

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

SJUNDE AP-FONDEN and THE
CLEVELAND BAKERS AND TEAMSTERS
PENSION FUND, individually and on behalf
of all others similarly situated,

Plaintiffs,

v.

GENERAL ELECTRIC COMPANY, et al.

Defendants.

17 Civ. 08457 (JMF) (GWG)

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION**

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Lead Plaintiff AP7 and Additional Plaintiff Cleveland Bakers respectfully submit this reply memorandum in response to Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification (the "Opposition" or "Opp.") (ECF No. 245), in further support of their Motion for Class Certification (the "Motion" or "Mot.") (ECF Nos. 218, 219), and in response to the Intervenor's Partial Opposition to Plaintiffs' Motion for Class Certification (the "Intervenor's Opposition") (ECF No. 248-1).¹

I. INTRODUCTION

In their Opposition, Defendants concede that all but one of the requirements for class certification under Rule 23(a) are satisfied and that certification under Rule 23(b)(3) is proper. The lone issue that Defendants raise as precluding class certification is whether there are intra-class conflicts between the Class representatives and certain members of the Class. The answer is a resounding no. While Defendants frame this issue as one of adequacy, courts in this district typically analyze it under the rubric of typicality.² However, irrespective of whether considered under adequacy or typicality, there can be no serious dispute that Plaintiffs are typical and adequate representatives of the proposed Class. As detailed in Plaintiffs' Motion, AP7 and Cleveland Bakers each purchased GE common stock during the Class Period, at prices artificially inflated by Defendants' alleged fraud, held such shares through each of the alleged corrective disclosures, and have adequately represented the Class since being appointed Lead Plaintiff (AP7) and named an Additional Plaintiff (Cleveland Bakers). Defendants' claimed intra-class conflicts are speculative at best and, more fundamentally, rest on mere differences in the timing of when Plaintiffs

¹ Unless otherwise noted, all: (1) capitalized terms shall have the meanings ascribed to them in the Motion; (2) internal citations and quotations are omitted; and (3) emphasis is added.

² *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 85 (S.D.N.Y. 2007) ("As many courts have observed, the issues of typicality and adequacy tend to merge because they 'serve as guideposts for determining whether . . . the named plaintiff's claim and the class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence.'") (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982)).

purchased GE shares—which courts in this district roundly reject as a basis for denying class certification.

Defendants’ fallback argument that, if the Class is certified, the Class Period should be substantially shortened, is equally unavailing. This argument raises factual disputes regarding the merits of Plaintiffs’ claims that are not properly resolved at this stage. As to the ending date for the Class Period, Defendants simply reframe their *twice-rejected* loss causation arguments and once again ignore settled law with regard to partial corrective disclosures. The Class Period appropriately ends on the date of the last partial corrective disclosure detailed in the 5AC, i.e., January 24, 2018, when GE disclosed that the SEC was investigating GE’s revenue recognition and controls for LTSAs. As to the starting date for the Class Period, Defendants’ argument simply seeks to re-litigate the Court’s motion to dismiss ruling: the Court sustained Plaintiffs’ Item 303 claims that, in “*GE’s filings from 2015 on*,” Defendants failed to disclose GE’s reliance on and the risks related to its factoring practices. *See* ECF No. 206 at 27. The Class Period appropriately begins on March 2, 2015—the date of the first periodic filing in which these risks were required to be disclosed.

Separately, Plaintiffs object to the arguments raised in the Intervenor’s Opposition filed on August 30, 2021, by the plaintiffs involved in an action against GE in New York State Court that is currently stayed.

Plaintiffs respectfully submit that Defendants’ and the Intervenor’s arguments in response to Plaintiffs’ Motion should be rejected, and the Motion should be granted in its entirety.

II. ARGUMENT

A. THERE ARE NO INTRA-CLASS CONFLICTS THAT BAR CLASS CERTIFICATION

Defendants’ sole Rule 23 challenge—that intra-class conflicts bar class certification—is two-fold: (1) differences in the timing of when Plaintiffs purchased their GE shares create conflicts

between AP7, Cleveland Bakers, and Class members who purchased after the so-called last misstatement in the case; and (2) conflicts exist between Class members who purchased before and after the first alleged partial corrective disclosure. Neither argument has any merit.

