THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE ZILLOW GROUP, INC. SECURITIES LITIGATION THIS DOCUMENT RELATES TO: ALL ACTIONS	No. 2:17-CV-01387-JCC DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION ORAL ARGUMENT REQUESTED

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INTRODUCTION

The plaintiffs allege that Zillow and two of its officers violated the securities laws by making materially misleading statements about the company's compliance with the Real Estate Settlement Procedures Act ("RESPA"). Plaintiffs seek to certify a Rule 23(b)(3) class of investors who purchased Zillow stock between November 17, 2014, the date that Zillow first purportedly failed to disclose the claimed RESPA violation, and August 8, 2017, the day Zillow announced that the Consumer Financial Protection Bureau ("CFPB") had proposed a related settlement. Zillow made no misstatements; in fact, the CFPB ultimately closed its investigation without taking any enforcement action. But leaving aside the merits of plaintiffs' allegations, the proposed class is fundamentally flawed: About 90% of the class is statutorily barred from recovering damages; the remaining 10% cannot prove the element of reliance on a class-wide basis; and the plaintiffs have failed to satisfy their burden of proof on multiple Rule 23 requirements.

First, about 90% of the proposed class cannot recover damages. "[A] class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant"—that is, when they can claim no damages. *Melgar v. CSk Auto, Inc.*, 2015 WL 9303977, at *7 (N.D. Cal. Dec. 22, 2015), *aff'd*, 681 F. App'x 605 (9th Cir. 2017) (quoting *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009)). Put another way, when a significant portion of the class has "no *cognizable* injury," certification is improper. *Sandoval v. Pharmacare US, Inc.*, 2016 WL 3554919, at *8 (S.D. Cal. June 10, 2016) (emphasis added).

The Private Securities Litigation Reform Act ("PSLRA") contains a "90-day bounce back" provision that limits damages based on the timing of a "corrective disclosure": An "award of damages to the plaintiff shall not exceed the difference between the purchase" price of the security "and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission . . . is disseminated to the market." 15 U.S.C. § 78u-4(e). Thus, "if the mean trading price of a security during the 90-day period following the correction is *greater* than the price at which the plaintiff purchased his stock then

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that plaintiff would recover nothing." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 461 (9th Cir. 2000). The purpose of this rule, as the legislative history explains, is to avoid "overestimat[ing] plaintiff's actual damages"—to "limit[] damages to those losses caused by the fraud and not by other market conditions." *In re River Park Square Project Bond Litig.*, 2003 WL 27374985, at *4 (E.D. Wash. Aug. 1, 2003) (quoting S. Rep. No. 104-98 at 20 (1995)).

Plaintiffs allege that the market was not fully corrected until the last day of the class period—August 8, 2017—when Zillow disclosed the potential CFPB settlement. Defendants contend that the market had all material information well before that date. But even accepting plaintiffs' argument as true, the bounce back provision would bar the vast majority of the class from recovery (if defendants were correct, the entire class would be barred). During the 90-day period after August 8, 2017, Zillow's stock had a mean price of $40.24. That amount is *higher* than the price of Zillow's stock at any point from the beginning of the class period in November 2014 through May 4, 2017—a little over three months before the end of the class period. Thus, anyone who acquired Zillow stock before May 5, 2017 is barred from recovering damages. Because about 90% of the proposed class fits that description—as shown by the accompanying expert reports—the class is dramatically overbroad and should not be certified. (And as discussed below, the remaining 10% cannot prove reliance on a class-wide basis.) Plaintiffs' motion is silent on this problem, even though their own expert admits that the 90-day rule applies to this case.

Second, plaintiffs' motion fails to satisfy the threshold requirements of Rule 23(a). Although plaintiffs claim to be typical and adequate class members, they do little more than simply quote the rules. They assert that "[n]o evidence exists that render their claims in any way whatsoever atypical," but never even describe what a typical plaintiff looks like. Pl. Mot. at 8. They say that their "interests are the same as those of the absent Class members," but never explain why. *Id.* at 9. They claim to be "actively involved in this litigation," but do not explain how. *Id.*

These statements are not just conclusory; they are inaccurate. Unlike the vast majority of the proposed class, the named plaintiffs purchased Zillow securities *after* May 4, 2017—meaning

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they are not similarly situated to most absent class members when it comes to the 90-day rule. The plaintiffs held only common stock, and therefore cannot properly represent the full universe of securities holders. And the plaintiffs made it strikingly clear at their depositions that they have done almost nothing on their own to advance this lawsuit; it has been dominated by their lawyers.

Third, plaintiffs' have not met their burden on Rule 23(b)(3)'s requirement that common issues predominate over individualized ones. Issues of reliance will require extensive mini-trials. Plaintiffs do not (and cannot) contend that they can prove that all class members actually relied on Zillow's alleged misrepresentations. Instead, they invoke the "fraud-on-the-market" theory set forth in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), which presumes that shares traded on a well-developed market reflect all publicly available information. Even if this presumption applies here, it is squarely rebutted as to the small universe of class members who purchased Zillow stock after May 4, 2017—the only purchasers *not* precluded from damages by the bounce back rule.

On that day, Zillow issued a 10-Q disclosing the CFPB investigation into alleged RESPA violations, and warning the public about its legal implications. The market got the message: Numerous news articles and analyst reports predicted that Zillow would be subjected to substantial fines and injunctive relief. Nevertheless, Zillow's price *rose*. And for the rest of the class period, the market received no "new" information that would have been likely to affect the stock price. After May 4, 2017, it would have been "unreasonable" to place any "continued reliance" on any alleged misrepresentation about the CFPB investigation, rebutting the *Basic* presumption. *Hayes v. MagnaChip Semiconductor Corp.*, 2016 WL 7406418, at *8 (N.D. Cal. Dec. 22, 2016). Because the only arguably viable class members cannot invoke *Basic*, they have to prove individual reliance, defeating predominance.

