IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

FRED KELSEY, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. PATRICK J. ALLIN, JILLIAN SHEEHAN, and TEXTURA CORPORATION, Defendants.	)	Civil Action No.: 14-CV-7837

LEAD PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLASS CERTIFICATION, APPOINTMENT OF CLASS REPRESENTATIVE, AND APPOINTMENT OF CLASS COUNSEL

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I. INTRODUCTION

Court appointed Lead Plaintiff Fred Kelsey ("Lead Plaintiff") submits this memorandum in support of his motion for class certification, appointment of class representative, and appointment of class counsel.[1] Lead Plaintiff seeks certification of a plaintiff class (the "Class") defined as:

> All persons who purchased the common stock of Textura Corporation ("Textura"), between June 7, 2013 and January 7, 2014, both dates inclusive, and were damaged thereby. Excluded from the Class are: (a) persons who suffered no compensable losses, e.g., those who bought Textura securities during the Class Period but sold prior to any corrective disclosure; and (b) Defendants, the officers and directors of the Company, at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which Defendants have or had a controlling interest.

In addition to certifying the above mentioned Class and appointing Lead Plaintiff as class representative, Lead Plaintiff seeks the appointment of The Rosen Law Firm, P.A. as Lead Class Counsel, and Heffner & Hurst as Liaison Class Counsel.

This action asserts claims pursuant to the Securities Exchange Act of 1934 (the "Exchange Act") against Textura, Textura's Chief Executive Officer, Patrick Allin, and Textura's Chief Financial Officer, Jillian Sheehan. During the Class Period, Defendants repeatedly published a misleading professional biography of Defendant Allin in Textura's filings with the U.S. Securities and Exchange Commission ("SEC"). Lead Plaintiff, as well as many others who purchased Textura securities at artificially inflated prices during the Class Period, seeks class certification, which would permit the efficient and effective prosecution of this action on behalf of Lead Plaintiff and the hundreds, if not thousands, of other Textura shareholders.

[1] At the Status Conference held on November 30, 2016, the Court granted Lead Counsel's request for an extension of the page limits for this motion. At the Status Conference, the Court permitted up to 30 pages for Lead Plaintiff's opening brief, Defendants could file up to 30 pages for their opposition brief, and Lead Plaintiff could file up to 20 pages for his reply.

II. BACKGROUND

On October 7, 2014, Lead Plaintiff filed the initial complaint asserting primary violations of Section 10(b) against Textura, Allin, and Sheehan as well as controlling person liability against Allin and Sheehan under Section 20(a) of the Exchange Act. (Dkt. No. 1). On December 16, 2014, the Court appointed Fred Kelsey as Lead Plaintiff and approved his selection as The Rosen Law Firm as Lead Counsel and Heffner & Hurst as Liaison Counsel. (Dkt. No. 20). On February 17, 2015, Lead Plaintiff filed the Amended Complaint for Violations of the Federal Securities Laws ("Amended Complaint") (Dkt. No. 25). On March 2, 2016, the Court issued an order granting in part and denying in part Defendants' motion to dismiss. ("MTD Order")(Dkt No. 47). In its MTD Order, the Court directed Lead Plaintiff to file a second amended complaint to comport with the MTD Order. On March 24, 2016, Lead Plaintiff filed the operative Second Amended Complaint for the Violations of the Federal Securities Laws ("SAC")(Dkt. No. 48).

The SAC alleges that Defendant Allin's professional biography, published in several of Textura's SEC filings including the: (1) final prospectus filed on June 7, 2013; (2) registration statement filed on September 19, 2013; (3) final prospectus filed on September 20, 2013; and (4) the proxy statement filed on January 3, 2014, was misleading as it omitted Allin's tenure at Patron Systems, Inc. ("Patron") and its successors. (SAC ¶¶22-23). Omitting Allin's tenure at Patron was material to Textura investors as it relates to Allin's credibility and reputation. (*Id*. at ¶4). Company leadership is a crucial aspect of the success of a company – a fact recognized in Textura's 10-K filed with the SEC on November 8, 2013. (*Id*. at ¶25).

The biography repeated in Textura's SEC filings was intentionally written to mislead investors into believing that immediately prior to his time at Textura, Allin was an audit partner at PricewaterhouseCoopers when it fact, he was the CEO, Chairman, and acting CFO of Patron

immediately before joining Textura. (*Id.* at ¶¶22, 26). Defendants attempted to erase Patron, a dark mark in Allin's career, as he was involved with notorious convicted stock fraudsters, including Thomas Prousalis — the chief legal architect behind fraudulent merger deals sold by "boiler room" firm Stratton Oakmont, Inc. Allin caused Patron to issue 1.5 million shares of Patron stock to Prousalis. (*Id.* at ¶¶6, 37). Stratton Oakmont was co-founded by convicted fraudster Jordan Belfort—the so-called "*Wolf of Wall Street.*" (*Id.* at ¶6). Due to the misleading biography, investors were unaware of Allin's involvement with other convicted stock promoters involved in operating a boiler room operation. (*Id*. at ¶¶40, 43). During Allin's tenure at Patron, Patron's auditor Grant Thornton LLP ("Grant Thornton") resigned because the auditor claimed that it could no longer rely on Allin's representations. (*Id*. at ¶¶ 5, 33-35).

The truth about Allin and his misleading biography began to enter the market on December 26, 2013 when Citron Research published a report which revealed Allin's undisclosed past at Patron and Patron's involvement with stock fraudsters. This disclosure caused Textura's stock to fall 17% on December 26, 2013 and an additional 5.6% on December 27, 2013. (*Id*. at ¶¶45-46). On January 7, 2014, Citron Research published another report further revealing more details about Allin's tenure at Patron which caused Textura's share price to fall 10.4% on January 7, 2014 and an additional 10% on January 8, 2014. (*Id*. at ¶¶47-48).

