UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE HEALTH INSURANCE INNOVATIONS SECURITIES LITIGATION	Case No.: 8:17-cv-02186-TPB-SPF (**Consolidated**)

LEAD PLAINTIFF'S MOTION TO CERTIFY THE CLASS, APPOINT CLASS REPRESENTATIVE AND CLASS COUNSEL; MEMORANDUM OF LAW

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I. INTRODUCTION

Lead Plaintiff Robert Rector hereby moves this Court, pursuant to Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") to certify a class consisting of:

> All persons and entities who purchased or otherwise acquired Health Insurance Innovations, Inc. ("HIIQ") common stock between August 4, 2017, and September 11, 2017, inclusive (the "Class Period"). Excluded from the class are Defendants, directors, and officers of Health Insurance Innovations, Inc. as well as their families and affiliates.[1]

Lead Plaintiff also moves the Court for an Order: (a) appointing Lead Plaintiff as Class Representative; and (b) appointing the law firm of Kahn Swick & Foti, LLC ("Kahn Swick" or "KSF") as Class Counsel, and George Gesten McDonald, PLLC as liaison counsel for the class. *See* §IV.D., *infra*. KSF is a national law firm focused predominantly on securities class actions. *See* Abadou Decl., Ex. A.[2]

This is a securities class action brought against Health Insurance Innovations, Inc. ("HIIQ" or the "Company") and its Chief Financial Officer Michael D. Hershberger for violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 promulgated thereunder by the U.S. Securities and Exchange Commission ("SEC"), 17 C.F.R. § 240.10b-5, during the proposed class period of August 4, 2017, and September 11, 2017, inclusive (the "Class Period").

As set forth herein, this securities class action presents a straightforward case for class certification. *See Halliburton Co. v. Erica P. John Fund, Inc*., 573 U.S. 258 (2014) ("*Halliburton II*"); *Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp*., 762 F.3d

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[1] "Defendants" refers collectively to Health Insurance Innovations, Inc. ("HIIQ" or the "Company") and Michael D. Hershberger.

[2] "Abadou Decl., Ex. __" refers to the Declaration of Ramzi Abadou and Index of Exhibits in Support of Lead Plaintiff's Motion for Class Certification and to Appoint Class Representatives and Class Counsel, which is contemporaneously submitted herewith, and its corresponding exhibits.

1248, 1255 (11th Cir. 2014). It satisfies the four requirements for class certification established by Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. *See* §IV.B., *infra*. Further, this action satisfies the two requirements for certification under Rule 23(b)(3): predominance of common questions of law or fact, and superiority of a class over other available methods for adjudication. *See* §IV.C., *infra*. This securities action is ideally suited for class certification because of the predominance of common issues of fact and the impracticability of bringing individual actions to redress a common wrong. *See In re HealthSouth Corp. Sec. Litig*. ("*HealthSouth I*"), 257 F.R.D. 260, 284 (N.D. Ala. 2009) ("[T]he class-action device also provides a key to the courthouse for parties with legitimate claims whose access to justice may be slammed shut because the individual amounts of their claims make it economically infeasible to pursue them on an individual basis.").

Indeed, the Supreme Court has repeatedly recognized that "[p]redominance is a test readily met in certain cases alleging" violations of the federal securities laws. *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997). Similarly, "[t]he Eleventh Circuit has explicitly recognized that securities class actions serve both the public interest in maintaining the integrity of the securities markets and the private interests of investors who would not otherwise obtain redress of grievances through a multiplicity of small individual damage suits." *In re Theragenics Corp. Sec. Litig*., 205 F.R.D. 687, 693-94 (N.D. Ga. 2002). Ultimately, "securities fraud claims arising from public misstatements are particularly suitable for class action litigation." *Thorpe v. Walter Inv. Mgmt., Corp*., 2016 U.S. Dist. LEXIS 33637, at *48 (S.D. Fla. 2016). Accordingly, and for all the reasons set forth herein, Lead Plaintiff's motion for class certification should be granted. *See Monroe Cty. Employees' Ret. Sys. v. S. Co*., 2019 U.S. Dist. LEXIS 142630, at *76 (N.D. Ga. 2019).

II. STATEMENT OF FACTS

HIIQ develops and administers health insurance products (*i.e.* short-term medical plans) that do not provide the essential benefits (such as coverage of pre-existing conditions) required by the 2010 Affordable Care Act ("ACA"). *See* Consolidated Class Action Complaint for Violation of Federal Securities Law ("Consolidated Complaint" or "CC"), ECF No. 43 at ¶¶59-61; *see also* Second Amended Answer to Consolidated Complaint ("SAA"), ECF No. 90 at ¶60. The company targets "new graduates, divorcees, early retirees, military discharges, the unemployed" and other individuals who cannot afford ACA-compliant health insurance. CC at ¶59. HIIQ's distribution network includes websites and call centers that sell insurance products that are underwritten by insurance companies. SAA at ¶60.

For the past several years, the Company has faced acute public scrutiny regarding its relationships with its third-party call centers, as both consumers and state regulators alleged that call center agents made false or deceptive representations in order to sell HIIQ's short-term insurance policies. *In re Health Ins. Innovations Sec. Litig.*, 2019 U.S. Dist. LEXIS 141591, at *4 (M.D. Fla. 2019). In March 2016, the Company was issued a temporary cease-and-desist order from the Arkansas Insurance Department based on the company's "fraudulent and dishonest practices in attempting to sell short-term health care plans." *Id.* at *5. On May 9, 2016, the Office of the Montana State Auditor, Commissioner of Securities & Insurance filed an action against the Company for routinely selling insurance policies through misinformation and deception and suspended its insurance license. *Id*. On June 8, 2016, Indiana's Commissioner of Insurance announced that it was issuing an examination warrant on behalf of itself, the National Association of Insurance Commissioners ("NAIC") and ***thirty-three other states*** to investigate the Company's "sales, marketing and administration of short term medical plans and ACA plans. . ." CC at ¶72.

