UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re LEHMAN BROTHERS SECURITIES AND ERISA LITIGATION

This Document Applies To:

In re Lehman Brothers Equity/Debt Securities Litigation, 08-CV-5523-LAK

Case No. 09-MD-2017 (LAK)

ECF CASE

LEAD PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 3

I. E&Y FAILS TO ESTABLISH ANY UNIQUE DEFENSE TO DEFEAT CLASS CERTIFICATION 3

A. ACERA Satisfies Rule 23's Adequacy And Typicality Requirements 3

B. E&Y Cannot Rebut The Presumption Of Reliance Through INTECH's Index-Based Investment Strategy 7

C. Reliance On Investment Managers Does Not Establish A Unique Defense 13

II. PLAINTIFFS' CLASS DEFINITION IS PROPER AND DOES NOT INCLUDE "IN-AND-OUT" TRADERS 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

CASES

In re Am. Int'l Grp., Inc. Sec. Litig.,
265 F.R.D. 157 (S.D.N.Y. 2010) .... *passim*

In re Bank of Am. Corp. Sec., Deriv., and ERISA Litig.,
2012 WL 370278 (S.D.N.Y. Feb. 6, 2012) 15

Basic, Inc. v. Levinson,
485 U.S. 224, 108 S. Ct. 978 (1988) 11

Berwecky v. Bear, Stearns & Co.,
197 F.R.D. 65 (S.D.N.Y. 2000) 7

Billhofer v. Flamel Tech., S.A.,
2012 WL 928147 (S.D.N.Y. Mar. 15, 2012) 15

Black v. Finantra Capital, Inc.,
418 F.3d 203 (2d Cir. 2005) 10

In re Connetics Corp. Sec. Litig.,
257 F.R.D. 572 (N.D. Cal. 2009) 8

In re Countrywide Fin. Corp. Sec. Litig.,
273 F.R.D. 586 (C.D. Cal. 2009) 8

Faris v. Longtop Fin. Techs., Ltd.,
2011 WL 4444176 (S.D.N.Y. Oct. 4, 2011) 5, 6

In re Fed. Home Loan Mortg. Corp. Sec. Litig.,
2012 WL 1028642 (S.D.N.Y. Mar. 27, 2012) 2, 3

In re Flag Telecom Holdings, Ltd. Sec. Litig.,
574 F.3d 29 (2d Cir. 2009) 14, 15

Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
119 F.R.D. 344 (S.D.N.Y. 1988) 6, 7

Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
903 F.2d 176 (2d Cir. 1990) 6

Hanon v. Dataproducts Corp.,
976 F.2d 497 (9th Cir. 1992) 12

In re Harcourt Brace Jovanovich, Inc. Sec. Litig.,
838 F. Supp. 109 (S.D.N.Y. 1993) 13

In re Indep. Energy Holdings, PLC Sec. Litig.,
210 F.R.D. 476 (S.D.N.Y. 2002) 2

In re Initial Pub. Offering Sec. Litig.,
471 F.3d 24 (2d Cir. 2006)....................3

Kovaleff v. Piano,
142 F.R.D. 406 (S.D.N.Y. 1992) 7

Lehocky v. Tidel Techs., Inc.,
220 F.R.D. 491 (S.D. Tex. 2004)....................3

In re Nortel Networks Corp. Sec. Litig.,
2003 WL 22077464 (S.D.N.Y. Sept. 8, 2003)....................3, 8

In re Parmalat Sec. Litig.,
2008 WL 3895539 (S.D.N.Y. Aug. 21, 2008)....................1

In re Pfizer Inc. Sec. Litig.,
2012 WL 1059671 (S.D.N.Y. Mar. 29, 2012) .... *passim*

In re Providian Fin. Corp. Sec. Litig.,
2004 WL 5684494 (N.D. Cal. Jan. 15, 2004)....................10

Pub. Emps.' Ret. Sys. of Miss. v. Goldman Sachs Grp., Inc.,
2012 WL 336146 (S.D.N.Y. Feb. 3, 2012)....................15

In re Rent-Way Sec. Litig.,
218 F.R.D. 101 (W.D. Pa. 2003) 3

Rocco v. Nam Tai Elecs., Inc.,
245 F.R.D. 131 (S.D.N.Y. 2007) 3, 5, 6, 7

Rosen v. Textron, Inc.,
369 F. Supp. 2d 204 (D. R.I. 2005)....................7

Saddle Rock Partners, Ltd. v. Hiatt,
2000 WL 1182793 (S.D.N.Y. Aug. 21, 2000)....................12

In re Sadia S.A. Sec. Litig.,
269 F.R.D. 298 (S.D.N.Y. 2010) 15

In re Schering-Plough Corp. Sec. Litig.,
2003 WL 25547564 (D.N.J. Oct. 10, 2003)....................8

Silverman v. Motorola, Inc.,
259 F.R.D. 163 (N.D. Ill. 2009)....................6

In re SLM Corp. Sec. Litig.,
2012 WL 209095 (S.D.N.Y. Jan. 24, 2012) 15

Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.,
546 F.3d 196 (2d Cir. 2008)....................3

