IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

IN RE ENDOCHOICE HOLDINGS, INC. SECURITIES LITIGATION	)	Civil Action File No. 2016CV277772
	)	(Consolidated with Civil Action No. 2016CV281193)
	)	Bus. Case Div. 2

ORDER ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

The above styled action is before this Court on Plaintiffs' Motion for Class Certification. Having considered the entire record and argument of counsel at a Jan. 24, 2018 hearing in this matter, the Court finds as follows:

SUMMARY OF ALLEGATIONS

EndoChoice Holding, Inc. ("EndoChoice") is a medical device company that offers products used by gastrointestinal caregivers. In this putative class action, Plaintiffs Kenneth T. Raczewski ("Raczewski") and Jesse L. Bauer ("Bauer") (collectively "Plaintiffs") bring claims under the Securities Act of 1933 in connection with EndoChoice's June 5, 2015 initial public offering ("IPO"). At the IPO, EndoChoice sold 6,350,000 shares of common stock to the public at an offering price of $15.00 per share.

Plaintiffs, who both purchased shares of EndoChoice common stock shortly after the IPO, assert that in connection with the IPO Defendants offered and/or approved certain materials that misled the public, including: a Form S-1 Registration Statement (as amended and declared effective after the markets closed on Jun. 4, 2015) and final Prospectus filed on Jun. 5, 2015

("Offering Materials"). According to Plaintiffs, the Offering Materials contained materially false and misleading statements and/or omitted material information about the quality and design of EndoChoice's Fuse endoscopy system ("Fuse"), the availability of the second generation Fuse systems, and the ability of its sales force to market and sell the Fuse system.

Plaintiffs allege that when the undisclosed, adverse facts concerning EndoChoice were later revealed through a series of partial disclosures, the price of EndoChoice shares fell over 72% from the initial IPO price of $15.00 per share in June 2015 to approximately $4.00 per shares 14 months later, resulting in losses to Plaintiffs and other investors. On Sept. 27, 2016, EndoChoice announced it had agreed to be bought by Boston Scientific for $8.00 per share and that sale was completed in November 2016.

Plaintiffs, individually and on behalf of a proposed plaintiff class ("Proposed Class"), have filed this action against EndoChoice and eight of its officers and directors (collectively the "EndoChoice Defendants") as well as Defendants J.P. Morgan Securities, LLC, Merrill Lynch, Pierce, Fenner & Smith, Incorporated, William Blair & Company, LLC and Stifel, Nicolaus & Company, Incorporated, entities which served as underwriters for the IPO (collectively the "Underwriter Defendants"). Plaintiffs assert claims under §§ 11 and 15 of the Securities Act of 1933 ("1933 Act"), alleging each Defendant is liable to investors for the misstatements and/or omissions in the Offering Materials.[1]

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[1] In their Consolidated Class Action Complaint for Violations of the Securities Act of 1933 (hereinafter "Consolidated Class Action Complaint"), Plaintiffs Raczewski and Bauer initially also asserted a claim under §12(a)(2) of the 1933 Act, however, Plaintiffs have since abandoned pursuit of any §12 claim, individually or on behalf of the Proposed Class. *See* Plaintiffs' Motion for Class Certification, p. 1 at n. 2.

In the instant motion, Plaintiffs move to certify the Proposed Class, defining it as follows:

> All those who purchased EndoChoice common stock pursuant or traceable to EndoChoice's Offering Materials and who were damaged thereby, but excluding Defendants; the past and current executive officers and directors of EndoChoice and the Underwriter Defendants; the legal representatives, parents, subsidiaries, heirs, immediate family members, successors and assigns of any excluded person; and any entity in which any Defendant(s) has or had a controlling equity interest.[2]

However, Defendants oppose the motion, asserting Plaintiffs have not satisfied the statutory requirements under O.C.G.A. §9-11-23 to certify the class.

