a supposed “informational proxy” that is not subsequently backed up by *actual information* will be quickly impounded out of price. As Dr. Bessembinder explains, trading activity may affect prices because the trade originator *might* have knowledge about firm fundamentals, and thus the market reacts “based on trades’ *expected* information content.” (Bessembinder Rep. ¶ 24 (emphasis in original), citing Albert S. Kyle, “Continuous Auctions and Insider Trading,” *Econometrica*, Vol. 53, No. 6 (November 1985), at 1315-35.) However, if a trade results in price impact, but the expected information never ultimately reaches the market, the price impact of the trade will subsequently be reversed. (*Id.* ¶ 26.) This reversal can occur “because the market infers the truth from the absence of subsequent confirming information, because value-oriented traders detect the mispricing, or because the parties that originally traded (*e.g.*, those who purchased due to tie-in agreements) elect to reverse their positions.” (*Id.*) Empirical studies show that this reversal comes very quickly, likely within minutes, and certainly not months. (*See id.* ¶¶ 30-31; Spiegel Rep. ¶ 28.)

Fischel does not offer any basis for the conclusion that alleged laddering trades acted as “informational proxies” with a durable effect. Rather, Fischel simply notes that “alleged trades pursuant to Tie-in Agreements *could have* led other market participants to revise upward their expectations about value,” without ever explaining why they *would have*. (Fischel II ¶ 15 (emphasis added).) But the market “is not easily fooled,” and professional investors are not the lemmings that plaintiffs’ theory implies. Daniel R. Fischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities*, Business Lawyer (November

1982), at 13. And Fischel has not identified anything about the Focus Case stocks to suggest that the alleged laddering purchases here would have had a long-term effect on price.

Second, sales by other market participants would also tend to dissipate the inflationary effect of any purchases. In an efficient market, “if arbitrageurs observe a difference between price and value, they immediately eliminate it by their trading.” *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 8-9 (1st Cir. 2005) (citation omitted); *see also* Spiegel Rep. ¶ 16). Fischel agrees that the “buying and selling activity of these market participants” would “rapidly” eliminate any profit opportunity from mispricings. (Fischel Eff. ¶ 7; *see also* ¶¶ 17-18 (noting the scrutiny of “arbitrageurs [who] were active in [the] stock” and “numerous market makers”). Nevertheless, plaintiffs’ theory of loss causation is premised on the (flawed) notion that purchases alone can generate artificial demand and increase price, but that subsequent sales will not drive the price back down. (Spiegel Rep. ¶ 9.) Thus, they assert that while the alleged inflation dissipated as “true facts exert[ed] their natural pull on price,” this “pull” was protracted, sluggish and imprecise (despite a torrent of available information about the subject securities).¹⁴ But plaintiffs cannot have it both ways – either any inflationary effect would have rapidly dissipated in an efficient market, or what plaintiffs describe is “the very antithesis of an efficient market.”¹⁵ *Miles*, 471 F.3d at 43.

¹⁴ Fischel’s Report on Market Efficiency includes, for each Focus Case stock, findings related to “extensive” coverage by investment professionals and the media during the class periods, including the number of market makers, arbitrageurs, news articles and analyst reports. (*See, e.g.*, Fischel Eff. ¶¶ 13, 16-18 (Corvis); ¶¶ 53, 55-58 (Firepond); ¶¶ 93, 96-98 (Sycamore); ¶¶ 120, 123-125 (VA Linux); *see also* Und. Opp., Part II.)

¹⁵ Even in an inefficient market, Fischel does not provide any empirical evidence to suggest that price inflation from the alleged manipulation could persist over the course of months.

Third, Fischel fails to account for the deflationary effect of sales by the alleged ladderers themselves, which could negate the effect of their previous purchases. (Spiegel Rep. ¶ 23.) The data that is available shows that allocants were in fact active sellers – only about 37% of allocants alleged to have tie-in agreements were net purchasers in the first 10 days of trading following the offerings. (See Bessembinder Rep. ¶ 15.) Since Fischel has not analyzed the extent to which the alleged ladderers sold their positions after the first ten days of trading, he has not considered the possibility that the ladderers subsequently engaged in sales that would offset any inflationary effect caused by their purchases. (Spiegel Rep. ¶ 24.) This oversight undercuts Fischel’s assertion that the alleged scheme inflated prices for any significant length of time.¹⁶