In re Veeco Instruments, Inc. Sec. Litig.,
235 F.R.D. 220 (S.D.N.Y. 2006) 13

Wilkof v. Caraco Pharm. Labs., Ltd.,
_ F.R.D. _, 2012 WL 638517 (E.D. Mich. Feb. 28, 2012) 8

In re WorldCom, Inc. Sec. Litig.,
219 F.R.D. 267 (S.D.N.Y. 2003) 2, 8, 9

OTHER AUTHORITIES

Fed. R. Civ. P. Rule 23 ....1, 3, 5, 11

S. Rep. No. 104-98 (1995) 2

15 U.S.C. § 78j(b) 15

PRELIMINARY STATEMENT

Alameda County Employees' Retirement System ("ACERA") and Oklahoma Firefighters Pension and Retirement System ("Oklahoma FF") (together, "Plaintiffs") established in their opening brief (the "Motion" or "Mot.") that this case is ideally suited for class certification. In response, Ernst & Young LLP ("E&Y") does not challenge that the proposed class satisfies the numerosity, commonality, and superiority requirements of Rule 23. Rather, E&Y contests only whether ACERA and Oklahoma FF satisfy the typicality and adequacy requirements of Rule 23(a), claiming Plaintiffs are subject to "unique defenses," which threaten to become the focus of the litigation against E&Y. Such contentions, however, must be viewed with skepticism because the unique defense rule is "'intended to protect [the] plaintiff class – not to shield defendants from a potentially meritorious suit' and 'has generally been applied only where a full defense is available against an individual plaintiff's action.'" *In re Parmalat Sec. Litig.,* 2008 WL 3895539, at *5 (S.D.N.Y. Aug. 21, 2008) (citation omitted). Here, E&Y has no such defense.

As explained below, E&Y has not rebutted the presumption of reliance with respect to ACERA because the defendant has failed to show that ACERA was aware of an ***ongoing*** fraud at Lehman Brothers Holdings Inc. ("Lehman" or the "Company") at the time of its August 2008 Lehman common stock purchases. Numerous courts in this District have rejected similar contentions that post-disclosure purchases of the defendant company's stock disqualify a class representative on adequacy or typicality grounds. *See, e.g., In re Pfizer Inc. Sec. Litig.*, 2012 WL 1059671, at *7 (S.D.N.Y. Mar. 29, 2012).

Likewise, E&Y's challenge to the index-based trading strategy of Oklahoma FF's investment manager, INTECH Investment Management LLC ("INTECH"), fails because such investment strategies do not rebut the presumption of reliance, are widely accepted, and are hardly atypical because index investing is commonplace among institutional investors. *See, e.g.,*

In re WorldCom, Inc. Sec. Litig., 219 F.R.D. 267, 281-82 (S.D.N.Y. 2003). Moreover, INTECH relied upon current stock prices and did not possess any non-public information concerning Lehman when it purchased Lehman stock on behalf of Oklahoma FF.

Similarly, the use of outside investment managers is typical of public pension funds like ACERA and Oklahoma FF and does nothing to rebut the reliance presumption. Indeed, institutional investors "are likely to use advisors . . . to invest conservatively in securities they consider undervalued by the market" and thus precluding institutions from participating in securities class actions would contravene the Private Securities Litigation Reform Act's purpose to "increase the likelihood that institutional investors will serve as lead plaintiffs." *See WorldCom*, 219 F.R.D. at 282 (quoting S. Rep. No. 104-98, at 11 (1995)).

Finally, E&Y's claim that the class definition improperly includes "in-and-out" investors who sold all of their Lehman shares before the first corrective disclosure is factually inaccurate. Such investors are not within the class definition as they were not damaged by the misinformation, and the class definition is limited to Class members "damaged thereby."

In short, this case is a classic securities fraud action ideally suited for class certification. *See In re Indep. Energy Holdings, PLC Sec. Litig.*, 210 F.R.D. 476, 486 (S.D.N.Y. 2002) (finding that class actions are "generally well-suited to securities fraud cases" given "the large number of potential plaintiffs and the commonality of their claims").[1]

[1] E&Y requests an "evidentiary hearing," but provides no support for its request and fails to explain how an evidentiary hearing will assist the Court under the circumstances here. *See* E&Y's Memorandum Of Law In Opposition To Lead Plaintiffs' Motion For Class Certification And Appointment Of Class Representatives And Class Counsel ("Opp.") at 3. E&Y has ***not*** challenged: (1) the admissibility of Plaintiffs' evidence, (2) the market efficiency for Lehman stock, or (3) Plaintiffs' expert opinion on market efficiency. *See In re Fed. Home Loan Mortg. Corp. Sec. Litig.*, 2012 WL 1028642, at *2 (S.D.N.Y. Mar. 27, 2012) (evidentiary hearing held because parties disputed market efficiency and "moved to exclude the opposing party's expert testimony and related evidence on efficiency."). E&Y merely cites decisions indicating, unremarkably, that the Court has discretion to convene an evidentiary

