UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BING LI, Individually and On Behalf of All others Similarly Situated, *Plaintiffs*, v. AETERNA ZENTARIS, INC., *et al.*, *Defendants.*	Civil Action No: 14-cv-7081 (PGS)(TJB) **MEMORANDUM AND ORDER**

This matter comes before the Court on Lead Plaintiff Gregory Vizirgianakis, Phong Thomas Dinh, and Jamshid Khodavandi's (hereinafter, "Lead Plaintiffs") motion for class certification pursuant Federal Rule of Civil Procedure 23. (ECF No. 104). Defendants Aeterna Zentaris Inc. ("Aeterna"), David Dodd, Juergen Engel, Paul Blake, and Nicholas Pelliccione (collectively, "Defendants") oppose Lead Plaintiffs' motion on three separate grounds: (1) Lead Plaintiffs face unique defenses, which defeat the typicality requirement under Federal Rule of Civil Procedure 23(a)(3); (2) Lead Plaintiffs have failed to satisfy the adequacy requirement under Federal Rule of Civil Procedure 23(a)(4), since the present matter constitutes "lawyer driven litigation"; and (3) Defendants have rebutted Lead Plaintiffs' presumption of reliance. For the reasons set forth below, Lead Plaintiffs' motion will be granted.

BACKGROUND

In this putative securities class action, Lead Plaintiffs allege that Aeterna Zentaris Inc. and its executives violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t(a), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5(b), by making false or misleading press releases. At the heart of this case, Lead Plaintiffs claim

that Defendants' failure to disclose to investors that it planned to omit the data results of two study patients from their Phase 3 study constitutes a material misrepresentation or omission contrary to securities law.

Aeterna is a biopharmaceutical company that develops endocrinology and oncology treatments. (Second Amended Complaint [SAC] at ¶ 2). Although Aeterna has several products at different stages of development, it has yet to receive regulatory approval for commercial sale of any of its product and, according to the Complaint, has "virtually no operating revenue." (*Id.*). At all relevant times, Aeterna has been traded on the NASDAQ stock exchange.

In 2009, Aeterna acquired AEZS-130 from Ardana Bioscience for $232,000. (*Id.* at ¶¶ 3-4). AEZS-130, marketed as "Macrilen," "is a growth hormone stimulator intended to diagnose whether a person has adult growth hormone deficiency ('AGHD')." (*Id*). As part of its acquisition, Aeterna also acquired Ardarna's partially completed Phase 3 study of AEZS-130. (*Id.* at ¶ 4). In an attempt to obtain regulatory approval of AEZS-130, Aeterna and the Federal Drug Administration ("FDA") entered into a Special Protocol Assessment ("SPA"), which set forth the requirements that Aeterna had to satisfy to receive FDA approval. (*Id.* at ¶¶ 4, 48-51). If Aeterna failed to comply with the SPA, the FDA would reject Aeterna's New Drug Application ("NDA"). (*Id.* at ¶ 7). The Phase 3 Study of AEZS-130 consisted of two parts; the first had been completed by Ardarna, which Aeterna acquired, and the second part was to be completed by Aeterna. (*Id.* ¶ 52). Ardana's study consisted of "42 patients with confirmed AGHD or multiple pituitary hormone deficiencies and a low insulin-like growth factor . . ." and "[a] control group of 10 subjects without AGHD." (*Id.* at ¶ 53). During Ardana's study, AEZS-130's effectiveness was to be compared with a drug that was already on the market, GHRH. (*Id.* at ¶ 54). However, by the time of Aeterna's acquisition, GHRH had been removed from the market, leaving AEZS-130 with

no comparator drug. (*Id.* at ¶ 55). As such, the SPA required Aeterna to enroll an additional 50 patients to assess the accuracy and efficacy of the drug. (*Id.* at ¶ 56). As would later be discovered, Ardana's study group of 42 patients with confirmed AGHD included two individuals who did not have the degenerative condition; however, as discussed below, including their data as part of AEZS-130's final study would affect the overall statistical performance of the drug.

Nevertheless, during Aeterna's Phase 3 study, it made certain public disclosures about its Phase 3 study and AEZS-130's efficacy and compliance with the SPA. (*Id.* at ¶¶ 8, 64-94). Specifically, in an August 30, 2011 Press Release, former Aeterna President and CEO, Defendant Juergen Engel claimed:

> We are pleased with the results obtained and we therefore expect to meet with the FDA and work out the content of a submission for an NDA. We believe that AEZS-130 could become the first approved oral test for the diagnosis of AGHD, providing patients with a potentially safer, accurate and more convenient alternative to the current injectable tests.

(ECF No. 49-3, "Aeterna Press Release (Aug. 30, 2011)"). In this press release, Aeterna stated that "[t]he parameters of the study . . . were achieved as agreed to with FDA under our Special Protocol Assessment (SPA)" and that:

> [T]he primary efficacy parameters show that the study achieved both specificity and sensitivity at a level of 90% or greater. In addition, 8 of the 10 newly enrolled AGHD patients were correctly classified by a pre-specified peak GH threshold level. The use of AEZS-130 was shown to be safe and well tolerated overall throughout the completion of this trial.