ARGUMENT

III. THIS ACTION SHOULD BE CERTIFIED AS A CLASS ACTION

Lead Plaintiff seeks an order of the Court certifying this action as a class action on behalf of the following plaintiff class pursuant to Fed. R. Civ. P. 23(a) and (b)(3):

> All persons who purchased the common stock of Textura Corporation ("Textura"), between June 7, 2013 and January 7, 2014, both dates inclusive, and were damaged thereby. Excluded from the Class are: (a) persons who suffered no compensable losses, e.g., those who bought Textura securities during the Class

> Period but sold prior to any corrective disclosure; and (b) Defendants, the officers and directors of the Company, at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which Defendants have or had a controlling interest.

As discussed below, the proposed Class meets all of the requirements for certification under Rule 23, and Lead Plaintiff and his counsel will competently litigate this action on their behalf.

A. Applicable Standards

Courts within the Seventh Circuit routinely certify classes of investors in securities litigation cases.[2] Indeed, "[t]he Seventh Circuit Court of Appeals has liberally construed Rule 23 in shareholder suits." *Tatz v. Nanophase Techs. Corp.*, No. 01 C 8440, 2003 WL 21372471, at *3 (N.D. Ill. June 13, 2003) (citations omitted). "In a securities fraud action, 'any error, if there is one, should be committed in favor of allowing a class action.'" *In re General Instrument Corp. Secs. Litig.*, 1999 WL 1072507, at *4 (N.D. Ill. Nov. 18, 1999). In *In re Bank One Shareholders Secs. Litig.*, the Court explained that the rationale for such liberal treatment stems from the fact that class treatment for securities claims is the "most fair and practicable" method of adjudication as:

> [S]ecurities fraud cases are uniquely situated to class action treatment since the claims of individual investors are often too small to merit separate lawsuits. The class action is thus a useful device in which to litigate similar claims as well as an efficient deterrent against corporate wrongdoing.

2002 WL 989454, at * 2 (N.D. Ill. May 14, 2002).

The question of whether a case can be certified as a class action is governed by Fed. R. Civ. P. 23. Because the determination of class certification pursuant to Rule 23 is a procedural

[2] *See e.g. Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 256 F.R.D. 586 (N.D. Ill. 2009); *In re Anicom Inc. Secs. Litig.*,2002 WL 472249 (N.D. Ill. Mar. 27, 2002); *In re Sys. Software Assocs., Inc. Secs. Litig.*, 2000 WL 1810085 (N.D. Ill. Dec. 8, 2000); *Weiner v. The Quaker Oats Co.*, 1999 WL 1011381 (N.D. Ill. Sept. 30, 1999); *Retsky Family Ltd. P'ship. v. Price Waterhouse LLP*, 1999 WL 543209 (N.D. Ill. Jul. 21, 1999); *Miller v. Material Scis. Corp.*, 1999 WL 495490 (N.D. Ill. Jun. 25, 1999).

question, a court should not delve into the ultimate merits of the claims. Indeed, a court should delve into only "factual and legal inquiries *necessary* to determining whether Rule 23's requirements are met…." *Tellabs*, 256 F.R.D. at 595 (citing *Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001)) (emphasis in original); *see also Cotton v. Asset Acceptance, LLC*, 2008 WL 2561103, at * 3 (N.D. Ill. June 26, 2008) ("At this stage of the proceedings ... the Court will not 'delve into the merits of the ultimate issues in the case.'"); *In Hartmarx Secs. Litig.*, 2002 WL 31103491, at *2 (N.D. Ill. Sept. 19, 2002).

Under Rule 23 of the Federal Rules of Civil Procedure, plaintiffs seeking class certification must show that the four requirements of Rule 23(a) are satisfied: (1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class ("adequacy") are met. Fed. R. Civ. P. 23(a); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 606-07, 614 (1997).

Additionally, where, as here, Lead Plaintiff seeks to certify a class under Rule 23(b)(3), he must also show that: (1) common issues predominate ("predominance") and that (2) class treatment is the superior method to resolve the dispute ("superiority"). Fed. R. Civ. P. 23(b)(3); *Bank One*, 2002 WL 989454, at * 7.

As demonstrated below, this action clearly satisfies the requirements of Rule 23(a) and (b)(3).

B. The Requirements of Rule 23(a) Are Satisfied

1. The Class Is So Numerous That Joinder of All Members Is Impracticable

Rule 23(a)(1) requires that the class be so numerous that the joinder of all class members is impracticable. Numerosity is "not known as a demanding requirement." *Beale v. Edgemark*

Fin. Corp., 164 F.R.D. 649, 654 (N.D. Ill. 1995). A plaintiff need not specify an exact number of class members. *Id*. A court "can apply common sense to the facts available." *Bank One*, 2002 WL 989454, at *3 (citation omitted). Consequently, "in securities fraud suits involving nationally traded securities, numerosity may be assumed." *Sys. Software Assocs.*, 2000 WL 1810085, at *1; *see also Hartmarx*, 2002 WL 31103491, at *2 (numerosity assumed where five million shares are publicly traded).

Here, although the exact number of Class members has not yet been determined, the numerosity requirement is satisfied. Defendants admit that Textura stock was publicly traded on the New York Stock Exchange ("NYSE") (*See* Dkt. No. 52 at ¶15) and that during the Class Period there were 23.5 million shares of common stock outstanding. Ex. 1 to the Declaration of Phillip Kim ("Kim Decl."), Declaration of Dr. Adam Werner ("Werner Decl."), ¶115. Undeniably, the numerosity element is met.

