No. ______

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SNAP INC., et al.,

Petitioners,

v.

JAMES ERICKSON, et al.,

Respondents.

On Appeal from the United States District Court for the Central District of California,
No. 2:17-cv-03679-SVW-AGR

PETITION FOR PERMISSION TO APPEAL UNDER RULE 23(f)

MICHAEL W. MCCONNELL
BORIS FELDMAN
IGNACIO E. SALCEDA
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
650 Page Mill Road
Palo Alto, CA 94304

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioners

December 3, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), petitioner Snap Inc. certifies that it does not have a parent corporation and that no publicly held corporation owns more than ten percent of its stock.

The remaining petitioners—Evan Spiegel, Robert Murphy, Andrew Vollero, and Imran Khan—are all individuals.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The District Court here circumvented multiple legal obstacles in its zeal to certify this class action. When problems developed with the lead plaintiff a year into the case, the District Court allowed class members who never made an appearance before the statute of limitations ran to step forward and assert class claims, in contradiction of clear and recent Supreme Court teaching. When it became clear that only a fraction of the putative class could trace their shares back to the registration statement as required by Section 11 of the Securities Act, the District Court adopted an atextual theory of statistical tracing already rejected by the Fifth Circuit and most courts in this circuit. And when the timing of this federal class action created a massive damages problem that later-filed state class actions do not share—thus rendering those state actions "superior" within the meaning of Rule 23(b)(3)—the District Court forged ahead based on a dubious damages theory that this Court has never approved. This certify-at-all-costs approach is the antithesis of the "rigorous analysis" demanded by Rule 23, *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013), and produced three independent errors that cry out for review under Rule 23(f).

First, the lead plaintiffs' Securities Act class claims are time-barred. None of the lead plaintiffs filed a claim, made an appearance, or attempted to serve as a lead plaintiff before the one-year statute of limitations expired. Under the Supreme

Court's decision in *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018), those late-arriving plaintiffs are categorically barred from bringing class claims. The District Court brushed aside this fatal defect by relying on a theory advanced in a separate opinion and *expressly rejected* by the Supreme Court majority. This Court should grant review to give effect to the majority opinion in *China Agritech*.

Second, the District Court refused to limit the Securities Act class to purchasers who could trace their shares to the initial public offering, as required by the plain text of Section 11. Instead, it massively expanded both the class and Snap's potential liability by certifying a class including millions of purchasers who bought Snap stock after non-IPO shares entered the market. To get around the Securities Act's text, the court relied on a novel, atextual "statistical tracing" method that is in tension with this Court's precedent and has been rejected by the majority of the district courts within this circuit and the Fifth Circuit. Whether Section 11 permits such "statistical tracing" is a recurring question of critical importance.

Finally, reinforcing its certify-at-all-costs approach, the District Court not only endorsed a dubious and untested theory of damages under the Securities Act, but deemed this federal class action "superior to" nearly identical state-court class actions that do not have the same fatal damages defect. The federal action was initiated when Snap's stock price was *above* its IPO price. This Court's precedent—and basic economics—suggest that Plaintiffs therefore have zero damages. To surmount that obstacle, Plaintiffs have proposed a "value-based" damages model under which they will try to prove that the shares' "true value" on the date the federal action commenced was well below the market price. This Court has never accepted such a model. Given its significance in securities class actions, the District Court's acceptance of that model alone warrants this Court's immediate review. But, at a minimum, the need to resort to that novel damages model should have made clear beyond cavil that the state-court class actions, which were not filed until Snap's market price was *below* the IPO price, and thus lack this fatal defect, are "superior" for Rule 23 purposes. The District Court recognized this potential problem and even toyed with the possibility of "solving" it via issue classes, but in the end chose to forge ahead despite all these red and yellow flags.

Rule 23(f) was designed for cases like this. This Court should not let all these clear errors fester, but should intervene now to avoid an enormous waste of time and resources, with proceedings brought by ineligible class representatives on behalf of an oversized class and premised on an invalid damages model.

STATEMENT OF FACTS

Snap is best known for its mobile-phone camera application, Snapchat. Dkt.73-1 at 9. On March 2, 2017, Snap conducted its IPO. Dkt.291-1 at 9. Several underwriter banks purchased all IPO shares at a slight discount and then resold them to the public at $17 per share. *Id*. at 9-10.

As is customary, preexisting Snap shareholders entered into "lock-up" agreements preventing them from selling their pre-IPO shares until 150 days after the IPO. *Id.* at 10. The underwriters had the power to waive the lock-up agreements, however. *Id.* On March 8, 2017, the underwriters granted such a waiver and permitted a shareholder to sell 100,000 shares that had been issued to him pre-IPO. *Id.* Consequently, as of that date, Snap shares issued during the IPO became permanently commingled with shares not sold pursuant to the IPO registration statement. *Id.*

On May 16, 2017, the first complaint in this action was filed. Dkt.1. On that date, Snap shares traded at $20.78—well above the IPO price of $17. Dkt.73-1 at 11. That complaint alleged violations of Sections 11 and 15 of the Securities Act and Sections 10(b) and 20(a) of the Exchange Act. Dkt.1 at 4. On September 18, 2017, the District Court appointed Thomas DiBiase as lead plaintiff and approved Kessler Topaz as Lead Counsel. Dkt.54. On November 1, 2017, DiBiase, along with plaintiff David Steinberg, filed a consolidated complaint alleging that Defendants failed to disclose: (1) a slowdown in Snap's growth caused by competition; (2) a lawsuit filed by a former Snap employee; and (3) that Snap had been boosting its user engagement through so-called "growth hacking." Dkt.67.

DiBiase and Steinberg served as proposed class representatives for more than a year. But then they disappeared from the case. On August 30, 2018, lead counsel moved for class certification, Dkt.114, and to withdraw Steinberg and substitute Donald Allen and Shawn Dandridge as proposed class representatives, Dkt.115. Weeks later, lead counsel canceled DiBiase's deposition, withdrew him as lead plaintiff, and sought to substitute in Allen and Dandridge. Dkt.118.

On January 10, 2019, the District Court rejected the lead plaintiff substitution and reopened the lead plaintiff appointment process. Dkt.208. The Court also denied Plaintiffs' motion for class certification. *Id*. The action could not continue without new lead plaintiffs; at that point, the suit lacked *any* named plaintiffs, let alone a lead plaintiff (or, for that matter, any class claims, given the denial of class certification). *Id.* at 4.

Seven candidates sought appointment as lead plaintiffs. Dkt.209-210; 213-15; 219; 222. One candidate was the "Snap Shareholder Group," comprising five unrelated investors. Dkt.219. None of those individuals had previously filed a complaint, sought to be lead plaintiff, or sought to intervene in the action. Dkt.291-1 at 11-12. Other lead plaintiff candidates without similar defects warned that the Group's class claims were therefore barred by the Securities Act's one-year statute of limitations. Dkt.242 at 15-17, 24-25; Dkt.237 at 13. On April 1, 2019, the District Court nevertheless appointed the Group as lead plaintiff and re-appointed Kessler Topaz as lead counsel. Dkt.262. On May 29, 2019, Plaintiffs filed an amended complaint reasserting class claims. Dkt.272.

On June 7, 2019, Plaintiffs moved for class certification. Dkt.275. Defendants opposed certification on several bases, including that the new Plaintiffs' Securities Act class claims are time-barred, that their expert failed to set forth a viable model for measuring Securities Act damages because the case was initiated when the stock was above the IPO price, and that even if Plaintiffs could maintain a Securities Act class, it would have to be limited to purchasers who bought Snap stock before the influx of non-IPO shares on March 8, 2017. Dkt.291-1.

On June 24 and July 8, 2019, plaintiffs who had filed putative class actions in California state court filed motions to intervene in this case to oppose Plaintiffs' motion for class certification. Dkt.284; 285. The Intervenors argued that the federal action was not suitable or superior for resolving the Securities Act claims because the federal action was filed when Snap shares were trading above the IPO price of $17 per share. By contrast, the state-court actions were filed when the stock was trading below that price.[1]

On October 10, 2019, in apparent recognition of problems that class certification could create, the District Court requested briefing as to whether it should employ issue classes under Rule 23(c)(4). Dkt.324. The Court expressed "concern[]" about Plaintiffs' Securities Act damages model and the potential

[1] The two state actions have been coordinated before a single judge in the Los Angeles Superior Court.

preclusive effect of a final judgment on the state-court Securities Act cases. *Id*. The Court suggested that Rule 23(c)(4) issue classes addressing liability but not damages could mitigate these challenges. *Id.*

On November 20, 2019, after receiving briefing, the District Court abandoned the issue-class possibility and granted Plaintiffs' motion in its entirety, certifying a class of "all purchasers of Snap common stock between March 2, 2017 and August 10, 2017 … whose shares were issued under Snap's IPO Registration Statement." Op.2. The court acknowledged that it is "unsettled in this circuit" whether a plaintiff can sue under Section 11 when the market price at the time of suit exceeds the IPO price, and it recognized that the state-court Securities Act cases do not implicate this threshold issue. Op.10-11. Nevertheless, the District Court accepted Plaintiffs' dubious theory for getting around the fact that the class had suffered no losses when the case was filed—a "value-based" damages model—and concluded that their suit was "superior to" the state-court actions that did not even present this issue. Op.9-15. The court further held that the lead plaintiffs' class claims are not time-barred under *China Agritech* despite not filing any complaint or seeking to serve as class representatives until well after the limitations period expired. The court acknowledged that *China Agritech*'s no-tolling rule "embodies a categorical approach," yet the court distinguished *China Agritech* due to "circumstances" here, including that it had not addressed class certification "on the merits" and the original lead plaintiff "withdrew for medical reasons." Op.17. And while conceding that the Fifth Circuit and district courts have rejected "statistical tracing" as a means of satisfying Section 11's "traceability" requirement, the District Court accepted it and thus refused to narrow the class to those who purchased stock before March 8, 2017. Op.17-18.

QUESTIONS PRESENTED

1. Whether Plaintiffs' Securities Act class claims are time-barred under *China Agritech* because they did not bring any claims or seek to serve as class representatives until after the District Court denied a motion for class certification and the Securities Act's one-year statute of limitations had expired.

2. Whether, contrary to decisions of the Fifth Circuit and other district courts in this circuit, the "statistical tracing" theory satisfies Section 11's "traceability" requirement.

3. Whether a federal class action filed when the defendant's stock was trading above the IPO price involves any recoverable damages and is "superior" to nearly identical, later-filed state-court class actions that do not share that fatal defect concerning damages.

ARGUMENT

This Court has "unfettered discretion" to allow an appeal from an order granting class certification, and may do so based on "any consideration that [it] finds persuasive." Fed. R. Civ. P. 23(f), Adv. Comm. Note to 1998 Amend. An appeal is warranted where a questionable class certification order may "force a defendant to settle rather than incur the costs" of a class-action defense and large liability exposure, where the appeal may "facilitate the development of the law" on a "novel or unsettled" question, or where the district court's certification decision is "manifestly erroneous." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957-58 (9th Cir. 2005) (per curiam).