ARGUMENT

I. E&Y FAILS TO ESTABLISH ANY UNIQUE DEFENSE TO DEFEAT CLASS CERTIFICATION

A. ACERA Satisfies Rule 23's Adequacy And Typicality Requirements

E&Y incorrectly contends that ACERA's claims are not typical of other Class members, and that ACERA would be an inadequate class representative, because it purchased Lehman common stock in August 2008, after ACERA became involved in this litigation. *See* Opp. at 9-14. As E&Y itself acknowledges, however, there is no *per se* rule that renders a proposed class representative's claims atypical under Rule 23 simply by virtue of the fact that it purchased the defendant company's stock after a corrective disclosure was issued, or after it became involved in litigation. Opp. at 12; *see Rocco v. Nam Tai Elecs., Inc.*, 245 F.R.D. 131 (S.D.N.Y. 2007) (acknowledging that there is no *per se* rule that post-disclosure purchases render claims of proposed class representatives atypical). To the contrary, numerous courts in this District have rejected similar challenges in circumstances comparable to those here. *See, e.g., Pfizer*, 2012 WL 1059671, at *7 (holding class representatives' post-disclosure purchases do not render claims atypical); *In re Am. Int'l Grp., Inc. Sec. Litig.*, 265 F.R.D. 157, 169 (S.D.N.Y. 2010) ("*AIG*") (same).[2]

---

hearing if necessary. *See*, Opp. at 3 n.2 (*citing Fed. Home Loan Mortg. Corp.*, 2012 WL 1028642, at *2; *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 201-02 (2d Cir. 2008); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("*IPO*")). However, the Second Circuit has cautioned against such evidentiary hearings, noting the Court should "avoid the risk that a Rule 23 hearing will extend into a protracted mini-trial of substantial portions of the underlying litigation." *IPO*, 471 F.3d at 41.

[2] *See also In re Nortel Networks Corp. Sec. Litig.*, 2003 WL 22077464, at *3 (S.D.N.Y. Sept. 8, 2003) (rejecting defendants' argument that purchases "well after the alleged 'fraud' was 'exposed'" rendered class representative's claims atypical); *Lehocky v. Tidel Techs., Inc.*, 220 F.R.D. 491, 501-02 (S.D. Tex. 2004) ("[P]urchases of stock by the class representatives after negative announcements during the class period or even after the close of the class period do not destroy typicality."); *In re Rent-Way Sec. Litig.*, 218 F.R.D. 101, 114 (W.D. Pa. 2003) (finding purchases after disclosure of accounting irregularities and after proposed class representative had become plaintiff were "irrelevant" to typicality analysis).

E&Y's argument fails because when ACERA purchased Lehman stock in August 2008, it was unaware that Lehman was engaged in an ***ongoing fraud*** related to its undisclosed Repo 105 transactions and that Lehman's second quarter 2008 Form 10-Q contained material misrepresentations and omissions by Lehman and E&Y. Indeed, at the time ACERA moved for appointment as Lead Plaintiff, the operative complaint in this action alleged that Lehman's fraud had been fully and completely revealed on June 9, 2008. *See* ECF No. 1. at ¶103.[3] Lehman's share price declined by 20% in direct response to this revelation, indicating that all artificial inflation present in Lehman's stock price prior to June 9, 2008, had dissipated. As a result, ACERA, like thousands of other shareholders, justifiably purchased Lehman common stock during the Class Period in reliance on the integrity of Lehman's share price, and on the ability of the market to absorb and reflect all material public information in Lehman's common stock price. *See AIG*, 265 F.R.D. at 169 (class representatives entitled to rely on market price in making post-disclosure purchases "because the price of AIG stock had declined to incorporate the latest information in those [corrective] disclosures").

While ACERA continued to investigate its claims against Lehman after being appointed Lead Plaintiff, it did so under the belief that it was investigating ***a past fraud at Lehman*** that had been ***fully disclosed to the market***. Only after Lehman's issuance of subsequent corrective disclosures in September 2008 – and after its September 15, 2008 bankruptcy filing – did it become apparent to ACERA that Lehman's fraudulent conduct extended beyond June 9, 2008.

---

[3] Indeed, E&Y acknowledges that on June 9, 2008, Lehman announced a $2.87 billion quarterly loss due to $3.7 billion in mortgage and real estate-related write-downs. Opp. at 10 (citing Mot. at 5). Accordingly, E&Y's conspicuously unsupported contention that ACERA was "aware[] of an ***ongoing*** fraud during the Class Period" cannot be credited. Opp. at 13 (emphasis added). Moreover, while E&Y attempts to generalize the nature of the "fraud" about which ACERA was purportedly aware, it has offered no evidence linking ACERA to any knowledge or belief about Lehman's use of Repo 105 transactions, or about E&Y's involvement in a fraud regarding such transactions, when it purchased Lehman stock in August 2008.

Moreover, E&Y was not a defendant in this action when ACERA moved for Lead Plaintiff appointment.