2. Common Questions of Law and Fact Exist

The commonality requirement is satisfied where questions of law or fact are common to the proposed class. Fed. R. Civ. P. 23(a)(2). As is the case with respect to numerosity, "[t]he commonality requirement has been referred to as a low hurdle that is easily surmounted." *Kohen v. Pacific Inv. Mgt. Co. LLC*, 244 F.R.D. 469, 476 (N.D. Ill. 2007); *Nanophase*, 2003 WL 21372471, at *6; *Bank One*, 2002 WL 989454, at *4. For this reason, some degree of factual variation among class members will not defeat class certification. *Kohen*, 244 F.R.D. at 476 (citing *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)).

Courts routinely find commonality in securities class actions, such as this one, that involve the dissemination of misleading public filings and press releases. "The commonality requirement is easily met in cases where class members all bought or sold the same stock in

reliance on the same disclosures made even when damages vary." *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, LLP*, 212 F.R.D. 400, 407 (E.D. Wis. 2002) (quoting Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 22.14 (3d ed. 1992)); *see also Blackie*, 524 F.2d at 902 ("The overwhelming weight of authority holds that repeated misrepresentations of the sort alleged here satisfy the 'common question' requirement.").

Common issues of law and fact dominate in this case, and include:

(a) whether Defendants omitted to state material facts necessary to prevent the statements made to the investing public from being misleading during the Class Period concerning Defendant Allin's biography;

(b) whether Defendants acted knowingly or recklessly;

(c) whether Defendants' alleged omissions are the proximate cause of Class members' losses;

(d) whether the Class has sustained compensable damages and the proper measure of damages; and

(e) whether Defendants have adequately proven any defense, such as their "truth-on-the-market" affirmative defense.[3]

[3] Defendants may argue that the so-called truth-on-the-market affirmative defense precludes class certification. The truth-on-the-market affirmative defense provides that "a misrepresentation is immaterial if the information is already known to the market because the misrepresentation cannot then defraud the market." *Lawrence E. Jaffe Pension Plan v. Household Intern., Inc.*, 2006 WL 3332917, at * 2 (N.D. Ill. Nov. 13, 2006) (quoting *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 167 (2d Cir. 2000)). Under the defense, a defendant must prove that the truthful corrective information was conveyed to the public "with a degree of intensity and credibility sufficient to counter-balance effectively any misleading information created by the alleged misstatements." *Ganino*, 228 F.3d at 167 (quotation marks and citation omitted). In the context of commonality, whether the truth-on-the-market affirmative defense is applicable is a common question affecting all class members. *See e.g. Swack v. Credit Suisse*

The factual basis for all the Class members' claims is exactly the same: each Class member purchased Textura securities during the Class Period while the price of that stock was artificially inflated due to the same series of omissions by Defendants. All Class members were damaged when the price of Textura shares fell upon the ultimate revelation of the truth. Moreover, Class members assert claims under the same legal theories. This common nucleus of law and facts unites all Class members, regardless of when and how many shares they purchased. Nothing more is required to show commonality under Rule 23(a)(2). Thus, all Class members were damaged similarly by Defendants' "standardized conduct" during the Class Period. *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998).

3. Lead Plaintiff's Claims Are Typical of the Class Claims

Under Rule 23(a)(3)'s typicality requirement, the proposed class representative's claims must "arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Smith v. Aon Corp.*, 238 F.R.D. 609, 615 (N.D. Ill. 2006). "The similarity of legal theory may control even where factual distinctions exist between the claims of the named representative and the other class members." *Danis v. USN Communications, Inc.*, 189 F.R.D. 391, 395 (N.D. Ill. 1999). "A "typicality" inquiry centers on "the defendant's conduct and the plaintiffs' legal theory to satisfy Rule 23(a)(3)." *Rosario*, 963 F.2d at 1018; *see also Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996) (typicality "should be determined with reference to the [defendants'] actions, not with respect to particularized defenses it might have against certain class members"). A finding that commonality generally results in a finding that typicality also exists. *Bank One*, 2002 WL 989454, at *4.

First Boston, 230 F.R.D. 250, 260 (D. Mass. 2005) (common issue and does not preclude certification); *In re PE Corp. Secs. Litig.*, 228 F.R.D. 102, 111 (D. Conn. 2005) (same; and truth on the market is a factual question for summary judgment or trial).

Here, the typicality requirement is met since Lead Plaintiff's claims arise out of the same course of conduct by Defendants and rest on the same legal theories as those of the absent Class members. The SAC alleges that the Defendants committed the same type of unlawful acts by the same methods against the entire Class, *i.e.*, Defendants omitted to disclose material facts in SEC filings concerning Allin's biography. All Class members were misled by the same false information, by the same fraudulent course of conduct on the part of the Defendants, and will employ the same evidence to prove their case. Lead Plaintiff, like the absent Class members, purchased Textura stock during the Class Period, and suffered losses because of Defendants' material omissions in Textura's SEC filings. Thus, the typicality requirement of Rule 23(a)(3) is satisfied.