All three considerations strongly support granting this petition. In light of the massive expansion in theoretically available damages created by the overbroad class, the important open issues of Securities Act law that this case implicates, and the opportunity for this Court to correct the District Court's manifestly erroneous legal determinations, this Court should exercise its discretion to allow this appeal.

I. Plaintiffs' Securities Act Class Claims Are Time-Barred, And The District Court Ignored The Clear Command Of *China Agritech*.

None of the lead plaintiffs brought any claim or sought to serve as class representative until after the one-year Securities Act statute of limitations expired and after the initial certification motion was denied. Under *China Agritech*, that means their class claims are time-barred. The Supreme Court held in *China Agritech* that when class certification is denied and the limitations period has already expired, a new plaintiff cannot enter an appearance and attempt to commence a new class claim; that new class claim is untimely. 138 S. Ct. at 1804. That is precisely what happened here. The District Court thus should have rejected the class claims. Instead, the court contradicted *China Agritech*'s straightforward holding. And to reach that result, it flipped *China Agritech* on its head: It relied on a theory advanced in a separate opinion by Justice Sotomayor that was rejected by the majority, and it relied on a passage in the *China Agritech* majority opinion that, on its face, says the opposite of what the District Court claimed. This Court should correct the manifest error.

1. In *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974), the Supreme Court held that the filing of a class suit tolls the statute of limitations "for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *Id.* at 553. In *Crown, Cork, and Seal Co. v. Parker*, 462 U.S. 345 (1983), the Supreme Court extended the *American Pipe* rule from motions to intervene to the filing of *individual* suits after the denial of certification. The Court reasoned that failure to do so would result in "a needless multiplicity of actions" filed by class members seeking to preserve their individual claims, which is "precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Id.* at 351.

Recently, in *China Agritech*, the Supreme Court considered whether the tolling rules of *American Pipe* and *Crown* apply to subsequent efforts to bring class claims, rather than individual claims. The Court did not hesitate to state that neither *American Pipe* nor *Crown* “so much as hints that tolling extends to otherwise time-barred class claims.” 138 S. Ct. at 1806. In contrast to the litigation efficiencies promoted by the *American Pipe* rule in preserving individual claims, the Court reasoned, “efficiency favors early assertion of competing class representative claims.” *Id*. at 1807. The Court held that upon the denial of class certification, an absent class member may not decide to pursue class claims beyond the time allowed by the applicable statute of limitations. *Id*. at 1811.

2. By permitting Plaintiffs’ Securities Act class claims here to go forward, the District Court evaded the clear command of *China Agritech*. As the District Court conceded, it “did deny a prior motion to certify a class,” Op.15—specifically, on January 10, 2019. Dkt.208. It further acknowledged that each lead plaintiff “did not seek to join the case until January 31, 2019, well after the expiration of” the Securities Act’s one-year limitations period. Op.15. That should be the end of the matter, because, under *China Agritech*, a pending class action does not toll the limitations period for subsequent *class* claims. 138 S. Ct. at 1811. Plaintiffs may be able to bring individual claims, but someone whose individual claim would be time-barred but for *American Pipe* cannot bring a class action. That is the clear teaching of *China Agritech.*

The District Court brushed that aside, however, because, in its view, the "circumstances" here raise "none of the concerns regarding resuscitation of litigation or 'endless tolling of a statute of limitations' that animated the [Supreme] Court's decision in *China Agritech*." Op.17 (quoting *China Agritech*, 138 S. Ct. at 1809). That is highly debatable, but beside the point. In *China Agritech*, in order to ensure potential lead plaintiffs stepped forward at the time of initial certification, the Supreme Court did not leave room for district courts to carve out *post hoc* exceptions based on "circumstances." Even the District Court admitted that "*China Agritech* embodies a categorical approach." Op.17.

3. Justice Sotomayor's separate opinion in *China Agritech* concurring in the judgment proves the point—and underscores the District Court's error. Justice Sotomayor proposed a rule that would allow tolling where class certification "is denied because of the deficiencies of the lead plaintiff as class representative, or because of some other nonsubstantive defect." 138 S. Ct. at 1814 (Sotomayor, J., concurring in the judgment). The majority specifically rejected this proposal, explaining that "Rule 23 contains no instruction to give denials of class certification different effect based on the reason for the denial." 138 S. Ct. at 1809 n.5. Yet here, the District Court followed Justice Sotomayor's rejected path: It reasoned that the *China Agritech* rule did not apply because it had not addressed class certification "on the merits" and the original lead plaintiff "withdrew for medical reasons."

Op.17. Put differently, by its own account, the District Court had previously denied class certification because of a "nonsubstantive defect" with the "lead plaintiff as class representative." 138 S. Ct. at 1814 (Sotomayor, J., concurring in the judgment). But that is exactly the rule that Justice Sotomayor proposed and that the *China Agritech* Court rejected.

The District Court also flouted *China Agritech* in a second respect. It stated that the late-arriving lead plaintiffs here pass muster under *China Agritech* because "[t]he Supreme Court … expressly contemplated a scenario where 'as class discovery proceeds and weaknesses in the class theory or adequacy of representation come to light, the lead complaint might be amended or a new plaintiff might intervene.'" Op.16 (quoting *China Agritech*, 138 S. Ct. at 1807 n.2). Indeed, the Supreme Court did, but the Court expressly contemplated that all of that would happen while "sufficient time remains *under the statute of limitations*." *China Agritech*, 138 S. Ct. at 1807 n.2 (emphasis added). The Supreme Court emphasized that by not extending *American Pipe* to subsequent class claims, its decision would incentivize all potential lead plaintiffs to come forward in a timely fashion. The lead plaintiffs here did not respond to those incentives, and the District Court's decision to nonetheless allow them to pursue class claims is plain error.

II. The District Court Relied On A Novel "Statistical Tracing" Theory That This Court Has Never Adopted And The Fifth Circuit And Other District Courts Have Rejected.

The District Court allowed Plaintiffs to premise their Securities Act claims on a "statistical tracing" theory that this Court has never approved, that the Fifth Circuit and other district courts in this circuit have rejected, and that is inconsistent with the text of the Securities Act. The District Court should have limited the Securities Act class, if any, to purchasers who bought Snap stock between March 2 and 7, 2017. That is the only date range in which each purchaser can trace her shares back to the IPO, as the Securities Act requires. The District Court's reliance on the dubious and often-repudiated "statistical tracing" theory to evade that requirement and to extend the class definition well beyond March 7—thereby adding millions more purchasers to the class and substantially increasing Snap's potential liability—calls out for immediate appellate review. *See Chamberlan*, 402 F.3d at 957.

1. The Securities Act is concerned with the initial distribution of securities pursuant to a false or misleading registration statement. It imposes a "stringent" standard of liability—for example, a plaintiff need not establish scienter, unlike under Section 10(b) of the Exchange Act—but limits possible plaintiffs to those who bought stock pursuant to a registration statement. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983). Specifically, it provides that suit may be brought challenging the material accuracy of "any part of the registration statement" by "any person acquiring *such security*." 15 U.S.C. §77k(a) (emphasis added). Accordingly, a plaintiff without the ability to trace the shares she bought back to the allegedly false or misleading registration statement has no suit. If she did not purchase shares in the IPO itself, or from IPO underwriters, she must be able to trace back her shares' "chain of title" to the underwriters. *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1106 (9th Cir. 2013); *accord Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 496-99 (5th Cir. 2005); *see also Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 n.4 (9th Cir. 1999) ("If there is a mixture of pre-registration stock and stock sold under the misleading registration statement, a plaintiff must either show that he purchased his stock in the initial offering or trace his later-purchased stock back to the initial offering.").

This "tracing" requirement creates a formidable hurdle for those who purchased shares after non-IPO shares entered the market. After that point, plaintiffs must prove that their shares were issued under the allegedly false or misleading registration statement, rather than from another source. *See Century Aluminum*, 729 F.3d at 1106. As this Court has acknowledged, tracing "the chain of title" can be "often impossible" given the realities of modern securities trading. *Id.* at 1106-07.

2. On March 8, 2017, a private investor sold 100,000 of his pre-IPO shares of Snap stock. Those shares were not issued pursuant to the IPO registration statement. Dkt.291-1 at 20. Accordingly, on March 8, the Snap shares available for public purchase included indistinguishable IPO and non-IPO shares. Individuals who purchased Snap stock on or after March 8, 2017 therefore cannot trace their particular shares to the IPO and cannot sue under Section 11 of the Securities Act.

Plaintiffs did not dispute any of these facts. Instead, they argued that the Section 11 class need not be limited to individuals who purchased stock between March 2 and March 7 (dates that would ensure that every plaintiff's stock can be traced back to the registration statement) because a post-March 7 plaintiff could rely on a "statistical tracing" theory. Under that theory, even though such a plaintiff could not actually trace the chain of title for her stock back to the IPO, it was statistically likely that any given stock was from the IPO, because a high percentage of the shares in the market during the entire proposed class period would be IPO shares. The District Court accepted that theory. Op.18.

3. Whether such "statistical tracing" satisfies the Securities Act's requirements is an unsettled but recurring and important question. As the District Court acknowledged, there is an intra-circuit split on the matter, with most district courts rejecting the theory. *Id*. at 17. *Compare Sudunagunta v. NantKwest, Inc.*, 2018 WL 3917865, at *5-6 (C.D. Cal. Aug. 13, 2018) (permitting statistical tracing), *with Doherty v. Pivotal Software, Inc.*, 2019 WL 5864581, at *10 (N.D. Cal. Nov. 8, 2019) (rejecting statistical tracing and reasoning that "[s]imply alleging that stock is traceable because of a favorable percentage does not give rise to a reasonable inference that plaintiffs' shares are traceable"), *In re Quarterdeck Office Sys. Sec. Litig.*, 1993 WL 623310, at *2-3 (C.D. Cal. Sept. 30, 1993) (rejecting statistical tracing as "speculative" and "insufficient"), *and Abbey v. Comput. Memories, Inc.*, 634 F. Supp. 870, 874 (N.D. Cal. 1986) (rejecting as insufficient the theory that it was "highly probable that at least some of" plaintiffs' shares were from offering).

This Court has not directly addressed "statistical tracing," but its decision in *Century Aluminum* suggests it would greet the theory with justifiable skepticism. There, the Court noted that Section 11 claims "require plaintiffs to trace the chain of title" of their securities back to the allegedly improper registration statement, and it explained that while tracing is "difficult to meet in some circumstances"—indeed, "often impossible"—"this tracing requirement is the condition Congress has imposed for granting access to the relaxed liability requirements § 11 affords." 729 F.3d at 1106-07 (internal quotation marks omitted). The "statistical tracing" theory is in significant tension with this language. To state the obvious, a showing that it is *statistically likely* that one's shares can be traced to the IPO falls short of a showing that one's shares *actually* can be traced to the IPO. This Court's precedent requires the latter.