For these reasons, *Rocco v. Nam Ti Elecs., Inc.*, 245 F.R.D. 131, upon which E&Y principally relies, is inapposite. There, the court found that the plaintiff's purchases rendered the proposed class representative atypical under Rule 23, because he was aware of an ongoing fraud that had not been publicly corrected at the time he purchased the stock.[4] Here, as discussed above, at the time of ACERA's August 2008 purchases, the operative complaint – pursuant to which ACERA moved for appointment as Lead Plaintiff – alleged that Lehman's fraud had been completely revealed in June 2008. Under similar circumstances, courts in this District have recently rejected attempts by defendants to rely on *Rocco* to disqualify a proposed class representative. For example, in *Pfizer,* 2012 WL 1059671, at *7, Judge Swain distinguished *Rocco* in appointing a proposed class representative that purchased a large proportion of its Pfizer shares after an initial corrective disclosure. Specifically, Judge Swain noted that, unlike the proposed class representative in *Pfizer*, the proposed class representative in *Rocco* "sought to pursue on behalf of the class a claim regarding a second fraud that had never publicly been disclosed and about which that putative class representative had non-public information at the time of his purchases." *Id*.[5]

---

[4] *See id.* ("Absent a public disclosure of a correction, not only would there be no corresponding drop in stock price attributable to that correction, but the class affected by the inventory fraud would, presumably, still be open. The fact that Ward is alleging this second fraud and still made his post-class purchases while this ongoing issue was known to him makes him subject to potential unique defenses at trial.").

[5] *Faris v. Longtop Fin. Techs., Ltd.,* 2011 WL 4444176 (S.D.N.Y. Oct. 4, 2011), which is a lead plaintiff decision and not a class certification decision, is distinguishable for several reasons. In *Faris*, the court suggested in dicta that a group of investors may be subject to unique defenses due to their significant stock purchases after the first of several alleged corrective disclosure was issued on April 26, 2011. However, the court assessed the group's adequacy and typicality only out of an "abundance of caution" after determining that another lead plaintiff group, which had sustained a significantly larger financial loss, was the most adequate plaintiff. *Id*. at *7. Furthermore, the court separately found that one member

Similarly, in *AIG*, Judge Batts recently held that the proposed class representatives' purchases of the stock after disclosure of the company's alleged fraud did not render their claims atypical. 265 F.R.D. at 168-69. Again rejecting the defendants' attempt to analogize their case to *Rocco*, Judge Batts found that "[u]nlike the facts in *Rocco*, at the times Lead Plaintiffs [in *AIG*] made their post-disclosure purchases, . . . there is no evidence that they were aware of any ongoing, publicly undisclosed fraud or that they purchased the stock with anything other than public information." *Id.* at 169; *see also Silverman v. Motorola, Inc.,* 259 F.R.D. 163, 172 (N.D. Ill. 2009) (distinguishing *Rocco* because it "involved an investor capitalizing on [an] ***uncorrected and on-going fraud***") (emphasis added).

Defendant's reliance on *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 179-80 (2d Cir. 1990), a decision by the Second Circuit affirming the district court's denial of class certification, is similarly misplaced. In the district court's class certification opinion in that matter, the court found that "a number of significant problems" counseled against appointing the proposed class representative, including a family relationship between the proposed class representative and its broker and a potential conflict of interest between the class representative and its counsel. *See* 119 F.R.D. 344, 348-49 (S.D.N.Y. 1988). Moreover, as in *Rocco*, the proposed class representative in *Gary Plastic* continued to purchase

---

of the investor group was alleged to have knowingly profited from a Ponzi scheme to the tune of $261 million, and that such conduct cast serious doubt on the adequacy of the entire group. *Id.* Finally, the April 26, 2011 disclosure at issue was not made by Longtop itself, but instead consisted of a financial analyst "rais[ing] serious issues regarding the legitimacy of Longtop's financial statements." *Id.* at *2. Here, by contrast, the June 9, 2008 disclosure was issued by Lehman itself, wherein it acknowledged suffering billions of dollars in losses and write-downs. This disclosure did not, as E&Y suggests, put the market on notice of a potential ongoing fraud. Rather, it caused the market to believe, albeit incorrectly, that the fraud was fully revealed by the Company itself.

CDs from Merrill Lynch after learning of a purported ***ongoing fraud*** at Merrill Lynch related to the sale of such CDs. *Id.* at 348. Accordingly, *Gary Plastic*, like *Rocco*, is inapposite.[6]

In sum, the fact that ACERA, like the class representatives in *Pfizer* and *AIG*, had no knowledge of an ongoing fraud at Lehman in August 2008 (and thus no reason to suspect that Lehman's share price was artificially inflated) is fatal to E&Y's attempt to rebut the fraud-on-the-market presumption.

B. E&Y Cannot Rebut The Presumption Of Reliance Through INTECH's Index-Based Investment Strategy

E&Y contends that Oklahoma FF cannot invoke the presumption of reliance because of the investment methodology of its investment manager, INTECH. *See* Opp. at 15. E&Y, however, cannot rebut the presumption of reliance when, as here, the methodology: (1) is an index-based trading strategy which (2) relied upon the current market price of individual stocks.[7]

---

[6] The remaining authorities cited by E&Y do nothing to remedy this fatal defect. Like *Rocco*, the proposed class representatives in *Berwecky v. Bear, Stearns & Co.*, 197 F.R.D. 65 (S.D.N.Y. 2000), were on notice of an ongoing fraud related to the manipulation of markets for certain "promoted securities" at the time they increased their holdings in such securities. Moreover, at least one court has declined to follow the 1992 decision in *Kovaleff v. Piano,* 142 F.R.D. 406 (S.D.N.Y. 1992), which runs counter to the weight of recent authority in this District. *See Rosen v. Textron, Inc.*, 369 F. Supp. 2d 204, 209 (D. R.I. 2005) (refusing to follow *Kovaleff* in holding that post-disclosure purchases did not render class representative atypical).