FINDINGS, ANALYSIS, AND CONCLUSIONS OF LAW

I. Applicable Standard

"When a court determines the propriety of a class action, the first issue to be resolved is not whether the plaintiffs have stated a cause of action or may ultimately prevail on the merits but whether the requirements of O.C.G.A. §9–11–23 have been met." Glynn County v. Coleman, 334 Ga. App. 559, 559, 779 S.E.2d 753, 754 (2015) (citing Peck v. Lanier Golf Club, 298 Ga. App. 555, 556, 680 S.E.2d 595 (2009). Specifically, to obtain class action certification, the putative class representative(s) must satisfy all four prerequisites of O.C.G.A. §9-11-23(a) and at least one of the requirements set forth in O.C.G.A. §9-11-23(b). *See* Brenntag Mid S., Inc. v. Smart, 308 Ga. App. 899, 902, 710 S.E.2d 569, 573 (2011) (citing Doctors Hosp. Surgery Center v. Webb, 307 Ga. App. 44, 46, 704 S.E.2d 185 (2010)).

Thus, putative class representatives must establish the following factors:

> (1) **numerosity**—that the class is so numerous as to make it impracticable to bring all members before the court; (2) **commonality**-that there are questions of law and fact common to the class members which **predominate** over any individual questions; (3) **typicality**-that the claim of the named plaintiff is typical of the claims of the class members; (4) **adequacy of representation**-that the named plaintiff will adequately represent the interest of the class; and (5) **superiority**-that a class action is

[2] Consolidated Class Action Complaint, ¶134.

> superior to other methods of fairly and efficiently adjudicating the controversy.

Brenntag Mid S., Inc, 308 Ga. App. at 902 (citing R.S.W. v. Emory Healthcare, 290 Ga. App. 284, 286(1), 659 S.E.2d 680 (2008) (emphasis added). *See* O.C.G.A. §9-11-23(a) and (b)(3).

> When deciding whether a requested class is to be certified, the court shall enter a written order addressing whether the factors required by this Code section for certification of a class have been met and specifying the findings of fact and conclusions of law on which the court has based its decision with regard to whether each such factor has been established. In so doing, the court may treat a factor as having been established if all parties to the action have so stipulated on the record.

O.C.G.A. §9-11-23(f)(3). "The party seeking to represent a class "bear[s] the burden of proving that class certification is appropriate." Georgia-Pac. Consumer Prod., LP v. Ratner, 295 Ga. 524, 525, 762 S.E.2d 419, 421 (2014) (citing Carnett's, Inc. v. Hammond, 279 Ga. 125, 127(3), 610 S.E.2d 529 (2005)).

Here, at the Jan. 24, 2018 class certification hearing, the parties through their respective counsel stipulated that this action satisfies the numerosity, commonality, and superiority factors. Thus, only the typicality, adequacy of the representation and predominance factors are disputed. Each are addressed below.

II. Plaintiffs' Motion for Class Certification

The Court finds Plaintiffs have satisfied each of the requisite factors for certification of this matter as a class action.

(1) Typicality

> Traditionally, commonality refers to the group characteristics of the class as a whole, while typicality refers to the individual characteristics of the named plaintiff in relation to the class." (Citation omitted.) Piazza v. Ebsco Indus., 273 F.3d 1341, 1346 (11th Cir.2001). "The typicality requirement under O.C.G.A. § 9–11–23(a) is satisfied upon a showing that the defendant" "committed the same unlawful acts in the same method against an entire class." (Citation and punctuation omitted.) Liberty

> Lending Svcs. v. Canada, 293 Ga. App. 731, 738(1)(b), 668 S.E.2d 3 (2008). Thus, "typicality measures whether a sufficient nexus exists between the claims of the named representatives and those of the class at large." (Citation and punctuation omitted.) Vega v. T–Mobile USA, 564 F.3d 1256, 1275 (11th Cir.2009). "A sufficient nexus is established if the claims or defenses of the class and the class representatives arise from the same event or pattern or practice and are based on the same legal theory." Kornberg v. Carnival Cruise Lines, 741 F.2d 1332, 1337 (11th Cir.1984).

Brenntag Mid S., Inc., 308 Ga. App. at 904.

Here, Plaintiffs' claims all arise from the same allegedly unlawful acts committed in the same method against the Proposed Class members, *i.e.,* issuance of allegedly deficient Offering Materials in connection with EndoChoice's IPO. The claims are predicated upon the same legal theories as the claims of the absent Proposed Class members, *e.g.,* strict liability for material misstatements or omissions in a registration statement under §§ 11 and 15 of the 1933 Act. Further, liability, if any, would be established through much of the same evidence for both Plaintiffs and the Proposed Class members. Thus, the Court finds the typicality requirement is satisfied.