1. Timing Differences In Plaintiffs' Purchases Do Not Create Intractable Conflicts With The Class

Defendants incorrectly argue that because Cleveland Bakers only purchased shares after the so-called first misstatement, and because AP7 purchased more shares at that time, they have a greater interest in recovering for Defendants' omissions in SEC filings made prior to the date of the misstatements in GE's February 24, 2017 10-K, at the expense of Class members who only purchased after that date. Opp. at 16.³ This argument rests on the flawed premise that the Item 303 claims with respect to GE's SEC filings, and the misrepresentation claims with respect to the February 24, 2017 10-K, are two different frauds. They are not. And, even if Plaintiffs' allegations could be read to concern different theories of liability, that fact still would not create the kind of intractable conflict that would warrant denial of class certification.

While the potential for a conflict to arise based on purchases straddling different false statements or omissions is "inherent in any case involving multiple false statements and corrective disclosures," it is well-settled law in the Second Circuit that this potentiality does not preclude class certification. *In re Vale S.A. Sec. Litig.*, 2019 WL 11032303, at *8 (S.D.N.Y. Sept. 27, 2019) ("The Second Circuit has affirmed class certifications based on multiple misrepresentations despite

³ None of the cases Defendants cite address the question of whether differences in the timing of a plaintiff's stock purchases raise insurmountable intra-class conflicts. Instead, they all involve external, conflicting relationships that are not present here. Opp. at 15. For example, *Schaffer v. Horizon Pharma Plc*, 2016 WL 3566238, at *1 (S.D.N.Y. June 27, 2016), a case involving the appointment of lead counsel, discussed a pre-existing, external conflict created by a "fiscal crisis in Puerto Rico" and a "high probability" that the proposed lead plaintiff would become "embroiled . . . in litigation of an all-consuming variety." Likewise, both *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 565 (S.D.N.Y. 2018) and the case it cites as authority, *Hale v. Citibank, N.A.*, 198 F.R.D. 606, 607 (S.D.N.Y. 2001), involve conflicts that likely could arise from the plaintiff's already-existing "close relationship with class counsel." These cases are inapposite.

the potential for this kind of conflict”) (citing *In re Petrobras Sec.*, 862 F.3d 250, 258 (2d Cir. 2017)). Indeed, a “[p]laintiff’s claims are typical of the rest of the class where, as here, it intends to argue that the ‘claims of fraud arise out of the same . . . schemes as the rest of the putative class.’” *In re Symbol Tech., Inc. Sec. Litig.*, 2015 WL 3915477, at *4 (E.D.N.Y. June 25, 2015) (quoting *Yang v. Odom*, 2005 WL 2000156, at *5 (D.N.J. Aug. 19, 2005) (granting class certification because the “class representative’s interests in proving a continuous scheme to defraud were properly aligned with the other class members”)); see also *In re Facebook, Inc., IPO Sec. & Deriv. Litig.*, 312 F.R.D. 332, 345 (S.D.N.Y. 2015) (“[T]he purported conflict [relating to the timing of purchases] is speculative . . . and thus not grounds to defeat certification.”).

Even if the misstatements and omissions here could be characterized as alleging different theories of liability—they cannot—that fact still would not create an insurmountable conflict. See *In re Am. Int’l Grp., Inc. Sec. Litig.* (“AIG”), 265 F.R.D. 157, 169-71 (S.D.N.Y. 2010) (where misstatements and omissions are “brought under the same causes of action . . . the Court does not find a class conflict” due to the timing of purchases); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 245 F.R.D. 147, 159-60 (S.D.N.Y. 2007) (rejecting claims of intra-class conflict based on the timing of purchases in action involving distinct frauds, both chronologically and substantively); *In re Alstom SA Sec. Litig.*, 253 F.R.D. 266 (S.D.N.Y. 2008) (held no class conflict where the two alleged frauds did not occur simultaneously and involved different segments of Alstom’s business); cf. *Pub. Emps.’ Ret. Sys. of Miss. v. Goldman Sachs Grp., Inc.*, 280 F.R.D. 130, 136 (S.D.N.Y. 2012) (finding intra-class conflict “not fundamental” and representation adequate despite potential conflict created by a settlement structure that would favor one group of class members over another).