[7] At issue here is INTECH's "Enhanced Plus" portfolio process, which included four steps. *First*, Oklahoma FF selected the S&P 500 Index as its benchmark from several options. *See* Deposition Transcript of INTECH Representative Nancy N. Holden ("Holden Tr.") at 37:4-10 and exhibits thereto attached as Exhibit D to the Declaration of Christopher S. Turner In Support Of Defendant Ernst & Young LLP's Opposition To Lead Plaintiffs' Motion For Class Certification And Appointment Of Class Representatives and Class Counsel, filed under seal pursuant to Memo Endorsed Letter of Latham & Watkins dated Apr. 4, 2012 (respectively, ECF Nos. 376 and 383 in 08-cv-05523-LAK). *Second*, INTECH eliminated eleven (11) stocks within the index which were determined to be too illiquid to trade. *Id.* at 37:21-38:6. *Third*, INTECH implemented a stochastic mathematical process to the remaining eligible universe of 489 stocks, which attempted to identify stocks with high relative volatility and low correlation. *Id.* at 38:7-10. INTECH used four years of historical stock-return data to estimate the variances and covariances of the stocks' relative returns for the remaining stocks. *Id.* at 39:9-25; 40:22-25. These estimates were then used as inputs into an "optimization program" intended to construct a portfolio that would generate a level of excess return. *Id.* at 54:19-55:5. As a result of this process, the original S&P 500 portfolio was trimmed down to 336 selected stocks, including Lehman. *Id.* at 54:13-18.

First, INTECH's methodology is an index-based investment strategy which started with the stocks contained in the S&P 500 Index, including Lehman. Contrary to E&Y's claim, use of such index-based investment strategies does not rebut the presumption of reliance. *See WorldCom,* 219 F.R.D. at 281-82 (rejecting argument that named plaintiffs' reliance on computer models replicating the portfolio of the S&P 500 Index rendered them atypical and defeated predominance); *Nortel Networks*, 2003 WL 22077464, at *3 (rejecting defendants' argument that class representative's claim failed to satisfy typicality requirement because class representative bought defendant's stock by tracking an index).[8]

Through a process of eliminating certain stocks that were either too expensive to trade or whose relative computer-calculated volatilities and correlations did not meet INTECH's criteria, these original 500 stocks were reduced to 336 selected stocks, including Lehman (the "Enhanced Plus" portfolio). Significantly, the similarities between the Enhanced Plus portfolio and the S&P 500 Index were ensured by INTECH's risk controls.[9] For example, due to these controls, the target weight (*i.e.,* capitalization weight) of each stock in the Enhanced Plus portfolio did not vary significantly from the capitalization weight of that stock in the S&P 500 Index. *Id.* In

---

Fourth, INTECH rebalanced the Enhanced Plus portfolio every six business days in order to adjust the capitalization weights of those stocks in the portfolio. *Id.* 27:6-9; 56:10-58:2.

[8] District courts outside the Second Circuit are in accord. *See, e.g., Wilkof v. Caraco Pharm. Labs., Ltd.,* _ F.R.D. _, 2012 WL 638517, at *8 (E.D. Mich. Feb. 28, 2012) ("Whether institutional investors rely on a stock's inclusion in an index, the price of the stock, or other qualitative factors, said factors are based on the market providing reliable information."); *In re Countrywide Fin. Corp. Sec. Litig.,* 273 F.R.D. 586, 602 (C.D. Cal. 2009) (rejecting defendants' argument that because index purchases seek to match a predetermined index of securities, such purchases are not made in reliance on any misrepresentation); *In re Connetics Corp. Sec. Litig.*, 257 F.R.D. 572, 578 (N.D. Cal. 2009) (finding unpersuasive defendant's argument that lead plaintiff was subject to a unique non-reliance defense because it made at least some of its trades based on a computer program designed to mirror a stock index); and *In re Schering-Plough Corp. Sec. Litig.*, 2003 WL 25547564, at *5 (D.N.J. Oct. 10, 2003) (finding use of index funds did not preclude class representative from invoking the fraud-on-the-market theory because index funds rely on both the efficiency of the market as well as the company's historical and current stock price trends).

[9] Holden Tr. at 48:14-49:25; 50:17-52:12.

Pfizer, Judge Swain found the decision in *WorldCom* particularly instructive with respect to the appropriateness of similar computer modeling and index investment strategies:

> [T]he Court rejected similar arguments that plaintiffs were atypical and subject to unique defenses "because they did not rely, and cannot be presumed to have relied, on the market price for WorldCom securities," and instead "relied on the advice of highly sophisticated investment managers, relied on the assessment that the market price was not accurate but in fact understated WorldCom's value, [or] relied on computer models that replicate the portfolio of the S&P 500 Index." *Id.* at 281. The court found that each of these methods reflected "an evaluation of the publicly available information about WorldCom, whether by the named plaintiff, the advisor, or a computer model." *Id.* at 282.

