IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MAKOR ISSUES & RIGHTS, LTD., CHRIS BROHOLM, RICHARD LEBRUN, *et al.*,

Plaintiff,

v.

TELLABS, INCORPORATED, MICHAEL J. BIRCK, RICHARD C. NOTEBAERT, *et al.*,

Defendants.

Case No. 02-C-4356

Honorable Amy J. St. Eve

DEFENDANTS' [REDACTED] MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION, APPOINTMENT OF CLASS REPRESENTATIVES, AND APPOINTMENT OF CLASS COUNSEL

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Defendants Tellabs, Inc., Michael J. Birck, Richard C. Notebaert, Brian Jackman and Joan E. Ryan (collectively, "Defendants"), by their attorneys, respectfully submit this memorandum in opposition to Plaintiffs' Motion for Class Certification, Appointment of Class Representatives, and Appointment of Class Counsel ("Motion").

INTRODUCTION

Plaintiffs bear the burden of proving that class certification is appropriate. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. Ill. 1993). That burden has not been met here. Instead, Plaintiffs' counsel have submitted a largely boiler-plate brief in support of their motion for class certification, unaccompanied by affidavits from or regarding the alleged class representatives, and failing to address basic issues in a meaningful fashion. Consistent with this perfunctory approach – and consistent as well with the decidedly nominal role played in this litigation by the proposed class representatives – the Motion says little about those proposed class representatives, devoting but a single paragraph to their alleged adequacy. (*See* Motion, p. 9.) It presents virtually no facts about any of them, or their involvements, other than conclusory assertions and the rudiments of their trades.

The Motion's attempt to gloss over the proposed class representatives is no accident. In fact, the record establishes that the proposed class should not be certified because the four plaintiffs put forward as class representatives – lead plaintiff Makor Issues & Rights, Ltd. ("Makor Issues"), Richard LeBrun, Nolan Howell, and Alan Mobley – demonstrably fail to meet Rule 23(a)(4)'s requirement that the class representatives be able adequately to protect the interests of the class. To the contrary, the depositions of these proposed representatives reveal that this case is precisely the sort that Rule 23's adequacy requirement does not allow. Rather than competent plaintiffs directing the action, the evidence shows that Plaintiffs' counsel, Milberg LLP ("Milberg"), is exercising virtually unfettered discretion in prosecuting the case and making key decisions – including unilaterally determining who will serve as its purported class representative overseers. In that regard, the evidence shows that it is Milberg that has

chosen (or offered to discard) the proposed class representatives, largely without consultation with other proposed class representatives or named plaintiffs. Consistent with the passive nature of their selection, each of the proposed representatives has testified that he has exercised little or no supervisory role over counsel, and has played little or no role in any decisions pertaining to this litigation, instead deferring entirely to counsel. What is more, there are substantial reasons to doubt that any of the proposed representatives is even capable of fulfilling his fiduciary duties to the class, and it is clear that several of the proposed representatives do not understand the fundamental nature of the duties owed by a class representative. Finally, the fact that these proposed representatives – including not a single institutional investor – are the best that apparently have been able to be mustered after more than six years of litigation itself speaks volumes about whether this case truly merits proceeding as a class action.

It is not only Rule 23(a)(4)'s adequacy requirements which have not been met here, however. As to two of the proposed class representatives, Mobley and LeBrun, the typicality requirement of Rule 23(a)(3) has also not been met. These proposed representatives' trading records show that neither suffered a cognizable injury from the alleged wrongdoing – Mobley because he likely benefited from the alleged fraud, and LeBrun because he cannot establish loss causation. And the purchases of the remaining two proposed class representatives, Makor Issues and Howell, each occurred only after Tellabs had indisputably revealed declining demand to the market (*i.e.*, on April 18, 2001). As discussed below, this rump portion of the class period fundamentally differs in that regard from preceding periods at issue here, and should be excluded from any class.