(2) Adequacy of the representation by Plaintiffs

Pursuant to O.C.G.A. §9-11-23(a)(4), the representative parties must also "fairly and adequately protect the interests of the class." Georgia courts have repeatedly held, "[t]he important aspects of adequate representation are whether the plaintiffs' counsel is experienced and competent and whether plaintiffs' interests are antagonistic to those of the class." Brenntag Mid S., Inc., 308 Ga. App. at 905 (citing Liberty Lending Servs. v. Canada, 293 Ga. App. 731, 739(1)(c), 668 S.E.2d 3, 10 (2008)).

> The adequacy of representation prerequisite of Rule 23 requires that the class representatives have common interests with the non-representative class members and requires that the representatives demonstrate that they will vigorously prosecute the interests of the class through qualified counsel. [Piazza v. Ebsco Indus., Inc., 273 F.3d [1341, 1346 (11th Cir.

> 2001)]. Thus, the adequacy of representation analysis involves two inquiries: "(1) whether any substantial conflicts of interest exist between the representatives and the class, and (2) whether the representatives will adequately prosecute the action." Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1189 (11th Cir.2003) (quoting In re HealthSouth Corp. Securities Litig., 213 F.R.D. 447, 460–461 (N.D.Ala.2003)). The existence of minor conflicts alone are not sufficient to defeat a party's claim to class certification. Rather, "the conflict must be a 'fundamental' one going to the specific issues in controversy." Id.

In re Sci.-Atlanta, Inc. Sec. Litig., 571 F. Supp. 2d 1315, 1331 (N.D. Ga. 2007).[3]

Importantly, the adequacy requirement is intended to protect the legal rights of absent class members. Lewis v. Knology, Inc., 341 Ga. App. 86, 90, 799 S.E.2d 247, 250 (2017), reconsideration denied (Mar. 29, 2017), cert. denied (Sept. 13, 2017) ("Knology"). "Because all members of the class are bound by the res judicata effect of the judgment, a principal factor in determining the appropriateness of class certification is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class." Id. (citing London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1253(IV)(C) (11th Cir. 2003)).

Here, Plaintiffs' counsel's resumes establish the firms' respective experience litigating securities class actions and demonstrate counsel is qualified, competent and capable of litigating this action on behalf of the Proposed Class.[4] However, in opposing class certification, Defendants contend Plaintiffs are inadequate representatives because they do not have a significant financial interest in the litigation; are not sufficiently informed but rather are allowing counsel to lead the litigation; and have abandoned claims that other members of the Proposed

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[3] *See* Bickerstaff v. Suntrust Bank, 299 Ga. 459, 462, 788 S.E.2d 787, 791, cert. denied, 137 S. Ct. 571, 196 L. Ed. 2d 447 (2016) ("As we have previously noted, "[m]any provisions of O.C.G.A. § 9-11-23 were borrowed from Federal Rule of Civil Procedure 23, and for this reason, when Georgia courts interpret and apply O.C.G.A. §9-11-23, they commonly look to decisions of the federal courts interpreting and applying Rule 23") (citing Georgia–Pacific Consumer Products, LP v. Ratner, 295 Ga. 524, 525(1) n. 3, 762 S.E.2d 419 (2014)).

[4] *See* Aff. of Stephen J. Teti (May 26, 2017), Exhibits D and E.

Class could potentially pursue. The Court disagrees and finds Plaintiffs satisfy the adequacy requirement.

In challenging the adequacy of Plaintiffs' representation, Defendants rely heavily on the Court of Appeals of Georgia's recent decision in Knology, 341 Ga. App. 86. In Knology, a shareholder brought a putative class action against Knology and its directors for allegedly failing to disclose material information regarding a merger. The plaintiff initially filed suit in Delaware, asserting the Knology directors breached their fiduciary duties by approving the merger and failing to disclose material facts in a preliminary proxy statement. Shortly thereafter the majority of shareholders voted in favor of the merger. The plaintiff did not receive a proxy statement nor a ballot and, thus, was unable to vote because the shares of preferred stock she had initially purchased in 2001 were subject to a mandatory conversion to common stock in 2003. The plaintiff had failed to submit the requisite paperwork to convert the shares so she was not listed as a common stock holder after 2010. After the merger, the plaintiff dismissed the Delaware action, refiled it in Troup County and consolidated it with a previously pending putative class action, asserting claims for breach of fiduciary duty and failure to disclose and seeking damages and rescission of the merger. When a corporate co-plaintiff voluntarily dismissed its claims and withdrew from the consolidated action, the plaintiff was left as the sole class representative.