4. Lead Plaintiff and Counsel Will Fairly and Adequately Represent the Class

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." The adequacy requirement of Rule 23(a) is satisfied where (1) the plaintiff has an interest in the outcome of the case and has no claims antagonistic to or conflicting with the claims of other class members, and (2) is represented by qualified, experienced counsel. *Hinman v. M and M Rental Center, Inc.*, 545 F.Supp.2d 802, 807 (N.D. Ill. 2008). "'[T]he burden in demonstrating that the class representative meets this standard is not difficult ... An understanding of the basic facts underlying the claims, some general knowledge, and a willingness and ability to participate in discovery are sufficient to meet this standard.'" *Tellabs*, 256 F.R.D. at 601 (citations omitted). Indeed, in complex securities actions, "'a plaintiff need not have expert knowledge of all aspects of the case…and a great deal of reliance on expertise of counsel is expected.'" *Id.*, (quoting *Wagner v. Barrick Gold Corp.*, 251 F.R.D. 112, 118 (S.D.N.Y. 2008)). Additionally, as the Court noted in *Bank One*, 2002 WL 989454, at *5,

"when plaintiffs are represented by experienced, able counsel familiar with class litigation, 'there is no ground for supposing that plaintiffs will not adequately represent the class.'" (citation omitted). In fact, "[c]ourts do not deny class certification on speculative or hypothetical conflicts." *Brieger v. Tellabs*, 245 F.R.D. 345, 355 (N.D. Ill. 2007) (citing *Rosario*, 963 F.2d at 1018-19)).

In this case, Lead Plaintiff is well suited to represent the Class. Lead Plaintiff's interests are the same as those of the absent Class members, and there are no conflicts between him and the Class. Lead Plaintiff has been involved in this litigation, has read, reviewed, and authorized all the complaints in this action, has frequently communicated with counsel regarding the litigation, and attended mediation. And, importantly, Lead Plaintiff is willing to serve as a representative party on behalf of the Class. *See* Kim Decl. Ex. 2, Declaration of Proposed Class Representative Fred Kelsey. Lead Plaintiff has fully cooperated with counsel and is willing and able to prosecute this action on behalf of the Class to a successful conclusion. *Id.* The interests of the proposed representative and those of the Class complement each other. Lead Plaintiff and all Class members have suffered losses due to their transactions in Textura stock in an artificially inflated market. They have been injured by the identical wrongful conduct of the Defendants and it is in Lead Plaintiff's interest to prosecute this action vigorously on behalf of the Class.

Additionally, Lead Plaintiff has engaged qualified, experienced and capable attorneys for this type of litigation. Proposed Class Counsel, The Rosen Law Firm, P.A. and Heffner & Hurst LLP, are highly experienced in complex class litigation, especially securities fraud actions, and have the ability and willingness to prosecute vigorously this action. *See* Kim Decl., Exs. 3-4. Proposed Class Counsel have already vigorously prosecuted this case, successfully opposed Defendants' motions to dismiss the Amended Complaint, engaged in discovery, and participated

in mediation proceedings. Overall, Lead Plaintiff is an adequate representative and will continue to represent the Class vigorously in this case, with the assistance of able and effective counsel.

C. The Requirements of Fed. R. Civ. P. 23(b)(3) Have Been Satisfied

Lead Plaintiff has also met the requirements of Fed. R. Civ. P 23(b)(3) because common questions of law and fact predominate over individual questions, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

1. Common Issues Predominate

The United States Supreme Court has recognized: "[p]redominance is a test readily met in certain cases alleging...securities fraud." *Amchem*, 521 U.S. at 625. In a securities fraud class action, common questions predominate because "each plaintiff's claim hinges on the same alleged fraudulent scheme to withhold information and the same alleged action or non-action of the Defendants." *Beale*, 164 F.R.D. at 658; *see also Bank One*, 2002 WL 989454, at *7 ("The issues of law and fact that flow from Defendants' alleged misstatements and omissions predominate over any individual issue."). "While common questions of law or fact must predominate, they need not be exclusive." *Nanophase*, 2003 WL 21372471, at * 9 (quoting *Scholes v. Moore*, 150 F.R.D. 133, 138 (N.D. Ill. 1993)); *Abrams v. Van Kampen Funds, Inc.*, 2002 WL 1989401, at *4 (N.D. Ill. Aug. 27, 2002) (finding predominance of common issues notwithstanding variance in material information). "When determining if plaintiffs have met the predominance requirement, district courts focus on questions of liability, not damages." *Fletcher v. ZLB Behring LLC*, 245 F.R.D. 328, 332 (N.D. Ill. 2006); *see also Beale*, 164 F.R.D. at 658.

As discussed in Paragraph B2, *supra*, there is a host of questions of law and fact common to the members of the Class that Lead Plaintiff seeks to represent. These questions predominate over individual questions because Defendants' alleged conduct affected all Class members in the same manner through Defendants' omissions of material fact about Allin's biography that

artificially inflated the price of Textura's stock. It is difficult to discern any issues in this case that are not common to all members of the class. *See e.g. Harman v. LyphoMed, Inc.*, 122 F.R.D. 522, 526 (N.D. Ill. 1988) (because materiality is determined under an objective reasonable investor standard, the inquiry into materiality is same for all class members; common questions as to scienter predominate); *Neopharm*, 225 F.R.D. at 568 (because "the main question involved in this case is whether defendants' alleged false and misleading statements and material omissions violated §§ 10(b) and (20)(a) of the Act" common questions predominate). The critical issues of fact and law raised in this action are common to all members of the Class and they will predominate in this case. Once these common questions are resolved, all that should remain is the purely mechanical act of computing the amount of damages per share suffered by each class member. *See Blackie*, 524 F.2d at 905.