(*Id.*). In an unrelated article published that same day, Bloomberg LLP reported that "Aeterna Zentaris rose to [its] highest since July 27 intraday in U.S. trading after Phase 3 results showed AEZS-130 reached primary endpoint demonstrating >90% area-under-the-curve of Receiver Operating Characteristic curve. Aeterna sees meeting with U.S. FDA in coming months to prep

for NDA of AEZS-130." (SAC at ¶ 68). Bloomberg LLP also noted that "AEZS up 10% after climbing as much as 14%." (*Id.*).

According to Lead Plaintiffs, Aeterna inflated the effectiveness of AEZS-130 in diagnosing AGHD:

> In truth, Aeterna's Phase 3 trial, when analyzed pursuant to the terms of the SPA, actually failed to show that AEZS-130 was an effective diagnostic test for AGHD. In fact, AEZS-130 was only arguably "effective" when Aeterna manipulated the data and threw out the results from two patients from the Ardana portion of the Phase 3 study, in clear violation of the protocol Aeterna agreed to in the SPA.
>
> When all of the study subjects were included in the planned analysis pursuant to the terms of the SPA, AEZS-130 failed to show efficacy. Yet, Aeterna consistently misrepresented to investors that the planned analysis called for by the SPA proved efficacy.

(*Id.* at ¶¶ 10-11).

In a November 2011 conference call, Defendant Engel claimed that Aeterna "received confirmation of a pre-NDA meeting with the FDA before year-end, which we expect, depending on the outcome of this meeting, to be followed by the filing of an NDA for the registration of AEZS-130 in the United States in the first half of 2012." (*Id.* at ¶ 70).

In a statement to investors in March 2012, Defendant Engel claimed that Aeterna is "in active discussion with the FDA and expect[s] to meet with them in the first half of this year. The goal of the meeting will be to establish the overall content and format of our NDA for AEZS-130." (*Id.* at ¶ 75). According to the Complaint "[i]n or around May 2012," Aeterna met with the FDA in advance of filing the NDA for AEZA-130. (*Id.* at ¶ 80). At this meeting, Aeterna purportedly sought to have the data from the two patients, who did not have confirmed AGHD, excluded from their study, since that data distorted the overall results of the study. (*Id.* at ¶ 82). The FDA disagreed. (*Id.*).

Nevertheless, Aeterna issued another press release detailing the results of the Phase 3 drug trial on June 26, 2012. (*Id.* at ¶ 83). In this press release, Aeterna claimed, "the drug is safe and effective in diagnosing adult growth hormone deficiency (AGHD)." (*Id.* at ¶ 84; ECF No. 49-4, "Aeterna Press Release (June 26, 2012)"). That same day, Bloomberg LLP reported, "Aeterna Zentaris up as much as 42%, most intraday since June 2009, after phase 3 data shows AEZS-130 is safe/effective in diagnosing adult growth hormone deficiency." (*Id.* at ¶ 85).

On November 5, 2013, Aeterna submitted the NDA for AEZS-130, without including the data sets of the two patients who did not have AGHD. (*Id.* ¶¶ 94-95). According to the Complaint, while Aeterna continued to discuss publicly its expectations that the NDA would be well-received by the FDA, it failed to disclose the fact that it excluded the results of two patients, which violated the SPA. (*Id.* at ¶ 91).

Almost exactly a year later, on November 6, 2014, Aeterna announced that the FDA denied its NDA, since it did not meet the requirements set forth in the SPA. (*Id.* at ¶¶ 18, 95-96). In a press release published that same day, Aeterna stated:

> Aeterna Zentaris . . . today announced that the Company has received a Complete Response Letter ("CRL") from the [FDA] for its [NDA] for Macrilen™ (macimorelin), a novel orally-active ghrelin agonist, for use in evaluating adult growth hormone deficiency ("AGHD"). Based on its review, the FDA has determined that the NDA cannot be approved in its present form.
>
> The CRL mentions that the planned analysis of the Company's pivotal trial did not meet its stated primary efficacy objective as agreed to in the Special Protocol Assessment agreement letter between the Company and the FDA. The CRL further mentioned issues related to the lack of complete verifiable source data for determining whether patients were accurately diagnosed with AGHD. The FDA concluded that, "in light of the failed primary analysis and data deficiencies noted, the clinical trial does not by itself support the indication." To address the deficiencies identified above, the CRL states that the Company will need to demonstrate the efficacy of macimorelin as a diagnostic test for growth hormone deficiency in a new, confirmatory clinical study.

(*Id.* at ¶ 95) (emphasis omitted). According to the Complaint, this announcement "caused Aeterna's stock to open at $0.63 per share, a decline of more than 50% from the previous day's closing price of $1.29 per share." (*Id.* at ¶¶ 19, 96). The following day, Aeterna held a conference call with securities analysts to discuss the FDA's denial of its NDA. (*Id.* at ¶ 97). During this call, David Dodd, a former Aeterna executive, explained that there was not an apparent "meeting of minds" between Aeterna and the FDA, with regards to the Phase 3 study. (*Id.* at ¶ 98). Dodd explained, "[i]n general, there is a difference with our view on the most appropriate population for primary analysis of this study." (*Id.*).