Relatedly, courts in this district “have . . . repeatedly recognized that putative intra-class conflicts relating to the times at which particular class members purchased their securities, and which could potentially motivate different class members to argue that the securities were relatively more or less inflated at different time periods, relate to damages and do not warrant denial of class certification.” *Alstom*, 253 F.R.D. at 277; *see also In re J.P. Morgan Stable Value Fund ERISA Litig.*, 2017 WL 1273963, at *10 (S.D.N.Y. Mar. 31, 2017) (“issues related to differing preferred damages periods do not preclude certification”); *Symbol Tech.*, 2015 WL 3915477, at *7 (citing *AIG*, 265 F.R.D. at 169 (same)); *Flag Telecom*, 245 F.R.D. at 159-60 (declining to find an intra-class conflict where “the decline in value in [the defendant’s] stock may have been caused by both the alleged fraud[s]” because “[u]nder the doctrine of proximate causation, the harm may have been caused by either or both of these alleged acts of deception”), *rev’d on other grounds*, 574 F.3d 29 (2d Cir. 2009); *Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 126-27 (S.D.N.Y. 2001) (“[T]he fact that conflicts among class members may arise at the settlement or damages stage of the litigation does not require the denial of class certification or the disqualification of these representatives.”).

Here, there is no dispute that Plaintiffs’ claims for Defendants’ alleged violations of Item 303, as well as for their misrepresentations regarding the use of factoring, rest on Defendants’ concealment of the same risks related to GE’s factoring practices. Therefore, whether AP7 or Cleveland Bakers purchased shares after GE’s SEC filings that omitted the risks related to its factoring practices, or after the February 24, 2017 10-K that misrepresented GE’s use of factoring to manage credit risk, does not create intractable conflicts with other Class members. To be sure, Plaintiffs and all other Class members were damaged as a result of the same underlying misconduct and have the same interest in proving Defendants’ liability for each of the challenged

misstatements and omissions. Moreover, each Class member's damages are susceptible to a common damages methodology, a fact Defendants do not dispute.

Furthermore, because Plaintiffs rely on a straightforward out-of-pocket event study methodology that will calculate damages formulaically for all Class members (ECF No. 254-1 § VI), even to the extent Plaintiffs would need to prove how much "each corrective disclosure's stock price decline is attributable to each challenged statement in order to calculate damages recoverable by each class member" based on the timing of their purchases and/or sales (Opp. at 16), such damages questions would not preclude class certification. *See e.g., Waggoner v. Barclays PLC*, 875 F.3d 79, 106 (2d Cir. 2017); *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 408-09 (2d Cir. 2015) ("individualized damages determinations alone cannot preclude certification under Rule 23(b)(3)"); *In re Teva Sec. Litig.*, 2021 WL 872156, at *40 (S.D.N.Y. Mar. 9, 2021); *Wilson v. LSB Indus., Inc.*, 2018 WL 3913115, at *17 (S.D.N.Y. Aug. 13, 2018) (holding plaintiffs' reliance on the out-of-pocket damages model "does not preclude a finding that common issues of law and fact predominate over individual damages issues"); *New Jersey Carpenters Health Fund v. DLJ Mortg. Capital, Inc.*, 2011 WL 3874821, at *4 (S.D.N.Y. Aug. 16, 2011) ("[I]t is well-established that the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification.")⁴.