As a result of all these factors, the loss causation inquiry is highly individualized. Because the alleged tie-in purchases occurred at varying times in the aftermarket and because sales (by either the same allocants who purchased or other investors) would off-set the inflationary effect of any such purchases, the price effect resulting from any or all tie-in trades could be eliminated by the time of any particular class member’s purchase. Thus, the relevant points of inquiry for proof of loss causation are not on either side of a disclosure, but when *each* individual class member bought and sold and when each alleged tie-in trade occurred. *Grandon v. Merrill Lynch & Co.*, No. 95 Civ. 10742, 2003 WL 22118979, at *9 (S.D.N.Y. Sept. 11, 2003) (denying class certification where predominance requirement not met because determination of liability “requires an individualized assessment of each transaction”). Similarly, the *rate* of

¹⁶ The relative liquidity of the Focus Case stocks further undermines plaintiffs’ contention that inflation was long-lived. For the Focus Case IPOs, “trading volume was more than 50 times higher on the offer day, and more than 10 times higher over the first ten days, than the trading over the remainder of the period.” (Spiegel Rep. ¶ 32.) Thus, “as a result of these relative liquidities over time, purchases of stock in the first ten days after each offering date would, if anything, have had a smaller price impact than sales conducted subsequent to that period.” (*Id.*)

dissipation is equally critical. If, as plaintiffs contend, the inflation dissipated very slowly, any class members who purchased and sold while the level of inflation was unchanged suffered no loss. *Dura*, 544 U.S. at 346 (sale before inflation dissipates does not constitute loss). Conversely, if the dissipation occurred quickly, countless putative class members suffered no injury at all.

In sum, even assuming the alleged manipulation had an inflationary effect, the proposed classes would extend well beyond the small subset of any persons who could plausibly claim injury. And even for those few, the loss causation inquiry would be highly individualized. Accordingly, class certification must be denied.

C. Plaintiffs Cannot Prove Reliance On A Class-Wide Basis.

Reliance on the alleged misstatement or omission is a required element of the Section 10(b) misrepresentation claims against the Issuer Defendants. *Dura*, 544 U.S. at 341. Because reliance can only be proven class-wide for these claims by invoking the fraud-on-the-market theory,¹⁷ the Court must affirmatively find that the markets in question were efficient throughout

¹⁷ *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), does not apply to these cases for the reasons set forth in the Underwriter Defendants' Opposition Brief. (See Und. Opp., Part III.D.) Additionally, the need for the presumption in *Affiliated Ute* — which involved a face-to-face transaction where information was entirely omitted — does not arise in a “fraud-on-the-market” case, where the market “transmits information to the investor in the processed form of a market price.” *Basic, Inc. v. Levinson*, 485 U.S. 224, 244 (1988). Thus, whether a misrepresentation is an affirmative misstatement or a wholesale omission, once the market discovers the deception, stock price will react accordingly. Because stock price evinces the misrepresentation, regardless of its form, and because that information is publicly available, the evidentiary problem at issue in *Affiliated Ute* does not exist in the context of a market transaction. Plaintiffs here should not be permitted to invoke *Affiliated Ute* to get around the fact that, in these cases, there is no alleged impact on stock price caused by the alleged misrepresentations. See *In re Genesis Intermedia Sec. Litig.*, 232 F.R.D. 321, 334 (D. Minn. 2005) (*Affiliated Ute* presumption of reliance applicable only to face-to-face transactions).

the proposed class periods in order to certify the Aftermarket Purchaser Class.¹⁸ *Miles*, 471 F.3d at 41 (factual findings required for Rule 23 determinations to be made at class certification stage, notwithstanding overlap with merits inquiry); *Basic*, 485 U.S. at 248 n.27 (presumption of reliance on market price applies only where market is shown to be efficient). But it is the law of the case that “the market for IPO shares is not efficient,” and that “an efficient market *cannot be established in this case*” owing to plaintiffs’ own allegations as to how slow the market was to correct alleged price inflation. *Miles*, 471 F.3d at 42 (emphasis added). As discussed below, plaintiffs’ newly-minted allegations and class certification papers have provided no basis on which to depart from the Second Circuit’s holdings.