Lead Plaintiffs presently allege that Defendants committed securities fraud since Aeterna consistently publicized favorable reports of the status of AEZS-130's Phase 3 study, but failed to disclose that it had excluded the data sets of the two patients, which was a critical violation of the SPA. As such, Lead Plaintiffs contend this constitutes a material omission made with scienter that violates securities laws. Lead Plaintiffs now seek certification of a class of individuals who purchased Aeterna securities from August 30, 2011 through November 6, 2014, who did not sell their securities prior to November 6, 2014.

LEGAL 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.'" *Comcast Corp. v. Behrend,* 569 U.S. 27, 33 (2013) (quoting *Califano v. Yamasaki,* 442 U.S. 682, 700-01 (1979)). In order to meet the requirements of this exception, a party moving to represent a class "must affirmatively demonstrate . . . compliance with Rule 23." *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350 (2011). The Third Circuit has emphasized that "actual, not presumed, conformance with Rule 23 requirements is essential." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 (3d Cir. 2012).

A party seeking class certification bears the burden of proving that the proposed class action satisfies the requirements of Rule 23. *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 183-84 (3d Cir. 2001). To meet this burden, the plaintiff must satisfy the four prerequisites of Rule 23(a) – numerosity, commonality, typicality, and adequate representation – and show that the action can be maintained under at least one of the three subsections of Rule 23(b). These requirements are "meant to assure both that class action treatment is necessary and efficient and that it is fair to the absentees under the particular circumstances." *Baby Neal v. Casey,* 43 F.3d 48, 55 (3d Cir. 1994).

In the Third Circuit, we look beyond the pleadings at the class certification stage of litigation. "[I]n reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 (3d Cir. 2001). Class certification is proper only after a "rigorous analysis" that all prerequisites of Rule 23 are met. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309 (3d Cir. 2008) (quoting *Gen. Tel. Co. of SW v. Falcon,* 457 U.S. 147, 161 (1982)). In assessing whether a plaintiff has satisfied his or her burden, the court "cannot be bashful" and must resolve all factual and legal disputes relevant to class certification, including disputes touching on the elements of the causes of action, and the merits of a claim. *Gonzalez v. Corning*, 317 F.R.D. 443, 489 (W.D. Pa. 2016) (citing *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 484 (3d Cir. 2015)).

The Third Circuit has set forth the District Court's responsibilities when addressing a motion to certify a class. *See Reyes*, 802 F.3d at 485. Specifically, "the District Court must: (1) conduct rigorous analysis, (2) review all avenues of inquiry in which it may have doubts (even if it requires reviewing the merits), (3) be satisfied and (4) make a definitive determination on the

requirements of Rule 23, or even (5) require that a plaintiff demonstrate actual, not presumed conformance with Rule 23 requirements." *Id.*

ANALYSIS

I. Rule 23(a)

Lead Plaintiffs first contend that they satisfy each of the four prerequisites set forth under Rule 23(a). As noted above, in order to maintain a class action under Rule 23(a), the plaintiff must establish four elements: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy. Fed. R. Civ. P. 23(a)(1)-(4). The Court addresses each element in turn.

1. Numerosity

Under Rule 23(a)(1), class actions may be maintained only if "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "To meet the numerosity requirement, class representatives must demonstrate that 'common sense' suggests that it would be difficult or inconvenient to join all class members." *In re Prudential Ins. Co. of Am. Sales Practical Litig.*, 962 F. Supp. 450, 510 (D.N.J. 1997) (citing *Lerch v. Citizens Fist Bancorp Inc.*, 144 F.R.D. 247, 250 (D.N.J. 1992)). "No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001). Moreover, courts "have recognized a presumption that the numerosity requirement is satisfied when a class action involves a nationally traded security." *In re DVI Inc. Sec. Litig.*, 249 F.R.D. 196, 200 (E.D. Pa. 2008) (*DVI I*) (quoting *In re CIGNA Corp. Sec. Litig.*, No. 02-8088, 2006 U.S. Dist. LEXIS 58560, at *6 (D.N.J. Aug. 18, 2006)).

Here, the Court has no difficulty in finding, and Defendants do not contest, that Lead Plaintiffs satisfy the numerosity requirement. Potential class members are dispersed throughout

the United States and encompass all individuals who purchased common stock in Aeterna from August 30, 2011 through November 6, 2014. Furthermore, neither party disputes that Aeterna's stock was actively traded on the NASDAQ stock exchange during the class period. As such, the Court is satisfied that the proposed class is sufficiently numerous to render joinder impractical, thereby satisfying Rule 23(a)(1)'s numerosity requirement. *See* Fed. R. Civ. P. 23(a)(1).

2. Commonality

Rule 23(a)(2) requires a showing that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Baby Neal*, 43 F.3d at 56. Since a single question of fact suffices to satisfy commonality, it is easily met. *Id.* Moreover, "[c]ourts in this circuit . . . have recognized that securities fraud cases often present a 'paradigmatic common question of law or fact' of whether a company omitted material information or made misrepresentations that inflated the price of its stock." *In re Corel Corp. Secs. Litig.*, 206 F.R.D. 533, 540 (E.D. Pa. 2002) (citations omitted).