Finally, plaintiffs make only a halfhearted effort to establish that a class action is superior to individual lawsuits, as Rule 23(b)(3) further requires. Plaintiffs contend that "the typical claim is too small for each class member to maintain separate actions" (Pl. Mot. at 21), without ever explaining what a "typical claim" is, or why losses of thousands of dollars (as the named plaintiffs

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allege) are too miniscule to encourage individual lawsuits. Plaintiffs "foresee no management difficulties," and "are confident that any potential management problems can be addressed and resolved" (*id.* at 21), but they offer no *proof* to support this assertion—as the law requires.

For these reasons and those set forth below, plaintiffs' motion to certify should be denied.

BACKGROUND

A. Zillow And The Co-Marketing Program

Zillow provides e-commerce services to homeowners, buyers, sellers, renters, and real estate professionals throughout the U.S. SAC (Dkt. 47) ¶ 20. Among other things, Zillow sells advertising on various websites—including zillow.com and streeteasy.com—to real estate agents and mortgage professionals. *Id.* ¶ 28. When prospective customers find a real estate listing they like, they can submit their contact information to the agent attached to the listing. *Id.* ¶ 3. Zillow receives revenue from agents, who pay the company for each time a user views a listing. *Id.* ¶ 4.

Zillow's customers may obtain a special "suite" of products by paying additional fees to become "Premier Agents." *Id.* ¶ 29. Since 2014, these products have included a "co-marketing program," under which real estate agents may—but do not have to—defray a portion of their advertising costs by partnering with lenders participating in the program. *Id.* ¶ 5. Lenders who agree to share the agent's marketing costs appear as "Premier Lenders" in advertising alongside the Premier Agent on Zillow's mobile applications and website. *Id.* Each lender makes a fixed monthly payment to Zillow in exchange, covering a fixed percentage of the agent's monthly advertising costs. *Id.* Consenting customers—those with a box checked "I would like to receive financing information"—send their contact information to the lender as well as the agent. *Id.*

B. The CFPB Investigation, Its Extensive Publicity, And Zillow's Disclosures

In 2015, the CFPB dramatically stepped up enforcement of RESPA. This statute was enacted to protect home buyers from certain improper practices that had developed in the real estate industry, including "kickbacks or referral fees that tend to increase unnecessarily the costs of [real estate] settlement services." 12 U.S.C. § 2601. RESPA provides that "[n]o person shall

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give and no person shall accept any fee, kickback or thing of value" for the referral of federally insured mortgage loans. *Id.* § 2607(a). The statute contains a safe harbor for the "payment for goods or facilities actually furnished or for services actually performed." *Id.* § 2607(c).

In May 2015, the CFPB issued Zillow a broad Civil Investigative Demand ("CID"), and followed up two years later with requests tailored towards the co-marketing program: a Notice and Opportunity to Respond and Advise ("NORA") letter in February 2017, and another CID in April. SAC ¶ 61. In its next quarterly report, a 10-Q filed with the SEC on May 4, 2017, Zillow disclosed the CFPB's requests along with its Q1 results. Ex. A at 23.[1] Zillow reported that "the CFPB's Office of Enforcement is considering whether to recommend that the CFPB take legal action against us, alleging that we violated Section 8 of [RESPA]." *Id.* The disclosure continued: "Should the CFPB commence an action against us, it may seek restitution, civil monetary penalties, injunctive relief or other corrective action. We cannot provide assurance that the CFPB will not ultimately commence a legal action against us in this matter, nor are we able to predict the likely outcome of the investigation into this matter." *Id.* Following the May 4, 2017 10-Q, Zillow's stock price increased. Expert Report of Lucy P. Allen (Ex. B) ("Allen Rpt.") ¶ 94.

Two weeks after Zillow issued its 10-Q, on May 17, 2017, the trading firm Susquehanna Financial Group issued a six-page report summarizing the CFPB investigation. Ex. C. The report stated that the CFPB was investigating whether Zillow made illegal kickbacks, whether there was a *quid pro quo* agreement between agents and lenders, whether lenders were paying a fair share of costs, and whether Zillow was acting as a facilitator of RESPA violations. *Id.* at 2-3. Susquehanna predicted that "formal charges/settlement could come in the near-term," and that the imposition of significant penalties in one of the CFPB's recent cases "suggest[ed] that Zillow will not receive a 'get out of jail free card.'" *Id.* at 3. The report predicted that Zillow's liability could include a

[1] All exhibit references ("Ex. __") refer to documents attached to the Declaration of Matthew D. Ingber, filed concurrently with this brief. Ms. Allen is defendants' damages expert, who submitted a report that is attached to the Ingber declaration as Exhibit B.

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fine in the "tens of millions," as well as "conduct-based remedies" that could potentially bar Zillow from continuing its co-marketing program, threatening "20-50% of [Zillow's] 2018 EBITDA." *Id.* at 4-5. The report concluded that "[w]e do not believe that the CFPB will drop the case without some monetary fine/conduct-based remedy." *Id.* at 6. Zillow's stock experienced a statistically insignificant drop on the day the Susquehanna report was issued. Allen Rpt. ¶ 48.

Around the same time, numerous articles echoed Susquehanna's prediction. To name just a few: *Realtor Magazine* reported that "CFPB Investigates Zillow's Co-Marketing Ads." Ex. D at 2. The website "realestateclassactions.com" issued an article titled "Zillow Fesses Up About RESPA investigation," and told readers to "[e]xpect an epic battle." Ex. E at 2. Another article reported that "[a]ny mystery about whether Zillow Group was under federal investigation for potential anti-kickback violations cleared up last week." Ex. F at 3. HousingWire interpreted the investigation as a shot across the bow of the entire industry: "You've been warned: CFPB puts real estate agents, lenders on RESPA violation watch." Ex. G at 2.

On August 8, 2017, Zillow issued a Form 10-Q with its Q2 results and an update on the investigation. Zillow announced that "[t]he CFPB has invited us to discuss a possible settlement," and "intend[ed] to pursue further action if those discussions d[id] not result in a settlement." Ex. H at 23, 32. That same day, Susquehanna reported that the 10-Q "confirm[ed] [its] belief that a settlement or formal lawsuit from the CFPB is imminent." Ex. I at 574 of 586. Fourteen other analysts also issued reports, none of which provided more than an update on the investigation. Allen Rpt. ¶ 51-58. The focus of the reports was on Zillow's lowered revenue projections, not the investigation. *See id.* Over the next two days, Zillow's stock price dropped by about 15%.