First, plaintiffs’ evidence of market efficiency is insufficient. Undeterred by *Miles*, plaintiffs contend that the Focus Case stocks “traded efficiently for their entire class periods” (Pl. Mem. at 52), and offer yet another report by Fischel in support of this proposition. But plaintiffs’ evidence fails to confront the Second Circuit’s holding, and instead, Fischel’s report is largely a rote application of the *Cammer* factors, without any meaningful attempt to address the “totality of the circumstances” bearing on market efficiency during the class periods. *See Teamsters*, 2006 WL 2161887, at *12 (Scheindlin J.) (court must look at “totality of the circumstances” to assess market efficiency). Because plaintiffs have failed to meet their burden on this critical issue, there is no basis to conclude that reliance can be proven class-wide in these cases.

¹⁸ The various class definitions proposed by plaintiffs suffer from crippling manageability and ascertainment problems that alone preclude certification. (*See* Und. Opp., Parts V, VI.) More importantly, plaintiffs cannot avoid the issue of reliance through the use of Rule 23(c)(4)(A) certification, because unless plaintiffs can establish that the presumption of reliance would apply to most class members, separate trials on the issue of reliance are not appropriate. *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, No. 05 Civ. 1898, 2006 WL 2161887, at *12 n.161 (S.D.N.Y. Aug. 1, 2006) (Scheindlin, J.).

Second, even if the markets in question were efficient, reliance cannot be presumed in a widely informed market, or even in a less informed market where market makers are privy to the truth (as they must have been as alleged participants in the scheme). *Basic*, 485 U.S. at 248-49. In these cases, plaintiffs face an insurmountable hurdle — which they have not tried to overcome — to show that the market was *not* widely informed about the alleged manipulative scheme. Indeed, the Second Circuit has already held that “the predominance requirement [was] defeated” because thousands of allocants were alleged to have known of the scheme, and that it was “obvious[.]” that knowledge would have spread far beyond those institutions or individuals receiving allocations to the “many thousands” of people employed by them. *Miles*, 471 F.3d at 43. The Court of Appeals further noted that two television networks and other media sources reported on the alleged scheme in 1999 and 2000. *Id.* Additionally, the Underwriter Defendants have submitted with their Opposition Brief further evidence of media reports, SEC postings, internet chat room discussions, and television viewership, as well as expert evidence, that underscores the spread of knowledge of the alleged scheme. (*See* Und. Opp., Part II.C.)

Plaintiffs cannot seriously contend that the alleged scheme was known to a select few, when those “few” allegedly include thousands of allocants, hundreds of issuers (and more than a thousand of their officers and directors who were previously named as defendants), dozens of underwriters, their employees, families and friends, as well as the many other thousands informed by the media, and in fact, plaintiffs offer no evidence to the contrary. Plaintiffs’ retooled class definitions and pleadings have not (and cannot) provide a remedy to the “broad extent of knowledge . . . throughout the community of market participants and watchers” that “would precipitate individual inquiries as to the knowledge of each member of the class.” *Miles*, 471 F.3d at 44. Instead, the only evidence plaintiffs have offered confirms that, for each Focus

Case, active traders in the stocks included Underwriter Defendants and allocants who, plaintiffs acknowledge, would have known of the scheme. (*See* Und. Opp., Part III.A.) In the face of such widespread knowledge, “the basis for finding that the fraud had been transmitted through market price [is] gone.” *Basic*, 544 U.S. at 248. Thus, both the findings of the Court of Appeals, as well as the record before the Court preclude the application of the *Basic* presumption of reliance in these cases.

Third, the presumption of reliance should not apply where plaintiffs fail to show that the alleged misrepresentations had any effect on stock price. The Supreme Court in *Basic* made clear that the presumption of reliance may be rebutted by “[a]ny showing *that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff.*” 544 U.S. at 248 (emphasis added). Plaintiffs have failed to show that this link even exists. As discussed *supra*, Part I.A., plaintiffs have not provided any evidence of separate loss caused by the Issuer Defendants’ misstatements, much less that this element can be proven class-wide. No corrective disclosure is even alleged, and neither is a related price decline. Without any indication that the impugned statements actually affected stock price, the presumption of reliance — which is premised on the fraud being transmitted through price — has no application. *Id.*

The Fifth Circuit recently recognized this principle in vacating an order certifying a class action for securities fraud where loss causation was not proved. In *Oscar Private Equity Inv. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007), the court affirmatively held that “loss causation must be established at the class certification stage by a preponderance of all admissible evidence” in order to “trigger[] the presumption of reliance.” *Id.* at 269-70. The Fifth Circuit

required “proof that the misstatement *actually moved* the market.” *Id.* at 265 (emphasis in original). As the Court noted:

[t]he power of the fraud-on-the-market doctrine is on display here. With proof that these securities were being traded in an efficient market, the district court effectively concluded that if plaintiffs can establish at trial that defendants acted with the requisite intent . . . then defendants would be liable for millions of dollars in paper losses In short, the efficient market doctrine facilitates an extraordinary aggregation of claims. We cannot ignore the *in terrorem* power of certification”

Id. at 266-67; *see also In re Seitel, Inc. Sec. Litig.*, 245 F.R.D. 263 (S.D. Tex. 2007) (denying class certification and holding presumption of reliance inapplicable where alleged misrepresentations did not affect stock price). Certification of the misrepresentation claims against the Issuer Defendants on the basis of the “fraud-on-the-market” theory without evidence that the alleged misconduct actually had *any* effect on the market would utterly unhinge the presumption of reliance from its moorings in *Basic*, and permit an “extraordinary aggregation of claims” indeed. Such a result should not be permitted.

Neither should plaintiffs be permitted to compartmentalize the elements of their claims in order to survive class certification and defer their day of reckoning. As discussed above, plaintiffs assert a theory of loss causation for their manipulation claims that fundamentally conflicts with the efficient market theory, while at the same time invoking that theory for purposes of proving reliance for their misrepresentation claims, as though the two concepts are unrelated. But “loss causation speaks to the semi-strong efficient market hypothesis on which classwide reliance depends,” *Oscar Private Equity*, 487 F.3d at 269, and if plaintiffs’ flawed theory of slowly dissipating inflation is credited, it must follow that the markets for the Focus Case stocks were woefully inefficient throughout the class periods, and the presumption of reliance therefore cannot be applied. *Basic*, 485 U.S. at 248; *see also* Und. Opp., Part III.A.

Finally, even if the presumption of reliance were not doomed by plaintiffs’ theory of loss causation, the presumption is properly applied only to an issuer’s statements about the company itself. As the Supreme Court stated, “[t]he fraud-on-the-market theory is based on the hypothesis that, in an open and developed securities market, the price of a company’s stock is determined by the available material information regarding *the company and its business*.” *Basic*, 485 U.S. at 241-42 (emphasis added). While the exact substance of the alleged misrepresentation has been somewhat of a moving target in this litigation, it has never had anything to do with the Issuer Defendants’ business prospects or performance. As the Second Circuit noted, it is “doubtful” whether the presumption of reliance can be extended “beyond its original context.” *Miles*, 471 F.3d at 43.

II. PLAINTIFFS’ SECTION 11 CLAIMS RAISE INDIVIDUALIZED ISSUES THAT PRECLUDE CLASS TREATMENT

A. The Proposed Section 11 Classes Include Allocants With Knowledge Of The Alleged Scheme.

The issue of class members’ knowledge applies even more forcefully to the Section 11 class, which still includes allocants. As the Underwriter Defendants explain, no clear division can be drawn between institutional and other allocants based on the receipt of an allocation from an “institutional pot.”¹⁹ (*See* Und. Opp., Part II.D.) But even if the Section 11 class could somehow be restricted to “non-institutional” allocants, plaintiffs concede that retail investors had

¹⁹ Plaintiffs’ tortured redefinition of the proposed classes has, ironically, led to the exclusion of *all* allocants who received allocations from an “institutional pot” from the Section 11 class, even though the statute was enacted specifically to protect purchasers in an IPO. *See* H.R. Rep. No. 85, 73rd Cong., 1st Sess. at 5 (1933) (“The bill [Securities Act] affects only *new offerings* of securities sold through the use of the mails or of instrumentalities of interstate or foreign transportation or communication”). (“Paragraph [4(1)] broadly draws the line between distribution of securities and trading in securities, indicating that the [Act] is, in the main, concerned with the problem of distribution as distinguished from trading”). *Id.* at 15.

knowledge of the scheme, but assert, without any evidence, that the “majority” were unaware of the manipulation. (*See* Pl. Mem. at 5.) The pervasive knowledge problem inherent to plaintiffs’ claims, described above, would necessitate potentially thousands of mini-trials as part of the Section 11 “knowledge” defense, which could include additional parties and claims. (*See* Und. Opp., Part II.A.)