In this case, it is readily apparent that Lead Plaintiffs demonstrate commonality. In their brief in support of their motion, Lead Plaintiffs identify the following common questions of law or fact:

> (1) whether Defendants violated [ ] federal securities laws; (2) whether statements made by Defendants to the investing public during the Class Period misrepresented material facts about the business, operations and management of Aeterna; (3) whether the Individual Defendant caused Aeterna to issue false and misleading statements during the Class Period; (4) whether the Defendants acted knowingly or recklessly in issuing false and misleading financial statements; and (5) to what extent the members of the Class have sustained damages and he proper measure of damages.

(Pls' Brief in Supp. at 7-8). As such, the Court finds, and Defendants again do not dispute, that there are common issues of both law and fact, satisfying Rule 23(a)(2)'s commonality requirement. *See* Fed. R. Civ. P. 23(a)(2).

3. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The concepts of typicality and commonality are closely related and often tend to merge." *Baby Neal*, 43 F.3d at 56. "The typicality inquiry . . . centers on whether the named plaintiffs' individual circumstances are markedly different or the legal theory upon which the claims are based differs from that upon which the claims or other class members will perforce be based." *Newton*, 259 F.3d at 183 (citing *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985)). Like commonality, the typicality requirement does not require that the putative class share identical claims. *In re Prudential Ins. Co. Am. Sales Practices Litig. Agent Actions*, 148 F.3d 283, 306-07 (3d Cir. 1998). "If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." *Newton*, 259 F.3d at 183-84.

Here, Lead Plaintiffs argue that its "legal theory and factual circumstances underlying the theory are the same as those of the Class." (Pls' Brief in Supp. at 8). Specifically, Lead Plaintiffs contend that Defendants' failure to disclose that Aeterna had excluded two patients from its Phase 3 study, while nevertheless claiming that it was in compliance with the SPA, constituted a material omission giving rise to their present securities claims. Moreover, Lead Plaintiffs argue that their "interests and incentives are aligned with those of the class," since "they acquired Aeterna securities at artificially inflated prices and subsequently suffered losses when it was revealed that Aeterna had violated the requirements of the SPA, and subsequently the FDA denied Defendants' NDA for AEZS-130." (*Id.* at 8-9).

Defendants respond, arguing that the Lead Plaintiffs are not typical of the putative class because they are subject to unique defenses that preclude certification. Specifically, Defendants contend that because Khodavandi and Dinh invested in Aeterna prior to any alleged misrepresentations, there is a unique defense that neither Lead Plaintiff actually relied on Aeterna's representations in making investment decisions. Similarly, since Vizirgianakis was aware of the risks inherent to investing in pharmaceutical products, Defendants argue that he cannot claim to have relied on Aeterna's statements.

"To defeat class certification, a defendant must show some degree of likelihood a unique defense will play a significant role at trial." *Beck v. Maximus, Inc.* 457 F.3d 291, 300 (3d Cir. 2006). However, where "an asserted unique defense has no merit, the defense will not preclude class certification." *Id.* The key issue, here, is whether the unique defense identified by Defendants will actually "become a major focus of the litigation." *Id.* at 301.

At his deposition, Khodavandi testified that on March 2, 2011, he purchased 2,230 shares of Aeterna stock based on its acquisition AEZA-130; however, he later sold his shares at a loss on August 5, 2011. (ECF No. 105-9, "Khodavandi Dep." at 45-46, 54). In 2012, he reinvested in Aeterna, believing that the company "had potential." (*Id.* at 57). Khodavandi explained that, based on Aeterna's background and information, he had always liked the company and thought that Aeterna's claim that its Phase 3 study was in compliance with the SPA made it less of a risky investment. (*Id.* at 78). Citing *In re Trump Casinos Sec. Litig.*, 793 F. Supp. 543, 565 (D.N.J. 1992), Defendants contend that Khodavandi is subject to a unique defense since he made investments prior to any purported misrepresentations by Aeterna. In *Trump*, this court held that the plaintiffs could not rely on alleged misrepresentations reported in the media, since the plaintiffs purchased their bonds prior to any of these statements being printed. *Id.* at 565-66. Here, the record

reflects that Khodavandi purchased, and later sold, his Aeterna stocks prior to the Class period. However, pertinent to this matter, Khodavandi later re-invested in Aeterna, within the class period, based on his impressions of company's stability, which was based, at least in part, on its claim that its Phase 3 study was in compliance with the SPA. As such, the Court finds that Khodavandi does not faces a unique defense.