The CFPB concluded its investigation in June 2018. Ex. J at 3. It did not charge Zillow with any RESPA violations or seek any enforcement action. *Id.* Zillow disclosed the news in a June 25, 2018 8-K. Its stock price held steady, rising from $60.75 to $60.80 the next day.

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C. This Lawsuit

On September 14, 2017, while the CFPB investigation was still ongoing, plaintiffs filed this lawsuit against Zillow, its CEO Spencer Rascoff, and its CFO Kathleen Philips. Dkt. 1. The three named plaintiffs— Jo Ann Offutt, Raymond Harris, and Johanna Choy—were appointed lead plaintiffs the following January. Dkt. 29. All three purchased Zillow shares after its announcement of the CFPB investigation, and sold the shares shortly after Zillow's August 2017 10-Q. Offutt purchased 518 shares of Zillow Class A stock for $23,897.30 in June 2017, and sold them for $20,957.53 on August 10. Ex. K at 2. Harris bought 600 shares of Zillow Class A stock for $28,733.52 on August 8, 2017—the same day as Zillow's 10-Q—and sold them for $23,976.24 on August 10. *Id.* Choy bought 200 shares of Zillow Class C stock for $9,650.00 on June 22, 2017, and sold them for $8,141.00 on August 18. *Id.* at 3.

The complaint alleges that the defendants concealed the fact that the CFPB had begun an investigation into Zillow's co-marketing program in 2015, and that Zillow's co-marketing program violated RESPA until 2017. SAC ¶ 9. Plaintiffs allege that before that time, by accepting a share of marketing costs from lenders pursuant to the co-marketing program, and then posting advertising from the lender alongside Premier Agents, Zillow was facilitating "kickbacks" between the agent and lender. *Id.* ¶ 45. Plaintiffs further allege that RESPA's safe harbor does not apply because Zillow permitted lenders to pay a greater share of the marketing budget than is justified by the number of leads generated by the co-marketing program. *Id.* ¶ 48. Plaintiffs claim that, as a result of defendants' misrepresentations, they purchased Zillow shares at an artificially inflated price, and that once the truth was revealed, their Zillow holdings lost value. *Id.* ¶ 119.

On October 2, 2018, this Court dismissed plaintiffs' suit with leave to amend. Dkt. 46. It explained that the complaint did not adequately allege that "Zillow designed the co-marketing program to violate RESPA and to allow lenders and agents to conceal such violations," or "that the co-marketing program was facilitating RESPA violations." *Id.* at 15-16. Plaintiffs then filed the operative complaint, which provided some additional detail about the allegations of

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wrongdoing, including from two new anonymous witnesses. Dkt. 47. In April 2019, this Court denied the defendants' motion to dismiss that complaint. Dkt. 54.

On October 11, 2019, plaintiffs moved to certify a class under Federal Rule of Civil Procedure 23(b)(3). Pl. Mot (Dkt. 74). Their proposed class "consist[s] of all persons other than Defendants who purchased or otherwise acquired Zillow securities between November 17, 2014 and August 8, 2017, both dates inclusive." *Id.* at 7. Plaintiffs argue that because Zillow's alleged "misstatements affected all class members in the same manner, . . . all that remains is the mechanical computation of per share damages suffered by each class member." *Id.* at 17. In support of their motion, plaintiffs submitted three declarations from the proposed class representatives and an expert report on damages from Dr. Zachary Nye. Nye Rpt. (Dkt. 75-5).[2]

CLASS CERTIFICATION STANDARD

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quotation marks omitted). Rule 23 "imposes stringent requirements for certification that in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). Plaintiffs "must affirmatively demonstrate [their] compliance with the Rule," and "certification is proper only if the trial court is satisfied, after a rigorous analysis," that the plaintiffs have met their burden of satisfying the four threshold requirements of Rule 23(a) and at least one of the three subdivisions of Rule 23(b). *Dukes*, 564 U.S. at 350-51 (quotation marks omitted). "[P]laintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014); *see also Dukes*, 564 U.S. at 350.

[2] The parties have taken discovery related to plaintiffs' motion to certify. In addition to the exchange of documents, Zillow has deposed the three named plaintiffs and Dr. Nye.

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ARGUMENT

I. THE PROPOSED CLASS IS DRAMATICALLY OVERBROAD—AND THEREFORE UNCERTIFIABLE—BECAUSE ABOUT 90% OF THE CLASS IS BARRED FROM RECOVERING DAMAGES.

Whether viewed as an issue of typicality, predominance, or superiority, class certification is improper if the vast majority of the class members cannot recover damages. That is the case here: Unlike the named plaintiffs, about 90% of the class members purchased Zillow shares at a *lower* price than the mean price during the 90-day period after Zillow's alleged misrepresentation was supposedly "corrected." Under the PSLRA, these class members cannot recover. The proposed class is therefore drastically overbroad—a problem on which plaintiffs' motion is silent.

A. A Proposed Class Should Not Be Certified If The Vast Majority Of Class Members Cannot Recover Damages.

A class should not be certified if the "proposed class definition is overbroad." *Melgar*, 2015 WL 9303977, at *7. "Proof of . . . economic loss is an element of a cause of action for securities fraud. Thus, in order to determine whether [people] should remain part of the proposed class, it is necessary to demonstrate that they might be able to prove a loss, *i.e.*, damages." *In re UTStarcom, Inc. Sec. Litig.*, 2010 WL 1945737, at *11 (N.D. Cal. May 12, 2010) (citation and quotation marks omitted) (citing *Dura Pharms., Inc. v. Broudo*, 544 U.S. 36, 338, 341 (2005)). "[C]lass certification is not proper . . . to the extent that the class includes [people] who have no *cognizable* injury." *Sandoval*, 2016 WL 3554919, at *8 (emphasis added). And it certainly "should not be certified if it is apparent that it contains a *great many* persons who have suffered no injury." *Melgar*, 2015 WL 9303977, at *7 (emphasis added) (quoting *Kohen*, 571 F.3d at 677); *cf. Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) (federal courts lack "power to order relief to any uninjured plaintiff, class action or not").