In contrast, there are no significant, let alone predominant, individual issues even with respect to issues such as reliance. This is so, because proof of reliance is presumed at the class certification stage where either: (1) where a plaintiff's claim is primarily an omissions claim under *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972); or (2) where it can be shown that securities traded in an efficient market, under on the "fraud-on-the market" theory set forth by the Supreme Court in *Basic v. Levinson*, 485 U.S. 224 (1988). Both presumptions of reliance apply here.

i. There Is a Presumption of Reliance Pursuant to the *Affiliated Ute* Doctrine

To prevail on their Section 10(b) claim, Lead Plaintiff and the Class must show "transaction causation," i.e., that they relied upon Defendants' misleading statements and/or omissions of fact in connection with their decision to purchase of Textura securities. In the context of an omission, direct proof of reliance where an omission is alleged would be difficult,

if not impossible, to prove how the investor would have acted had the material information been disclosed. *Schneider v. Traweek*, No. CV 88-0905 RG (KX), 1990 WL 132716, at *15 (C.D. Cal. July 31, 1990). Therefore, the Supreme Court has held that when a defendant omits material information that it was duty-bound to disclose, courts will presume reliance. *Affiliated Ute*, 406 U.S. at 154; *see, e.g., Nauman v. Abbott Labs.*, No. 04 C 7199, 2007 WL 1052478, at *2 (N.D. Ill. Apr. 3, 2007)(When a case "alleges material omissions with a duty to disclose… reliance could be presumed."); *Helfand v. Cenco, Inc.*, 80 F.R.D. 1, 8 (N.D. Ill. 1977)(citing *Affiliated Ute*, 406 U.S. at 128)(For cases "involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery."); *Mottoros v. Abrams*, 524 F. Supp. 254, 258 (N.D. Ill. 1981)(*Affiliated Ute* applies to non-disclosure claims where "Upon proof of the materiality of the nondisclosure, reliance becomes a rebuttable presumption in favor of the plaintiff.").

Lead Plaintiff is entitled to the *Affiliated Ute* presumption of reliance because the Court has already found that Plaintiff's claim is that of an omission. MTD Order at 9-10.

ii. Alternatively, There Is A Presumption of Reliance When There Is Fraud-On-The-Market

Lead Plaintiff and the Class are entitled to a presumption of reliance under the fraud-on-the-market theory, first recognized by the Supreme Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) and by the Seventh Circuit in *Asher v. Baxter Intern. Inc.*, 377 F.3d 727 (7th Cir. 2004). The premise of *Basic* is that in well-developed securities markets a misleading statement or omission of material fact is incorporated in the price of a stock. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2416 (2014) ("*Halliburton II*"). The Supreme Court gave several reasons for the fraud-on-the-market theory. First, the Court was concerned that without the theory and presumption of reliance, it would be impossible for any action to proceed as a class (if it alleged false statements). *Basic*, 485 U.S. at 242; *Halliburton II*, 134 S. Ct. at 2407-08

(preserving investors' ability to recover through class actions was important to *Basic*). Second, the traditional concept of actual reliance on a specific statement was an unrealistic model of modern secondary securities markets. *Basic*, 485 U.S. at 244-45 (internal quotations omitted). Investors buy ***from the market***, rather than from individual sellers, and sellers sell into it; the market itself processes the information, transmitting it to investors as the security's price. *Id.* Third, investors relied on the market price, because they relied on the assumption that information incorporated into it was true.

The Supreme Court therefore ruled in *Basic* that "[b]ecause most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action." *Basic*, 485 U.S. at 247. Because of the market's central role in pricing securities, the Supreme Court concluded that "where materially misleading statements have been disseminated into an impersonal, well-developed market for securities, the reliance of individual plaintiffs on the integrity of the market price may be presumed." *Id*. The application of this theory ensures that individual issues of reliance will not predominate over common questions. *Schleicher v. Wendt*, 618 F.3d 679, 682 (7th Cir. 2010)("Because each investor's loss usually can be established mechanically, common questions predominate and class certification is routine, if a suitable representative steps forward."); *see also Nanophase*, 2003 WL 21372471, at *7 ("The [fraud-on-the-market] theory holds that efficient trading markets automatically establish a causal link between material misstatements or omissions and a stock purchaser's injury, and manifest that link in the stock's price.") (citing *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1129 (7th Cir. 1993)).

But *Basic* left unsettled how to prove that the false information was incorporated into the

stock price, which would trigger the presumption. While the Seventh Circuit has not specifically articulated standards for establishing market efficiency, district courts in this Circuit and other Circuit Courts of Appeals[4] have utilized factors in *Cammer v. Bloom*, 711 F. Supp. 1264, 1276 (D.N.J. 1989) which was decided a year after *Basic* and is the leading case on the subject.

The so-called "*Cammer* factors" for proof of market efficiency, to wit: (1) whether the stock trades at a high weekly volume; (2) whether securities analysts report on the stock; (3) whether the stock has market makers and arbitrageurs; (4) whether the company is eligible to file SEC registration form S-3, as opposed to Form S-1 or S-2; and (5) whether there are empirical facts showing a causal relationship between unexpected corporate events or public news releases and a subsequent response in the stock price. *Cammer*, 711 F. Supp. at 1281.

Later court decisions added new factors, but did not reconsider *Cammer*'s contention that a plaintiff proves that the stock price incorporated the defendants' false statements by showing that it generally incorporates news. In *Unger v. Amedisys*, the Fifth Circuit listed three additional factors that all touched on the stock's market efficiency: (6) market capitalization, since according to *Krogman v. Sterritt*, 202 F.R.D. 467, 478 (N.D. Tex. 2001), there is greater incentive to invest in more highly capitalized companies; (7) bid-ask spread, since a low bid-ask spread makes a stock inexpensive to trade; and (8) size of the float, which is market capitalization minus insider holdings, since insiders may have nonpublic information that is not yet reflected in stock prices. *Unger v. Amedisys*, 401 F.3d 316, 324 (5th Cir. 2005); *see also*

[4] *See In re Groupon, Inc. Sec. Litig.*, No. 12 C 2450, 2015 WL 1043321, at *8 (N.D. Ill. Mar. 5, 2015);*Nanophase*, 2003 WL 21372471, at * 7; *In re Northfield Labs., Inc. Sec. Litig.*, 267 F.R.D. 536, 545-46 (N.D. Ill. 2010); *Greenberg v. Boettcher & Co.*, 755 F.Supp. 776, 782 (N.D. Ill. 1991) (on motion to dismiss). Several Circuits have adopted the *Cammer* factors to determine market efficiency. *See e.g. In re PolyMedica Corp. Secs. Litig.*, 432 F.3d 1, 4 (1st Cir. 2005); *Binder v. Gillespie*, 184 F.3d 1059, 1065 (9th Cir. 1999)*; Hayes v. Gross*, 982 F.2d 104, 107 (3d Cir. 1992)*; Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990).