The trial court denied her motion for class certification, finding she was not an adequate class representative and that her claims were not typical of the proposed class. In affirming the trial court, the Court of Appeals of Georgia highlighted the extremity of the situation and how little the plaintiff knew of the action she purported to prosecute on behalf of a class. Specifically: she did not know anything about the Knology merger, any of the potential bidders, or the process by which the Knology directors negotiated the merger; she did not know that the Delaware

action had been dismissed or that a lawsuit had been filed on her behalf in Georgia; she had never heard of her Georgia counsel; she had not heard of co-lead plaintiff's counsel or of liaison counsel and was not familiar with the name of the actual law firm she had retained; she did nothing to research potential counsel before agreeing to the representation, had never met any of her attorneys prior to her deposition, and had done nothing to negotiate the legal fees for the putative class members; although one of the class claims was that the defendants had failed to disclose material facts in Knology's proxy statement, the plaintiff had never read the proxy statement and, thus, was not in a position to know whether it misrepresented or omitted any material information, and instead described her claim as premised on not receiving notice of the merger or payment for her shares; and she was not present at the class certification hearing. The appellate court determined the plaintiff "lack[ed] virtually any knowledge of the substance of the claims or the nature of the relief she s[ought] and ha[d] yielded control entirely to her counsel," and, thus, held there was no abuse of discretion in the trial court's decision to deny class certification. Id. at 91.

The Court finds Knology inapposite to the case at bar. While the Knology plaintiff had practically no knowledge whatsoever of the action she was purporting to pursue on behalf of shareholders, Plaintiffs, here, have demonstrated sufficient interest in and knowledge of the claims being asserted on behalf of the Proposed Class. Plaintiff Raczewski's testimony establishes he has met with counsel several times and communicated with them through phone conversations and emails prior to his deposition. He is a lay investor but has adequate knowledge of securities trading generally and his own trading strategy and is familiar with most of the attorneys representing him and his co-Plaintiff although he acknowledged his counsel has brought on other counsel to assist with the case. He reviewed Levi & Korsinsky's website before

contacting them and considered their geographic proximity to him as the primary factor driving his selection of counsel. He has read court documents, including the complaint and interrogatories, and can adequately articulate the parties (including the Proposed Class), and the basis of Plaintiffs claims (including misrepresentations concerning the Fuse system and Defendants' ability to sell them) as well as the relief sought. Further, he can adequately articulate his responsibilities in this action to the Proposed Class and Plaintiff Bauer.[5]

Plaintiff Jesse Bauer's deposition establishes he: has met with and spoken with his attorneys on multiple occasions; has reviewed pleadings, court documents filed on his behalf by counsel and the Court's order denying Defendants' Motion to Dismiss and has been available to provide input; has participated in discovery; researched EndoChoice before purchasing stocks and followed its performance after the purchase which ultimately led him to contact counsel regarding the initiation of this action; has adequate knowledge of the parties and the claims asserted; understands his role and responsibilities as a class representative, including representing the Proposed Class, "continu[ing] to be where [he] need[s] to be" and appearing at proceedings as needed, "continu[ing] to follow along with what [he is] sent as far as paperwork and continue to question anything that [he] feel[s] questionable", "keep in contact with [his] attorneys, Mr. Fredericks" and "whatever he sends [him], to follow through and answer questions."[6]

Although Defendants assert Plaintiffs have merely loaned their names to this lawsuit, both Plaintiffs testified they have communicated with counsel on numerous occasions regarding this case, including in person, over the phone, and through text and email. Both testified they've spent hours reading through court documents and discussing the case with counsel. Further,

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5 Kenneth T. Raczewski Depo., pp. 17-18, 23-24, 29-35, 36-44, 58-73, 79-85, 89-91, 93-98, 110-121.