The question of "whether a class definition is sufficiently 'overbroad' as to preclude certification" is "encompassed within" several parts of "the Rule 23 analysis." *Rodman v. Safeway, Inc.*, 2014 WL 988992, at *16 (N.D. Cal. Mar. 10, 2014), *aff'd*, 694 F. App'x 612 (9th

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Cir. 2017). This question goes to typicality because if the named plaintiffs can recover damages and absent class members cannot, their "incentives [do not] align . . . so as to assure that the absentees' interests will be fairly represented." *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994).[3] "If the plaintiffs cannot prove that damages resulted from the defendant's conduct, then the plaintiffs cannot establish predominance." *Vaquero v. Ashley Furniture Indus.*, 824 F.3d 1150, 1154 (9th Cir. 2016)).[4] An overbroad class implicates superiority too, because when "the probability that the [class] will succeed in establishing liability is slight," the "*in terrorem* character of a class action" is at its greatest; "the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good." *Kohen*, 571 F.3d 672 at 677-78.[5]

For all these reasons, a class cannot be certified if it contains a substantial number of plaintiffs who cannot obtain damages; at minimum, the class must be narrowed to those with some legitimate prospect of recovery.

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[3] *See also Dukes*, 564 U.S. at 348-49 ("[A] class representative must . . . possess the same interest and suffer the same injury as the class members." (quotation marks omitted)); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998) (defendant cannot be forced to litigate against a "perfect plaintiff" with stronger claims than the rest of the class).

[4] *See also Comcast Corp. v. Behrend*, 569 U.S. 27, 30 (2013) (plaintiffs must show "that the existence of individual injury . . . [is] common to the class."); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008) (vacating certification of class where plaintiffs did not meet their "duty to prove each [class member] was harmed by the defendants' practice"); *In re Juniper Networks, Inc. Sec. Litig.*, 264 F.R.D. 584, 594 (N.D. Cal. 2009) ("In this case, in-out traders who sold their securities prior to May 18, 2006, the first date on which Plaintiffs allege that partially curative disclosures were disseminated to the public marketplace, cannot logically prove economic loss based on [defendant's] alleged misrepresentations. . . . Accordingly, the class shall exclude any person who sold their [ ] securities prior to May 18, 2006.").

[5] *See also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (class actions often improperly pressure defendants "to settle and to abandon a meritorious defense."); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 (3d Cir. 2001) ("[G]ranting [class] certification may generate unwarranted pressure to settle nonmeritorious or marginal claims.").

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B. The PSLRA Limits Recovery To Those Class Members Who Have Suffered Losses Caused By The Alleged Fraud.

The PSLRA governs federal class actions brought under the securities laws. *See* 15 U.S.C. § 78u-4(a)(1). The statute contains a "90-day bounce back" provision (also known as a "look back" provision) stating as follows:

> [I]n any private action arising under this chapter in which the plaintiff seeks to establish damages by reference to the market price of a security, the award of damages to the plaintiff shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market.[6]

Id. § 78u-4(e)(1). This provision accordingly requires a comparison between (1) the purchase price of a security and (2) the mean price during the 90-day period following the correction of the market's alleged misimpression. "[I]f the mean trading price of a security during the 90-day period following the correction is *greater* than the price at which the plaintiff purchased his stock then that plaintiff would recover nothing." *Mego Fin. Corp.*, 213 F.3d at 461.

This provision was enacted to determine how much a plaintiff has been actually harmed by the defendant's alleged conduct. As courts in this Circuit have recognized, the Senate Report accompanying the statute states that "[b]etween the time a misrepresentation is made and the time the market receives corrected information, . . . the price of [a] security may rise or fall for reasons unrelated to the alleged fraud." *River Park*, 2003 WL 27374985, at *4 (quoting S. Rep. 104-98 at 20 (1995)). Thus, the Senate committee found that "[c]alculating damages based on the date corrective information is disclosed may substantially overestimate plaintiff's actual damages." *Id.* (quoting S. Rep. No. 104-98 at 20 (1995)). "[T]o rectify the uncertainty," the PSLRA "provid[es] a 'bounce back' period, thereby limiting damages to those losses caused by the fraud and not by other market conditions." *Id.* (quoting S. Rep. No. 104-98 at 20 (1995)).

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[6] The statute defines "mean trading price" as the "average of the daily trading price of th[e] security, determined as of the close of the market each day." 15 U.S.C. § 78u-4(e)(3).

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Courts have accordingly recognized that the bounce back provision can have a substantial impact on the propriety of class certification. "Application of [the bounce back provision is] appropriate on a class-certification" motion, with "the benefit of expert testimony on damages." *In re CV Scis., Inc. Sec. Litig.*, 2019 WL 6718086, at *6 & n.72 (D. Nev. Dec. 10, 2019) (citing *In re Terayon Commc'ns Sys., Inc.*, 2003 WL 21383824, at *3 (N.D. Cal. Feb. 24, 2003)). In *Terayon*, for example, the court acknowledged that a class period may be "over-broad" if it includes "plaintiffs who purchased [ ] securities during [a] period" in which they "could not have been damaged" in light of the bounce back provision. 2003 WL 21383824, at *1. But the court found it "premature . . . to establish with certainty the correct application of the bounce-back provision," because there was a factual dispute about the timing of the alleged corrective disclosure, and there was "no [expert] testimony . . . before the court." *Id.* at *3. Here, as discussed next, this Court has the benefit of both sides' expert opinions on damages—and those opinions are substantially aligned when it comes to the applicability of the 90-day bounce back rule.

C. About 90% Of The Proposed Class Is Barred From Recovery.

Plaintiffs' damages expert acknowledges that "per-security damages should [ ] incorporate the so-called '90-day lookback' provision of the [PSLRA]." Nye Rpt. ¶ 74. Although plaintiffs had previously calculated the relevant mean price as $40.12 (Ex. K at 2), Dr. Nye does not actually "incorporate" any such analysis into his report; instead, he concludes his report immediately after noting the *need* for the analysis (*see* Nye Rpt. ¶ 74). This is a critical omission because, as he conceded at his deposition, if a plaintiff's purchase price is below the mean price during the 90-day period, "that would limit [that plaintiff's] damages entirely." Nye Dep. (Ex. L) at 206.