Pfizer, 2012 WL 1059671, at *5-6 (fact that some of plaintiffs' investment advisors did not rely on market price – including one who testified he did not believe in the "efficient market hypothesis" – did not render lead plaintiff's claims atypical).

Second, INTECH'S strategy necessarily relied upon the current stock price of each individual stock in the portfolio, including the price of Lehman stock, as these prices determined: (1) the weight of each stock in the portfolio; and (2) whether more of the stock would be purchased or sold.[10] INTECH rebalanced the Enhanced Plus portfolio every six business days in order to adjust the capitalization weights of those stocks in the portfolio.[11] When a stock's trading price fluctuated such that it caused its market capitalization to become over-weighted or under-weighted in the portfolio, it was sold or bought based on ***current prices***. *See* Holden Tr. at 27:6-9 ("So when a stock goes up we can sell a little bit, bring it back down to a target weight. When a stock goes down we are going to buy a little bit more and bring it back into line.").[12]

---

[10] Holden Tr. at 26:6-27:9; 78:25-79:7.

[11] Holden Tr. at 42:22-44:12; 56:10-58:2.

[12] Holden Tr. at 78:25-79:7 ("Q. On the next page, 0261, entitled "How INTECH's investment process is implemented." That process depicted on that page pertains to individual stocks, correct? A. That's correct. Q. And that entails current prices of those stocks, correct? A. Correct."); *see*, Holden Tr. Ex. 5 at OKFF 0261.

In this case, INTECH purchased under-weighted Lehman stock to increase the stock's market capitalization to the target weight in Oklahoma FF's portfolio (on July 29 and August 22, 2008), while INTECH sold some of the Lehman stock (on July 21, 2008) in order to adjust its market capitalization to the target weight.[13] Both purchases and the sale were transacted at the then-current trading price of Lehman common stock and were made in reliance on the integrity of such price. *See In re Providian Fin. Corp. Sec. Litig.*, 2004 WL 5684494, at *3 (N.D. Cal. Jan. 15, 2004) (rejecting defendants' argument that claims were atypical because class representative purchased stock "to rebalance the weighting in its portfolios").

Moreover, the fact that INTECH's methodology applied "other considerations" (*i.e.,* volatility and correlation) *in addition to market price* when investing does not mean it disregarded the market price. *See Black v. Finantra Capital, Inc.*, 418 F.3d 203, 210 (2d Cir. 2005) (fact that plaintiff "also took ***other*** considerations, such as [company's] future prospects [and] its business plan . . . into account in making his investment decision does not foreclose a finding of material reliance upon market price") (emphasis added); *Pfizer*, 2012 WL 1059671, at *5-6 ("[a]t most, the GSAM report and Atlanta Capital testimony show that GSAM and Atlanta Capital took market price and ***other*** considerations into account when deciding whether to invest in Pfizer stock") (emphasis added). There is no evidence that INTECH's methodology relied *instead* only upon factors *other than market price* (whether current or historical) in purchasing Lehman stock.[14] Notably, INTECH was unaware of any non-public information concerning

---

[13] Holden Tr. at 76:12-22 ("Q. And those purchases were made based upon the current price of Lehman stock, correct? A. Correct.").

[14] In constructing the Enhanced Plus portfolio, INTECH used four years of historical stock-return data to estimate the variances and covariances of the stocks' relative returns for the remaining stocks. *See* Holden Tr. at 38:7-40:25. The four years' historical prices, however, were essentially a guide in determining how much stock to buy or sell. In this way, there is basically no difference between looking at the historical prices as a guide and looking at the price of oil as a guide to buy or sell Exxon Mobil

Lehman at the time it purchased Lehman stock on behalf of Oklahoma FF.[15] *See Pfizer*, 2012 WL 1059671, at *5-6 (finding defendants' evidence challenging reliance, which did not include any evidence that plaintiff had access to non-public information, insufficient to render plaintiff's claims atypical).

E&Y contends that the fraud-on-the-market presumption of reliance is rebutted, claiming it has shown that INTECH would have necessarily traded Lehman stock, even after disclosure of the fraud. Opp. at 15 ("Put differently, given the way its model operates, INTECH would have purchased Lehman stock even if it had known that E&Y's review report was false or that Lehman's actual stock price was inflated."). This is pure speculation on E&Y's part, however, because Ms. Holden did ***not*** testify how INTECH "would have invested" under such hypothetical circumstances. *See* Opp. at 15-19.[16] Moreover, INTECH, like all Lehman investors, is entitled to rely on the integrity of the price of Lehman's stock, including the lower price resulting from the disclosure of information and materialization of risks that were previously concealed. *See Basic,* 485 U.S. 224, 245, 108 S. Ct. 978, 990. Indeed, Ms. Holden testified that INTECH's trading model is based on the price of companies' *current* stock, as well as historical prices and price volatility.[17] Courts have rejected arguments similar to E&Y's here, and found the typicality requirement under Rule 23 satisfied. *See Pfizer,* 2012 WL 1059671, at

---

stock, for example. Either way, the purchaser is still relying on the integrity of the price and the lack of fraud in making the decision. *Id.* at 42:22-44:12; 76:12-22; 78:25-79:7.