6 Jesse Bauer Depo., pp. 11-18, 23-35, 38, 43-45, 50-52, 53-60, 67-75, 79-83, 94-99, 112-120, 127-130.

Plaintiff Raczewski testified he would "keep [counsel] on track" and Plaintiff Bauer swore that with respect to counsel he would "continue to question anything that [he] felt questionable." Notably, both Plaintiffs travelled from out of state, making themselves available to be deposed in Atlanta, Georgia, and Plaintiff Raczewski travelled from Connecticut to attend the class certification hearing.[7] Having considered the record and Plaintiffs' deposition testimonies, the Court is satisfied Plaintiffs' are competent, have an adequate understanding of this litigation, understand their responsibilities as class representatives and are committed to vigorously prosecuting the case on behalf of the Proposed Class through qualified counsel. Knology, 341 Ga. App. at 90; In re Sci.-Atlanta, Inc. Sec. Litig., 571 F. Supp. 2d at 1331.

Defendants also contend allowing Plaintiffs Raczewski and Bauer to represent the Proposed Class will be harmful to some class members because, in their Motion for Class Certification, Plaintiffs abandon any §12 claim and assert claims under §11 and §15 only. Defendants argue this will prejudice absent class members who purchased EndoChoice stock directly in the IPO (rather than in "aftermarket" trading on a securities exchange) and who consequently may assert a claim under §12(a)(2) of the 1933 Act.

However, such does not prejudice absent class members and is not a basis for denying class certification. First, it appears no member from the Proposed Class with standing to assert a §12(a)(2) claim has attempted to pursue such a claim on behalf of a class. Further, under Georgia law, class members will be provided notice of the class action and any potential class member who would be better served by proceeding under §12(a)(2) would have the option to opt out of the Proposed Class to pursue such claims separately. *See* O.C.G.A. §9-11-23(c)(2).

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[7] Although Plaintiff Bauer did not attend the class certification hearing, the Court is compelled to note the hearing was originally scheduled to take place on Jan. 17, 2018 but, due to inclement weather, the hearing was moved to Jan. 24, 2018.

Finally, to the extent Defendants contest whether Plaintiffs have a sufficient financial interest in this litigation to pursue vigorously claims on behalf of the Proposed Class, it is important to note the class action procedure has been adopted to address just such situations:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 2246, 138 L. Ed. 2d 689 (1997) (citing Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997).

Given the foregoing, the Court finds Plaintiffs and their counsel will adequately represent the Proposed Class in this action.

(3) Predominance test

A case may be maintained as a class action if "[t]he court finds that the questions of law or fact common to the members of the class ***predominate*** over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." O.C.G.A. §9-11-23(b)(3) (emphasis added). When assessing these factors, the Court should consider:

> (A) The interest of members of the class in individually controlling the prosecution or defense of separate actions;
> (B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> (C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) The difficulties likely to be encountered in the management of a class action.

O.C.G.A. §9-11-23(b)(3)(A)-(D). At issue, here, is whether the questions of law or fact common to members of the Proposed Class with regards to the claims asserted under §§ 11 and 15 of the 1933 Act predominate over questions affecting only individual members.

In considering whether common issues predominate over issues affecting only individual class members, the Court must consider the claims asserted. Pursuant to §11 of the 1933 Act:

> In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue [five categories of persons therein named].

APA Excelsior III L.P. v. Premiere Techs., Inc., 476 F.3d 1261, 1271 (11th Cir. 2007) ("APA Excelsior") (citing 15 U.S.C. §77k(a)). *See also* 15 U.S.C. §77o ("Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77l of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist"; setting forth the standard for §15 claims).

As summarized by the Eleventh Circuit in APA Excelsior:

> The statute creates a presumption that "any person acquiring such security" was legally harmed by the defective registration statement. *See, e.g., Kirkwood v. Taylor,* 590 F.Supp. 1375, 1378 (D.Minn.1984) ("[Section 11] in effect presumes that those who purchased stock in the public offering relied upon the allegedly misleading documents."), *aff'd,* 760 F.2d 272 (8th Cir.1985). **But, that presumption ends after an earnings statement which covers a period of at least twelve months after the effective date of the registration statement has become available.**

APA Excelsior, 476 F.3d at 1271 (emphasis added). *See* 2 Law Sec. Reg. § 7:20, *Liability for Misstatements and Omissions in the Registration Statement—Absence of Need to Prove Reliance*

in Section 11 Actions ("Without proof of plaintiff's actual knowledge of the misstatement or omission at time of purchase, there is a conclusive presumption of reliance for any person purchasing the security prior to the expiration of twelve months").