For purposes of this argument only, we credit plaintiffs' allegation that the relevant corrective disclosure took place on August 8, 2017, when Zillow announced settlement discussions with the CFPB. As Ms. Allen's report explains, Zillow's stock had a mean trading price of $40.22 during the 90-day period beginning on that date—an amount about ten cents higher than the

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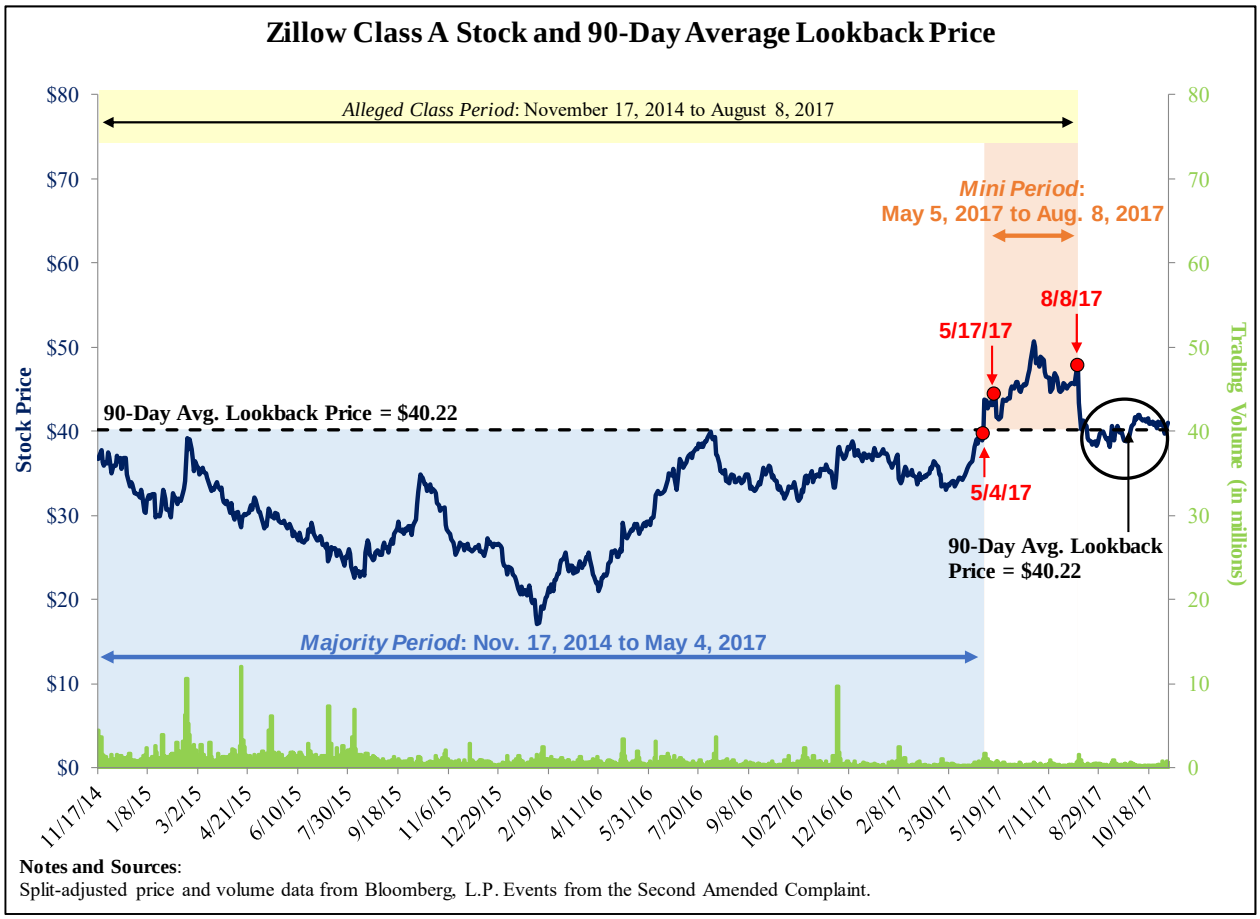
plaintiffs' previous calculation. *See* Allen Rpt. ¶¶ 26-30. As the following chart illustrates, $40.22 is higher than the price of Zillow's stock at any point before May 5, 2017. *See Id.*[7]



Thus, any class member who purchased Zillow stock before May 5, 2017 cannot recover any damages—regardless of the purchase price, the sale price, or the current price. *Mego Fin. Corp.*, 213 F.3d at 461. As explained in Ms. Allen's report, this group represents "approximately 90% of the proposed Class." Allen Rpt. ¶¶ 30-33. And if the Court agrees—as defendants contend in Part III.A—that all relevant corrective information entered the market by May, then ***100%*** of the class is barred from recovering damages, because Zillow's stock price *rose* afterwards.

[7] This chart shows only the price of Zillow's Class A stock, but the same is true of Zillow's Class C stock and convertible notes. Allen Rpt. ¶ 26-30.