On March 6, 2017, Indiana issued a modified examination warrant to include "all insurance carriers, agencies, sub-agencies, agents, sub-agents, producers, contractors and other parties with whom HII conducted business." CC at ¶76. A few days after Indiana issued the modified warrant, the Company filed a Final Prospectus on Form 424B3 with the SEC, which allowed its founder, Michael Kosloske, to sell three million shares (nearly half of his total holdings), and pocket $40 million. CC at ¶126.

In the meantime, the Company had yet to obtain a license to act as a third-party administrator in its home state of Florida, even though its licensure in other jurisdictions required a home state license. SAA at ¶64; *id.* at 79; CC at ¶107. The Company waited until July of 2016 to apply for a TPA license in Florida (*see* SAA at ¶64)—only after compliance problems in Arkansas, Montana, Indiana and other states threatened its survival. HIIQ submitted its Third-Party Administrator ("TPA") application to Florida's Office of Insurance Regulation ("FLOIR" or "FOIR") on or around July 18, 2016. CC at ¶13.

Defendants admit that a week later, on July 25, 2016, FLOIR rejected the application for being incomplete. SAA at ¶13. The Company reapplied on October 28, 2016, but then missed a deadline to provide additional information to FLOIR by December 12, 2016. SAA at ¶80. On December 16, 2016, the Company withdrew its application. SAA at ¶16. FLOIR warned the same day that "until HIIQ's application has been approved by FOIR and the appropriate licensure issued, HIIQ should not transact business that requires such license in Florida." *Health Ins. Innovations*, 2019 U.S. Dist. LEXIS 141591, at *8. The Company did not disclose ***any of this*** to investors at the time. CC at ¶80.

The Company refiled its TPA Application with FLOIR on April 19, 2017 (SAA at ¶82), just outside the 60-day window during which it could have reapplied without submitting new

paperwork or fees (CC at ¶22). On June 1, 2017, the FLOIR privately notified the company that its application was denied, based on FLOIR's conclusions that HIIQ's application "contained numerous, material errors and omissions" and that HIIQ was "not competent." CC at ¶24-25; SAA at ¶¶24-25. In a June 16, 2017, letter to FLOIR, HIIQ complained that the denial of its application would require it to report this event to the other states in which it operated, triggering a "domino effect" which could result in its losing licenses in the other states where it operated. SAA at ¶27.

On August 4, 2017, more than two months later, the Company finally disclosed that FLOIR had denied the TPA Application. SAA at ¶28. However, that disclosure was itself materially misleading because it failed to reveal to investors the potentially devastating reasons the application was denied, and "conveyed a false impression to the public by suggesting that FOIR may not require HIIQ to hold a TPA license." *Health Ins. Innovations*, 2019 U.S. Dist. LEXIS 141591, at *52-57. To the contrary, on September 1, 2017, Defendant Hershberger, who had signed the 2Q17 Report disclosing the denial by FLOIR just weeks earlier, personally executed a "Declaration and Certification" under penalty of perjury with the Illinois Department of Insurance misrepresenting that the Company had never been "refused" a TPA license, and that a "license to act as such" had never been denied "in any state." *Id.* at *14. Meanwhile, Defendant Hershberger (who had established a 10b5-1 trading plan in November 2016) had also sold 17,769 shares of HIIQ common stock over a two-day span between August 31 and September 1, 2017, personally receiving $558,384 in proceeds. *Id.* at *85; *see also* SAA at ¶¶117, 121.

Finally, on September 11, 2017, a whistleblower report about HIIQ was published on *Seeking Alpha* publicly revealing, *inter alia*, "the previously undisclosed reasons for FOIR's denial." *Health Ins. Innovations*, 2019 U.S. Dist. LEXIS 141591, at *105. Upon the release of this and related news, the Company's share price fell $6.55 per share, from a closing price of $29.90

per share on September 8, 2017, to a close at $23.35 per share on September 11, 2017, on massive volume of 9,454,117 shares traded that day – a drop of approximately 21.91%. *See* Expert Report of Zachary Nye, Ph.D. Ex. 3B (hereinafter "Nye Rpt.") filed as Abadou Decl. Ex. B. As the market continued to digest the negative news the following day, the Company's share price fell an additional 15.4% on September 12, 2017, again on massive trading volume. *Id.*

III. PROCEDURAL HISTORY

This lawsuit was first filed in this District on September 21, 2017. ECF No. 1. Two other lawsuits, which were filed in the Southern and Eastern Districts of New York, were subsequently transferred and consolidated with this one. ECF No. 37. On February 6, 2018, Robert Rector was appointed Lead Plaintiff of this consolidated case. ECF No. 42. On March 23, 2018, he filed the Consolidated Complaint. ECF No. 43. Defendants filed their motion to dismiss on May 7, 2018. ECF No. 53. On April 24, 2019, and May 22, 2019, the parties engaged in court-ordered mediation before the Honorable Christopher P. Tuite. *See* ECF Nos. 71 & 74. On June 28, 2019, the Court issued its 83-page order on Defendants' Motion to Dismiss, denying Defendants' motion in part. *See* ECF No. 76; *Health Ins. Innovations*, 2019 U.S. Dist. LEXIS 141591.