However, after an earnings statement is released covering a period of at least twelve months after the effective date of the registration statement, the presumption no longer applies. Thereafter, a purchaser seeking to assert a §11 claim must also demonstrate reliance upon the deficient registration statement.

> If such person acquired the security after the issuer has made generally available to its security holders **an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement**, then **the right of recovery** under this subsection shall be **conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission**, but such reliance may be established without proof of the reading of the registration statement by such person.

15 U.S.C. §77k (emphasis added).

For purposes of the foregoing provision, an "earning statement" made generally available to security holders is sufficient if:

> (1) There is included the information required for statements of income contained either:
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> (i) In Item 8 of Form 10–K (§ 239.310 of this chapter), part I, Item 1 of Form 10–Q (§ 240.308a of this chapter), or Rule 14a–3(b) (§240.14a–3(b) of this chapter) under the Securities Exchange Act of 1934;
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> (ii) In Item 17 of Form 20–F (§ 249.220f of this chapter), if appropriate; **or**
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> (iii) In Form 40–F (§ 249.240f of this chapter); **and**
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> (2) The information specified in the last paragraph of section 11(a) is contained in one report **or any combination of reports either**:

> (i) On Form 10–K, Form 10–Q, Form 8–K (§ 249.308 of this chapter), or in the annual report to security holders pursuant to Rule 14a–3 under the Securities Exchange Act of 1934 (§ 240.14a–3 of this chapter); or
>
> (ii) On Form 20–F, Form 40–F or Form 6–K (§ 249.306 of this chapter).

17 C.F.R. § 230.158(a) (emphasis added; footnotes omitted). Further, the "earning statement" contemplated under §11(a) is deemed to be "made generally available to its security holders" if the registrant: (1) is required to file the reports pursuant to §§ 13 or 15(d) of the Securities Exchange Act of 1934; (2) has filed its form reports with the Securities and Exchange Commission ("SEC") or supplied the SEC with copies of its annual report sent to security holders containing the relevant company information; or (3) a registrant may "use other methods" to make its earning statement "generally available to its security holders." 17 C.F.R. § 230.158(b).

Here, in the twelve months following the IPO, EndoChoice issued: an Annual Report on Form 10-K for the year ended Dec. 31, 2015 that was filed with the SEC on Mar. 21, 2016; a Quarterly Report on Form 10-Q for the quarterly period that ended on Mar. 31, 2016 and that was filed with the SEC on May 4, 2016; and a Quarterly Report on Form 10-Q for the quarterly period that ended on Jun. 30, 2016 and that was filed with the SEC on Aug. 3, 2016. These filings constitute an "earning statement" which triggers §11's reliance requirement. Thus, each absent class member who acquired his/her EndoChoice shares after Aug. 3, 2016 will have to separately prove, as an element of his/her §11 claim, that he/she relied upon the challenged statements in the Offering Materials when purchasing the shares.

Defendants argue such individualized consideration of class members' reliance forecloses a finding of predominance in this case if the Court accepts the Proposed Class as has been broadly defined by Plaintiffs; *i.e.*, "All those who purchased EndoChoice common stock

pursuant or traceable to EndoChoice's Offering Materials and who were damaged thereby."[8] Although the Court agrees that individualized reliance inquiries would predominate over the common facts and law at issue under Plaintiffs' broad class definition, the Court finds that, rather than denying class certification altogether, the more appropriate remedy is to narrow the Proposed Class temporally to those who purchased EndoChoice common stock prior to Aug. 3, 2016.

Defendants also urge that individualized inquiries relevant to their affirmative defenses will be necessary for some absent class members and that such inquiries will predominate over common issues of fact and law. Specifically, §11(a) provides for an affirmative defense if Defendants can "prove[] that at the time of...acquisition [the purchaser] knew of [the] untruth or omission" in EndoChoice's registration statement. *See* 15 U.S.C. §77k(a). *See also* In re Kosmos Energy Ltd. Sec. Litig., 299 F.R.D. 133, 152 (N.D. Tex. 2014) ("Because of its potential to defeat liability, investor knowledge is a relevant consideration during class certification...Defendants, of course, bear the burden of proof on this affirmative defense and, as such, must submit evidence showing the existence of individual investor knowledge sufficient to preclude a finding by the Court that "common liability issues predominate over individual knowledge issues") (citations omitted); In re IndyMac Mortg.-Backed Sec. Litig., 286 F.R.D. 226, 238 (S.D.N.Y. 2012) ("In order to defeat predominance on this basis, defendants must provide evidence that certain class members had differing levels of knowledge regarding the misleading nature of the statements or omissions when they invested sufficient to outweigh common issues").