[15] Holden Tr. at 76:12-19.

[16] Indeed, Lead Plaintiffs are not required to engage in such speculation. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 245, 108 S. Ct. 978, 990 (1988) ("[r]equiring a plaintiff to show a speculative state of facts, *i.e.*, how he would have acted . . . if the misrepresentation had not been made, [citations omitted] would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market.").

[17] Holden Tr. at 27:6-9; 38:7-40:25; 76:12-22; and 78:25-79:7.

*7 (holding that class representatives' post-disclosure purchases did not render their claims atypical); *AIG,* 265 F.R.D. at 169 (same).[18]

Finally, E&Y's argument that INTECH's investment strategy is designed to work in both efficient and "informationally inefficient markets" and therefore rebuts the presumption of reliance is without merit. As an initial matter, Ms. Holden testified that INTECH's investment strategy *depends upon an efficient market*.[19] Moreover, E&Y's claim that INTECH "has acknowledged that it did not . . . rely upon the integrity of Lehman's stock price in deciding to purchase Lehman stock" lacks evidentiary support. *See* Opp. at 19. Specifically, while conceding that "INTECH's model cares about reported stock prices," E&Y fails to cite any evidence supporting its assumption that the model "does not care whether those prices fairly reflect all relevant information about the company." Opp. at 18. Instead, E&Y incorrectly contends that Ms. Holden's testimony stating INTECH does not conduct its own fundamental analysis on stocks constitutes evidence that the firm does not care whether the market is informationally efficient. *See* Opp. at 18 n.17. Even assuming *arguendo* that INTECH's methodology can operate in an informationally inefficient market, this would not preclude finding Oklahoma FF adequate or its claims typical for class certification purposes. *See Saddle Rock Partners, Ltd. v. Hiatt,* 2000 WL 1182793, at *4 (S.D.N.Y. Aug. 21, 2000) (fact that plaintiff was "gambling" and trading on "perceived market inefficiencies" did not render his claims atypical).

---

[18] E&Y's reliance on *Hanon v. Dataproducts Corp*., 976 F.2d 497, 507 (9th Cir. 1992) is misplaced. While the court in *Hanon* stated that "one way to rebut the fraud-on-the-market theory is to show that the plaintiff would have bought his stock at the same price had he known the information that was not disclosed or misrepresented," the court did not consider the validity of a proposed class representative's use of an index investment strategy. Rather, the court concluded that one who purchases stock in order to become a lead plaintiff fails to show reliance on the integrity of the market. *See id.* at 507-09.

[19] *See* Holden Tr. at 66:22-25 ("Q: And does it matter to the successful operation of your investment strategy whether the markets are efficient or inefficient? A: Over the long-term efficiency is a plus.").

Accordingly, INTECH's S&P 500 Index-based investment strategy – which relied on actual current stock prices – does not subject Oklahoma FF's claims to a unique defense that would predominate this litigation and render Oklahoma FF inadequate or its claims atypical.

C. Reliance On Investment Managers Does Not Establish A Unique Defense

Courts in this District routinely certify class representatives who made purchases through third-party investment advisors. *See, e.g., Pfizer*, 2012 WL 1059671, at *5. ("[I]t is well established that 'reliance on the advice of third parties does not, in and of itself, constitute non-reliance, so long as the third party, in turn, relied on the integrity of the market.'") (quoting *In re Harcourt Brace Jovanovich, Inc. Sec. Litig.*, 838 F. Supp. 109, 114 n.4 (S.D.N.Y. 1993)); *In re Veeco Instruments, Inc. Sec. Litig.*, 235 F.R.D. 220, 238-39 (S.D.N.Y. 2006) (employee benefit plan named as lead plaintiff in securities fraud class action was not rendered atypical by virtue of fact that plan relied on money managers to make its investment decisions). Accordingly, ACERA's and Oklahoma FF's reliance on outside investment managers does not establish any unique defense to their claims against E&Y.

E&Y's attempt to criticize ACERA for failing to "warn" its third-party investment advisors, including Bivium and its sub-managers OakBrook and Winslow, against purchasing Lehman stock after moving to be appointed Lead Plaintiff on June 30, 2008, is another red herring. Opp. at 13-15. The fact remains – and E&Y does not dispute – that at the time of ACERA's August 2008 stock purchases, neither ACERA nor its third-party investment advisors had any reason to believe Lehman was engaged in an ***ongoing***, undisclosed fraud. As a result, there was nothing for ACERA to "warn" its investment advisors about as the claims ACERA was pursuing in August 2008 alleged that Lehman's fraud had been fully revealed.

II. PLAINTIFFS' CLASS DEFINITION IS PROPER AND DOES NOT INCLUDE "IN-AND-OUT" TRADERS

E&Y claims that the Class should not be certified because the Class definition purportedly includes "in-and-out" investors who sold all Lehman shares before the first corrective disclosure. E&Y is wrong.