Judge Kovachevich's June 28 Order recognized that the Company's statements contained in its (i) Third Quarter 2016 Report, (ii) press release of March 2017, and (iii) Second Quarter 2017 Report were materially misleading. *See Health Ins. Innovations*, 2019 U.S. Dist. LEXIS 141591, at *33, *39, *55-57.[3] The Court also found that the Complaint's allegations "demonstrate a strong inference that [Defendant Michael] Hershberger acted with the requisite state of mind with respect to each act or omission alleged to violate the Exchange Act." *Id.* at *86. Finally, the Court found that the Complaint alleged loss causation with respect to statements made in the 2Q17

[3] Defendants filed these publications with the SEC on Form 10-Q, Form 8-K, and Form 10-Q, respectively.

Quarterly Report regarding the reasons that the TPA license was denied, the truth of which was revealed in an article posted on *SeekingAlpha.com* on September 11, 2017. *Id.* at *106-107.

Following that order, this matter was reassigned from Judge Kovachevich to the Honorable Thomas P. Barber. ECF No. 79. Defendants filed their Answer on August 13, 2019. ECF No. 81. On August 22, 2019, the Court entered a scheduling order, directing Plaintiff to file his motion for class certification by November 15, 2019. ECF No. 83. On September 3, 2019, the parties exchanged initial disclosures and Defendants' new counsel filed an Amended Answer. ECF No. 85. Defendants filed their Second Amended Answer on October 11, 2019. ECF No. 90. Discovery is ongoing.

IV. ARGUMENT

A. The Standard for Class Certification

"For a district court to certify a class action, the named plaintiffs must have standing, and the putative class must meet each of the requirements specified in Federal Rule of Civil Procedure 23(a), as well as at least one of the requirements set forth in Rule 23(b)."[4] *Klay v. Humana, Inc*., 382 F.3d 1241, 1250 (11th Cir. 2004). Federal Rule of Civil Procedure 23(a) requires a putative class plaintiff "to satisfy four criteria before a class may be certified: numerosity, commonality, typicality, and adequacy." *Dickens v. GC Servs. Ltd. P'ship*, 706 F. App'x 529, 534 (11th Cir. 2017).[5] After satisfying these four elements, Lead Plaintiff must fulfill one of the sub-categories of Rule 23(b). *See Klay*, 382 F.3d at 1250. Here, Rule 23(b)(3) applies, "which states that a class action may be certified if 'the court finds that the questions of law or fact common to the members

[4] Lead Plaintiff has standing to bring this case based on the losses he suffered associated with his purchases of the Company's common stock during the Class Period. *See* ECF No. 20-1.

[5] Mr. Rector has previously made a preliminary showing of his adequacy and typicality in his successful effort to be appointed Lead Plaintiff in this matter. *See* ECF No. 42 at 5-7 (concluding, in pertinent part, "Based on the foregoing, the Court finds that Rector has satisfied the requirements in order to be appointed lead plaintiff under the PSLRA … and he meets Rule 23's typicality and adequacy requirements." *Id*. at 7.).

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.'" *Id.* at 1251 (quoting Rule 23).

Lead Plaintiff has the burden of meeting Rule 23's requirements, but does not have to show that he will ultimately prevail on the merits of his claims. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013) ("Merits questions may be considered to the extent—***but only to the extent***—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."). As demonstrated below, Lead Plaintiff satisfies the four prerequisites of Rule 23(a). He also satisfies Rule 23(b)(3)'s two requirements that: (i) common questions of law and fact predominate; and (ii) a class action is superior to alternatives for the fair and efficient adjudication of Defendants' alleged violations of the federal securities laws. Accordingly, class certification is justified here. *See Kirkpatrick v. J.C. Bradford & Co*., 827 F.2d 718, 727 (11th Cir. 1987) ("[T]he financial incentives offered by the class suit serve both the public interests in the private enforcement of various regulatory schemes, particularly those governing the securities markets, and the private interests of the class members in obtaining redress of legal grievances that might not feasibly be remedied within the framework of a multiplicity of small individual suits for damages.").

B. Lead Plaintiff Satisfies the Requirements of Rule 23(a)

1. The Class is Numerous

Rule 23(a) requires the proposed class to be so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). "Practicability of joinder depends on many factors, including, for example, the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion." *Kilgo v.*

Bowman Transp., Inc., 789 F.2d 859, 878 (11th Cir. 1986) (certifying class of "at least thirty-one individual class members").

"The numerosity requirement is generally assumed to have been met in class action suits involving nationally traded securities." *S. Co*., 2019 U.S. Dist. LEXIS 142630, at *13; *see also Thorpe.,* 2016 U.S. Dist. LEXIS 33637, at *16 (certifying securities class of "potentially hundreds to thousands of members of the putative class" and where "the average trading volume per week of [the stock] during the Class Period was 3.13 million shares.").Here, HIIQ's average number of shares outstanding during the Class Period was 12.6 million. Nye Rpt. at ¶24. The average weekly trading volume was over 2.9 million shares. *Id*. The class consists of "hundreds if not thousands of persons." CC at ¶143. Accordingly, the class is sufficiently numerous.

2. Common Questions of Law and Fact Exist

Rule 23(a)(2) requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The threshold for commonality is low. "The Eleventh Circuit has noted that the Rule 23(a)(2) commonality requirement is a 'low hurdle,' which can even be satisfied by a single common question." *Thorpe,* 2016 U.S. Dist. LEXIS 33637, at *17. "Generally, where plaintiffs allege that the action is a result of a unified scheme to defraud investors, the element of commonality is met." *In re NetBank, Inc*., 259 F.R.D. 656, 664 (N.D. Ga. 2009) (collecting cases).