The only court of appeals that has addressed "statistical tracing," moreover, has squarely rejected it. In *Krim v. pcOrder.com*, the Fifth Circuit held that allowing "statistical tracing" would "impermissibly expand the [Securities Act's] standing requirement." 402 F.3d at 496. The court concluded that "showing a very high probability" that each plaintiff can trace her shares to the IPO is insufficient because that approach "cannot be squared with the statutory language." *Id.* at 497; *see also id.* at 495-96 (noting that Section 11 limits suit to "any person acquiring *such* security"). In short, the Fifth Circuit held, allowing plaintiffs to use "statistical tracing" to "satisfy the tracing requirement" would "contravene the language and intent of Section 11." *Id.* at 497.

The District Court ignored *Krim* and numerous other decisions rejecting statistical tracing. Instead, without explanation, it concluded that it was "persuaded by the logic" of the one district court decision it cited that has accepted the theory. Op.18 (citing *Sudunagunta*). The District Court then offered a policy argument to justify its holding, stating that without statistical tracing, a company could be "effectively inoculate[d]" against "nearly all potential Section 11 liability." *Id.* But as the Fifth Circuit explained in *Krim*, the fact that "present market realities … may render Section 11 ineffective as a practical matter" in some situations "is an issue properly addressed by Congress." 402 F.3d at 498.

In sum, the "statistical tracing" theory that the District Court accepted is unsupported by the statute, is inconsistent with the thrust of this Court's own precedent, and has been rejected by the Fifth Circuit and the majority of district courts within this circuit that have addressed it. It is also the key to massively expanding the size of the class and Defendants' potential liability, with attendant unjustified settlement pressures. By any measure, the validity of this theory is an important, recurring, and unsettled question that warrants immediate review. *See Chamberlan*, 402 F.3d at 957-58.

III. Class Treatment Is Not "Superior" Because The Federal Action Suffers A Fatal Flaw Concerning Damages Not Implicated In The State-Court Actions.

As demonstrated by its cursory treatment of the *China Agritech* rule and its eagerness to substitute statistical probabilities for actual Section 11 tracing, the District Court appeared willing to overcome any obstacle to certify an expansive class. Underscoring its damn-the-torpedoes approach, the District Court concluded that this federal class action is "superior" to "other available methods," Fed. R. Civ. P. 23(b)(3), even though the timing of the federal action creates serious difficulties that are absent in state-court class actions and could risk any recovery there.

It is undisputed that when this federal action was initiated (by other plaintiffs), the market price of Snap stock, $20.78, was "substantially higher" than the IPO price of $17. Op.6. This Court has stated that Securities Act damages "must be measured by the difference between the [IPO price] and its price at either the time it was sold or the date the Section 11 claim was filed." *In re Broderbund/Learning Co. Sec. Litig.*, 294 F.3d 1201, 1204 (9th Cir. 2002) (internal quotation marks omitted); *see also In re Wash. Mut., Inc. Sec., Derivative & ERISA Litig.*, 2010 WL 4272567, at

*12 (W.D. Wash. Oct. 12, 2010) (describing *Broderbund* as "binding Ninth Circuit authority"); 15 U.S.C. §77k(e). Under that reasoning, the class members here suffered damages of exactly zero.

To surmount that obstacle, Plaintiffs have proposed a "value-based" model of damages, theorizing that the true "value" of Snap shares on the relevant date was well below the market price of $20.78 (and the IPO price), and arguing that they will be able to prove damages based on the difference between that true "value" of Snap stock on May 16, 2017 and the IPO price.

That value-based model ignores that the prevailing above-IPO market price precludes any damage from the alleged Section 11 violation. If a shareholder develops concerns about a registration statement, such that she thinks the share's true value is less than $17 at a point when the stock is trading at $20.78 per share, then the answer is not to file a Section 11 suit. It is to sell her stock and realize a gain. *See Broderbund*, 294 F.3d at 1204 ("The logical question, then, is how [a plaintiff's] $15.7625 gain per share can be a loss."). A shareholder whose theory is that the "value" of her stock is below both the IPO price and the even higher market price does not have a Section 11 remedy.

At a bare minimum, Plaintiffs' value-based model is highly questionable and indisputably untested, and it has yet to be accepted by this Court. The District Court invoked a Second Circuit decision endorsing this theory but acknowledged that the issue is "unsettled in this circuit." Op.11. And other courts in this circuit have acknowledged the same. *See In re Lendingclub Sec. Litig.*, 282 F. Supp. 3d. 1171, 1187 (N.D. Cal. 2017) ("Whether a stock's 'value' on the date suit is filed can be distinct from its price for the purpose of calculating Section 11 damages is a question unresolved by our court of appeals."). Review of that "unsettled" question, and resolution of the apparent tension between the Second Circuit and this Court's decision in *Broderbund*, alone warrant this Court's immediate intervention, since resolution in Defendants' favor would terminate the Securities Act claims before further resources are needlessly expended.

But there is an even more acute problem here: The substantial, unsettled questions regarding Plaintiffs' legally vulnerable damages theory should have made clear that this putative federal class action is not "superior to" the putative Securities Act class actions currently pending in California state court, which do not present those difficulties. Fed. R. Civ. P. 23(b)(3). The plaintiffs in those cases—Intervenors here—filed suit when Snap's market price was *below* the IPO price. Their suits, accordingly, do not implicate the unusual circumstance of a suit initiated while the market price *exceeded* the IPO price, the unsettled law regarding whether a Section 11 claim is available in that situation, or the untested model necessary to establish any damages in that scenario. The plaintiffs in those cases can avail themselves of the traditional model that measures the difference between the IPO price and the price when they filed suit. By any rational measure, then, the state-court litigation, not this action, is the "superior" method for adjudicating classwide Section 11 claims. The District Court's contrary holding not only blinks reality but reinforces the extraordinary lengths to which the court went to certify class treatment here.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

s/Paul D. Clement
PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

MICHAEL W. MCCONNELL
BORIS FELDMAN
IGNACIO E. SALCEDA
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
650 Page Mill Road
Palo Alto, CA 94304

Counsel for Petitioners

December 3, 2019

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Circuit R. 5-2(c) and Circuit Rule 32-3(2) because this brief contains 5,173 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). Pursuant to Circuit Rule 32-3, the word count divided by 280 does not exceed the designated limit of 20 pages.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type.

December 3, 2019

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I further certify that copies were sent to the following via U.S. First Class Mail and electronic mail:

Jennifer L. Joost
jjoost@ktmc.com
Stacey M. Kaplan
skaplan@ktmc.com
Jenny L. Paquette
jpaquette@ktmc.com
KESSLER TOPAZ MELTZER & CHECK, LLP
One Sansome Street, Suite 1850
San Francisco, CA 94104

s/Paul D. Clement
Paul D. Clement

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:17-cv-03679-SVW-AGR	Date	11/20/2019
Title	*In Re Snap Inc. Securities Litigation*		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION [275]

I. Introduction

Before the Court is a motion for class certification by Plaintiffs, Dkt. 275, and two motions to intervene for the purpose of opposing class certification by non-parties. Dkt. 284; Dkt. 285. For the reasons articulated below, the Court first GRANTS the motions to intervene, and then GRANTS the motion for class certification.

II. Factual Background

The facts of this case are well known to the parties and have been articulated at length in prior orders issued by this Court. *See* Dkt. 92. This is a securities class action arising out of the initial public offering ("IPO") conducted by Snap, Inc. ("Snap") on March 2, 2017 (the "IPO Date"), at an opening price of $17.00 ("IPO price"). It concerns a variety of alleged material misstatements and omissions made in Snap's registration statement and incorporated investment prospectus (collectively the "Registration Statement"), as well as certain statements made by officers of Snap during the leadup to the IPO and at earnings calls and other presentations following the IPO. Dkt. 272 ¶ 6-19. Plaintiffs allege that these assorted misstatements, misrepresentations, and omissions created liability against Snap, Evan Spiegel (Snap's CEO), Robert Murphy, Andrew Vollero, and Imran Khan (the "Individual Defendants"), under both the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"). Dkt. 272 ¶ 29-35.

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The factual core of the alleged misrepresentations and omissions in this action center on three issues. First, Plaintiffs allege that Snap's use of what they consider "growth hacking," a technique to artificially inflate Snap's reported daily active users ("DAU"), was misrepresented in statements made by officers including Spiegel, and the registration statement itself. Dkt. 272 ¶ 179-80, 250-52, 323-26. Next, the existence of a lawsuit (the "Pompliano lawsuit") challenging the metrics by which investors and advertisers valued Snap's platform, and highlighting certain internal control deficiencies at the company, which should have been disclosed prior to the IPO. Dkt. 272 ¶ 135-67. Finally, the impact of competition from Instagram on Snap's core business, which plaintiffs allege was materially understated in Snap's registration statement.[1] Dkt. 272 ¶ 95-117. Plaintiffs seek to certify a class including all purchasers of Snap common stock between March 2, 2017 and August 10, 2017 (the "Class Period") whose shares were issued under Snap's IPO Registration Statement. Dkt. 272 ¶ 22.

III. Procedural Background

The first securities lawsuit against Snap was filed in this court by plaintiff James Erickson on May 16, 2017. Dkt. 1. Upon the filing of a variety of related cases alleging similar violations, this Court consolidated a variety of related actions, Dkt. 11; Dkt. 15; Dkt. 19; Dkt. 21; Dkt. 25, against Snap pursuant to Federal Rule of Civil Procedure 42(a) on September 18th, 2017. Dkt. 53. The Court then selected Thomas DiBiase as Lead Plaintiff for the putative class and appointed Kessler Topaz as Lead Counsel for the class. Dkt. 54. The first consolidated complaint was then filed on November 11th, 2017 and added Named Plaintiff David Steinberg to the lawsuit. Dkt. 67. On June 6, 2018, this Court denied a motion to dismiss by the Defendants. Dkt. 92.

Initial Lead Plaintiff DiBiase and Named Plaintiff Steinberg both filed motions to withdraw and attempted to substitute new lead plaintiffs in late 2018. Dkt. 115; Dkt. 118. In response the Court chose to reopen the lead plaintiff appointment process. Dkt. 208. On April 1, 2019, the Court selected the Snap Shareholder Group[2] (hereafter "Lead Plaintiffs") as lead plaintiffs, and permitted Kessler Topaz to

[1] The Second Amended Complaint also includes allegations that certain other accounting information the SEC required Snap to disclose in its registration was not properly disclosed. Dkt. 272 ¶¶ 349-62.
[2] The Snap Shareholder Group consists of Smilka Melgoza, Rediet Tilahun, Tony Ray Nelson, Rickey E. Butler, and Alan L. Dukes. Dkt. 262 at 1.

remain lead counsel. Dkt. 262. The new Lead Plaintiffs then filed a second consolidated complaint on May 29, 2019, removing allegations involving both the underwriters and directors, whose claims had previously been voluntarily dismissed without prejudice. Dkt. 272; Dkt. 275-1 at 5 n.3. The Plaintiffs then filed a motion for class certification— the topic of this order. Dkt. 275.

IV. **Motions to Intervene**

Joseph Iuso and Chenghsin Hsieh ("Intervenors") have each filed motions to intervene in this case, for the limited purpose of opposing Plaintiffs' motion for class certification of the alleged Securities Act claims. Dkt. 284, 285. They each represent putative classes pending in California state court, who seek to bring Securities Act claims in state court against these same Defendants. Dkt. 284-1 at 4; Dkt. 285-1 at 3. Both state court actions have been stayed pending the resolution of this suit. Dkt. 284-1 at 5; Dkt. 285-1, at 4.