Here, the Court finds Defendants have not sufficiently shown the existence of individual investor knowledge such as would preclude a finding that common class issues predominate.

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[8] Consolidated Class Action Complaint, ¶134.

Although Defendants point to certain "corrective disclosures" as cited in the Consolidated Class Action Complaint, it is far from clear the extent to which those disclosures were disseminated in the public market and accessed by EndoChoice stockholders and whether knowledge of the alleged "untruths or omissions" in EndoChoice's registration statement can be imputed therefrom.

For example, one such disclosure related to a third quarter earnings call that took place on Nov. 5, 2011 at which EndoChoice's third quarter 2015 financial results were discussed, including a noted decline in units sold. EndoChoice participants included Nick Laudico, Mark Gilreath (Founder and CEO) and David Gill (CFO) and analysts from JP Morgan, Bank of America Merrill Lynch, Stifel, and William Blair. Although a transcript of the call was produced by Bloomberg, it is unclear whether, how, when and to what extent the transcript was publically disseminated. Moreover, a review of the transcript itself indicates, a decline in Fuse system sales and gross margin notwithstanding, EndoChoice remained very positive regarding EndoChoice's performance and prospects:

> **[Mark Gilreath]**
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> .... We're very pleased overall with our revenue performance, increased operating leverage and adjusted EBITDA, and cash management for the third quarter. Total revenue was up to $18.4 million, that's 30% year-over-year or 32% on a constant currency basis. Imaging revenue was up 148% year-over-year with Fuse units of 425% from Q3, 2014.
>
> We shipped 21 Fuse systems in the quarter bringing our total installed base to 104 units, as Fuse continues to regularly win head-to-head against the larger competitors in the marketplace...We continue to grow the customer base with more than 2,600 customers buying our products across the United States and we've made good progress over the past year expanding our Fuse installed base. Now, after a year from launch, approximately 50% of our sales territories have installed Fuse systems...
>
> Another important factor that will drive accelerating Fuse adoption is sales rep tenure, which leads to improve productivity. As you may recall from

> our IPO road show, we proactively top graded over 50% of our sales force during the second half of 2014 in order to cultivate a high-caliber sales force, capable of demonstrating the advantages of Fuse and the entire product portfolio to physicians. Many of these hires are just now reaching an inflection point in their tenure in terms of product knowledge, productivity and relationship development with the key physicians in their territories. So to summarize, we believe that we will drive increased market share gains in 2016. As we experience the benefit from a growing number of reference sites, a broader domestic installed base and a more tenured sales force…
>
> **[David Neil Gill]**
>
> I'll begin with a review of our third quarter financial results. Total revenue in the third quarter of 2015 was $18.4 million, up 30% year-over-year compared to $14.2 million in the third quarter of 2014.
>
> On a constant currency basis, revenue growth in the third quarter was 32%. Imaging revenue was up 140% year-over-year and Fuse units were up 425% compared to the third quarter of 2014. We now have a global installed base of 104 systems, crossing over the 100 system milestone in the third quarter, as expected.
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> While we are pleased with the Fuse competitive wins that Mark mentioned earlier, our third quarter revenue was impacted by normal capital equipment lumpiness, driven by seasonality where summer vacations influenced purchase and committee attendance and impacted timing and capital equipment orders.
>
> However, we continue to be encouraged by our broadening pipeline of leads where purchasing decisions are expected over the next few quarters. Building a strong pipeline of sales opportunities is one of our highest priorities as it is the best way to buffer against seasonality and the natural ebb and flow of CapEx orders. At the end of Q3, we are tracking over 200 sales opportunities for more than 400 systems. So, we are making good progress building our deal funnel. We're pleased to note that during the third quarter we maintained good pricing on Fuse units as our ASP was essentially unchanged from the second quarter…

Knowledge of the alleged "untruths or omissions" in EndoChoice's Offering Materials can hardly be imputed from such disclosures.