The proposed Class satisfies Rule 23(a)'s commonality requirement. Lead Plaintiff alleges Defendants made misleading statements to investors via their filings with the SEC. Their material misrepresentations and omissions injured each Class member who acquired HIIQ common stock during the Class Period. Common questions of law or fact include whether: (i) Defendants violated the Exchange Act; (ii) Defendants omitted and/or misrepresented material facts; (iii) Defendants knew or recklessly disregarded that their statements were false and misleading; (iv) the price of

HIIQ securities was artificially inflated during the Class Period; as well as (v) the extent and appropriate measure of damage sustained by Class members. CC at ¶¶51-57.

Such "allegations arising from a fraudulent scheme illustrate the kind of common questions of law and fact anticipated by the commonality requirement." *HealthSouth I*, 257 F.R.D. at 274. Indeed, Defendants admit that whether (i) they violated the federal securities laws with their August 4, 2017, statements, (ii) the August 4, 2017, statement was a misrepresentation of material fact, (iii) the price of HIIQ's common stock was artificially inflated, (iv) there is a common formula or method for measuring damages sustained by putative Class members, and (v) whether Hershberger is liable under Section 20(a) as a "control person" are all questions common to all putative Class members. *See* Abadou Decl. Ex. C (RFA Excerpts 2-4).[6]

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

"Typicality measures whether a sufficient nexus exists between the claims of the named representatives and those of the class at large." *Wooden v. Bd. of Regents of the Univ. Sys*., 247 F.3d 1262, 1287 (11th Cir. 2001). "A sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines, Inc*., 741 F.2d 1332, 1337 (11th Cir. 1984). "Typicality, however, does not require identical claims or defenses." *Id.* "The typicality requirement may be satisfied despite substantial factual differences . . . when there is a strong similarity of legal theories." *Local 703*, 762 F.3d at 1259.

Lead Plaintiff Robert Rector's claims are typical of, if not identical to, the claims of the other class members. Defendants are alleged to have violated Sections 10(b) and 20(a) of the Exchange Act by making statements that misrepresented and omitted material facts about the

[6] "RFA" refers to The Remaining Defendants' Responses and Objections to Lead Plaintiff's First Set of Requests for Admissions.

Company's ability to obtain a license to operate in its home state. Lead Plaintiff's claims (like those of the Class) involve the same security (HIIQ common stock), are based on the same facts and legal theories, and will be proven with the same evidence. *Thorpe*., 2016 U.S. Dist. LEXIS 33637, at *20 (typicality met in securities case where "[t]he alleged fraudulent statements comprise the wrongful acts which will serve as the same factual predicate for Plaintiffs and all members of the class and which will determine whether Defendants are liable under the same securities fraud theories."). *See also* ECF Nos. 20-1 and 20-2 (establishing Mr. Rector's Class Period transactions in the Company's common stock and estimated losses, respectively).

4. Lead Plaintiff is an Adequate Representative

The adequacy of representation requirement of Rule 23(a)(4) requires a movant to show that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Adequacy analysis requires 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." *Dickens v. GC Servs. Ltd. P'ship*, 706 F. App'x 529, 535 (11th Cir. 2017). "[M]inor conflicts alone are insufficient to deem a representative inadequate." *Id.* at 536. "In securities cases, where the class is represented by competent counsel, class certification should not be denied . . . unless their participation is so minimal that they virtually have abdicated to their attorneys the conduct of the case." *Cheney v. Cyberguard Corp*., 213 F.R.D. 484, 495 (S.D. Fla. 2003) (citing *Kirkpatrick*, 827 F.2d at 728).

Here, Lead Plaintiff purchased HIIQ common stock during the Class Period, and sustained damages in the same fashion due to the same alleged material misrepresentations and omissions that harmed other Class members. *See* ECF No. 20-1 (Lead Plaintiff's PSLRA certification); *see also Thorpe*, 2016 U.S. Dist. LEXIS 33637, at *28 (finding lead plaintiffs adequate because "the

overriding aim of the Plaintiffs and the class will be to prove liability by, in part, establishing the materiality of the alleged misstatements and that they were made with scienter.").

Lead Plaintiff's willingness and ability to take an active role and control the litigation on behalf of the absent Class Members is established through his certification, showing he: (i) understands a class representative's requirements and responsibilities under the PSLRA; and (ii) shall provide testimony at deposition and trial, if necessary. *See* ECF No. 20-1. Lead Plaintiff has and will continue to vigorously prosecute the claims of other Class members. Lead Plaintiff's adequacy is further underscored by his retention of KSF, which is highly experienced in prosecuting securities class actions. *See* Abadou Decl. Ex. A.

Lead Plaintiff, through Lead Counsel, has vigorously prosecuted this action since 2017 by thoroughly researching the case through public records requests to several jurisdictions, filing the Complaint, reviewing pleadings, and pursuing discovery from parties and non-parties and responding to Defendants' discovery requests. Lead Plaintiff's chosen counsel will also continue to vigorously represent all Class members' interests. Accordingly, Lead Plaintiff is an adequate representative of the class.

C. This Case Meets the Requirements of Rule 23(b)(3)

Rule 23(b)(3) requires that: (i) "the questions of law or fact common to class members predominate over any questions affecting only individual members"; and (ii) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

1. Common Questions of Law and Fact Predominate

"Predominance is a test readily met in certain cases alleging consumer or securities fraud [claims]." *Amchem*, 521 U.S. at 625; *see also S. Co.*, 2019 U.S. Dist. LEXIS 142630, at *21 (same).