Dr. Tabak's 2015 article does not support a different result. That article, cited by Defendants, describes a possible argument that inefficient markets may process certain types of news in irrational ways. In that specific situation, he posits, plaintiffs who purchased on different

⁴ The recent Second Circuit decision in *Plumber & Steamfitters Loc. 773 Pension Fund v. Danske Bank A/S*, 11 F.4th, 90, 104 (2d Cir. 2021), does not advance Defendants' argument. The Second Circuit endorsed the unremarkable proposition that a plaintiff cannot bring a § 10(b)(5) case based *solely* on statements made after their final purchases of the subject securities. That case did not involve class certification or discuss the widely accepted methodologies for apportioning damages among class members who purchased and sold securities at different times during a class period.

dates might be motivated to attribute more weight to portions of a corrective disclosure that relate to a particular misstatement. Opp. at 16-17; ECF No. 244-3. Unlike Dr. Tabak’s hypothetical, here there is no dispute that GE’s common stock traded on an efficient market. More fundamentally, Dr. Tabak’s article addresses a situation where aspects of the corrective disclosure address different alleged misstatements or omissions. By contrast, GE’s alleged omissions and misstatements regarding the failure to disclose the risks related to factoring are substantively the same, and the effect of the corrective disclosures does not vary by topic in the manner contemplated by Dr. Tabak’s article.

2. Purchases Between Corrective Disclosure Dates Do Not Create Intra-Class Conflicts

Defendants also incorrectly argue that intra-class conflicts exist among Class members who purchased before the respective corrective disclosure dates and those who purchased after. Opp. at 18. This argument is premised on the faulty assertion that “a misstatement can only be corrected once.” *Id.* But that ignores Plaintiffs’ allegations that Defendants’ misstatements and omissions were corrected through a series of partial disclosures beginning on April 21, 2017, and ending on January 24, 2018. 5AC ¶¶ 451-53, 455-56, 458, 462-65, 468, 475-79. Like the Class members who purchased before April 21, 2017, Class members who purchased after any of the partial corrective disclosures will be incentivized to argue (as Plaintiffs allege) that those disclosures did not disclose the full truth regarding the risks related to GE’s factoring, and that Defendants’ misstatements and omissions continued to impact GE’s stock price.

Numerous courts in this Circuit have “rejected the argument that typicality is defeated where some class members purchased before disclosures and others purchased after.” *New Jersey Carpenters Health Fund v. Residential Capital, LLC*, 272 F.R.D. 160, 167 (S.D.N.Y. 2011), *aff’d sub nom. New Jersey Carpenters Health Fund v. Rali Series 2006-QOI Tr.*, 477 F. App’x 809 (2d

Cir. 2012); *see also Pirnik v. Fiat Chrysler Autos., N.V.*, 327 F.R.D. 38, 43 n.2 (S.D.N.Y. 2018) (Furman, J.) (“the objection [that plaintiff is atypical because he purchased additional shares after a partial corrective disclosure] is without merit because [plaintiff’s] purchase was before the final corrective disclosure”); *Symbol Tech.*, 2015 WL 3915477, at *7; *AIG*, 265 F.R.D. at 169. Notably, “Defendants do not cite a single case . . . holding that a lead plaintiff seeking class certification in a securities fraud suit fails to establish adequacy or typicality where that plaintiff made securities purchases after an alleged partial corrective disclosure but before the final corrective disclosure.” *In re JPMorgan Chase & Co. Sec. Litig.*, 2015 WL 10433433, at *4 (S.D.N.Y. Sept. 29, 2015).⁵ Likewise, “[t]he fact that [plaintiff] made purchases during the period between the initial partial corrective disclosure . . . and the final, fully corrective disclosure . . . does not render him atypical.” *Pearlstein v. BlackBerry Ltd.*, 2021 WL 253453, at *9 (S.D.N.Y. Jan. 26, 2021). Just as a plaintiff’s purchases after a partial corrective disclosure does not render him atypical or inadequate, such timing differences in Class members’ purchases do not create intra-class conflicts that bar certification.

B. THE COURT SHOULD NOT MODIFY THE CLASS PERIOD

1. The Class Period Properly Ends On January 23, 2018

Defendants’ attempt to shorten the Class Period on the back end is premised on their erroneous claim that all the relevant truth was fully revealed on April 21, 2017, when GE announced disappointing Industrial CFOA. This fails for two reasons.