Defendants also cite EndoChoice's fourth quarter earnings call which took place on Mar. 3, 2016. EndoChoice participants, again, included Mr. Laudico, Mr. Gilreath and Mr.Gill and

analysts from JP Morgan, Bank of America Merrill Lynch, Stifel, and William Blair, as well as an unidentified "private investor." Again, EndoChoice officers strongly touted the successes and plans of the company:

> **[Mark Gilreath]**
>
> 2015 was a very important year of growth and development for EndoChoice. Our total revenue increased 20% in constant currency to $72.3 million, driven by our innovative products and services and our unique value preposition as the only company with a platform approach in the GI market. Our results for the year highlight the strength of this approach with growth balanced across each of the three business categories: Imaging, Pathology and Single-Use Products…
>
> The key near-term drivers across each of our business categories include the expansion and optimization of our sales force, enhancements to the Fuse system, the launch of new Single-Use Products and the addition of unique services to our Pathology business…Starting with Imaging, our Fuse Full Spectrum Endoscopy system had a solid year of growth with increased adoption driven by head-to-head competitive wins against the larger players. We achieved 49% growth year-over-year. Revenue growth has a continued – as we continue to earn market share. For the full year 2015, we shipped 99 Fuse systems, representing a 116% growth when compared to 2014.
>
> And we exited the year with a global installed base of 123 systems compared to our installed base of 42 systems at the beginning of the year. From a competitive standpoint, 64% of our fourth quarter Fuse deals were wins against Olympus and 18% were wins against Fuji with the rest related to new construction. These data points give us confidence in our long-term ability to grow market share.
>
> We also made significant enhancements in Fuse during 2015, which we believe contributed to our growth. Our Generation 2 system was launched in April 2015, bringing major improvements to image quality and the Gen 2 system also provided improvements in scope reliability, significantly reducing repair frequencies. We're committed to maintaining and building upon our culture of rapid innovation as a key driver of our differentiation from the competition…
>
> Moving on to a broader discussion of the sales force, we've made significant headway in our optimization efforts to improve the breadth and quality of our sales organization during the year. Following our significant top grading efforts in 2014, we continue to make improvements to our

> sales force in 2015, retaining our best performers while adding experienced capital sales reps in additional territories. We believe this optimization has cultivated a very high caliber team, which is far more capable in demonstrating the advantages of Fuse and the entire product portfolio through physicians and administrators in the C-suite…

A first quarter 2016 earnings call that took place on May 4, 2016 and a second quarter 2016 earnings call that took place on Aug. 3, 2016, which included Mr. Gilreath and Mr. Gill of EndoChoice as well as analysts from JP Morgan, Stifel, William Blair, and Bank of America Merrill Lynch, again, couch financial disclosures in terms of positive reports and expectations of increased Fuse system sales, increases in the installed base of Fuse systems worldwide, strategic growth and improvements in the sales force and increased productivity of tenured sales force representatives.

In short, although the "corrective disclosures" cited include information regarding stalled or less than anticipated growth and sales which may have negatively impacted public trading, Defendants have not shown broad knowledge of the alleged wrongful conduct regarding the Offering Materials existed throughout the community of market participants that would precipitate individual inquiries as to the knowledge of each member of the class and, thus, defeat the predominance of common issues.

Moreover, the claims of the Proposed Class arise out of the same Offering Materials and allegations of materials misrepresentations and omissions therein and are premised on the same theories of liability for violations of §§ 11 and 15 of the 1933 Act. The central issues to be adjudicated are subject to class-wide proof to establish liability as to each class members' claims. The Court finds these common issues of fact and law predominate over class members' individualized issues. *See* Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248, 1261 (11th Cir. 2003), aff'd sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 125 S. Ct.

2611, 162 L. Ed. 2d 502 (2005) (citing In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 139 (2d Cir.2001)) ("[N]umerous courts have recognized that the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate").

CONCLUSION

Given all of the above, the Court finds Plaintiffs have satisfied all of the requirements under Georgia law and specifically O.C.G.A. §9-11-23 to maintain this suit as a class action and none of the issues raised in the EndoChoice Defendants' and Underwriter Defendants' opposition briefs or arguments provide a basis for denying class certification outright. Accordingly, the Court hereby GRANTS Plaintiffs' Motion for Class Certification but temporally narrows the certified class to include only all those who purchased EndoChoice common stock through Aug. 3, 2016.

SO ORDERED this 14 day of February, 2018.

JUDGE JOHN J. GOGER *on behalf of*
SENIOR JUDGE ELIZABETH E. LONG
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

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