The predominance requirement does ***not*** require a plaintiff to prove that "each element of her claim is susceptible to classwide proof.'" *Amgen*, 568 U.S. at 469.

Lead Plaintiff brings securities fraud claims under §§10(b) and 20(a) of the Exchange Act. To prevail, he 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." *Amgen*, 568 U.S. at 460-61. The elements of materiality, scienter, and loss causation are all subject to class-wide proof. *Id*. at 475 ("This Court has held that loss causation and the falsity or misleading nature of the defendant's alleged statements or omissions are common questions that need not be adjudicated before a class is certified."). Thus, "[w]hether common questions of law or fact predominate in a securities fraud action often turns on the element of reliance." *Local 703*, 762 F.3d at 1253. "This case is no exception." *Id.*

Reliance is often subject to class-wide proof as plaintiffs "can in certain circumstances satisfy the reliance element of a Rule 10b-5 action by invoking a rebuttable presumption of reliance." *Halliburton II*, 573 U.S. at 268.[7] As discussed below, the putative class is entitled to the Class-wide presumption of reliance first enunciated by the Supreme Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) and reaffirmed in *Halliburton II*. Finally, damages will be determined on a Class-wide basis using the same formula and measure of artificial inflation for all Class members. Nye Rpt. at ¶¶57-63.

[7] "[T]he typical 'investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price'—the belief that it reflects all public, material information. As a result, whenever the investor buys or sells stock at the market price, his 'reliance on any public material misrepresentations . . . may be presumed for purposes of a Rule 10b-5 action." *Id.* (quoting *Basic*, 485 U.S. at 247).

2. The Class is Entitled to the Fraud-on-the-Market Presumption of Reliance

Class-wide reliance is established in this case, as in most securities fraud class actions, through the fraud-on-the-market ("FOTM") presumption adopted in *Basic*, 485 U.S. 224. In an efficient market, "the market price of shares traded on well-developed markets reflects all publicly available information" and investors in such markets transact "in reliance on the integrity of that price." *Id.* at 246-47. The FOTM presumption negates the requirement that each Class member prove individual reliance on Defendants' alleged misstatements or omissions. *Id*. at 241-42. "Because an informationally efficient market rapidly and efficiently translates public information into the security's price, the market price will reflect the defendant's fraudulent statement, and everyone who relies on the market price as a reflection of the stock's value in effect relies on the defendant's misrepresentation." *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1310 (11th Cir. 2011).

To invoke this presumption, a plaintiff must show "(1) that the alleged misrepresentations were publicly known, (2) that they were material, (3) that the stock traded in an efficient market, and (4) that the plaintiff traded the stock between the time the misrepresentations were made and when the truth was revealed." *Halliburton II*, 573 U.S. at 268. These standards are easily met here.

First, there is no dispute that the alleged misrepresentations and omissions in this case were made as public statements to investors and the marketplace in the form of a Quarterly Report filed with the SEC on Form 10-Q. SAA at ¶105. Second, while materiality must be shown at trial, such "proof is not a prerequisite to class certification" in order to invoke the FOTM presumption. *Amgen*, 568 U.S. at 459. Third, Lead Plaintiff purchased HIIQ common stock between the time when the alleged material misstatements and omissions were made and the end of the Class Period

when the truth was revealed. ECF No. 20-1. Further, as set forth in detail below, the market for HIIQ common stock was efficient at all relevant times.

3. HIIQ's Stock Traded in an Efficient Market

While the Eleventh Circuit has "not adopted any sort of mandatory analytical framework" for evaluating market efficiency, it has defined some features of an efficient market: "high-volume trading activity facilitated by people who analyze information about the stock or who make trades based upon that information." *Local 703*, 762 F.3d at 1255. Additionally, it has recognized that "eligib[ility] to file an SEC Form S-3"and "the presence of institutional investors can contribute to a market efficiency finding."[8] *Id.* at 1258. While there is no "*per se* rule that stocks trading on a national exchange always trade on efficient markets," whether a stock "trad[es] on a national exchange may be relevant to the inquiry." *Id.* at 1257. And though the Eleventh Circuit focuses on the above, it also held that the factors discussed in *Cammer v. Bloom* (711 F. Supp. 1264 (D.N.J. 1989)) can be "useful." *Local 703*, 762 F.3d at 1255. These factors are: (1) high average trading volume during the class period; (2) a significant number of analysts following the stock; (3) numerous market makers who react quickly to, and trade based upon, new information about the company; (4) entitlement to file a Securities and Exchange Commission (SEC) Form S—3, which has minimum stock and trading requirements; and (5) empirical facts showing a cause and effect relationship between unexpected corporate events and an immediate response in the stock price. *Cammer*, 711 F. Supp. at 1286-87.

Some courts in the Eleventh Circuit have also considered factors identified in *Krogman v. Sterritt*, 202 F.R.D. 467, 478 (N.D. Tex. 2001): "(1) the capitalization of the company; (2) the bid-ask spread of the stock; and (3) the percentage of stock not held by insiders (the 'float')." *See S.*

[8] Defendants have admitted that HIIQ was eligible to file an SEC Form S-3 during the Class Period. *See* Abadou Decl., Ex. C (RFAs No. 26).