The Intervenors oppose class certification on the same grounds. They each filed their lawsuits at a time when Snap's share price was substantially lower than the IPO price— Iuso at $12.58, Hsieh at $13.89, in contrast to this now-consolidated federal lawsuit, which was filed when Snap's stock price was substantially higher than the IPO price— $20.78 on May 16, 2017. Dkt. 284-1 at 3-4; Dkt. 285-1, at 4. Each opposes class certification of this action on the basis that the statutory damages calculation in Section 11(e) of the Securities Act makes this federal forum and these federal plaintiffs ill-suited to represent the interests of the class members with Securities Act claims. Dkt. 284-3; Dkt. 285-3.

a. *Legal Standard*

Rule 24 of the Federal Rules of Civil Procedure ("FRCP") provides for two types of intervention: (a) intervention of right, and (b) permissive intervention. *See* Fed. R. Civ. P. 24(a)-(b). With respect to permissive intervention, Rule 24 provides that on a "timely motion, the court may permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B); *see also Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992).

b. *Analysis*

Intervenors' motions to intervene under Rule 24(b)(1)(B) are GRANTED via permissive intervention. Both Intervenors share multiple "common question[s] of law or fact" with this action because their Section 11 and 15 claims under the Securities Act arise from alleged material misstatements made in Snap's registration statement just like those alleged by the federal plaintiffs. Dkt. 284-1 at 4; Dkt. 285-1 at 3. The federal plaintiff's arguments that both Intervenors have failed to demonstrate the "timeliness" required by Rule 24(b), Dkt. 295 at 9 n.5, are unpersuasive in light of their limited purpose of opposing class certification, which federal plaintiffs only moved for on June 7, 2019. Dkt. 275. The substantive arguments raised by the Intervenors will be addressed in the appropriate sections of the following analysis.

V. Motion for Class Certification

a. *Legal Standard*

Class certification under Rule 23 is a two-step process. First, a plaintiff must demonstrate that the requirements of Rule 23(a) are met: "One or more members of a class may sue or be sued as representative parties on behalf of all members only 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). "Class certification is proper only if the trial court has concluded, after a 'rigorous analysis,' that Rule 23(a) has been satisfied." *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542-43 (9th Cir. 2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)).

Second, the plaintiff must also establish that one of the bases for certification in Rule 23(b) is satisfied. Here, Lead Plaintiffs invoke Rule 23(b)(3), which requires that Lead Plaintiffs show that the presence of "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

The party seeking class certification bears the burden of demonstrating by a preponderance of the evidence that all four requirements of Rule 23(a) and at least one of the three bases for certification under Rule 23(b) are established. *See Wal-Mart*, 564 U.S. at 350.

b. *Securities Act Claims under Section 11 and 15- Predominance and Superiority Issues*

i. Overview of Section 11's Statutory Damages Provision

Both Defendants and the Intervenors have mounted challenges to class certification regarding the Securities Act claims under Rule 23(b)(3), each making arguments that center on the statutory formula for calculation of damages under Section 11 of the Securities Act. *See* 11 U.S.C. 77k(e). Because the Court considers these arguments critical to the disposition of this motion, it addresses them first and then turns to the additional analysis under Rule 23(a) required to certify a class.

Section 11(e) gives in relevant part the following formula for calculation of damages against any liable party:

> The suit authorized under subsection (a) may be to recover such damages as shall represent the **difference** between the **amount paid** for the security (not exceeding the price at which the security was offered to the public) and (1) the **value thereof** as of the **time such suit was brought**, or (2) the **price** at which such security shall have been disposed of in the market before suit, or (3) the **price** at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought . . .

11 U.S.C. 77k(e) (emphasis added). This formula makes the filing date for any lawsuit involving a Section 11 claim key to calculating damages for any class members who held their stock until the time of judgment or sold it after the filing date but before judgment.

For example, in an IPO where the initial price was $20, a successful class member who sold prior to the filing date for $18 in the market would be limited to damages of $2 per share (the difference between the price they sold it for and the IPO price), and a class member who held their shares until judgment would receive the difference between the IPO price and the "value" of the shares on the date the lawsuit was filed. If the "value" on the date the lawsuit was filed is higher than the IPO price of $20, a class member who never sold their shares would have no damages under Section 11. Finally, a class member who sold their shares for $18 after the filing date and before the final judgment would have their damages capped at the *lesser* of either their actual loss, or the difference between the IPO price and the "value" at the time the lawsuit was filed. This means that if the "value" on the date the lawsuit was filed exceeds the IPO price, they would also have no Section 11 damages.

The date of the first filed lawsuit in this consolidated action was May 16, 2017, when Snap's trading price in the market closed at $20.78, substantially higher than the IPO price of $17.00. *See* Dkt. 285-1, at 2. Plaintiffs' theory of Section 11 damages is that the market price of Snap's stock at the time the first complaint was filed in this case was higher than the "value" for purposes of Section 11(e)'s statutory damage calculation, and that class members will be able to calculate Section 11 damages based on the difference between the true "value" of Snap's stock at the time of filing and the IPO price, after inflation related to allegedly fraudulent misstatements or omissions is removed. Dkt. 275-1 at 20-21; *see also* Dkt. 275-8, ¶ 62 (expert declaration explaining proposed damages model in context of Plaintiffs' theory).

ii. Predominance

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Plaintiffs must show that "damages are capable of measurement on a classwide basis" and tie their damages model to their theory of liability. *Comcast Corp. v. Behrend*, 569 U.S. 27, 34-35 (2013). In *Comcast*, the Supreme Court stated that "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory." *Id.* at 35. It further explained that "[i]f the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* However, in the Ninth Circuit, the need to engage in individualized damages calculations alone cannot defeat class certification. *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014) (citing *Leyva,* 716 F.3d at 513).

Defendants first assert that Plaintiff's Expert, Zachary Nye ("Nye"), has not adequately set forth a model of damages tied to their specific theory of liability. Dkt. 292, at 15-16. Defendants cite heavily to this Court's decision in *Loritz*, 2015 WL 6790247, where this Court declined to certify a securities class on the question of damages when the plaintiff's expert merely cited general techniques for computing damages in securities fraud cases and "fail[ed] to tie these theories to the facts of this case or to each other." Here, Nye does substantially more than that because the theory of price inflation that undergirds Nye's damages model for the Section 11 claims is expressly linked to his proposed model for calculating Section 10(b) damages. *See* Dkt. 275-8, at 26-32. Nye's damages model under Section 10(b) relies on an event study, where an expert estimates company-specific price movement relative to price movement caused by other factors such as overall market conditions or dissemination of other material but non-fraudulent information relayed by the company. *See* Dkt. 275-8 ¶ 57; *In re Diamond Foods, Inc.*, 295 F.R.D. 240, 251-52 (N.D. Cal 2013); *Luna v. Marvell Tech*, 2017 WL 4865559, at *6 (N.D. Cal. Oct. 27, 2017) ("use of an event study to isolate damages stemming from a particular cause is . . . a feature of virtually every securities action, which must account for stock fluctuations unrelated to the particular theory of liability asserted in the case").

Nye's expert report then describes how an event study would enable him to assess price inflation in Snap's stock and describes how the five alleged corrective partial disclosures during the Class Period would be analyzed using that methodology to determine how potential price inflation was impacted by each round of corrective disclosures. Dkt. 275-8 ¶ 62. In contrast to the expert report in *Loritz*, which merely laid out broad principles and techniques used to calculate securities claims, Nye's expert report also includes specific references to the facts alleged here and articulates how a calculation of price inflation would be influenced by different lawsuit filing dates. *Compare* Dkt. 275-8, ¶ 60-63, *with Loritz*, 2015 WL 6790247, at *22.[3]

[3] Defendants also assert that until this Court expressly determines which date applies as the "time such suit was brought" for purposes of the Section 11 damages calculation, no specific damages model exists that can satisfy Rule 23's predominance requirement. Dkt. 292 at 17. But Nye's report acknowledges this uncertainty and articulates a clear plan for assessing the

Comcast addressed a situation where the proposed damages model incorporated multiple theories of liability in its damage calculations, but the district court had only certified one of those theories for class-wide proof. 569 U.S. 27, 31-32. This led the Supreme Court to conclude that the model could not satisfy the predominance requirement because its inclusion of invalid theories of liability meant plaintiffs had not established "that damages are capable of measurement on a classwide basis" as Rule 23(b)(3) requires. *Id.* at 34.

Nye's proposed damages model simply applies the common event study methodology used to demonstrate price inflation and loss causation under Section 10(b) of the Exchange Act to the statutory damages formula in Section 11(e). 11 U.S.C. 77k(e). It will determine only the "value" of Snap's stock on the date the lawsuit was filed, in order to properly calculate statutory damages *if* Plaintiffs successfully establish liability. Dkt. 275-8 ¶ 62. Because it seeks to measure only "damages attributable to that theory"— meaning a misstatement or omission in Snap's registration statement as required by Section 11, it does not offend *Comcast*. 569 U.S. at 35. To the extent that Defendant's arguments seek to challenge Nye's ability *in practice* to adjust for the confounding factors that may prevent isolation of price movement based on the alleged partial corrective disclosures, this is an inquiry to consider at the merits stage. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 807 (2011). Rule 23(b)(3) requires only that "plaintiffs 'be able to show that their damages stemmed from the defendant's actions that created the legal liability.'" *In re Twitter Inc. Sec. Litig.*, 326 F.R.D. 619, 630 (N.D. Cal. 2018) (citations omitted). Plaintiffs have made a sufficient showing here with regard to their Securities Act claims.[4]

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price inflation in Snap's stock on May 16th, 2017 or any other potential first-filing date within the class period, in order to determine the underlying value of Snap's stock on that date. Dkt. 275-8, at ¶ 63.

[4] Defendants' citation to other Ninth Circuit district court cases where courts denied motions for class certification based on insufficiently detailed damages models are not securities class actions, and did not address proposed use of event study-based statistical evidence. *See Werdebaugh v. Blue Diamond Growers*, 2014 WL 7148923 (N.D. Cal. Dec. 15, 2014); *In re POM Wonderful LLC*, 2014 WL 1225184 (C.D. Cal. Mar. 25, 2014). Both of those cases arise in the context of misleading advertising/labeling class actions, where the proposed damages models involved questionable, poorly explained underlying assumptions. In *POM*, the model assumed that 100% of any price difference between juices was attributed to misrepresentations alleged, while *Werdebaugh* involved a model that failed to isolate the value of the labeling claims to the defendant's product by assuming all competing products did not do so as well. *See Werdebaugh*, 2014 WL 7148923, at *13; *In re POM Wonderful*, 2014 WL 1225184, at *5. In contrast, an event study of a company's stock price is expressly designed

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iii. Superiority

The fact that the first lawsuit in this consolidated case was filed when Snap's stock price exceeded its IPO price has been extensively discussed in past orders and briefing by the parties. *See e.g.* Dkt. 73-1; Dkt. 92; Dkt. 94; Dkt. 108. At the motion to dismiss stage, Defendants argued that this meant that under Section 11(e)'s statutory formula, Plaintiffs lacked any possibility of damages because the value at the time the suit was brought should be the current market price, and the difference between the IPO price and the market price was negative, precluding both damages and liability. Dkt. 73-1, at 25. The Court denied that motion to dismiss, holding that the value-based theory based on Snap's allegedly inflated price at the time of filing for plaintiffs was permitted under Section 11, and that Plaintiffs had adequately pled that Snap's stock price was inflated. [5] Dkt. 92 at 16.