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"Whether characterized as problems with overbreadth" or with one of the specific Rule 23 requirements, "class certification is not proper" in this case because the proposed class includes a substantial number of people with "no cognizable injury." *Sandoval*, 2016 WL 3554919, at *8.[8]

II. THE NAMED PLAINTIFFS HAVE FAILED TO MEET THE THRESHOLD REQUIREMENTS OF RULE 23(a).

A. The Named Plaintiffs Have Not Met Their Burden Of Proving That They Are Typical Class Representatives.

To satisfy Rule 23(a)(3), the named plaintiffs were required to show that their "claims or defenses . . . are typical of the claims or defenses of the class."[9] "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quotation marks omitted). "[A] named plaintiff's motion for class certification should not be granted if there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." *Id.* (quotation marks omitted). Courts in this Circuit have routinely held

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[8] The PSLRA contains a limited exception to the 90-day rule when a plaintiff sells the relevant shares *during* the 90-day bounce back period. In that situation, "the plaintiff's damages shall not exceed the difference between the purchase [price] . . . and the mean trading price of the security during the period beginning immediately after dissemination of information correcting the misstatement or omission and ending on the date on which the plaintiff sells or repurchases the security." 15 U.S.C. § 78u-4(e)(2). In other words, the sale of the security effectively shortens the bounce back period to the time between the corrective disclosure and the sale, rather than the full 90 days. Plaintiffs have not attempted to show that any class members would be able to recover under this exception—as was their burden. *See Halliburton*, 573 U.S. at 275. And as detailed in Ms. Allen's report, it is exceedingly unlikely that any class members would qualify. The only plaintiffs who purchased before May 5, 2017 and would *not* be excluded by the 90-day rule are those who (1) purchased Zillow stock on August 1, 2016 (at a price of $39.94) *and* (2) sold on September 28, 2017 (when the rolling average stock price was $39.61). Allen Rpt. ¶ 36-37. And any damages would be pennies per share. *Id.*

[9] A discussed in Part I above, the named plaintiffs are among the 10% who purchased Zillow stock after May 4, 2017. Thus, to the extent they *can* recover damages, they are not typical members of the class. This section provides independent reasons why they are not typical.

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that a plaintiff cannot establish typicality merely by parroting the requirement. *See, e.g.*, *Brislane v. Brown*, 2017 WL 3579698, at *3 (C.D. Cal. Apr. 11, 2017) (finding no "sufficient evidence" of typicality where the plaintiff had "merely parroted the statutory language . . . without conducting any analysis"); *Russell v. Kohl's Dep't Stores*, 2015 WL 12748629, at *4 (C.D. Cal. Dec. 4, 2015) (an argument that "relies on labels instead of logic, parroting the language of Rule 23 without providing any analysis," is insufficient).

That is exactly what plaintiffs have done here. After providing a paragraph of quotations to case law, plaintiffs' motion offers four sentences on typicality:

> Plaintiffs' claims are substantially similar to those of the Class, satisfying the typicality requirement. They purchased Zillow stock or notes during the Class Period, holding through the end of the Class Period, and suffering losses. The same misrepresentations affected each security in the same manner. No evidence exists that render their claims in any way whatsoever atypical of those of the Class and no hint of a unique defense exists that would otherwise defeat the typicality of his [sic] claims.

Pl. Mot. at 8 (citation omitted).

These allegations are deficient on their face; plaintiffs do not even explain what a "typical" plaintiff actually is. For example, is the typical plaintiff one who purchased after the first alleged corrective disclosure (like the named plaintiffs) or one who purchased before (like most of the class members)? Is the typical plaintiff one who held only common stock (like plaintiffs) or purchasers of convertible notes, or both?[10] Class A shares, or Class C? Is the typical plaintiff one who purchased tens of dollars of shares, hundreds of dollars, thousands, tens of thousands (like plaintiffs), or more? Is it one who sold those shares at a loss of thousands of dollars (like plaintiffs) or an amount less or more than that? Is it a person or a corporation? A current Zillow investor or, like plaintiffs, a former investor? Plaintiffs' brief answers none of these questions, and it is not the obligation of defendants or the Court to provide answers for them.

[10] *See, e.g.*, *Model Assocs., Inc. v. U.S. Steel Corp.*, 88 F.R.D. 338, 340 (S.D. Ohio 1980) ("since plaintiff owned only common stock, its claim is not typical of the class").

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B. The Named Plaintiffs Have Not Met Their Burden Of Proving That They Are Adequate Class Representatives.

The named plaintiffs were required to demonstrate that they would "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). A class representative must "prosecute the action vigorously on behalf of the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). And "the Court must ensure that the litigation is brought by a named Plaintiff who understands and controls the major decisions of the case," *Sanchez v. Wal Mart Stores, Inc.*, 2009 WL 1514435, at *3 (E.D. Cal. May 28, 2009), because when "plaintiff's counsel [acts] on behalf of an essentially unknowledgeable client," that "risk[s] a denial of due process to the absent class members," *Burkhalter Travel Agency v. MacFarms Int'l, Inc.*, 141 F.R.D. 144, 154 (N.D. Cal. 1991). *See also In re Facebook, Inc., PPC Advert. Litig.*, 282 F.R.D. 446, 454 (N.D. Cal. 2012) (named plaintiff was "not an adequate class representative" where "he testified in his deposition that he kn[ew] essentially nothing about the case, and indicated that he would defer to counsel in prosecuting th[e] action"); *Bodner v. Oreck Direct, LLC*, 2007 WL 1223777, at *2-3 (N.D. Cal. Apr. 25, 2007) (class representative inadequate where it was "clear from the record that plaintiff's counsel, and not the plaintiff, [wa]s the driving force behind th[e] action"); *Welling v. Alexy*, 155 F.R.D. 654, 659 (N.D. Cal. 1994) (class representatives must "serve the necessary role of check[ing] the otherwise unfettered discretion of counsel" (quotation marks omitted)).

Plaintiffs' motion asserts without elaboration that "[e]ach Plaintiff has been actively involved in this litigation" and is "willing and able to prosecute this action on behalf of the Class to a successful conclusion." Pl. Mot. at 9. In support of this assertion, each plaintiff submitted an identically worded declaration stating: "I read the initial complaint in advance of my moving to serve as Co-Lead Plaintiff in this action. I reviewed and authorized the filing on February 16, 2018 of the Consolidated Amended Class Action Complaint . . . . I also reviewed and authorized the filing on November 16, 2018 of the Second Consolidated Amended Complaint." Offutt Decl. (Dkt. 75-2) ¶ 6; Choy Decl. (Dkt. 75-3) ¶ 6; Harris Decl. (Dkt. 75-4) ¶ 6.