Co., 2019 U.S. Dist. LEXIS 142630, at *29; *SEC v. Gane*, 2005 U.S. Dist. LEXIS 607, *34 (S.D. Fla. 2005); *Cyberguard Corp*., 213 F.R.D. at 501. All of these factors establish that HIIQ traded on efficient market. *See* Nye Rpt. at ¶56 (opining that "the market for HIIQ's stock was efficient throughout the Class Period.").

NASDAQ Listing: HIIQ's common stock traded on the NASDAQ during the Class Period. SAA at ¶5. NASDAQ listing "brings together thousands (or millions) of investors" such that "trading prices reflect a consensus opinion as to a security's value." Nye Rpt. at ¶18; *see also id.* ¶¶17-21. The Eleventh Circuit has recognized that stocks traded on national exchanges are often presumed to be traded on an efficient market "precisely because the exchanges are generally populated by stocks that are closely watched by analysts and that trade at a high volume." *Local 703*, 762 F.3d at 1257; *see also In re DVI, Inc. Sec. Litig*., 639 F.3d 623, 634 (3d Cir. 2011) ("[L]isting of a security on a major exchange such as the NYSE or the NASDAQ weighs in favor of a finding of market efficiency."); *Thorpe,* 2016 U.S. Dist. LEXIS 33637, at *40 (stock trading on a national exchange "further supports an efficiency finding."); *see also Nguyen v. Radient Pharma. Corp*., 287 F.R.D. 563, 573 n.7 (C.D. Cal. 2012) ("[T]he federal courts are unanimous in their agreement that a listing on the NASDAQ or a similar national market is a good indicator of efficiency.").

Institutional Ownership: Institutional ownership is indicative of market efficiency because institutions have the resources to actively review financial information, and bid up or down the stock price to reflect public information. Nye Rpt. at ¶37. At least 139 major institutions owned HIIQ stock during the class period, owning 79% of HIIQ shares available, suggesting a significant amount of institutional interest. Nye Rpt. at ¶38; *see also In re HealthSouth Corp. Secs.*

Litig. ("*HealthSouth II*"), 261 F.R.D. 616, 637 (N.D. Ala. 2009) (range of 118 to 489 institutional investors indicative of market efficiency).

Trading Volume (*Cammer* Factor 1): The average weekly trading volume for HIIQ common stock shares during the class period was over 2.9 million shares, which strongly supports a conclusion that the market was efficient. Nye Rpt. at ¶24; *see also In re NetBank, Inc.,* 259 F.R.D. at 670 (average weekly trading volume of 1.36 million indicative of market efficiency). Further, the average weekly volume represents 23.2% of outstanding shares shows significant investor interest in the Company. Nye Rpt. at ¶24; *In re NetBank, Inc*., 259 F.R.D. at 670 ("[A]n average weekly trading of two percent or more of outstanding shares would justify a strong presumption that the market for the security is an efficient one; one percent would justify a substantial presumption.").

Analyst Coverage (*Cammer* Factor 2): "The existence of a significant number of securities analysts implies that company reports are closely reviewed by investment professionals, who would in turn make buy/sell recommendations to client investors." *In re NetBank, Inc*., 259 F.R.D. at 671 (114 reports from 14 analysts over a class period of 26 months weighed in favor of finding of market efficiency); *see also Thorpe*, 2016 U.S. Dist. LEXIS 33637, at *40 (300 reports from twelve investment firms over a 27- month class period weighed in favor of finding of market efficiency). Here, over the six-week class period analysts issued at least 20 reports (Nye Rpt. at ¶28), far outnumbering the amount of coverage received in *NetBank* and *Thorpe* when considered on a proportional basis. Additionally, articles also appeared in several major domestic and international news outlets, indicating that Company-related information was widely disseminated to investors. Nye Rpt. at ¶29.

Market Makers (*Cammer* Factor 3): "A market-maker is one who helps establish a market for securities by reporting bid-and-asked quotations (the price a buyer will pay for a security and the price a seller will sell a security), and who stands ready to buy or sell at these publicly quoted prices." *In re NetBank, Inc*., 259 F.R.D. at 671. However, "a number of courts have acknowledged a growing concern that the mere number of market makers, without further analysis, has little to do with market efficiency." *Id.* (quoting *Unger v. Amedisys Inc*., 401 F.3d 316, 324 (5th Cir. 2005)). Here, the number of "market makers" itself is not a particularly critical metric because HIIQ common stock trades on the NASDAQ, which continuously reports public price and volume. *See* Nye Rpt. at ¶¶17-21. Nevertheless, *Bloomberg* noted some 80 market makers for HIIQ common stock during the Class Period, which further supports the efficiency of the market throughout the Class Period. *Id.* at ¶¶17-21.

Eligibility to File a Form S-3 (*Cammer* Factor 4): "Cases finding market efficiency have focused on eligibility for filing of an S-3 Registration Statement, finding that the SEC permits it only on the premise that the stock is already traded on an open and efficient market, such that further disclosure is unnecessary." *In re NetBank*, *Inc.*, 259 F.R.D. at 671-72; *see also Local 703*, 762 F.3d at 1258 (noting that eligibility to file an SEC Form S-3 was "one of the *Cammer* factors" and supported a finding of market efficiency). A company is eligible to file a Form S-3 if it has filed financial reports with the SEC for 12 consecutive months and has a float of at least $75 million. Nye Rpt. at ¶42. Here Defendants admit that the Company was eligible to file a Form S-3 throughout the class period. *See* Abadou Decl., Ex. C (RFAs No. 26); Nye Rpt. at ¶¶41-44. In fact, the Company filed a Form S-3 in May of 2017, just three months prior to the Class Period. *See* Abadou Decl., Ex. C (RFAs No. 23). That HIIQ was eligible to file Form S-3 throughout the class period supports a finding of market efficiency. Nye Rpt. at ¶44.