Moreover, even if, *arguendo*, some class were to be certified here, Plaintiffs' proposed class definition is overbroad in several ways. First, Plaintiffs have not come forward with any evidence that purchasers of Tellabs stock after April 18, 2001, can establish loss causation with respect to the core allegations regarding declining demand for the TITAN 5500. Although Plaintiffs contend that the supposed "truth" was not revealed until June 19, 2001, the Second

Amended Complaint's ("SAC") own allegations and supporting documents demonstrate that the market was made aware of declining demand for Tellabs' products no later than April 18, 2001.

Second, "in-and-out" traders – *i.e.*, those who purchased shares within the class period but then sold equal or greater amounts prior to the alleged revealing of the "truth" on June 19, 2001 – should be excluded from the class. Given Plaintiffs' own allegations, any losses suffered by class members who sold prior to the end of the class period cannot have been caused, as a matter of law, by Defendants' alleged misrepresentations. And despite the fact that it is Plaintiffs' obligation at the class certification stage to come forward with proof as to how it intends to treat any disparate issues of damages or causation – so that a meaningful assessment of the pragmatics of class certification can be made (including assessing potential intra-class conflicts) – in their Motion Plaintiffs have treated all class members as being apiece, making no distinctions among them.

Finally, members of the class certified in the ERISA action *Brieger v. Tellabs*, and any other persons who were Tellabs employees during the class period, should be excluded from the class. The *Brieger* plaintiffs should be excluded because allowing them to participate in both actions would constitute impermissible claim-splitting. Other Tellabs employees should also be excluded because those who elected to remain part of any class would be subject to unique, individualized inquiries regarding what inside information they were aware of and/or had access to, which would affect their ability to invoke a fraud-on-the-market presumption of reliance. The problem is illustrated by the alleged "confidential sources" cited in the SAC, most of whom are alleged to have been Tellabs' employees, and all of whom are alleged to have known of information at odds with the Company's public announcements.

STATEMENT OF FACTS

Plaintiffs filed their original motion for class certification on June 20, 2008. (Docket No. 197.) In that motion, Plaintiffs proposed lead plaintiff Makor Issues and named plaintiff Richard LeBrun as class representatives. (*Id.* at 1.) At a status hearing on August 27, 2008, Plaintiffs'

counsel reported to the Court that David Myr, Makor Issues's CEO, was unavailable to be deposed in the United States, and stated that Makor Issues was going to be withdrawn as a proposed class representative. (*See* Motion, p. 1, n.2.) The Court ordered Plaintiffs to file an amended motion for class certification. Plaintiffs' amended motion was filed on September 26, 2008, and proposed as class representatives Richard LeBrun, Alan Mobley, and Nolan Howell, as well as Makor Issues, whose CEO had then become available for a deposition in the United States in November. Neither Mobley or Howell is a named plaintiff in this action.

Plaintiffs seek to certify a class of all persons who purchased Tellabs common stock between December 11, 2000 and June 19, 2001.[1]

A. Proposed Class Representative Alan Mobley.

1. Mobley's transactions in Tellabs stock and certification of those trades.

The certification for Mobley attached as Exhibit B to Plaintiffs' amended motion for class certification purported to list all of Mobley's transactions in Tellabs securities during the class period. That certification listed only one transaction – a purchase of 700 shares on January 4, 2001, for $60.09 per share.[2] Defendants subpoenaed Mobley's broker, TD Ameritrade. The records received from TD Ameritrade revealed that, [redacted] (Ex. 1 at TDA0473.) On October 20, 2008 – the day before Mobley was deposed and after the subpoenaed materials were produced – Plaintiffs filed a revised certification for Mobley listing both the December 15, 2000 sale and the January 4, 2001 buy. (*See* Docket No. 225.) When asked at his deposition why the December

[1] The proposed class definition excludes: defendants; the subsidiaries and affiliates of Tellabs; the officers and directors of Tellabs or its subsidiaries or affiliates, at all relevant times; members of the immediate family of any excluded person; the legal representatives, heirs, successors, and assigns of any excluded person; and any entity in which any excluded person has or had a controlling interest.