Intervenors argue here that (1) the Lead Plaintiffs are inadequate Class Representatives under Rule 23(a)(4) because they will not fairly represent class members with Section 11 claims and (2) this proposed federal class action is not a superior forum for vindicating the Securities Act claims held by this class. Dkt. 284-3, at 3, 5; Dkt. 285-3, at 4. Intervenors argue that their state court Securities Act cases constitute a superior forum for resolution of these claims because they filed suit when Snap's market price was substantially lower than the IPO price. Dkt. 284-3; Dkt. 285-3. Intervenors assert that Lead Plaintiffs ("Federal Plaintiffs" for this subsection) face additional hurdles to recovering damages for class members because they must present a price-inflation model to the court, rather than relying on the market price at the time their lawsuit was filed. *See* Dkt. 284-3, at 4; Dkt. 285-3, at 5. Because the Court previously confronted this issue under Rule 12(b)(6)'s generous pleading standard, analysis under Rule 23(b)(3)'s superiority requirement requires reconsideration of the issue in the broader context of

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to filter out fluctuations in price not attributable to specific alleged disclosures in question. *See In re Diamond Foods,* 295 F.R.D. at 247 ("An event study is a statistical regression analysis that examines the effect of an event on a dependent variable, such as a corporation's stock price.").

[5] The Court also notes that there is separate argument, raised by the then-current Lead Plaintiffs in their Opposition to Defendant's Motion to Dismiss, that asserts that if Section 11 damages are calculated solely in reference to the market price at the time of first filing, then the original plaintiffs in this action, who filed on May 16, 2017, never had Article III standing in the first place. See Dkt. 78-1, at 24. Accordingly, the proper first-filed complaint for Section 11 damages calculation would be the first one filed when Snap's market price was actually lower than the IPO price. *Id.* While the Court's decision below does not require a decision on that argument, the Court raises it again here to the parties on notice that it remains unresolved.

class member's overall interests and the availability of other potential forums.

The Intervenors argue that they are defending the interests of those class members who have purchased Snap shares traceable to the IPO and thus have Section 11 claims. *See* Dkt. 284-3, at 1. But as explained in detail below in Part V.c.ii, *all* the Snap shares in the market are (statistically) traceable to the IPO, and therefore the entire proposed federal class, as purchasers of Snap shares between March 2, 2017 and August 10, 2017, have both Section 11 claims and Exchange Act claims. Dkt. 272 ¶ 22. This makes Intervenor's reference to *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) inappropriate because the alleged conflict here is not between different groups of claimants within a single class, but between different proposed class actions as the most effective vehicle for vindicating the identical claims held by *all* class members. *Cf. In re Literary Works in Electronic Databases*, 654 F.3d 242, 254 (2d Cir. 2011) (reversing certification, in absence of independent counsel, where subgroups had claims "of different strength [which] … command[] a different settlement value.").

Proposed Intervenors' citation to *In re Peregrine Sys., Inc. Sec. Litig*, 2002 WL 32769239 (S.D. Cal. Oct. 11, 2002) highlights this distinction, because it involved different groups of class members, each with different types of securities claims. That class action consolidated both Section 10(b) claims held by purchasers of Peregrine stock in the market, and Section 11 claims from class members who obtained stock *directly traceable* to Peregrine's registration statement, with the same factual core of alleged misrepresentations. *Id.* at *1. The court thus appointed co-lead plaintiffs to separately represent the Section 11 class members and the Section 10(b) class members, to ensure that both discrete groups had their interests adequately protected. *Id.* at *11-12. Here, the Section 11 claims of <u>all</u> Class members will rise or fall together on the question of Section 11 damages calculation, and Class Counsel will have no incentive to favor one group of claims over the other. Because all class members have claims under each Act, the Federal Plaintiffs and their class counsel will be incentivized to maximize recovery given the merits of both claims as informed by their discovery and litigation strategy. Therefore, the Court concludes that the arguments by Intervenors contesting adequacy under Rule 23(a)(4) are insufficient to deny class certification here.

The Intervenors' second grounds for opposing class certification of the Securities Act claims is that their consolidated state court class action constitutes a superior forum for these claims. They assert that because their lawsuits were filed when Snap's market price was substantially lower than its IPO

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price, adjudication in state court will make establishing damages substantially easier and free them to focus their efforts entirely on establishing that Snap's registration statement contained an untrue statement or material fact or an omission of such. *See* Dkt. 284-3 at 4; Dkt. 285-3 at 7.

Whether a plaintiff can sue under Section 11 when their lawsuit was filed at a time when the market price exceeded the IPO price of the relevant security is unsettled in this circuit. The Ninth Circuit's only references to damages calculation under Section 11(e) have asserted in passing that damages must be "measured by the difference between the amount paid for the security and its price at either the time it was sold or the date the Section 11 claim was filed." *In re Broderbund/Learning Co. Sec. Litig.*, 294 F.3d 1201, 1204 (9th Cir. 2002) (quoting *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1421 (9th Cir. 1994)). But as noted by other district courts, these assertions were made in dicta, and do not directly address the issue here— whether "value" in Section 11 can in certain situations differ from the market price at the time of filing. *See In re Lendingclub Sec. Litig.*, 282 F. Supp. 3d 1171, 1187 n.4 (N.D. Cal. 2017) *see also In re Fortune Sys. Sec. Litig.*, 680 F. Supp. 1360, 1370 (N.D. Cal. 1987) (recognizing the "value" theory for Section 11 damages, but finding no evidence at summary judgment to support it); *but see In re Wash. Mut., Inc. Sec., Deriv. & ERISA Litig.*, 2010 WL 4272567, at *12 (W.D. Wash. Oct. 12, 2010) (calling Broderbund "binding Ninth Circuit authority" and holding that "damages are calculated in this case as the difference between the price paid and the price on the date the suit was filed").

The Second Circuit has directly addressed this question and observed that "the term 'value' in section 11(e) was intended to mean the security's true value after the alleged misrepresentations are made public." *McMahan & Co. v. Wherehouse Entm't, Inc.*, 65 F.3d 1044, 1048-49 (2d Cir. 1995); *see also NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 165 (2d Cir. 2012). As noted by those courts and other district courts, the distinction in language within Section 11(e), which caps damages at the difference between the "value thereof" when the lawsuit was brought, or the "price" at sale prior to filing or "price" after sale but before judgment strongly suggests that Congress' intent was that was to calculate damages based on the underlying value when the lawsuit was filed, not the price. *See Campton v. Ignite Rest. Grp., Inc.*, 2014 WL 61199, at *5 (S.D. Tex. Jan. 7, 2014).

The interpretation used by the Second Circuit and the *Campton* court is logical given the reasonable assumption that most Section 11 claims are filed after the fraud has been fully revealed to the market, while in rarer circumstances (such as a series of partial corrective disclosures as alleged here) the market price may remain partially inflated. This assumption is also consistent with the Second Circuit's guidance that the market price "serves as a good starting point in determining value," just as Plaintiffs' damages model assumes by examining the response of Snap's market price to disclosures during the period. *McMahan*, 65 F.3d at 1049; Dkt. 275-8 ¶¶ 56-57. It is an elemental proposition of modern securities law that in an efficient market, fraud can inflate the price of a security above its actual value. *See generally Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 272-74 (2014). Given the lack of binding authority, persuasive guidance from the Second Circuit, and the statutory language of Section 11(e) referencing "value", the Court is persuaded that the value-based model articulated by the federal plaintiffs should not preclude certification.

Moreover, the superiority analysis under Rule 23(b)(3) requires consideration of other factors: "(1) the class members' interests in individually controlling a separate action; (2) the extent and nature of litigation concerning the controversy already begun by or against class members; (3) the desirability of concentrating the litigation in the particular forum; and (4) the manageability of a class action." *Twitter*, 326 F.R.D. at 630-31. While the Intervenors have shown good cause for some of the various delays in their litigation to this point, Dkt. 298 at 7, the Court cannot ignore these other relevant factors.

As noted by the state court judge who has stayed the Intervenors' actions since November 2017, adjudicating these interrelated claims under the Securities Act and the Exchange Act in both state and federal court would potentially create confusion and might result in differing conclusions on identical legal issues. Dkt. 114-7 at 20-21. Trial has been set in this case for March 24, 2020, and resolution of the Securities Act claims through state court might require several years of continued litigation before final resolution of the same claims. On this basis, the Court determines that the second factor for under Rule 23(b)(3)'s superiority analysis weighs strongly with continued resolution in this Court, alongside all of the related factual issues and the Exchange Act claims. As discussed in the preceding paragraphs, the third factor regarding desirability of concentrating litigation in this forum does not weigh against class certification because this Court is persuaded that the Section 11 damages model proposed by Plaintiffs does not hinder class members.

Finally, the first and fourth factors articulated by Rule 23(b)(3)'s superiority analysis, the benefits of individual control of litigation and the general manageability of a class action, do not raise concerns here. Fed. R. Civ. P. 23(b)(3)(A), (D). This Court does not need to consider "the manageability of a class action" in detail, because the alternative venue for these claims is also a class action. To this Court's knowledge, these are also the only two actions litigating the securities claims arising out of Snap's IPO, making consideration of individual interests in prosecuting these claims unnecessary. *See* Fed. R. Civ. P. 23(b)(3)(A) advisory committee's notes to 1966 amendment; *see also Jordan v. Paul Fin., LLC*, 285 F.R.D. 435, 467 (N.D. Cal. 2012) (finding superiority satisfied even in circumstances with substantial individual damages claims).

Even if federal plaintiffs prevailed on liability under Section 11 but failed to establish damages via their price-inflation model, that outcome would not necessarily prejudice the class by preventing assertion of their different theory of damages in the still-pending state court action.[6] Federal common law governs the claim-preclusive effect of a federal court judgment in a federal-question case. *See Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). California appellate courts have construed this to mean that "where a prior federal judgment was based on *federal question* jurisdiction, the preclusive effect of the prior judgment of a federal court is determined by federal law." *Louie v. BFS Retail & Commercial Operations, LLC*, 101 Cal. Rptr. 3d 441, 448 (Ct. App. 2009); *see also Guerrero v. Dep't of Corr. & Rehab.*, Cal. Rptr. 3d 726, 733 (Ct. App. 2018). The Securities Act claims here arise under federal law, and thus federal common law on claim preclusion would apply to a final judgment. 11 U.S.C. § 77k.