Krogman, 202 F.R.D. at 478.

It was not until 2014, in *Halliburton II*, that the Court clarified the means by which a Plaintiff can establish a fraud on the market. *Halliburton II*, 134 S. Ct. at 2398. *Halliburton II* reaffirmed the efficient market presumption of reliance first recognized by *Basic*. In *Halliburton II* the Supreme Court clarified *Basic* by pointing out that the prerequisites to the presumption: (i) proof that the misrepresentation or omission of fact was material; (ii) was issued publicly; and (iii) the security traded in an efficient market, were proxies for the ultimate fact that underlies the presumption of reliance; that the misrepresentation or omission affected the market price of the security (i.e. "price impact"); *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 429 (7th Cir. 2015), reh'g denied (July 1, 2015). *Halliburton II* clarified that a plaintiff can show fraud on the market ***either*** by providing evidence that the company's stock generally traded on an efficient market, ***or*** by direct evidence that the misleading statement had a price impact. *Halliburton II*, 134 S. Ct. at 2415. Defendants, by the same token, are also permitted to make "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." *Glickenhaus*, 787 F.3d at 429 (citing *Halliburton II*, 134 S. Ct. at 2408). *Halliburton II* also characterized the premise underlying the presumption of reliance as "fairly modest," and based on nothing more than that "market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices." *Id.* at 2408 (citation omitted).

The Court specifically held that a plaintiff may prove that a false statement was incorporated into the stock price by showing that the stock traded on an efficient market. *Halliburton II*, 134 S. Ct. at 2415. The Court, however, dubbed this evidence an "indirect proxy for price impact," and noted that a presumption of reliance may be granted if a party comes

forward with sufficient direct evidence of price impact. *Id.* Though it held that a defendant could attempt to rebut the presumption with evidence of no price impact, the Court specifically noted that plaintiffs may also submit price impact evidence at class certification in order to make an affirmative case. *Id.*

The holding that a plaintiff need not show price impact directly leaves alive and unchanged the lower court precedent establishing that a plaintiff who shows that a stock trades on an efficient market is entitled to a presumption of reliance. But plaintiffs may now ***also*** show that they are entitled to a presumption of reliance through direct evidence that the misrepresentation or omission had an impact on the stock's price (i.e., caused the price to be inflated).

a. *Cammer* Factors Demonstrate Market Efficiency

Factor One - Weekly Trading Volume: The average weekly trading volume for Textura's stock during the Class Period ranged between 132,400 shares and 10,381,500 shares of common stock. Werner Decl., ¶32. The 6.11% weekly turnover is more than three times greater than the 2.0% weekly turnover that the *Cammer* court explained would justify a "strong presumption of an efficient market." *Cammer*, 713 F.Supp at 1286; Werner Decl., ¶32. During the Class Period, on average there were 9 million shares in Textura's float and 23.5 million shares outstanding, resulting in an average float of 37.97% of shares outstanding. Werner Decl., ¶115. Because Textura's heavy weekly trading volume far exceeds the trading volume required under *Cammer*, this factor weighs strongly in favor of a presumption of reliance.

Factor Two - Analyst Coverage: At least five securities analysts published reports on Textura during the Class Period. These institutions included Barrington Research, Credit Suisse, JMP Securities, Oppenheimer & Co., and William Blair. Werner Decl. ¶34. This substantial

analyst coverage further supports the conclusion that there was an efficient market for Textura's securities. *See In re Nature's Sunshine Product's Inc. Secs. Litig.*, 251 F.R.D. 656, 662-63 (D. Utah 2008) (explaining that courts have found that coverage by two analysts publishing reports does not heavily favor a finding of market efficiency; four or more weigh in favor of finding market efficiency) (citations omitted).

Additionally, as explained in *Lehocky v. Tidel Technologies, Inc.*, "a high level of institutional interest in a security serves to increase the efficiency of the market." 220 F.R.D. 491, 508 (S.D. Tex. 2004); *see also In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 515 (1st Cir. 2005) (affirming class certification, court noted defendant's shares were held by more than 30 institutional investors); *Nanophase*, 2003 WL 21372471, at *7 (fact that 11-13% of total outstanding common stock held by large institutional investors supported finding of market efficiency). Here, market efficiency is demonstrated by the fact that at least 115 institutions held Textura during the Class Period. Werner Decl., ¶128.

Factor Three - Market Makers: There was sufficient market-maker interest in Textura securities during the Class Period for the stock to trade efficiently. Werner Decl., ¶47. There at least 88 market makers in Textura securities during the Class Period. *Id*. at ¶46. This also exceeds the requirements under *Cammer*. *See Cheney v. Cyberguard Corp.*, 213 F.R.D. 484, 500 (S.D. Fla. 2003) (finding that 15-19 market makers is "significant" and "appears to support a determination of [market] efficiency.") (citing *Cammer*, 711 F. Supp. at 1286)).