Like Khodavandi, Dinh testified at deposition that he had purchased shares in Aeterna on April 5, 2011, prior to the class period. (ECF No. 105-10, "Dinh Dep." at 57). According to Dinh, he reviewed Aeterna's press releases and other investment website reviews of the company prior to making his investments. (*Id.* at 33). Dinh also conceded that in September 2013 he began selling Aeterna stock, but then repurchased shares the following month. (*Id.* at 84). According to Defendants, Dinh's trading activity disqualifies him from claiming reliance on Aeterna's alleged misrepresentations since he was engaged in day trading. (Defs' Brief in Opp. at 33 (citing *Bang v. Acura Pharms. Inc.*, No. 10-5757, 2011 U.S. Dist. LEXIS 2550, at *16 (N.D. Ill. Jan. 11, 2011)). In *Bang*, the court held that an "unusually high-volume and high-frequency trading can raise challenges to typicality and raise a unique defense regarding lack of reliance on material misstatements and omissions." 2011 U.S. Dist. LEXIS 2550, at *16. Day traders have been defined as "those who both purchase and sell all of their shares prior to a corrective disclosure." *Sklar v. Amarin Corp. PLC*, No. 13-6663, 2014 U.S. Dist. LEXIS 103051, at *31 n.8 (D.N.J. July 29, 2014). Here, however, when reviewing Dinh's accounts, the record does not suggest that Dinh was in fact a day trader. (ECF No. 106-12, "Dinh Interrogatory"). Although Dinh made several large purchases of Aeterna stock, they were not accompanied by an immediate sale thereafter; moreover, these purchases were not made frequently or, more importantly, immediately prior to the corrective disclosure. (*Id.*). In addition, "the characterization that the movant was a day trader,

without more, does not prove that he is subject to a unique defense, or rebut the presumption that the movant should be appointed lead plaintiff." *Sklar*, 2014 U.S. Dist. LEXIS 103051, at *29. Since Defendants' argument is essentially predicated on Dinh's trading activities, the Court does not find that Dinh is subject to a unique defense.

Finally, Defendants attempt to undermine Vizirgianakis' reliance on Aeterna's statements, based on his deposition testimony. Specifically, because he testified that he had been following Aeterna since 2011 and ultimately invested when he had funds available, Defendants contend that he made investment decisions independent of Aeterna's statements. (ECF No. 105-11, "Vizirgianakis Dep." at 28-29, 33). Moreover, since he conceded that there are no guarantees in pharmaceutical products receiving FDA approval, Defendants argue he should be disqualified as a lead plaintiff since he was aware of the inherent risks in investing in such a product. However, Defendants' argument that Vizirgianakis made his investment solely based on his own independent impressions of the company finds no support in the record. According to Vizirgianakis' deposition testimony, he invested in Aeterna during the class period, October 27, 2014, and he decided to invest based on "more evidence that [Aeterna] had published [about] the efficacy of [AEZS-130]." (*Id.* at 34). Moreover, Defendants have failed to demonstrate how Vizirgianakis' awareness of the risks in investing in a pharmaceutical product otherwise disqualifies him as a lead plaintiff. Therefore, the Court finds this unique defense without merit.

In short, the Court finds that Lead Plaintiffs and the putative class share a common legal theory, based on Defendants' material omissions. Additionally, no unique defenses exist that would otherwise preclude typicality. As such, the Court is satisfied that Lead Plaintiffs have fulfilled Rule 23(a)(3)'s typicality requirement. *See* Fed. R. Civ. P. 23(a)(3).

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In ensuring that the class's interests are fully pursued, the adequacy inquiry requires the court consider: (1) the qualifications of the proposed class attorney to represent the class and (2) whether the named parties' interests conflict with those of the class. *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 597-98 (3d Cir. 2009); *see also Newton*, 259 F.3d at 185. This inquiry "assures that the named plaintiffs' claims are not antagonistic to the class and that the attorneys for the class representatives are experienced and qualified to prosecute the claims on behalf of the entire class." *Beck*, 457 F.3d at 269 (citing *Baby Neal*, 43 F.3d at 55).

Here, given that the proposed class counsel, the Rosen Law Firm, P.A. and Glancy Prongay & Murray LLP, have extensive experience in securities litigation, Lead Plaintiffs argue that they are sufficiently qualified to represent the class in this matter. Moreover, Lead Plaintiffs reiterate that their interests align with the putative class and that no interests exist that would otherwise preclude certification.

Defendants respond by arguing that there are conflicts between Lead Plaintiffs and the putative class, based on the existence of unique defenses. However, as discussed above, because the unique defenses are without merit, this argument fails.

Alternatively, Defendants contend that because the present action constitutes "lawyer-driven litigation," the proposed class counsel is unlikely to sufficiently represent the entire class. In support of this assertion, Defendants again rely on the deposition testimony of Lead Plaintiffs in seeking to demonstrate that they lack familiarity with the case and that class counsel have pursued this matter on their own behalf. Specifically, Defendants contend that Lead Plaintiffs

have never communicated with each other and appear disinterested in the present matter. The Court is unpersuaded.