⁵ Defendants’ only authority addressing intra-class conflict, *In re Literary Works in Electronic Databases Copyright Litigation*, concerns a copyright action involving different categories of claims and types of damages that were treated differently under a proposed settlement. 654 F.3d 242, 251-54 (2d Cir. 2011). Here, both AP7 and Cleveland Bakers incurred the same type of damages, based on transactions in the same security, as the proposed Class. Further, they have vigorously litigated claims arising from the very misrepresentations that, in Defendants’ telling, they have little or zero financial incentive to pursue.

First, Defendants’ argument is a thinly disguised truth-on-the-market defense that the Supreme Court has made clear is not properly decided at class certification. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 481 (2012). Whether an alleged corrective disclosure fully cured any prior misstatement is a merits issue “better suited for summary judgment or trial.” *See Menaldi v. Och-Ziff Capital Mgmt. Grp. LLC*, 328 F.R.D. 86, 100 (S.D.N.Y. 2018) (certifying class ending on the final corrective disclosure date in the face of dispute over whether earlier disclosures fully corrected the misstatements); *In re Chi. Bridge & Iron Co. N.V. Sec. Litig.*, 2019 WL 5287980 at *40 (S.D.N.Y. Oct. 18, 2019), *report and recommendation adopted in part*, 2020 WL 1329354 (S.D.N.Y. Mar. 23, 2020) (held the decision to shorten a class period “is appropriately left to trial or a motion for summary judgment,” barring a “clear, unambiguous disclosure[]” leaving “no substantial doubt as to [its] curative effect”).

Defendants recognized as much in prematurely moving for early summary judgment briefing on loss causation, where they argued that the April 21, 2017 disclosure revealed the relevant truth, such that Plaintiffs could not establish loss causation for any subsequent disclosures. Twice, the Court rejected Defendants’ attempts to litigate these questions on an incomplete factual record. ECF Nos. 240, 260. Defendants’ latest attempt to litigate this merits issue in the context of class certification is nothing more than another bite at the same apple.

Second, Plaintiffs allege that the April 21, 2017 disclosure only partially revealed the truth. As this Court has made clear, the presence of a partial corrective disclosure does not mandate early termination of the Class Period. *See Pirnik*, 327 F.R.D. at 48 (“courts are required to cut off the class period on the date of a statement or even that cures the market,” “[t]hat is . . . when the **full** truth has been disclosed”); *see also BlackBerry*, 2021 WL 253453, at *24 (“Defendants argue that no reasonable investor would have relied on [the alleged misrepresentation] after [the date of an

alleged corrective disclosure]. However, at this point, the ‘full truth’ had not yet been disclosed to the market.”).

Even if the Court were to consider this argument, it fails. Each of the alleged partial disclosures “changed the available public information” on relevant issues, thereby causing the market to “react negatively.” *In re Vale S.A. Sec. Litig.*, 2017 WL 1102666, at *29 (S.D.N.Y. Mar. 23, 2017). As such, they are all “‘corrective’ within the meaning of governing law” (*id.*), and there is no “mismatch between the contents of the misrepresentation and the corrective disclosure” as outlined in the cases cited by Defendants. Opp. at 14 (citing *Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys.*, 141 S. Ct. 1951, 1961 (2021)).⁶

Plaintiffs’ expert analyzed each of the partial corrective disclosures and concluded that the stock price declines on those dates were statistically significant and were caused, at least in part, by disclosures concerning CFOA or factoring, and may relate to Plaintiffs’ claims, with the ultimate proof of that last step dependent on further discovery. Defendants’ assertion to the contrary, that Dr. Tabak did not “attempt to demonstrate that GE disclosed additional information after April 21, 2017 that corrected the alleged factoring misstatement and omissions,” is simply untrue, and imparts a burden on Dr. Tabak that does not exist at this stage. *See* Tabak Report ¶¶ 42-59 (linking the July 21, October 20, and November 13-14, 2017 stock price declines to disclosures concerning GE’s cash flows, and the January 24, 2018 stock price decline to the disclosure of an SEC investigation into, among things, factoring).⁷ Defendants’ argument also ignores that each of