Factor Four - S-3 Eligibility: The *Cammer* Court found that a Company's eligibility to file a short-form registration statement, *i.e.* Form S-3, supports a finding of an efficient market. *Cammer*, 711 F.Supp. at 1285. To be eligible to file a Form S-3 with the SEC, the company is required to file 12 months of financial filings and have at least $75 million of float. Werner

Decl., ¶48. Textura was not eligible to file a form S-3 during the Class Period because it was privately held before the IPO. However, the registration statement on Form S-1 for its common stock filed with the IPO contained three years of financial data. *Id*. at ¶52. Therefore, Textura not being able to file on a Form S-3 is not fatal to a finding of efficiency. *Vinh Nguyen v. Radient Pharm. Corp.*, 287 F.R.D. 563, 574 (C.D. Cal. 2012). However, given that the reason for this ineligibility is the mere fact that Textura was a newly public company, any negative inference is therefore mitigated. Textura possessed the characteristics of an S-3 registration eligible company throughout the Class Period. Werner Decl., ¶53.

Factor Five - Cause-Effect Relationship of Unexpected Material News and Stock Price: The fifth factor is whether there are "empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in stock price." *Cammer*, 711 F. Supp at 1287. Dr. Werner employed empirical tests to determine the impact of the new and material information about Allin's professional history on Textura and the Company's stock price. Dr. Werner analyzed Textura's securities' trading history relative to material news events, net of market effects, and concluded that the release of unexpected information concerning Textura was associated with significant changes in Textura's share price. Werner Decl., ¶92. This demonstrable relationship between company-specific news releases and prompt share price reaction supports the conclusion that Textura's stock traded in an efficient market during the Class Period. *Id*.

Dr. Werner employed an event study covering the class period to determine the impact of new material information on Textura's stock price. Werner Decl., ¶¶62-108. The event study included, among others, the December 2013 Citron Report, and the January 2014 Citron Report. *Id.* at ¶70.

Reaction to the December 26, 2016 Citron Research Report:

On December 23, 2016, Textura's common stock fell 18.71%, an unusually large one day decline for Textura common stock, which was a strongly statistically significant price reaction to new Company-specific news, and was too severe to have been a random fluctuation. The Market Index return on that date was 0.40% and the Industry Index return was -0.07%. Based on a regression model, the expected portion of the return of Textura common stock was -0.68%. The difference between the actual return of -18.71% and the expected return of -0.68% is an abnormal return of -18.03% which is statistically significant. Werner Decl. ¶¶87-88.

Reaction to the January 7, 2014 Citron Research Report:

On January 7, 2014, Textura's common stock fell 10.99% on a volume of 3 million shares traded. *Id*. at ¶90. The Market Index return on that date was 0.61% and the Industry return was 1.50%. *Id*. Based on the regression model, the expected portion of the return on Textura stock was 2.90%. The abnormal return of -13.88% indicates that the residual return is statistically significant at a 95% confidence level. *Id*. at ¶¶90-91.

Event Study Conclusion:

Dr. Werner concluded that the event study demonstrates that there was a strong statistically significant cause-and-effect relationship between the new information and the stock price reaction. These results prove that Textura's common stock traded in an efficient market during the Class Period. *Id*. at ¶92.

b. Other Indicia Of Market Efficiency

Market Capitalization: Market capitalization is the total value of all outstanding shares, i.e., the number of shares outstanding times the price per share. The larger the market capitalization, the more likely the stock is to attract analyst and news media coverage, and gain

the attention of investors, including large institutional investors. All of these characteristics promote market efficiency. Werner Decl., ¶110. During the Class Period, Textura's market capitalization averaged $810.8 million, making it larger than at least 50% of publicly-traded companies in the United States. *Id*. at ¶112. Textura's sizeable market capitalization through the Class Period is evidence of the efficiency of the market for its stock. *Id*. at ¶112.

Size of the Float: The stock's float is the number of shares outstanding, less shares held by insiders and affiliated corporate entities. It is generally the number of shares available for trading by outside investors in the open market. Float is highly correlated with market capitalization, but it focuses on the shares available for trading rather than all outstanding shares. Stocks with large levels of float tend to trade more actively, attract more analyst and news media coverage, and garner the attention of greater numbers of investors, including large institutional investors. During the Class Period, Textura's common stock float averaged $319.6 million. Textura's float was larger than the total market capitalization of at least 30% of all other publicly-traded companies in the U.S. *Id*. at ¶114. The size of the float indicates that it satisfies the second *Unger*/*Krogman* factor for market efficiency. *Id*. at ¶116.

Bid-ask Spread: The bid-ask spread is "the difference between the price at which current stockholders are willing to buy the stock and the price at which current stockholders are willing to sell their shares." *Cheney*, 213 F.R.D. at 501. *Cheney* held that a bid-ask spread of 5.6% suggested inefficiency, but a spread of 2.44% suggested efficiency. *Id*. The average bid-ask spread of Textura stock during the Class Period was 0.25%, which was below the bid-ask spreads found to suggest efficiency in *Cheney*, and well below the average month-end bid-ask spread over the course of the Class Period for all stocks of 0.64%, according to the Center for Research in Security Prices ("CRSP"), a reliable data source widely used by academic

researchers and investment professionals. Werner Decl., ¶¶117-119. Textura's narrow average bid-ask spread support the conclusion that Textura's common stock traded in an efficient market during the Class Period. *Id*. at ¶120.

c. Conclusion

After considering the factors above, Dr. Werner concluded not only that the market for Textura common stock satisfies the *Cammer* and *Unger/Krogman* factors that indicate market efficiency, but also satisfied the empirical *Cammer* factor, *i.e*., price impact, which demonstrates the essence of market efficiency, with the event study proving that there was a cause and effect relationship between new, Company-specific information, and movements in the price of Textura stock. Textura common stock traded in an efficient market during the Class Period. *Id*. at ¶¶7, 108.