"Plaintiffs in a complex securities case cannot be expected to be intimately familiar with every factual and legal issue of the case." *In re Emulex Corp.*, 210 F.R.E. 717, 721 (C.D. Cal. 2002) (quoting *Yamner v. Boich*, No. 92-20597, 1994 U.S. Dist. LEXIS 20849, at *18 (N.D. Cal. Sept. 15, 1994)). In fact, given that securities cases routinely involve investigating particular misstatements or misrepresentations made by companies, as well as familiarity with federal securities law, "federal securities litigation is, by its very nature, attorney-driven litigation." *Mauss v. NuVasive, Inc.*, No. 13-2005, 2017 U.S. Dist. LEXIS 41894, at *10 (S.D. Cal. Mar. 22, 2017). In addition, the Court finds Defendants' "disinterested" argument without merit. All three travelled from afar to testify in New York for their depositions, Vizirgianakis travelled from South Africa, and Dinh and Khodavandi both travelled from California. Moreover, all three clearly demonstrated familiarity with the case, the basis for the present cause of action, and active participation in discovery, providing responses to interrogatories and document requests. As such, the Court is satisfied that the record demonstrates that Lead Plaintiffs' interests and involvement in this matter is consistent with the interests of the putative class. *See, e.g.*, *In re Rent-Way Sec. Litig.*, 218 F.R.D. 101, 115 (W.D. Pa. 2003). Therefore, the Court finds that Lead Plaintiffs have satisfied Rule 23(a)(4)'s commonality requirement. *See* Fed. R. Civ. P. 23(a)(4).

II. Rule 23(b)(3)

"In addition to satisfying the requirements of Rule 23(a), parties seeking class certification must establish the class is maintainable under one of the categories of Rule 23(b)." *Beck*, 457 F.3d at 301. Here, Lead Plaintiffs contend that they satisfy the requirements outlined under Rule 23(b)(3), which "authorizes class certification when 'questions of law or fact common to the

members of the class predominate over any questions affecting only individual members' and a class action would be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Id.* (quoting Fed. R. Civ. P. 23(b)(3)). "To satisfy this requirement, the Third Circuit has instructed that '[i]ssues common to the class must predominate over individual issues, and the class action device must be superior to other means of handling the litigation.'" *DVI I*, 249 F.R.D. at 207 (quoting *Johnston*, 265 F.3d at 185).

1. Predominance

"Predominance measures whether the class is sufficiently cohesive to warrant certification." *Newton*, 259 F.3d at 182. In determining the existence of predominance, the court must first examine the underlying cause of action. *Id.* at 172. Here, Lead Plaintiffs principally allege 10b-5 securities fraud claims. "In a typical § 10(b) private action a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 156 (2008). Both parties' briefs focus on whether Lead Plaintiffs have demonstrated the fourth factor, reliance. Lead Plaintiffs contend that, under the Fraud on the Market and *Affiliated Ute*[1] Doctrines, they are entitled to a presumption of reliance. The Court considers each.

"The 'fraud on the market' theory accords plaintiffs in Rule 10b-5 class actions a rebuttable presumption of reliance if plaintiffs bought or sold their securities in an 'efficient' market." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1419 n.8 (3d Cir. 1997) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 241-42 (1988)). This theory is predicated on the assumption

[1] *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972).

that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Basic*, 485 U.S. at 247. The Supreme Court explained that because individuals make investment decisions based on the "integrity of the price," "an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action." *Id.*; *see also Newton*, 259 F.3d at 175 ("[r]eliance may be presumed when a fraudulent misrepresentation or omission impairs the value of a security traded in an efficient market."). The "fundamental premise" of this doctrine is "that an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 813 (2011) (*Halliburton I*).

To invoke the fraud on the market doctrine, Lead Plaintiffs must establish by a preponderance of the evidence "that the securities at issue traded in an open and efficient market." *DVI I*, 249 F.R.D. at 208 (citing *Burlington*, 114 F.3d at 1419 n.8); *see also* 1 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 5:26, at 1319 (14th ed. 2017). In determining market efficiency, the court must consider five factors: (1) stock's average trading volume; (2) analyst coverage; (3) number of market makers; (4) eligibility to file an SEC Form S-3; and (5) price reaction to new information. *Cammer v. Bloom*, 711 F. Supp. 1264, 1286-87 (D.N.J. 1989). "[I]f a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price." *Halliburton v. Erica P. John Fund*, 134 S. Ct. 2398, 2414 (2014) (*Halliburton II*). In addition, if a plaintiff also establishes that he "purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased the stock in reliance on the defendant's misrepresentation." *Id.*

If a plaintiff meets his or her initial burden of demonstrating market efficiency and, therefore, an entitlement to a presumption of reliance, the defendant may rebut it by demonstrating that the purported misrepresentation or material omission had no price impact. *See id.* at 2415-16. "Any 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, will be sufficient to rebut the presumption of reliance." *Basic*, 485 U.S. at 248. "[W]ithout the presumption of reliance, a Rule 10b-5 suit cannot proceed as a class action: Each plaintiff would have to prove reliance individually, so common issues would not 'predominate' over individual ones, as required by Rule 23(b)(3)." *Halliburton II*, 134 S. Ct. at 2416. Where a defendant seeks to prove price impact, or lack thereof, the court must determine "whether the alleged misrepresentations affected the market price" of the stock. *Halliburton I*, 563 U.S. at 814. As such, the defendant bears the burden of producing evidence to rebut the presumption. *See IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*, 818 F.3d 775, 782 (8th Cir. 2016); *see also* Fed. R. Evid. 301 ("the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption."). To meet this burden, defendant need only produce enough evidence "to withstand a motion for summary judgment or judgment as a matter of law on the issue." *Lupyan v. Corinthian Colleges, Inc.*, 761 F.3d 314, 320 (3d Cir. 2014) (internal quotation marks and citation omitted).