⁶ Defendants also cite to *Pirnik*, 327 F.R.D. at 48, ostensibly for its holding that an “alleged corrective disclosure . . . did not disclose the full truth concerning defendant’s regulatory violations because it explicitly stated that the EPA’s investigation into violations of a separate regulation was ongoing, and ‘[i]t was not until [four months later] that the EPA explicitly claimed that [defendant] had installed defeat devices in violation of’ the separate regulation.” Opp. at 14. In fact, *Pirnik* directly contradicts Defendants’ argument; the EPA notice of violation functioned as a partial corrective disclosure—it did not mark the end of the class period because it did not reveal the full truth, making it equivalent to GE’s April 21, 2017 statement.

⁷ The burden is on Defendants at class certification to demonstrate a lack of price impact resulting from the alleged misstatements and omissions. *See, e.g., Pirnik*, 327 F.R.D. at 45; *Carpenters Pension Tr. Fund of St. Louis v. Barclays*

these partial disclosures revealed new information about, among other things, the extent of the cash flow problems created (and concealed) by factoring, and would require the Court to address the merits and draw inferences prematurely in their favor at the class certification stage.

For these reasons, the Court should not modify the Class Period end date in the manner suggested by Defendants.

2. The Class Period Properly Begins On March 2, 2015

Defendants' argument that the Class Period should be truncated by more than a year on the front end because "widespread" or "comprehensive" factoring did not take place until 2016 also fails. Opp. at 9. Significantly, Defendants' myopic focus on whether "widespread" or "comprehensive" factoring can be proven prior to 2016 misreads Item 303. Item 303 requires disclosure of any then-existing trend, risk, or uncertainty that is expected to impact liquidity. Thus, so long as GE's factoring programs were likely to have an adverse impact on the Company's future cash flows and liquidity position at the time of the SEC filings at issue, disclosure of these risks to investors was required. For this reason, the lone internal GE document Defendants cite, which simply showed GE's "Monetization by Quarter" for one of its factoring programs, as of a specific time, and did not analyze the future impact of its factoring practices, does nothing to further their position.

More fundamentally, however, this argument concerns merits inquiries that should not be resolved at class certification. *See Kaplan v. S.A.C. Capital Advisors, L.P.*, 146 F. Supp. 3d 588, 589 (S.D.N.Y. 2015) ("The Court considers the start date for the . . . Class period as a merits issue not properly resolvable at the class certification stage, but, insofar as it implicates a disputed question of fact, a matter that more appropriately should be left for trial.") (citing *Teamsters Local*

PLC, 310 F.R.D. 69, 94 (S.D.N.Y. 2015). Here, Defendants' own expert conceded that the stock price declines on the alleged corrective disclosure dates were statistically significant. *See* ECF No. 237 at 3-4.

445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 204 (2d Cir. 2008) (“[D]istrict courts retain ample discretion to limit discovery and the extent of the hearing on Rule 23 issues in order to assure that a class certification motion does not become a pretext for a partial trial of the merits.”); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 28 (2d Cir. 2006), *decision clarified on denial of reh’g sub nom. In re Initial Pub. Offering Sec. Litig.*, 483 F.3d 70 (2d Cir. 2007) (holding that at class certification a court should not assess any aspects of the merits unrelated to the Rule 23 requirements); *Betances v. Fischer*, 304 F.R.D. 416, 424-25 (S.D.N.Y. 2015) (same); *In re Bank of Am. Corp. Sec., Deriv., & Emp. Ret. Income Sec. Act (ERISA) Litig.*, 281 F.R.D. 134 (S.D.N.Y. 2012) (same). Even if the Court were to entertain such merits questions, Defendants rely on one statement by FE-7 that the factoring task force he describes was not formed until the fourth quarter of 2015 and argue that no obligation to disclose could have arisen before then. Opp. at 11. Defendants fail to explain why the timing of GE’s decision to create this task force is dispositive and, in fact, the creation of the task force may just as easily prove that GE’s factoring practices constituted a trend, risk, or uncertainty impacting liquidity long before its creation. Additionally, any modification of the Class Period, if ever warranted, is premature as discovery is ongoing. The Court’s reasoning in considering (and rejecting) early summary judgment motion practice is equally applicable here. *See* ECF Nos. 240, 260.