B. The Defense Of Negative Causation Requires Individual Assessment Of Claims.

Section 11(e) affords a defense of negative causation “if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from [the allegedly false] part of the registration statement.” 15 U.S.C. § 77k(e); *In re IPO Sec. Litig.*, 241 F. Supp. 2d 281, 351 n.80, 374 (S.D.N.Y. 2003). The Section 11 negative causation defense and the Section 10(b) loss causation element “are mirror images.” *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288, 2005 WL 375314, at *6 (S.D.N.Y. Feb. 17, 2005). The loss causation arguments raised in connection with the Section 10(b) claims thus apply equally to the Section 11 claims, and certification of the Section 11 claims must be denied on the same bases. (*See supra*, Part I.A.) Indeed, plaintiffs themselves have supplied the Issuer Defendants’ negative causation defense by attributing loss to the cessation of manipulative activity and failing to identify any basis on which such loss could be attributed to the Issuer Defendants’ alleged misrepresentations.²⁰

²⁰ Plaintiffs have also failed to meet their Rule 23 burden to show that tracing issues will not predominate for the proposed Section 11 classes. For example, evidence submitted by the Underwriter Defendants shows that the proposed Section 11 class for Firepond cannot extend beyond February 9, 2000 (less than a week after the IPO), and as a consequence, no Section 11 class can be certified in Firepond because of the lack of class representative. (*See* Und. Opp., Part VII.B.)

III. NO CLASSES SHOULD BE CERTIFIED FOR THE SECTION 10(b) CLAIM AGAINST CORVIS OR FOR CLAIMS AGAINST IXL

The Section 10(b) claim against Corvis was previously dismissed with prejudice and therefore cannot be certified. *In re IPO Sec. Litig.*, 241 F. Supp. 2d at 370-71. Plaintiffs have indicated that the Section 10(b) claim against Corvis is restated for purposes of preservation for a possible appeal only and that they do not intend to press those claims at this time. In correspondence prior to the Issuer Defendants' Motion to Dismiss, plaintiffs indicated that they would stipulate to the same result if a motion to dismiss the Corvis Section 10(b) claim were fully briefed at this time.


Plaintiffs' claims against iXL are also barred due to iXL's bankruptcy. At the conclusion of iXL's bankruptcy proceeding, all of the debtors' assets were distributed, the debtors were dissolved, and a Notice of Dismissal was approved by the court stating that all persons and entities with claims against the debtors are "enjoined from taking any action or asserting any claim against," among others, the successor to iXL as well as the other debtors. (*See* 11/13/07 Haims Decl. Ex. 24 at 1-2; Ex. 25 ¶ 3; and Ex. 26 ¶¶ 4, 16.) (*Cf.* 11/13/07 Haims Decl. Ex. 24 ¶ 24.) Accordingly, no class should be certified for any of the claims against iXL.

IV. CONCLUSION

For the foregoing reasons, the Issuer Defendants respectfully urge the Court to deny class certification, with prejudice.

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Respectfully submitted,
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE INITIAL PUBLIC OFFERING
SECURITIES LITIGATION

Master File No. 21 MC 92 (SAS)

THIS DOCUMENT RELATES TO

IN RE CORVIS CORP. INITIAL PUBLIC
OFFERING SECURITIES LITIGATION

No. 01 Civ. 3857

IN RE FIREPOND, INC. INITIAL PUBLIC
OFFERING SECURITIES LITIGATION

No. 01 Civ. 7048

IN RE IXL ENTERPRISES, INC. INITIAL
PUBLIC OFFERING SECURITIES
LITIGATION

No. 01 Civ. 9417

IN RE SYCAMORE NETWORKS, INC.
INITIAL PUBLIC OFFERING SECURITIES
LITIGATION

No. 01 Civ. 6001

IN RE VA SOFTWARE CORP. F/K/A VA
LINUX, INC. INITIAL PUBLIC OFFERING
SECURITIES LITIGATION

No. 01 Civ. 242

CERTIFICATE OF SERVICE

I certify that on December 21, 2007, I caused a true and correct copy of the following documents,

THE ISSUER DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION IN SIX FOCUS CASES; and

DECLARATION OF JOEL C. HAIMS, ESQ. IN SUPPORT OF THE ISSUER DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION IN SIX FOCUS CASES;


to be served via LexisNexis File & Serve upon all parties listed on the service list on the *IPO Securities Litigation* website maintained by Lexis/Nexis,

and by hand delivery upon the following:

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