[2] [redacted]

15, 2000 sale was not listed on his original certification, [redacted] (Ex. 2 at 40.)[3]

2. The genesis of Mobley's participation in this litigation.

[redacted]

[3] Milberg apparently filed Mobley's certification without reviewing Mobley's actual brokerage records to ensure that the certification was accurate. Milberg has previously been admonished by other courts for allowing incorrect certifications to be submitted. *See, e.g., In re Organogenesis Sec. Litig.*, 241 F.R.D. 397, 407 (D. Mass. 2007); *In re Sonus Networks Inc. Sec. Litig.*, 229 F.R.D. 339, 343 (D. Mass. 2005).

[4] The certification Mobley submitted in July 2002 also did not list the December 15, 2000 sale among his transactions in Tellabs' stock.

[redacted]

3. Mobley's lack of involvement in this litigation, lack of supervision, and lack of knowledge or understanding of Plaintiffs' claims.

[redacted]

[redacted]

B. Proposed Representative Richard LeBrun.

1. LeBrun's transactions in Tellabs stock.

LeBrun purchased 300 shares of Tellabs stock on February 2, 2001 and sold all of those shares on March 12, 2001. (Docket No. 40, pp. 77-78; Ex. 4 at 30-31.) [redacted]

2. LeBrun's lack of involvement in this litigation as a named plaintiff.

[redacted]

[redacted]

LeBrun was listed as one of the named plaintiffs in the Consolidated Amended Class Action Complaint ("CAC") filed on December 3, 2002. (*See* Docket No. 40, ¶ 20.) [redacted]

[5] The first entry on the log – which itself purports to list all correspondence between counsel and LeBrun – is dated February 25, 2003, more than two months after the CAC was filed. (Ex. 5 at 1.) The log also shows that LeBrun did not receive *any* documents or written communications from Milberg for nearly a full year between January 30, 2007 – shortly after the Supreme Court granted Defendants' petition for certiorari – and January 22, 2008 – shortly after the Seventh Circuit issued its decision on remand. (*Id.*)

[redacted]

3. LeBrun's passive involvement as proposed class representative, lack of supervision, and lack of knowledge or understanding of his responsibilities.

[redacted]

4. LeBrun's abdication of his responsibilities concerning his verification of Plaintiffs' interrogatory responses.

As a named plaintiff, LeBrun signed a verification in connection with Plaintiffs' Objections and Responses to Defendant Tellabs, Inc.'s First Set of Interrogatories. (Ex. 6.) His understanding of his role and responsibilities as it relates to that matter is telling regarding his ability to carry out a meaningful role in this litigation. To begin with, even though the Objections and Reponses were made on behalf of all plaintiffs, [redacted]

[redacted]

[redacted]

Second, while the verification from LeBrun was designed to ensure that the responses provided were factually correct, [redacted]

[redacted]

C. Proposed Representative Nolan Howell.

1. Howell's transactions in Tellabs stock.

Howell purchased 600 shares of Tellabs stock on May 30, 2001, and another 700 shares on June 11, 2001, all of which he still holds. (Ex. 7 at 39.)

2. Howell's lack of involvement in this litigation or supervision of counsel.

[redacted]

D. Proposed Class Representative Makor Issues & Rights, Ltd.

[redacted]

[redacted]

Makor Issues was appointed lead plaintiff by the Court on September 27, 2002. (Docket No. 34.) At the time of the lead plaintiff decision, the Court was not informed that Makor Issues is not a United States entity.

1. Makor Issues's ownership structure and representations to the Israeli government regarding its ownership structure.

Makor Issues is not an institutional investor. [redacted] Notwithstanding its request to be appointed a class representative, the ownership structure of Makor – a matter which is directly relevant to the question of who may ultimately control and benefit from the litigation – remains opaque.