For these reasons, the Court should not modify the Class Period start date in the manner suggested by Defendants.

C. THE COURT SHOULD DENY INTERVENORS’ REQUESTED RELIEF

Though styled as a “Partial Opposition to Plaintiffs’ Motion for Class Certification,” Intervenor’s Opposition is no such thing. Plaintiffs seek appointment as Class Representatives of the Class in *this* case, not Intervenor’s pending state court action or any other case. Intervenor *do not challenge* Plaintiffs’ adequacy to represent the putative Class in this action or Plaintiffs’

satisfaction of any other Rule 23(a)(1)-(3) or 23(b)(3) requirement. For the reasons set forth above and in Plaintiffs' Motion, Plaintiffs AP7 and Cleveland Bakers satisfy each requirement of Rule 23(a) and (b)(3). Thus, the Court should deny Intervenors' request to alter the Class definition in this case based on purported "adequacy" challenges.

What the Intervenors really seek, as their proposed order makes clear, is a premature ruling from this Court guaranteeing them the ability to pursue the Securities Act claims that are currently pending in their state court action, notwithstanding any final judgment in this case. *See* ECF No. 248-2 (requesting the Court "expressly reserv[e] the rights of absent class members to participate on a class-wide basis in *Mahar v. GE*"). In an effort to justify such relief, Intervenors raise only speculative concerns about the preclusive effect of a final judgment in this case. *See, e.g.*, ECF No. 248-1 at 2 (complaining of "*danger* that the Federal Plaintiffs would nonetheless seek to settle [the Securities Act] claims or that Defendants would seek to enforce any judgment against the absent class members beyond the claims asserted herein"); *id.* at 9 (complaining that "defendants *may* later argue" that putative state action class members are bound by a final judgment in this case).

But there has been no settlement release presented to the Court for approval and no final judgment entered in this action. And if Intervenors' hypothetical concerns about the preclusive effect of a settlement release or other final judgment in this case on their pending state action claims materialize, they can be addressed (if the Court deems it necessary to do so) at that time—i.e., in the context of approving a settlement release or entering a final judgment. Intervenors do not cite any authority justifying their request that the Court affirmatively act at the class certification stage to further protect their ability to prosecute their already-pending claims.⁸

⁸ This case is very different from *In re AXA Equitable Life Ins. Co. COI Litig.*, 2020 WL 4694172 (S.D.N.Y. Aug. 13, 2020). The remedy fashioned by this Court in *AXA* was designed to preserve the ability of certain class members to assert additional claims via *future* litigation. *See id.* at *7. Here, by contrast, Intervenors have already asserted their

Moreover, Intervenors will have the opportunity to raise their preclusion concerns with the judge presiding over the state court action once this Court enters final judgment in this case. Indeed, “[d]eciding whether and how prior litigation has preclusive effect is usually the bailiwick of the *second* court,” further demonstrating the premature nature of Intervenors’ requested relief. *Wyly v. Weiss*, 697 F.3d 131, 140 (2d Cir. 2012) (emphasis in original) (quoting *Smith v. Bayer Corp.*, 564 U.S. 299, 307 (2011)); *see also Am. Med. Ass’n v. United Healthcare Corp.*, 2011 WL 5386347, at *1 (S.D.N.Y. Nov. 7, 2011) (denying defendants’ request to enjoin members of a prior settlement from pursuing released claims in a later action in a separate court and without prejudice to defendants’ right to raise the issue in the subsequent litigation).

For these reasons, the arguments in the Intervenors’ Opposition are premature and should be rejected.

III. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs’ Motion for Class Certification in the form and manner set out in their opening brief and should deny the Intervenors’ request for relief.

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Respectfully submitted,

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Securities Act claims in the state action and have withstood a motion to dismiss. To the extent Intervenors believe the state court wrongly stayed their case, they are free to raise that issue with the state court.

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