Here, Defendants do not challenge the reliability of Dr. Adam Werner's, Lead Plaintiffs' expert, market analysis, nor do they contest Lead Plaintiffs' satisfaction of the *Cammer* factors and demonstration of market efficiency. Instead, Defendants spend considerable time rebutting Lead Plaintiffs' presumption of reliance, arguing that Aeterna's alleged misrepresentations had no price impact. Defendants also provide their own expert, Dr. David I. Tabak, to support their contention that Aeterna's statements had no significant impact on stock price. As such, since both

parties focus primarily on the issue of price impact, the Court will limit its discussion to determining whether Defendants have rebutted Plaintiffs' presumption of reliance.

In support of their assertion that Aeterna was traded in an efficient market, Lead Plaintiffs submitted Dr. Werner's expert report. (ECF No. 104-4, "Werner Report"). In this report, Dr. Werner conducted an event study, which he concluded "indicate[s] the presence of market efficiency." (*Id.* at ¶ 54). In arriving at this conclusion, Dr. Werner identified and assessed various "event test dates" during the Class Period, which could have caused Aeterna stock price to rise. (*Id.* at ¶ 66). Specifically, Dr. Werner identified statements made on August 30, 2011 (when Aeterna announced favorable results of its Phase 3 study) and June 26, 2012 (when Aeterna announced final Phase 3 results) as two of four event dates relevant to his event study. (*Id.* at ¶ 67). When assessing the market response to the August 30, 2011 press release, Dr. Werner noted that the event study demonstrated an abnormal positive return of 6.14%. (*Id.*). However, Dr. Werner also noted that this response did not achieve 95% confidence and explained,

> While news concerning the "favorable top-line results of its completed Phase III study with AEZS-130" was new positive information, Aeterna's abnormal stock return on August 30, 2011 cannot be definitively attributed to the news announced that day as the modest positive return was below the threshold for statistical significance. As such, the absence of a statistically significant return is consistent with market efficiency.

(*Id.* at ¶ 84). Although a 95% confidence level is generally necessary to demonstrate price impact, Dr. Werner acknowledged that his study reflected price impact at 84% confidence, which he contends is nevertheless significant. (*Id.* at ¶ 84 n.89). Dr. Werner also considered the significance of Aeterna's June 26, 2012 press release, which announced the final results of the Phase 3 study.[2]

[2] Although the August 2011 and June 2012 statements appear similar, Dr. Werner concluded that the June 2012 statement conveyed "new valuation-relevant information that could reasonably be expected to cause the Company's stock price to move by a statistically significant amount." (*Id.* at ¶ 66).

(*Id.* at ¶ 85). In this study, the abnormal positive return was 16.39%, leaving Dr. Werner to conclude at the 95% confidence level that the residual return was statistically significant. (*Id.* at ¶ 88). Based on these event studies, Dr. Werner ultimately concluded, "there was a cause and effect relationship between the release of new, Company-specific information and reactions in Aetena's common stock price, thereby establishing that Aetena's common stock traded in an efficient market during the Class Period." (*Id.* at ¶ 110).

To challenge Dr. Werner's conclusions, Defendants submit the report of their expert, Dr. Tabak. (ECF No. 105-8, "Tabak Report"). Relying on Dr. Werner's event studies, Dr. Tabak concluded that Dr. Werner's report failed to "demonstrate a lack of price impact from the August 30, 2011 news." (*Id.* at ¶ 13). Because the standard industry practice is to determine price impacts at the 95% confidence level, Dr. Tabak was particularly critical of the Werner report, since it demonstrated price movement at 84%. (*Id.* at ¶ 15). Dr. Tabak also noted that "[t]he lack of analyst action following the August 30, 2011 news, in contrast to the analyst action following other news events, further supports a finding that there was no price impact from the August 30, 2011 news." (*Id.* at ¶ 18).

Here, Defendants contend that Dr. Werner's report demonstrates a lack of price impact. (Defs' Brief in Opp. at 9-16). Like Dr. Tabak's report, the crux of Defendants' argument focuses on the fact that the Werner report did not conclude, at the 95% confidence level, that the August 30, 2011 press release had a significant impact on the stock price. This argument fails for several reasons. First, the Werner event study was not prepared to demonstrate price impact, but, rather, market efficiency. As such, Defendants' efforts to criticize his report for failing to make findings that were not the focus of the report is to no avail. Second, even assuming that the Werner report sought to demonstrate the existence of a price impact; "[t]he failure of an event study to find price