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Plaintiffs would have been better off submitting no declarations at all; their boilerplate assertions only underscore that plaintiffs have *not* been a "driving force behind this action." *Bodner*, 2007 WL 1223777, at *3. Beyond reading and authorizing the pleadings, plaintiffs do not claim to have been involved in a single "major decision[]" in this matter. *Sanchez*, 2009 WL 1514435, at *3. To the contrary, the named plaintiffs testified at their depositions that they had not reviewed, discussed or commented on the motion-to-dismiss briefing, any discovery requests, any other correspondence between the parties, or any other papers filed with the court. Harris Dep. at 35-44 (Ex. M); Choy Dep. (Ex. N) at 47-52; Offutt Dep. (Ex. O) at 38-42. Plaintiffs do not even claim to have reviewed—much less discussed with their attorneys—their own *motion for class certification*. Harris Dep. at 42; Choy Dep. at 50; Offutt Dep. at 42. Because the named plaintiffs are contributing almost nothing to this litigation—serving as figureheads while their lawyers drive this lawsuit—they are inadequate representatives and the proposed class should not be certified.

III. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEIR PROPOSED CLASS SATISFIES THE REQUIREMENTS OF RULE 23(b)(3).

A. Common Issues Do Not Predominate Because Plaintiffs Cannot Establish Reliance On A Class-Wide Basis.

This Court may certify a Rule 23(b)(3) class only if it "finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." "[I]f the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate." *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1189 (9th Cir. 2001). Plaintiffs have failed to satisfy this requirement because they have not met their burden of showing that reliance—an essential element of their securities fraud claim—can be adjudicated class-wide.

1. The *Basic* Presumption Of Class-Wide Reliance Is Rebuttable.

A securities fraud plaintiff must demonstrate "reliance upon the misrepresentation or omission." *Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1057 (9th Cir. 2014). This normally requires a plaintiff to show "that but for the deceptive act," he "would not

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have entered into the securities transaction." *In re Maxim Integrated Prods., Inc. Deriv. Litig.*, 574 F. Supp. 2d 1046, 1064 (N.D. Cal. 2008) (citing *Binder v. Gillespie*, 184 F.3d 1059, 1065-66 (9th Cir. 1999)). Here, however, plaintiffs do not contend that they can establish *actual* reliance on a class-wide basis—*i.e.*, that every class member would have acted differently with additional information. Instead, they invoke the "fraud-on-the-market" presumption of class-wide reliance first enunciated in *Basic*: that because the "price of shares traded on well-developed markets reflects all publicly available information," "an investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." 485 U.S. at 246-47.

"The [*Basic*] presumption, however, is just that, and can be rebutted by appropriate evidence." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 462 (2013) (quotation marks omitted).[11] If a defendant is able to demonstrate "that the 'market makers' were privy to the truth . . . , and thus that the market price would not have been affected by [the alleged] misrepresentations, the causal connection [would] be broken." *Basic*, 485 U.S. at 248-49. "The presence in the market of information corrective of the fraud—whatever its source—snaps the causal link between misinformation and any injury of plaintiffs." *Ravens v. Iftikar*, 174 F.R.D. 651, 670 (N.D. Cal. 1997). If such information makes "continued reliance" on previous alleged omissions "unreasonable"—even if the disclosure is not "*fully* corrective"—purchasers after that date will not be entitled to rely upon the fraud-on-the-market theory. *Hayes*, 2016 WL 7406418, at *8 (emphasis added); *see also S. Ferry LP No. 2 v. Killinger*, 271 F.R.D. 653, 656 (W.D. Wash. 2011) ("Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff . . . will be sufficient to rebut the presumption of reliance."). And "*without* the presumption of reliance, a [securities fraud] suit cannot proceed as a class action: Each plaintiff would have to prove reliance individually, so common issues would not predominate." *Halliburton*, 573 U.S. at 281-82 (emphasis added) (quotation marks omitted).

[11] Plaintiffs do not address whether the *Basic* presumption is rebutted by the evidence; they argue only that the presumption applies. *See* Pl. Mot. at 10-20.

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2. The Presumption Is Rebutted Here Because All Material Facts Were Fully Disclosed By May 5, 2017.

Plaintiffs allege that Zillow failed to disclose five things about the co-marketing program: that (1) the program allowed lenders to pay more than the fair market value for co-marketing services; (2) the program allowed agents to make personal referrals of customers to lenders in exchange for money; (3) the CFPB had issued the CID in 2015, beginning its investigation of possible RESPA violations; (4) the co-marketing program made up more than a small portion of Zillow's revenue; and (5) Zillow had altered the program in 2017 to make it RESPA-complaint. SAC ¶ 60; *see also* Allen Rpt. ¶ 15 (summarizing the five categories). Plaintiffs further allege that on three dates—May 4, 2017, May 17, 2017, and August 8, 2017—the market received information that corrected misimpressions about the CFPB investigation: Zillow's Form 10-Qs on May 4 and August 8, and the Susquehanna report on May 17. SAC ¶ 89-95; pp. 5-6 *supra*.

These three corrective disclosures, however, are facially irrelevant to three of the five alleged misrepresentations above. They did not "correct" any purported lack of market awareness of the fair market value of co-marketing services (#1), any coordination between lenders and agents (#2), or any decision by Zillow to alter the program (#5). Because plaintiffs have based their claim for damages on an alleged connection between the drop in Zillow's stock price and the revelation of information to the market (Nye Rpt. ¶¶ 57-58), they naturally cannot recover on the basis of alleged misrepresentations that were not corrected (Allen Rpt. ¶ 42). And to the extent the Susquehanna Report corrected a misimpression about how much the co-marketing program contributed to Zillow's revenue (#4) (*see* SAC ¶ 91), this too cannot support a claim for damages, because there was no statistically significant movement in Zillow's stock after that report was issued. Allen Rpt. ¶ 48 ("[T]he reactions in Zillow's stock and note on May 17, after controlling for market and industry movements, are within the range of expected daily variation, and thus, cannot be statistically distinguished from zero."); *id.* ¶ 51 ("[T]here can be no damages from the

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May 17 alleged corrective disclosure because this disclosure did not cause any statistically significant decline in Zillow's securities' prices according to Plaintiffs' event study model").