Cause-and-Effect (*Cammer* Factor 5): The Fifth *Cammer* Factor evaluates whether there are "empirical facts showing a cause and effect relationship between unexpected corporate events and an immediate response in the stock price." *Local 703*, 762 F.3d at 1254 n.2. *Cammer* recognizes that such facts are "helpful" because this relationship is "the essence of an efficient market." 711 F. Supp. at 1287. However, consistent with its refusal to adopt the *Cammer* factors as "the mandatory analytical framework for market efficiency inquiries," the Eleventh Circuit also rejects the premise that "a finding of market efficiency always requires proof that the alleged misrepresentations had an immediate effect on the stock price." *Local 703*, 762 F.3d at 1255-56; *see also Waggoner v. Barclays PLC*, 875 F.3d 79, 97 (2d Cir. 2017) ("[A] plaintiff seeking to demonstrate market efficiency need not always present direct evidence of price impact through event studies.").

Nevertheless, Plaintiff's expert, Dr. Nye, conducted an event study to examine the causal relationship between Company disclosures and movements in HIIQ's stock price. Nye Rpt. at ¶¶45-51; *FindWhat Inv't Grp.,* 658 F.3d at 1313 and n.31 ("[E]vent studies are a common method of establishing loss causation, used routinely in the academic literature to determine whether the release of particular information has a significant effect on a company's stock price" whose use "has been sustained by many circuits."). Based on his event study, Dr. Nye concluded that HIIQ's common stock reacted rapidly to new and unexpected information, demonstrating a clear cause-and-effect relationship between material news and the market price of HIIQ common stock, further evidencing market efficiency. Nye Rpt. at ¶51; *see also FindWhat Inv't Grp*, 658 F.3d 1282 at 1313; *Thorpe*, 2016 U.S. Dist. LEXIS 33637, at *41 (event study supported Dr. Nye's conclusion that there was "a causal relationship" and events at issue and that "those undisputed facts alone are sufficient to satisfy Plaintiffs' burden."); *HealthSouth II,* 261 F.R.D. at 636 (bond price responses

to market disclosures "taken together with all the other strong indicia of market efficiency, demonstrate[d] an efficient market.").

Market Capitalization (*Krogman* Factor 1): Market capitalization is an indicator of market efficiency because investors have greater incentive to invest in more highly capitalized corporations, and such companies tend to be more well-known and closely followed. *See Krogman*, 202 F.R.D. at 478; Nye Rpt. at ¶52. Here, HIIQ had a large market capitalization throughout the Class Period, which ranged between $383.9 million (in September 2017) and $597 million (in August 2017). Nye Rpt. at ¶52. By comparison, the median market capitalization of all 2,379 companies listed the NASDAQ was $348.4 million on August at the start of the Class Period. Thus, even at its lowest point in the class period, HIIQ's market capitalization was comparable to NASDAQ's median value. *Id.* ¶53; *see also Cyberguard Corp*., 213 F.R.D. at 501 ("[E]vidence that CyberGuard falls within the median market capitalization tends to suggest market efficiency.").

Bid-Ask Spread (*Krogman* Factor 2): The bid-ask spread—representing a measure of the cost to transact in a market—is an important indicator of the degree to which a market is developed, with a narrow bid-ask spread indicating a more efficient market. *See Krogman*, 202 F.R.D. at 478; Nye Rpt. at ¶54. During the Class Period, the percentage bid-ask spread for HIIQ common stock was 0.17%, which is comparable to the mean bid-ask spread of 0.28% for a random sample of 100 other common stocks trading on the NASDAQ Global Select Market. Nye Rpt. at ¶39. HIIQ's low bid-ask spread during the Class Period further supports market efficiency for its common stock. *Id*. ¶¶39, 54; *see also In re Scientific-Atlanta, Inc. Sec. Litig*., 571 F. Supp. 2d 1315, 1339 (N.D. Ga. 2007) (bid-ask spread never exceeding 1.9% "weighs heavily in favor of a finding of market

efficiency"); *Cyberguard Corp*., 213 F.R.D. at 501 (spread of 2.44% "is significantly lower than the high bid-ask price of 5.6% found to suggest market inefficiency in *Krogman*.").

Float (*Krogman* Factor 3): A stock's float is the number of shares outstanding, excluding shares held by insiders. A higher float indicates greater market efficiency. *See Krogman*, 202 F.R.D. at 478. During the Class Period, insiders held 13.4% of shares (*see* Nye Rpt. at ¶¶55-56)—a far lower amount than in *Krogman*, where a finding that insiders held 54% percent of company's stock weighed against a conclusion of market efficiency. 202 F.R.D. at 467.

4. Damages Can Be Calculated on a Class-Wide Basis

Proof of damages is not a prerequisite to class certification, and the need for individual damages calculations, standing alone, does not prevent class certification. *See Herrera v. JFK Med. Ctr., Ltd. P'ship*, 648 F. App'x 930, 936 (11th Cir. 2016) ("The presence of individualized damages issues does not prevent a finding that the common issues in the case predominate."); *see also Roach v. T.L. Cannon Corp.,* 778 F.3d 401, 407 (2d Cir. 2015) (recognizing that there is no requirement that plaintiffs "rely upon a classwide damages model to demonstrate predominance."). In a securities fraud case such as this, "[i]t is axiomatic that individualized damages calculations are generally insufficient to foreclose class certification, and particularly so where the central liability question is common to each class member." *S. Co*., 2019 U.S. Dist. LEXIS 142630, at *65-66. Indeed, Defendants concede that "whether there is a common formula or method for measuring damages" is a question that "would be common to all putative Class members." *See* Abadou Decl., Ex. C (RFAs No. 7).