Under Ninth Circuit precedent, "[c]laim preclusion 'applies when there is (1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between the parties.'" *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 855 (9th Cir. 2016) (internal quotations omitted). Assuming the second and third factors are met by a final judgment here, only the "identity of claims" would be at issue in post-judgment proceedings in state court. Determination of whether there is an "identify of claims" requires holistic consideration of four different factors:

> (1) whether the two suits arise out of the same transactional nucleus of facts; (2) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (3) whether the two suits involve infringement of the

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[6] The issue preclusive effect of this Court's future judgment on whether Snap's registration statement included a material misstatement or omission would be binding on state court plaintiffs, but that issue would have been "actually litigated and resolved" in a judgment issued by this Court, creating no prejudice. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008).

same right; and (4) whether substantially the same evidence is presented in the two actions.

Id. The "transactional nucleus" factor is especially important and requires consideration of whether the different suits "could conveniently be tried together." *ProShipLine Inc. v. Aspen Infrastructures Ltd.*, 609 F.3d 960, 968 (9th Cir. 2010). Additionally, "invocation of res judicata or claim preclusion" requires that "the first adjudication offer[ed] a full and fair opportunity to litigate." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 n.22 (1982).

Here, the date of the first filed lawsuit and the higher market price prevented this Court from considering the simpler, price-based damages calculation available to the state court plaintiffs, which therefore could not have been considered or litigated in this action. Additionally, if this Court finds liability under Section 11, but fails to find damages under the federal price-inflation model, allowing the state court cases to proceed would not impair "rights or interests" created by this judgment, because the question of liability would have been decided *in favor of the class* and against Snap. Because two of the four factors (including the most important) would likely weigh against finding claim preclusion, the Court determines that even a final judgment where the price-inflation model is the sole barrier to damages for the class would not prevent state court plaintiffs from pursuing their litigation in California state court.

The Ninth Circuit has also endorsed a "general exception to the claim preclusion doctrine when a court 'has expressly reserved the plaintiff's right to maintain the second action.'" *Garity*, 828 F.3d at 857 (9th Cir. 2016). If any final judgment entered in this case implicates such concerns, the Court will accordingly reserve the right of state court plaintiffs to maintain their prior action, assuming federal plaintiffs successfully establish liability but not damages on the Securities Act claims.

This Court previously issued an Order to Show Cause regarding the possibility of partial resolution via issue class under Rule 23(c)(4). Dkt. 324. But upon consideration of the briefings of the parties and Intervenors, Dkt. 327; Dkt. 328; Dkt. 329, and continued analysis of the Section 11 damages issue, this Court is persuaded the full certification under Rule 23(b)(3) is proper.[7] *See* Dkt. 329 at 7-10;

[7] The Court is most concerned by (1) Snap's ability to assert a negative causation defense to Section 11 claims when liability and damages are bifurcated between state and federal court, (2) possible jury confusion regarding consideration of evidence relevant to damages for the Exchange Act claims but not for the Securities Act claims, and (3) the possibility of three

Dkt. 328 at 8-10. Based on the foregoing analysis, the Court deems the Section 11 damages model proposed by Plaintiffs to be permitted under the statute's language and Ninth Circuit precedent, and that resolution in a federal forum alongside all other claims satisfies the superiority requirements of Rule 23(b)(3). The Court therefore declines to use issue classes to partially resolve this case.

As discussed below in detail with respect to the Exchange Act claims, there are many questions of law and fact common to Lead Plaintiff and the putative class. Because in the context of the Securities Act claims Lead Plaintiffs "need only show a material misstatement or omission" in the registration statement or prospectus, the Securities Act claims are readily susceptible to class-wide proof. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983). Because the Court is not persuaded by the arguments raised by Defendants or Intervenors above, it otherwise incorporates by reference the logic used below concerning the Exchange Act claims to find that common questions of law or fact predominate as required by Rule 23(b)(3) for the Securities Act claims. *See infra* Part V.d.vi.1.

c. *Securities Act Claims- Other Class Certification Issues*

i. Whether Lead Plaintiffs' Securities Act claims are time-barred by *China Agritech*

Defendants also assert that the Lead Plaintiffs are time-barred from bringing this motion for class certification under *China Agritech*, 138 S. Ct. 1800 (2018), because none of the current Lead Plaintiffs brought any claims or sought to participate as lead plaintiffs before the one-year statute of limitations for claims under the Securities Act expired. 15 U.S.C. § 77m. Each of the Lead Plaintiffs did not seek to join the case until January 31, 2019, well after the expiration of the one-year statute of limitations for the Securities Act claims. Dkt. 219. This argument does not apply to the Exchange Act claims, which have a two-year statute of limitations. 28 U.S.C. § 1658(b). This Court did deny a prior motion to certify a class, but this was a procedural decision made in order to reopen the lead plaintiff selection process following the withdrawal of Lead Plaintiff DiBiase. Dkt. 118; Dkt. 208.

In *China Agritech*, the Supreme Court held that the tolling period articulated in *American Pipe &*

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separate trials (and potential appeals) in federal, state, and then federal court again potentially delaying conclusion of this litigation for many years.

Constr. Co. v. Utah, 414 U.S. 538 (1974), which tolls the applicable statute of limitations for all persons included in the class complaint who file timely motions to intervene after denial of class certification, does not apply to a putative class member who, after denial of class certification, *initiates a new class action* beyond the time permitted by the applicable statute of limitations. *China Agritech*, 138 S. Ct. at 1804. *China Agritech* is not properly applied here, because Lead Plaintiffs intervened in an existing class action following the withdrawal of the former Lead Plaintiff, rather than filing a motion for class certification in a new (and otherwise time-barred) lawsuit. *Id.* at 1805. In explaining their decision, the Supreme Court stated:

> We hold that *American Pipe* does not permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action. The "efficiency and economy of litigation" that support tolling of individual claims, *American Pipe*, 414 U.S., at 553, 94 S.Ct. 756 do not support maintenance of untimely successive class actions; any additional class filings should be made early on, soon after the commencement of the first action seeking class certification.

China Agritech, 138 S. Ct. at 1806. The Supreme Court also expressly contemplated a scenario where "as class discovery proceeds and weaknesses in the class theory or adequacy of representation come to light, the lead complaint might be amended or a new plaintiff might intervene." *Id.* at 1807 n.2. That is precisely what this Court sought to do by reopening the lead plaintiff selection process following the medical withdrawal of a lead plaintiff. Dkt. 208, at 4.[8]

There is no question that the Securities Act claims in this case were validly asserted within the one-year statute of limitations, and Lead Plaintiffs only joined this action in order to participate in the

[8] Defendants' citation to a recent Ninth Circuit district court applying *China Agritech* is distinguishable— the original lead plaintiff in that case had previously been found to lack standing to bring wage claims under Nevada law under one of two relevant statutes. *See Evans v. Wal-Mart Stores, Inc.*, 2019 WL 3325806, at *2 (D. Nev. July 23, 2019). The plaintiff then sought to amend her complaint to include a new class representative who would not lack standing for the second relevant statute, at a time when those claims would be otherwise time-barred from asserting such a claim. *Id.* at *4. The court then concluded that under *China Agritech*, the proposed amendment and intervention was foreclosed because the relevant claims had never been validly asserted during the statute of limitations (since the original plaintiff lacked standing to assert them), and the new proposed plaintiff could not "revive" those claims. *Id.* at *5.

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lead plaintiff selection process this Court was forced to reopen. *See* Dkt. 208; Dkt. 262; Dkt. 272. Defendants correctly assert that *China Agritech* embodies a categorical approach that applies to all class actions, including both the Securities Act and the Exchange Act. 138 S. Ct. at 1811. But because (1) class certification has never been addressed on the merits, (2) the new Lead Plaintiffs were chosen to replace a class representative who withdrew for medical reasons, and (3) the previous Lead Plaintiff had validly asserted these claims within the requisite time period, the Court determines these circumstances raise none of the concerns regarding resuscitation of litigation or "[e]ndless tolling of a statute of limitations" that animated the Courts' decision in *China Agritech*. *See id.* at 1808-09.[9]

ii. Whether the Securities Act Class must be narrowed to those Class Members who can trace their shares directly to Snap's IPO.

Defendants also argue that any Securities Act claims certified here must be limited to those shares purchased before March 8, 2017, when a pre-IPO investor was permitted to sell his 100,000 non-IPO shares into the open market, because purchasers after that date cannot directly trace their shares to the IPO. Dkt. 292 at 13. As the Ninth Circuit has recognized, the tracing requirement necessary for liability under Section 11 of the Securities Act, 15 U.S.C. 77k, fits uncomfortably in the modern securities trading world, where brokers handle nearly all transactions and most securities accounts do not identify specific shares with certain accounts. *See In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1107 (9th Cir. 2013). Although it has not been directly addressed by the Ninth Circuit, some district courts have approved the use of "statistical tracing" for Section 11 claims while other Circuits have expressly precluded that possibility. *Compare Sudunagunta v. NantKwest, Inc.*, 2018 WL 3917865 (C.D. Cal. 2018) (permitting statistical tracing when ~98% of shares were issued pursuant to IPO), *with In re Quarterdeck Office Sys. Sec. Litig.*, 1993 WL 623310 (C.D. Cal. 1993) (preventing statistical

[9] Defendants' citation to a variety of Ninth Circuit precedent preventing time-barred plaintiffs from "piggybacking" via intervention in previously filed lawsuits have no bearing on this case, where the Court chose to reopen the process to satisfy the guidance embodied in the Private Securities Litigation Reform Act ("PSLRA") and selected the Lead Plaintiffs after renewed analysis under the PSLRA's selection guidelines. *See* Dkt. 208; Dkt. 262. Similarly, decisions by the Third and First Circuits invoking *China Agritech* involved motions for class certification in new class actions following expiration of the statute of limitations, rather than intervention in a previous, timely filed case. *See In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, 915 F.3d 1, 16 (1st Cir. 2019); *Blake v. JP Morgan Chase Bank NA*, 927 F.3d 701, 709 (3d Cir. 2019).

tracing when 97% of shares were pursuant to IPO); *Abbey v. Computer Memories, Inc.*, 634 F. Supp. 870, 874 (N.D. Cal. 1986) (preventing statistical tracing when 18% of total shares were traceable to new offering); *Krim v. pcOrder.com*, 402 F.3d 489, 496-97 (5th Cir. 2005) (rejecting use of statistical tracing).