movement does not prove lack of price impact with scientific certainty." *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 310 F.R.D. 69, 95 (S.D.N.Y. 2015). Third, and most importantly, Defendants have failed to present any competent evidence demonstrating a lack of price impact, thereby rebutting the presumption of reliance. *See Halliburton II*, 134 S. Ct. at 2416. Although Defendants present Dr. Tabak's report in an effort to undermine Dr. Werner's conclusions, Dr. Tabak did not perform an independent event study, nor did he perform a price impact assessment. Instead, Dr. Tabak criticized the Werner report for failing to find, with 95% confidence, price impact of the August 30, 2011 press release. However, as noted above, it is Defendants' burden, not Lead Plaintiffs', to prove price impact. *See Halliburton II*, 134 S. Ct. at 2414-15 (holding that because evidence of publicity and market efficiency indirectly demonstrate price impact, plaintiff is not required to prove price impact in order to be entitled to a presumption of reliance.). Therefore, since Dr. Tabak's report does not demonstrate the absence of a price impact, Plaintiffs' presumption of reliance stands unrebutted.[3] *Id.* at 2416; *see Carpenters*, 310 F.R.D. at 94-97 (finding that the plaintiffs are entitled to a presumption of reliance, since the defendant's failed to perform an event study or directly address price impact). As such, the Court finds that Plaintiffs are entitled to the presumption of reliance and have satisfied the Rule 23(b)(3)'s predominance requirement. *See* Fed. R. Civ. P. 23(b)(3).[4]

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[3] For these same reasons the Court finds Defendants' reliance on *In re Finisar Corp. Secs. Litig.*, No. 11-1252, 2017 U.S. Dist. LEXIS 201150 (N.D. Ca. Dec. 5, 2017) unavailing. In *Finisar*, the court denied class certification after concluding that the defendants had rebutted the plaintiff's presumption of reliance by presenting direct evidence, through their own event study, that demonstrated a lack of price impact. *Id.* at *16-22. Being that Defendants in this case failed to present any such evidence, the Court finds *Finisar* factually inapposite.

[4] Because the Court concludes that Plaintiffs are entitled to a presumption of reliance under *Basic*, there is no need to consider Plaintiff's alternative argument that *Affiliated Ute* presumption of reliance applies.

2. Superiority

In addition to establishing predominance under Rule 23(b)(3), there must also be a finding "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "In assessing whether a class action is a superior method of adjudication, we must balance the fairness and efficiency of the class action against other alternative forms of resolution, such as individual lawsuits or consolidation." *In re Rent-Way*, 218 F.R.D. at 121. Here, the Court is satisfied that class action is the preferable means of adjudicating the present matter. Given that potential class members reside throughout the country, to address these claims individually would create "'insurmountable' manageability problems," with numerous courts handing essentially the same factual and legal issues. *See Johnston*, 265 F.3d at 194. However, "[a] class action would allow both Lead Plaintiffs and Defendants to avoid duplicative expenses and take advantage of economies of scale which they would otherwise lack." *DVI I*, 249 F.R.D. at 218. As such, for the foregoing reasons, the Court is satisfied that a class action is the best method of adjudicating the present claims. *See* Fed. R. Civ. P. 23(b)(3).

III. Appointment of Class Representative

As discussed in Part I, *supra*, the Court finds that Lead Plaintiffs will fairly and adequately represent the interests of the class. Therefore, the Court will grant Lead Plaintiffs' motion to be appointed as class representatives.

IV. Appointment of Lead Counsel

Finally, The Rose Law Firm, P.A. and Glancy Prongay & Murray LLP law firms seek appointment as Co-Lead Counsel for the Class, and the law firm of Carella, Byrne, Cecchi, Olstein, Brody & Agnello seeks appointment as Liason Counsel. Under Federal Rule of Civil Procedure 23(g)(1), "a court that certifies a class must appoint class counsel." In appointing class counsel

the court must consider: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). Here, as discussed above, having reviewed the evidence submitted by Lead Plaintiffs, the Court is satisfied that all three firms meet the criteria set forth under Rule 23(g). All three firms have extensive experience in securities litigation and have demonstrated competency in litigating the present matter. As such, The Rosen Law firm, P.A. and Glancy Prongay & Murray LLP are appointed as Co-Lead Counsel for the Class; and Byrne, Cecchi, Olstein, Brody & Agnello is appointed Liaison Counsel for the Class.

ORDER

This matter having come before the Court on Lead Plaintiffs' Motion for Class Certification pursuant Federal Rule of Civil Procedure 23 (ECF No. 104); and the Court having carefully reviewed and taken into consideration the submissions of the parties, as well as the arguments and exhibits therein presented, and for good cause shown, and for all of the foregoing reasons,

IT IS on this 28th day of February, 2018,

ORDERED that Lead Plaintiffs' motion for class certification is GRANTED; and it is further

ORDERED that Lead Plaintiffs Dinh, Khodavandi, and Vizirgianakis are appointed as Class Representatives; and it is further

ORDERED that the Rosen law Firm, P.A. and Glancy Prongay & Murray LLP are appointed as Co-Lead Counsel for the Class; and Byrne, Cecchi, Olstein, Brody & Agnello is appointed as Liaison Counsel for the Class.

PETER G. SHERIDAN, U.S.D.J.