Nevertheless, Lead Plaintiff has demonstrated a viable method, detailing how the event study methodology capably calculates damages on a class-wide basis in accordance with widely-used and generally accepted methodologies and applicable statutes, consistent with his theory of the case. *See* Nye Rpt. at ¶¶57-62. *S. Co.,* 2019 U.S. Dist. LEXIS 142630 at *70-71 (noting that

it is sufficient for class certification that [the expert] has specified a damages model that can be used to establish damages using a common methodology for all class members); *see also Thorpe*, 2016 U.S. Dist. LEXIS 33637, at *49-50 ("a plaintiff's model satisfies Rule 23(b)(3) so long as their theory of liability aligns with their theory of damages 'and individualized damage issues will not predominate.'")

5. A Class Action is Superior to Alternative Methods for Resolving This Dispute

Rule 23(b)(3) requires a class action to be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "As a general rule, class action treatment presents a superior method for the fair and efficient resolution of securities fraud cases." *In re NetBank, Inc*., 259 F.R.D. at 676. Rule 23(b)(3) provides four factors for courts to consider in evaluating the superiority requirement: (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. Fed. R. Civ. P. 23(b)(3).

Here all four factors are easily met. The putative class likely consists of thousands of purchasers of HIIQ common stock. *See Lagrasta v. First Union Sec., Inc*., 2005 U.S. Dist. LEXIS 20207, at *38-39 (M.D. Fla. 2005) (finding class action superior, in part because no other class member had expressed an interest in individually controlling separate actions and where there did not appear to be any related law suits pending in any federal or state court). The interests of potential class members in individually controlling the prosecution or defense of separate actions are low because of the significant cost of prosecuting a securities action as compared to an individual's potential recovery. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985)

(noting that class actions may "permit the plaintiffs to pool claims which would be uneconomical to litigate individually.").

Accordingly, as with other the securities fraud cases, "[s]eparate actions by each of the class members would be repetitive, wasteful, and an extraordinary burden on the courts." *Kennedy v. Tallant,* 710 F.2d 711, 718 (11th Cir. 1983). This forum is the superior one in which to concentrate the claims because HIIQ's headquarters are located in this District. SAA at ¶34. Further, concentrating the litigation in this Court eliminates the risk of inconsistent adjudication.

Finally, there is no reason to expect any difficulty in managing this case as a class action. As even Defendants recognize (*see* Abadou Decl., Ex. C (RFAs No. 2-4), all of the proposed Class Members here were subject to the same alleged misstatements and omissions made by Defendants, thus requiring the same proof to establish Defendants' Exchange Act violations. *See Kirkpatrick*, 827 F.2d at 725 (where separate complaints "allege a single conspiracy and fraudulent scheme against a large number of individuals", proceeding as a class is "particularly appropriate."); *see also Theragenics*, 205 F.R.D. at 698 (in securities fraud case, "class certification is superior to any other method of adjudication and is the only practical way to proceed.").

D. KSF Should be Appointed as Class Counsel

Rule 23(g)(1)(A)'s factors to consider when appointing Class Counsel include counsel's: (i) work in identifying or investigating potential claims in the action; (ii) experience handling class actions, complex litigation, and the types of claims asserted in the action; (iii) knowledge of the applicable law; and (iv) resources that counsel committed to representing the class. Fed. R. Civ. P. 23(g)(1)(A). Here, all factors weigh in favor of appointing KSF as Class Counsel.

KSF has extensive experience successfully prosecuting securities class actions, having recovered hundreds of millions of dollars for class members since its inception in 2000 and has

successfully litigated before the United States Supreme Court and the Courts of Appeal in securities matters such as this. *See* Abadou Decl. Ex. A (KSF Firm Résumé). It is therefore well qualified to prosecute this case on behalf of Lead Plaintiff and the Class. Indeed, Lead Counsel has effectively and vigorously pursued Class Members' interests to date in this matter through their: (i) preparation and filing of the Consolidated Complaint; (ii) vigorous prosecution of this matter in this Court, including defeating Defendants' motion to dismiss; (iii) aggressive ongoing discovery with Defendants and third parties; and (iv) dedicated participation in two Court-ordered mediations that, while unsuccessful, enabled the parties to discuss the legal and factual issues before the Court in great detail.

George Gesten McDonald, PLLC ("GGM") was founded by three partners with more than seven decades of experience practicing law in some of the largest firms in the United States. See Abadou Decl. Ex. D (GGM Firm Résumé). The firm is based in Lake Worth, Florida and has offices in New York, Virginia and Guangzhou, China. Founding partner David J. George has served as liaison counsel for Lead Plaintiff and the putative class since the beginning of this case.

V. CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests that the Court: (i) certify this action as a class action pursuant to Rule 23(a) and (b)(3); (ii) certify Lead Plaintiff as representative of the proposed Class; and (iii) appoint KSF as Class Counsel.

Dated: November 15, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on Friday, November 15, 2019, I filed a copy of the foregoing document and its related exhibits with the CM/ECF system for the United States District Court for the Middle District of Florida, Tampa Division, which automatically distributed a copy to all attorneys enrolled therein. For those not so enrolled, copies were sent as set forth in the attached manual notice list.

/s/ Alayne K. Gobeille
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