Both parties acknowledge that only 100,000 of the more than 200 million shares in the market were not traceable to the IPO— meaning approximately 99.95% of the shares in the market during the relevant period *are* traceable to the IPO. Dkt. 292 at 13; Dkt. 304 at 19. In the absence of controlling Ninth Circuit precedent on the topic, this Court is persuaded by the logic of *Sudunagunta* and finds that the facts alleged by Lead Plaintiffs regarding the proportion of Snap's shares that are directly traceable to the IPO (99.95%) constitute a very substantial showing that effectively all class members can trace their shares back to the IPO. 2018 WL 3917865, at *5.[10]

As a policy matter, barring use of statistical tracing in litigation following a major IPO would mean that waiving the lock-up period for even nominal number of pre-IPO investors would effectively inoculate a corporation against nearly all potential Section 11 liability it might face for misstatements or omissions in its registration statement. *Cf. Herman & MacLean*, 459 U.S. at 381–82 ("The section was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering."). The Court declines to narrow the relevant Class Period for the Securities Act claims on this basis.

iii. <u>Numerosity, Commonality, Typicality, and Adequacy under Rule 23(a)</u>

With the exception of the arguments analyzed above regarding traceability, the relevant statute of limitations, and the predominance challenges raised under Rule 23(b)(3) below, the facts, legal standards, and analysis with regard to the Securities Act claims do not differ materially from those regarding the Exchange Act claims discussed below. *See infra* V.d.ii-iv. While the inquiry for purposes

[10] This is also consistent with Ninth Circuit decisions requiring more factual specificity when multiple offerings under different registration statements have occurred, in contrast with the single registration statement that 99.95% of shares were issued under in this case. *See In re Century Aluminum*, 729 F.3d at 1107 ("When a company has issued shares in multiple offerings under more than one registration statement, however, a greater level of factual specificity will be needed before a court can reasonably infer that shares purchased in the aftermarket are traceable to a particular offering.").

of Section 11 and Section 15 of the Securities Act is narrower than that under the Exchange Act because it focuses solely on the registration statement, it relates to the same fundamental facts about Snap, and a subset of the relevant alleged misrepresentations and omissions detailed below. Similarly, the adequacy and typicality arguments regarding the current Lead Plaintiffs raised by Defendants elsewhere apply identically to the Securities Act claims. *See infra* Part V.d.iii-iv. Intervenors couch some of their arguments opposing class certification as objections to the adequacy of Lead Plaintiffs, but the Court has already addressed them in the course of the superiority analysis above, alongside Intervenors' other arguments. *See supra* Part V.b.ii. The Court otherwise incorporates by reference its analysis below on these factors and finds them fulfilled here. *See infra* V.d.ii-v. For these reasons, the Court GRANTS class certification on Plaintiffs' Securities Act claims.

d. *Exchange Act Claims under Section 10(b), Rule 10b-5, and Section 20(a)*

i. <u>Snap's argument that the Class Period should be narrowed.</u>

Snap's Opposition contests certification of the Exchange Act claims by first arguing that the Court must exercise its discretion to substantially narrow the class period, ending on May 10, 2017 instead of Aug. 10, 2017. Dkt. 292, at 18-21. The crux of Snap's argument is that certain disclosures made prior to August 10 (when Snap reported its second quarter financial results and Spiegel allegedly disclosed that Snap had actually been using "growth hacking" all along) made it unreasonable for putative class members to rely on the alleged prior misrepresentations. Dkt. 272, ¶ 193-200. Snap argues that both the May 10, 2017 disclosure regarding slower user growth and the April 10, 2017 filing of an unredacted complaint in the Pompliano lawsuit made it unreasonable for class members to rely on alleged misrepresentations by Snap past that date— and thus the class should be limited to purchasers within that shorter period. Dkt. 292, at 19-20.

In support of this position, Snap cites to cases where district court judges have exercised discretion to narrow the relevant class period on the basis that subsequent disclosures made continued reliance unreasonable. *See Hayes v. MagnaChip Semiconductor Corp.*, 2016 WL 7406418, at *8 (N.D. Cal. Dec. 22, 2016); *In re SunEdison, Inc. Sec. Litig.*, 329 F.R.D. 124, 133 (S.D.N.Y. 2019); *Xiang v. Inovalon Holdings, Inc.*, 327 F.R.D. 510, 521 (S.D.N.Y. 2018). But arguments regarding the impact or lack of impact of different disclosures on the market are generally reserved for the merits stage, rather than class certification. *See Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 470, 482 (2013). Plaintiffs argue that Snap's arguments regarding the impact of subsequent disclosures on the reasonability of class members reliance is contrary to *Amgen*, and that the cases cited by Snap stand only for the proposition that when a securities class action defendant has *unequivocally* disclaimed the prior assertion, certification of a class that extends beyond that period is improper. Dkt. 304 at 9-11. The Court agrees with Plaintiffs and concludes that narrowing of the class period at class certification should be reserved for circumstances where follow-up disclosures by the defendant unequivocally disclaimed the alleged prior misrepresentations.[11]

Here, neither Plaintiffs' Second Amended Complaint ("SAC") nor the assertions in Defendant's Opposition assert unequivocal disclosures that justify narrowing the relevant Class Period at this juncture. The SAC acknowledges that Snap made Pompliano's whistleblower lawsuit public, but it also alleges Snap continued to make misrepresentations regarding the lawsuit. Dkt. 272 ¶ 163-65. The SAC describes both media scrutiny and Snap's continued efforts to deny the underlying allegations in the press. *Id.* ¶¶ 165-67. Because Pompliano's unsealed lawsuit is alleged to have been aggressively (and allegedly misleadingly) revealed to the market by Snap, the Court is satisfied that any inquiry as to precisely when the truth was fully disclosed to the market is best reserved for resolution on the merits.

Similarly, the SAC's allegations regarding the results of Snap's first quarterly report indicating slowing user growth on May 10, 2017 are couched entirely as a "partial" disclosure of the truth to the market. *Id.* ¶¶ 168, 171 ("the truth . . . began to emerge"). Because the SAC goes on to allege additional misrepresentations by Spiegel and other officers regarding "growth hacking" and user engagement on

[11] This approach is generally consistent with precedent cited by both parties— *In re SunEdison* involved modification solely of Securities Act claims that the plaintiff's complaint acknowledged had been fully disclosed in a follow-up 10-Q, and declined to narrow Exchange Act claims, citing *Amgen*. *SunEdison*, 329 F.R.D. at 133-34, 138. Similarly, in *Hayes v. Magnachip Semiconductor*, the district court distinguished *Amgen* by noting that it did not discuss subsequent disclosures because the defendant had expressly stated that its prior financial statements "should not be relied upon." 2016 WL 7406418, at *7; *see also In re Fannie Mae Sec. Litig.*, 247 F.R.D. 32, 39-40 (D.D.C. 2008) (finding "nothing equivocal" about disavowal of prior financial statements). This approach also avoids undue inquiry into the merits at class certification, as the Supreme Court has cautioned against in *Amgen.* 568 U.S. at 477 ("Amgen's argument, if embraced, would necessitate a mini-trial on the issue of materiality at the class-certification stage.").

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May 10 and May 24, 2017, the disclosure of the first quarterly report is not sufficiently unequivocal to justify narrowing the class period here. *Id.* ¶¶ 173-179a, 184-86.[12]

The Court determines that the period from the IPO Date until Aug. 10th, 2017 remains the appropriate class period here. Defendants can revisit these arguments regarding the impact of their alleged corrective disclosures at a later date.

ii. Numerosity

The numerosity requirement is satisfied when a plaintiff shows that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Courts generally find that "the numerosity requirement is met in securities fraud suits involving nationally traded stocks." *In re UTStarcom, Inc. Sec. Litig.*, 2010 WL 1945737, at *4 (N.D. Cal. May 12, 2010) (citing *Yamner v. Boich*, 1994 WL 514035, at *3 (N.D. Cal. Sept. 15, 1994)).

Plaintiffs allege, and Defendants do not dispute, that during the Class Period, there were between 661.9 million and 811.1 million shares of Snap Common Stock outstanding and an average of 106 million shares (or 15.6% of all outstanding shares) traded weekly. Dkt. 275-8 ¶ 24. Moreover, in addition to individual investors, more than 270 institutional investors held Snap Common Stock during the Class Period. *Id.* ¶ 41. Finally, with heightened relevance to the Securities Act claims, over 200 million shares of Snap Common Stock were sold in the IPO. *Id.* ¶11. Based on this information, Lead Plaintiffs have satisfied their burden to show that the number of putative class members is sufficiently numerous that joinder would be impracticable.

iii. Commonality

[12] Snap also makes an estoppel-esque argument that because Lead Plaintiffs articulated similar arguments against competing prospective lead plaintiffs based on the period during which they purchased their shares, they cannot argue against narrowing the class period here. Dkt. 292 at 20. But this fails to distinguish between the proper inquiry at class certification and the inquiry required for lead plaintiff selection by the Court. Setting aside that Lead Plaintiffs couched those arguments in terms of "partial" disclosure, Dkt. 247 at 16-17, the proper inquiry for lead plaintiff selection necessarily involves some inquiry into the merits of the case. *See generally* Dkt. 262 at 1-2. Thus, merits-based arguments made by the current Lead Plaintiffs against other prospective lead plaintiffs are not relevant to this issue.

The commonality requirement is satisfied when a plaintiff shows that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality exists when a plaintiff's claims "depend upon a common contention" of "a nature that is capable of classwide resolution," such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. For the purposes of Rule 23(a)(2), "even a single common question" is sufficient. *Wang*, 737 F.3d at 544.

Lead Plaintiff contends, and Defendants do not dispute, that questions of law or fact common to the putative class include: "(i) Whether Defendants violated the federal securities laws; (ii) Whether Defendants' statements misrepresented or omitted facts; (iii) Whether the facts misrepresented and omitted by Defendants were material; (iv) Whether the Exchange Act Defendants knew or recklessly disregarded that their statements were materially false and misleading; (v) Whether Snap's Common Stock was artificially inflated (and by how much); (vi) Whether the alleged stock price declines are causally connected to Defendants' misrepresentations and omissions; and (vii) Whether the Executive Defendants had control over Snap." Dkt. 275-1 at 8-9. These questions are sufficient to satisfy the commonality requirement. *See Luna v. Marvell Tech.,* 2017 WL 4865559, at *2 (finding commonality requirement satisfied when, as here, plaintiff alleged "that investors were defrauded by the same misleading statements over the same period of time, and suffered similar losses as a result").

iv. <u>Typicality</u>

Typicality exists if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation and internal quotation marks omitted). Under Rule 23(a)(3)'s "permissive standard" for typicality, "representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (citation omitted).

Snap contests the typicality of several prospective Lead Plaintiffs, arguing first that they are atypical because of their trading patterns, which Snap argues lend themselves to unique defenses regarding their reliance on market volatility rather than Snap's financial statements or public disclosures. Dkt. 292, at 22-23.[13] In particular, Snap argues that Plaintiffs Tilahum, Melgoza, and Dukes were "day traders," relying on price volatility to purchase Snap's stock. *Id.* Snap additionally argues that Plaintiffs Butler and Dukes are also atypical because they sold all of their Snap shares prior to the final corrective disclosure alleged on Aug. 10. *Id.* at 5.

The Ninth Circuit has emphasized that generally "the defense of non-reliance is not a basis for denial of class certification." *Hanon*, 976 F.2d at 509. An exception exists only in extreme circumstances where the lead plaintiff's atypicality would substantially influence the course of litigation. *Id.* at 508-09.