E&Y's arguments are premised on a fundamental mischaracterization of the Class definition to include investors who purchased Lehman shares during the Class Period and who incurred investment losses – ***but not damages*** – by selling shares at a loss ***before*** the truth began to be disclosed. Contrary to E&Y's assertions, the Class definition does not include such "in-and-out" traders (*i.e.*, investors who purchased Lehman shares at artificially inflated prices but sold all such shares before the first corrective disclosure).

As set forth in Plaintiffs' opening brief, the Class definition includes ***only*** those investors who were "damaged" by the alleged misstatements; *i.e.*, incurred damages legally caused by E&Y's misstatements. *See* Mot. at 1-2. Therefore, only investors who purchased Lehman common stock between July 11, 2008, and September 14, 2008, during the time the market price for Lehman shares was artificially inflated by E&Y's misstatement, and who held such shares through at least one curative disclosure or price decline due to the materialization of a concealed risk (*i.e.*, were damaged), are Class members. Under this definition, "in-and-out" traders who did not hold through at least one of the curative disclosures are plainly excluded from the Class.

E&Y's reliance on *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* 574 F.3d 29, 37-9 (2d Cir. 2009) ("*Flag*") and its progeny is misplaced. In *Flag,* the Second Circuit affirmed the district court's certification of a plaintiff class but vacated the decision to the extent the class included investors who were not damaged by defendants' fraud; *i.e.*, "those purchasers who sold their Flag shares before . . . the date on which Plaintiffs allege Flag disclosed the truth behind the

alleged misstatements to the public."[20] Here, the Class definition suffers no such infirmity because it includes only investors who were ***damaged*** by E&Y's misrepresentations, and thus expressly excludes "in-and-out" traders. Courts appropriately certify classes defined in this manner. *See*, *e.g.*, *Billhofer v. Flamel Tech., S.A.*, 2012 WL 928147 (S.D.N.Y. Mar. 15, 2012) (certifying class defined as those who purchased shares during the class period and "were damaged thereby"); *Pub. Emps.' Ret. Sys. of Miss. v. Goldman Sachs Grp., Inc.*, 2012 WL 336146 (S.D.N.Y. Feb. 3, 2012) (same).

Finally, E&Y cites no case where a court has declined to certify an Exchange Act class based on "in-and-out" arguments where the class is defined, as here, to include only investors who purchased shares at artificially-inflated prices during a proposed class period and "who were damaged thereby."[21] Accordingly, the Class should be certified as defined in Plaintiffs' Motion.

CONCLUSION

For all of the reasons set forth in Lead Plaintiffs' papers on this Motion, Lead Plaintiffs respectfully request that the Court certify the Class, appoint ACERA and Oklahoma FF as Class Representatives and appoint Lead Counsel as Class Counsel.

---

[20] 574 F.3d 29, 37-9. Here, unlike *Flag*, Lead Plaintiffs assert only claims under Section 10(b) of the Exchange Act of 1934 ("Exchange Act") and do not seek to include any in-and-out traders in the Class. The two other post-*Flag* decisions cited by E&Y (Opp. at 21) similarly provide no support for its arguments. *See In re Sadia S.A. Sec. Litig.*, 269 F.R.D. 298, 317-18 (S.D.N.Y. 2010) (certifying a class defined as investors who purchased shares during the class period and "who were damaged thereby" and noting that any class period purchasers that sold their shares prior to the first alleged curative disclosure are thereby excluded from the class); *AIG*, 265 F.R.D. at 174 n.9 (same *in dicta*).

[21] Instead, E&Y cites to *In re Bank of Am. Corp. Sec., Deriv., and ERISA Litig.,* 2012 WL 370278 (S.D.N.Y. Feb. 6, 2012) ("*BofA*") and *In re SLM Corp. Sec. Litig.,* 2012 WL 209095 (S.D.N.Y. Jan. 24, 2012) ("*SLM*") to suggest that the Class definition here should somehow "be revised" to explicitly exclude in-and-out traders. But both *BofA* and *SLM* support certification of the Class as defined. *See BofA,* 2012 WL 370278, at *14-15 and *SLM,* 2012 WL 209095, at *11.

Dated: May 2, 2012

BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP

/s/ *David R. Stickney*
DAVID R. STICKNEY

MAX W. BERGER
STEVEN B. SINGER
1285 Avenue of the Americas, 38th Floor
New York, NY 10019
Tel: (212) 554-1400
Fax: (212) 554-1444
-and-
DAVID R. STICKNEY
BENJAMIN GALDSTON
BRETT M. MIDDLETON
LAURENCE REZA WRATHALL
12481 High Bluff Drive, Suite 300
San Diego, CA 92130
Tel: (858) 793-0070
Fax: (858) 793-0323

Co-Lead Counsel for Lead Plaintiffs

KESSLER TOPAZ MELTZER & CHECK, LLP

David Kessler by BMM
DAVID KESSLER

DAVID KESSLER
JOHN A. KEHOE
KIMBERLY A. JUSTICE
JOHN GROSS
MICHELLE M. NEWCOMER
RICHARD A. RUSSO, JR.
280 King of Prussia Road
Radnor, PA 19087
Tel: (610) 667-7706
Fax: (610) 667-7056

Co-Lead Counsel for Lead Plaintiffs