Plaintiffs' theory of reliance therefore depends solely on their allegation that Zillow's August 8 disclosure corrected a misimpression in the market about the CFPB investigation (#3), resulting in the statistically significant price drop that followed. *See* SAC ¶¶ 93-94. But that investigation was fully revealed (and presumptively digested by the market) by the *first* of the three corrective disclosures. Zillow's May 4, 2017 10-Q disclosed the CID and the NORA letters, and explained that the CFPB was contemplating "legal action" against Zillow; that it was alleging RESPA violations; that it was considering whether to "seek restitution, civil monetary penalties, injunctive relief or other corrective action"; and that Zillow could not "predict the likely outcome of the investigation." Ex. A at 23; *see also* pp. 5-6 *supra*. That disclosure was followed by an *increase* in the stock price. *Cf. Waters v. Gen. Elec. Co.*, 2010 WL 3910303, at *8 (S.D.N.Y. Sept. 29, 2010) ("The Court cannot find . . . a single Section 10b-5 case in which the plaintiff prevailed . . . where the stock price *increased* after an announcement revealing an alleged fraud.").

The only potentially substantive difference between the May 4 and August 8 disclosures is the latter's statements that the CFPB had *concluded* its investigation, "invited [Zillow] to discuss a possible settlement," and indicated its intention "to pursue further action if those discussions do not result in a settlement." Ex. H at 23, 32. But this was not meaningful "news" to the market. On May 17, 2017—less than two weeks after the May 4 10-Q—the Susquehanna report articulated the *market's* view that "the CFPB will issue some fine and conduct-based restriction on Zillow's current co-marketing program." Ex. C at 2; *see* pp. 5-6 *supra*. The Susquehanna report specifically identified "formal charges/settlement" as likely "in the near term," predicting that "Zillow will not receive a 'get out of jail free card,'" that a fine might total in the "tens of millions," and that the investigation could affect "20-50%" of Zillow's "2018 EBITDA." Ex. C at 4-5.

As plaintiffs acknowledge, "Susquehanna's report received widespread coverage." Compl. ¶ 92. The media reported that "Zillow faces legal action over its co-marketing program,"

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that experts predicted an "epic battle" between Zillow and the CFPB, and that the whole industry should be "on RESPA violation watch." *See* p. 6 *supra*. Indeed, plaintiffs' expert conceded at his deposition that when Zillow disclosed the CFPB investigation on May 4, 2017, there was "an understanding [of] how the process works and that a settlement [was] a possibility," and that there was "always a possibility" that the CFPB would pursue litigation. Nye Dep. at 104-05.

Unsurprisingly, then, Susquehanna later reported that the August 8 10-Q did nothing more than "*confirm[]*" its prior "belief that a settlement or formal lawsuit from the CFPB [was] imminent"—"*the precise course of action* [it had] discussed since Zillow initially disclosed the CFPB investigation on May 4, 2017." Ex. I at 574 of 586 (emphases added). Fifteen analysist reports were issued after the August 8 10-Q, and not one claimed to have learned *any* new information relating to the alleged misrepresentations. Allen Rpt. ¶¶ 53-58. That was because the May 4 disclosure left no mystery about the implications of the CFPB investigation.

The May 4 disclosure therefore rebuts the *Basic* presumption as to those who purchased Zillow's stock after that date. By that date, there is no doubt that "the 'market makers' were privy to the truth." *Basic*, 485 U.S. at 248. After that date, it would have been "unreasonable" to place any "continued reliance" on Zillow's alleged failure to disclose the CFPB investigation. *Hayes*, 2016 WL 7406418, at *8. And critically, post-May 4 purchasers are the *only* members of the class who are not fully barred from recovery by the 90-day bounce back provision. *See* Part I *supra*.

In short, the only portion of the proposed class that could possibly prove damages—those who purchased after May 4, 2017—cannot rely on the *Basic* presumption, and must prove *actual* reliance on an individualized basis. Because the need for this inquiry defeats predominance, the proposed class should not be certified. *Haliburton*, 573 U.S. at 281-82.

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B. Plaintiffs Have Not Established That A Class Action Would Be Superior To Individual Actions.

Plaintiffs were required to show that a "class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) sets out four factors that are "pertinent" to this question:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Lee v. ITT Corp., 275 F.R.D. 318, 322 (W.D. Wash. 2011). Courts in this District have held plaintiffs to a high burden with respect to these factors, declining to find superiority where a plaintiff fails to substantively address even *one* of them. *Id.* at 324.

As with the typicality requirement, plaintiffs offer one paragraph of analysis on this issue. First, they assert that "[t]he number of Class members is too numerous and the typical claim is too small for each class member to maintain separate actions." Pl. Mot. at 21. Plaintiffs do not explain why the numerosity of the class members (a distinct requirement under Rule 23) has anything to do with their ability to pursue individual suits. They do not explain what a "typical claim" is. *See* pp. 14-15 *supra*. And they do not elaborate on why that "typical claim is too small." Plaintiffs are hardly claiming *de minimis* damages: Each claims losses in the range of about $1,500 to $5,000—multiple times the $500 statutory penalty that courts have held creates a sufficient incentive to sue. *See, e.g.*, *Smith v. Microsoft Corp.*, 297 F.R.D. 464, 469 (S.D. Cal. 2014).

Second, plaintiffs assert that "this Court is an appropriate forum [because] a substantial part of the alleged misconduct occurred in this district," and "the nationwide geographic dispersion of the class members, based upon Zillow's sale of stock on a national exchange, makes it desirable that litigation of the claims involved be concentrated in this forum." Pl. Mot. at 21. At most, this

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means that *if* a class action were appropriate, this Court would be the right venue in which to litigate it. But that only begs the question of whether class treatment is the superior method.

"Finally, Plaintiffs foresee no management difficulties that would preclude this action from being maintained as a class action and are confident that any potential management problems can be addressed and resolved by the parties or by this Court." Pl. Mot. at 21. No amount of "confidence" can satisfy the superiority rule; plaintiffs had to "actually *prove* . . . that their proposed class satisfies [this] requirement." *Halliburton*, 573 U.S. at 275 (emphasis added). Plaintiffs have done nothing to show why this case is the "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 564 U.S. at 348.

CONCLUSION

Plaintiffs' motion for class certification should be denied.

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