Plaintiffs Tilahun, Melgoza, and Dukes all reject the general label "day trader" in their depositions. *See* Dkt. 303-3 at 118:20-21; Dkt. 303-2 at 60:3-11; Dkt. 306-3 at 104:9-109:3.[14] The specific instances of frequent trading by the Tilahun, Melgoza, and Dukes are relatively limited. Tilahun bought and sold Snap share repeatedly in the course of one week and referred to specific price fluctuations that caused him to make these trades, while still asserting that each time he purchased Snap shares, he did not do so expecting to sell them within that same day. *See* Dkt. 303-3 at 79:21-81:17. Melgoza bought and sold 10,000 shares of Snap on the IPO Date, and then bought another 10,000 shares the next day, distinguishing the second purchase as a "long-term strategy" distinct from the "short-term strategy" embodied in the short-swing trade. *See* Dkt. 303-2 at 68:13-74:3. Dukes describes his trading process thus: "I sold the shares quickly for a profit and then, after more research, said this is— this is the real thing. I'm going to go long in this stock and keep it. I was convinced that it was going to be a good, good thing. So I purchased 5,000 shares of stock." Dkt. 306-3 at 130:2-7. After buying an addition 3,000

[13] Snap also makes reference to certain short sales of Snap made by Plaintiff Dukes which Snap argues render Dukes atypical as a lead plaintiff. Dkt. 292 at 23. As pointed out by Plaintiffs in their Reply, these trades were made months after the Class Period ended, and are irrelevant to this motion. Dkt. 306-3 at 204:3-19. Indeed, as Plaintiff Dukes stated in his deposition, short sales betting against the stock price of a corporation that Dukes alleges previously lied to him is entirely consistent with his position in this lawsuit. *Id.* at 204:14-19.

[14] The Court notes that Plaintiff Dukes' description of his consistent trading when he "noticed that there was a pattern of the stock going up or down," generally matches the colloquial definition of "day trader." Dkt. 306-3 at 107:8-12.

shares shortly afterwards, Dukes later sold 1,000 shares citing concerns over using borrowed money through margin trading to initially take the position. *Id.* at 136:3-13.

The Court concludes that these transactions do not render the Lead Plaintiffs "inadequate" for the purposes of Rule 23(a)(3). Given the Supreme Court's guidance that "it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity," short-term trading at varying points by several Lead Plaintiffs during the Class Period does not necessarily create the potential for unique defenses that would preoccupy class counsel. *Basic Inc. v. Levinson*, 485 U.S. 224, 246–47 (1988). In *Hanon*, the lead plaintiffs' "practice of buying a minimal number [of] shares in various companies" coupled with his close relationship with his lawyers and prior experience in securities class actions would likely have substantially influenced trial strategy if he had been appointed. *See* 976 F.2d at 508-509. Prior district court cases finding fault with day-trading plaintiffs generally involved substantially higher trading frequencies— 407 trades in 644 days, 5,000 trades in a nine-month period, or sustained patterns of daily or near-daily buying and selling, far in excess of the trading in this case. *See Applestein v. Medivation Inc*, 2010 WL 3749406, at *3 (N.D. Cal. Sept. 20, 2010); *Eichenholtz v. Verifone Holdings, Inc.*, 2008 WL 3925289, at *10 (N.D. Cal. Aug. 22, 2008); *Reinschmidt v. Zillow, Inc.*, 2013 WL 1092129, at *4 n.3 (W.D. Wash. Mar. 14, 2013).

Snap also argues that Plaintiffs Butler and Dukes are inadequate because they sold their shares prior to the final corrective disclosure alleged on August 10, like other proposed lead plaintiffs this Court previously disqualified. Dkt. 292 at 23. This Court's prior decision was based (partially) on the sale of *all* of one plaintiff's Snap holdings in advance of the final alleged corrective disclosure, and the fact that the other proposed plaintiff purchased the bulk (60% of his holdings) *after* news initially surfaced that allegedly partially disclosed the truth to the market. *See* Dkt. 262 at 2, 4. In contrast, only a minority (Dukes and Butler) of the Snap Shareholder Group sold their shares prior to the end of the Class period, and they did so only after the initial partial disclosure alleged in the SAC. Dkt. 304 at 8. Because the Snap Shareholder Group includes several other Lead Plaintiffs who did not do so, and all shareholders sold only after the initial partial disclosure alleged in the SAC, the Court determines that this is unlikely to "preoccupy" class counsel at trial, particularly given that the SAC's narrative arc hinges on the gradual revelation of the truth by Defendants. *See* Dkt. 272 ¶¶ 135-86; *Hanon*, 976 F.2d at 509.

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As a second argument for the Lead Plaintiffs' atypicality, Snap asserts that during their depositions, several Lead Plaintiffs admitted that they did not rely on the alleged misrepresentations made by Snap. *See* Dkt. 292 at 23-24. The Supreme Court has emphasized that reliance on the *Basic* presumption requires only "trad[ing] stock based on the belief that the market price will incorporate public information within a reasonable period." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014); *see also Loritz*, 2015 WL 6790247, at *5. Therefore, the fact that several Lead Plaintiffs had not read Snap's SEC filings, or that Plaintiff Dukes relied exclusively on third-party reports, is insufficient to support a finding of atypicality. Defendants also argue that Plaintiffs Butler and Nelson are atypical because they "admitted that, had they read Snap's IPO Prospectus, they would not have invested in Snap stock in light of the risks disclosed." Dkt. 292 at 23; Dkt. 303-5 at 143:22-145:2, 147:2-148:6; Dkt. 303-6 at 154:22-155:19. Viewed in context, these portions of the deposition transcript do not constitute express disclaimers of reliance on market integrity, only responses to hypothetical scenarios and situations proposed by Defendant's counsel, that *might* have influenced their investment decisions. *See* Dkt. 303-5 at 143:22-145:2, 147:2-148:6; Dkt. 303-6 at 154:22-155:19. Defendants' further assertion that Plaintiff Dandridge would have purchased Snap stock regardless of any misrepresentations, rendering him atypical, is belied by the discussion immediately preceding that statement, where he states that he would expect the market to lower the price accordingly— a perfect example of reliance on market integrity. *Compare* Dkt. 303-8 at 91:2-6, *with* 89:17-90:24.

For the reasons state above, this Court determines that the Lead Plaintiffs collectively are appropriately typical for purposes of Rule 23(a)(3).

v. <u>Adequacy</u>

"To determine whether named plaintiffs will adequately represent a class, courts must resolve two questions: '(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)).

Defendants' arguments against the adequacy of the Lead Plaintiffs focus primarily on their lack of familiarity with each other prior to the litigation, and their failure to monitor the fees sought by Lead

Counsel. Dkt. 292 at 24-25. They cite to *In re Quarterdeck Office Sys., Inc. Sec. Litig.*, 1993 WL 623310, at *6, to argue that Lead Plaintiffs have wholly abandoned their role as fiduciaries to the class members. Dkt. 292, at 25. This argument fails to credit the Lead Plaintiffs' deposition testimony demonstrating their understanding of the underlying issues and participation in decisions by Lead Counsel. *See generally* Dkt. 303-3, at 163-164; Dkt. 303-6, at 20-22; Dkt. 303-2, at 197-201; Dkt. 303-5, at 231-235. Given that "clients necessarily look to counsel to understand the factual and legal intricacies," the Court is not convinced that the Lead Plaintiffs are inadequate for any failure to prosecute the action vigorously. *Johnson v. Hartford Cas. Ins. Co.*, 2017 WL 2224828, at *14 (N.D. Cal. May 22, 2017); *see also In re Facebook Biometric Info. Privacy Litig.*, 326 F.R.D. 535, 543 (N.D. Cal. 2018). *In re Quarterdeck* involved proposed lead plaintiffs who were largely unfamiliar with the facts of the case and scarcely "seemed to even care" about the course of the litigation, in distinct contrast to the deposition testimony of Lead Plaintiffs. 1993 WL 623310, at *6.

Assertions by Defendants regarding Lead Counsel's inadequate control over potential fee arrangements are not relevant to the adequacy inquiry more generally and ignore the role of this Court in approving any fee award under Rule 23(h). Dkt. 292, at 24-25. More importantly, Defendants fail to highlight any specific conflicts of interests with other members of the class that would otherwise cause the Lead Plaintiffs to inadequately represent the class.[15] *See Ellis*, 657 F.3d at 985. Therefore, given the aggressive prosecution of this case by Lead Counsel and the deposition record of Lead Plaintiffs, this Court is satisfied that they meet the adequacy requirements of Rule 23(a)(4).

vi. Predominance and Superiority Under Rule 23(b)(3)

This provision requires that the Court find: (1) "the questions of law or fact common to the class members predominate over any questions affecting only individual members"; and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

1. *Predominance*

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[15] The adequacy of Lead Plaintiffs with regard to the Securities Act claims in particular, as contested by the Intervenors, is addressed above in Part V.b.iii.

"The predominance analysis under Rule 23(b)(3) focuses on 'the relationship between the common and individual issues' in the case and 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Wang*, 737 F.3d at 545 (quoting *Hanlon*, 150 F.3d at 1022). "Class certification under Rule 23(b)(3) is proper when common questions represent a significant portion of the case and can be resolved for all members of the class in a single adjudication." *In re Diamond Foods, Inc., Sec. Litig.*, 295 F.R.D. 240, 246 (N.D. Cal. 2013) (citing *Hanlon*, 150 F.3d at 1022).

When claims are based upon misrepresentations and omissions in violation of the securities laws, "[p]redominance is a test readily met." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Here, Plaintiffs' SAC alleges a variety of such misrepresentations and omissions. Dkt. 275-1 at 8-9. "[W]hether common questions of law or fact predominate in a securities fraud action often turns on the element of reliance." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809-10 (2011). Plaintiffs have submitted substantial, wholly unrebutted testimony establishing that both the *Basic* presumption of "fraud-on-the-market" reliance and the *Affiliated Ute* presumption of reliance for omissions of material facts are appropriate for the Exchange Act claims alleged here. *See* Dkt. 275-1 at 15-21.

Defendants do not contest predominance directly in their opposition, only raising objections to Lead Plaintiffs' adequacy and typicality and asserting that the Class Period should be narrowed. *See* Dkt. 292 at 18-25. The Intervenors do not oppose certification of the Exchange Act claims because they cannot be brought in state court. *See* Dkt. 284-3; Dkt. 285-3. On this record the Court concludes that the Exchange Act claims meets Rule 23(b)(3)'s predominance requirement.

2. <u>Superiority</u>

In determining superiority, "courts must consider the four factors of Rule 23(b)(3): (1) the class members' interests in individually controlling a separate action; (2) the extent and nature of litigation concerning the controversy already begun by or against class members; (3) the desirability of concentrating the litigation in the particular forum; and (4) the manageability of a class action." *Twitter*, 326 F.R.D. at 630-31 (citing *Hodges v. Akeena Solar, Inc.*, 274 F.R.D. 259, 270-71 (N.D. Cal. 2011)). "Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation," and is certainly superior "if no realistic alternative exists." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir. 1996).

The superiority requirement is both uncontested and easily satisfied here for the Exchange Act claims. Dkt. 275-1 at 22-23. The Court thus concludes that a class action is superior to alternative methods for resolving these claims.

VI. **Conclusion**

Plaintiffs' motion for class certification under Rule 23(b)(3) is GRANTED with regard to both the Securities Act and Exchange Act claims alleged in the SAC. The Court appoints Plaintiffs as Class Representatives, appoints Kessler Topaz as Class Counsel, and appoints Rosman & Germain as Liaison Counsel.

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Initials of Preparer PMC