2. A Class Action Is Superior to Individual Actions in the Securities Fraud Context

Not only is a class action the superior method of adjudicating this controversy, it is the only viable means of proceeding for most Class members. The Court has recognized:

> "Rule 23(b)(3) was designed for situations such as this, in which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate." ... *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (internal citations omitted); *see also Cicilline*, 542 F.Supp.2d at 838 ("Class certification is usually considered a superior method of adjudicating claims involving standardized conduct."). The Court's conclusion that a class action is superior to individual lawsuits under the circumstances is also supported by "the policy at the very core of the class action mechanism [,]" which "is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997).

Cotton, 2008 WL 2561103, at *6-*7.

Here, a class action is superior to other available methods for the fair and efficient adjudication of this controversy because absent a class action, this Court would be faced with the daunting task of litigating potentially hundreds, or even thousands of individual lawsuits. The parties would also face the enormous cost of litigating numerous cases in multiple jurisdictions around the country. Judicial resources are more efficiently used by resolving the common issues alleged in one action. When common questions of law and fact predominate over questions affecting individual members, a class action is superior to other available methods. *See Great Neck Capital,* 212 F.R.D. at 409 ("courts have recognized the superiority of a class action in securities fraud cases. Such cases generally involve numerous defrauded investors whose claims are individually not large enough to make separate actions economically feasible.").

3. Damages Can Be Calculated With a Common Model

The Supreme Court in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1428, 185 L. Ed. 2d 515 (2013) held that an antitrust class could not be certified because the damages model calculated damages that flowed from four theories of antitrust impact, three of which were already rejected by the Court. For that reason, there was a mismatch between the method of the class wide damages calculation, and the theory of class-wide proof. In *Comcast*, the Court noted, it was possible that some class members were damaged primarily by noncompensable harms, while other class members were damaged primarily by compensable harms. *Id.* Courts in the Seventh Circuit have followed *Comcast* and routinely granted class certification when damages can be measured on a class-wide basis. *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2016 WL 4992504, at *8 (S.D. Ill. Sept. 16, 2016)("If damages are capable for measurement on a class-wide basis, questions of individual damage calculations will not overwhelm questions common to the class."); *Lucas v. Vee Pak, Inc.*, 68 F. Supp. 3d 870, 882

(N.D. Ill. 2014)("Injury caused by the same common conduct is what is required, not identical damages."); *In re IKO Roofing Shingle Prod. Liab. Litig.*, 757 F.3d 599, 603 (7th Cir. 2014)("commonality of damages" is not legally indispensible to a class action.).

Here, Dr. Werner opines that per-share damages can be measured on a class-wide basis using daily pricing information. Werner Decl., ¶¶135-137. In fact, "[t]he event study method is an accepted method for the evaluation of materiality damages to a class of stockholders in a defendant corporation." *In re Diamond Foods, Inc., Sec. Litig.*, 295 F.R.D. 240, 251 (N.D. Cal. 2013). *Hatamian v. Advanced Micro Devices, Inc.*, No. 14-CV-00226 YGR, 2016 WL 1042502, at *9 (N.D. Cal. Mar. 16, 2016). At class certification, it is not necessary actually to conduct an event study. *Id.* at *8 (sufficient for plaintiffs to "propose" event study methodology).

D. The Court Should Appoint Lead Counsel as Class Counsel

Rule 23(g) provides that "[u]nless a statute provides otherwise, a court that certifies a class must appoint class counsel." As discussed in Paragraph B4, *supra*, The Rosen Law Firm, P.A. and Heffner & Hurst should be appointed as Lead Class Counsel and Liaison Class Counsel, respectively. The firms are well qualified to act as Class Counsel, as demonstrated by the firm resumes submitted herewith. *See* Kim Decl., Exs. 3-4. *See Lutz v. Int'l Ass'n of Machinists and Aerospace Workers*, 196 F.R.D. 447, 453 (E.D. Va. 2000) ("attorneys have been found to be adequate in the past, it is persuasive evidence that they will be adequate again.") (quoting *Gomes v. Illinois State Bd.*, 117 F.R.D. 394, 401 (N.D. Ill. 1987)); *see also In re Enron Corp. Sec. Derivative & ERISA Litig.*, 529 F. Supp.2d 644, 674-75 (S.D. Tex. 2006) (counsel found adequate under Rule 23(g) where counsel already had been appointed lead counsel in the same case under PSLRA.).

IV. CONCLUSION

As demonstrated above, this action satisfies all prerequisites of Fed. R. Civ. P. 23(a) and (b)(3), and should be certified as a class action with Lead Plaintiff Fred Kelsey appointed as the Class Representative, and The Rosen Law Firm, P.A. appointed as Lead Class Counsel and Heffner & Hurst LLP appointed as Liaison Class Counsel.

Dated: January 9, 2017

Respectfully submitted,

THE ROSEN LAW FIRM, P.A.

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CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

I, Phillip Kim, one of the attorneys for plaintiff, hereby certify that on January 9, 2017, service of the foregoing **LEAD PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLASS CERTIFICATION, APPOINTMENT OF CLASS REPRESENTATIVE, AND APPOINTMENT OF CLASS COUNSEL** was accomplished pursuant to ECF as to Filing Users and I shall comply with LR 5.5 as to any party who is not a Filing User or represented by a Filing User.

/s/ Phillip Kim
Phillip Kim