[redacted]

[redacted]

2. Makor Issues's trading patterns and transactions in Tellabs stock.

[redacted]

[redacted]

6 [redacted]

3. Makor Issues's lack of supervisory involvement in this litigation.

Makor Issues was appointed lead plaintiff on September 27, 2002. The first significant action in this litigation after that appointment was the filing of the CAC on December 3, 2002. One would have thought that Makor Issues would have had some involvement in that process – not only because it was lead plaintiff but also because the CAC was the first complaint in which Makor Issues was named as a plaintiff – but apparently it did not. It does not appear from the record that Makor Issues was provided with a draft of the CAC prior to the time of its filing. In particular, Plaintiff's privilege log (which has been represented to reflect all written communications between Plaintiffs' counsel and Makor Issues, including reflecting all occasions on which documents were sent to Makor Issues) does not contain any entries related to correspondence received or documents sent between Milberg and Makor Issues between July 22, 2002 (the day before Makor Issues signed its Certification of Proposed Named Plaintiff (*see* Ex. 12)) and February 25, 2003, nearly three months after the CAC was filed. (Ex. 13 at 3.) [redacted]

[redacted]

[redacted]

7 [redacted]

Makor Issues's lack of involvement in the class certification process is illustrative of its abdication of control over this case to its counsel. [redacted]

4. Makor Issues' lack of understanding of the claims it is asserting in this litigation.

Myr does not have a sound understanding of the factual allegations underlying Plaintiffs' claims. [redacted]

[8] On August 27, 2008, Plaintiffs' counsel reported to the Court that Myr was not available at that time to travel to the United States to be deposed, and that it therefore had determined to withdraw Makor Issues as a proposed class representative. Myr subsequently became available to be deposed and Plaintiffs re-proposed Makor Issues as a class representative. (*See* Motion, p. 1, n.2.)

[redacted]

5. Makor Issues's submission of inaccurate documents.

[redacted] Myr's testimony on behalf of Makor Issues raises substantial questions regarding his credibility and/or the seriousness he attaches to legal responsibilities, however, and thereby directly implicates Makor Issues's ability adequately to represent the class.

It is apparent from his deposition that Myr does not take seriously his responsibility to provide complete and accurate information on behalf of Makor Issues, even with respect to legal matters and certifications. [redacted]

[redacted]

Myr has demonstrated a similarly cavalier attitude in this litigation. [redacted]

[redacted]

[9] After the existence of these emails was uncovered during the deposition, Makor Issues produced them the following day.

[redacted]

ARGUMENT

Federal Rule of Civil Procedure 23 sets out specific requirements that must be met in order for a case to be maintained as a class action. *See Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006). In this case, Plaintiffs have the burden of proving that the action meets all of the requirements of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation – and those of Rule 23(b)(3) – predominance of common issues and superiority of a class action. *See* Fed. R. Civ. P. 23. Plaintiffs cannot simply assert in a conclusory manner that those dictates have been met or merely rely on the allegations in their complaint; they bear the burden of proving their fulfillment of each requirement. *See Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 677 (7th Cir. 2001).

Plaintiffs here have not carried their burden of establishing that the putative class will be adequately represented by the proposed class representatives. Plaintiffs also have not established that various proposed class representative's claims are typical of those of the class. In addition, Plaintiffs have not established that the scope of the proposed class is appropriate. In that regard, if a class is certified, the class period should end on April 18, 2001. Moreover, any class that is certified should exclude in-and-out traders, members of the class in *Brieger*, and other Tellabs employees.

I. THE CLASS SHOULD NOT BE CERTIFIED BECAUSE THE PROPOSED REPRESENTATIVES ARE NOT ADEQUATE.

The proposed representatives are not adequate because they have not played – and are not capable of playing – a meaningful supervisory role in this litigation.

Rule 23(a)'s adequacy requirement encompasses class representatives, their counsel, and the relationship between the two. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001); *see also Weiner v. The Quaker Oats Co.*, 1999 WL 1011381, *6 (N.D. Ill. Sept. 30, 1999). "Because of the binding effect of any judgment on absent class members, the adequacy

of representation is crucial." *Ballan v. The Upjohn Co.*, 159 F.R.D. 473, 482 (W.D. Mich. 1994). *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members."); *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 89-90 (7th Cir. 1977). What constitutes adequate representation is a question of fact to be determined by the circumstances of each case. *Susman*, 561 F.2d at 90; *Ballan*, 159 F.R.D. at 482. Under the circumstances of this case, Plaintiffs have not met their burden of establishing that the absent class members will be adequately represented if this case is certified as a class action.

A key purpose of the PSLRA was to ensure that securities class actions would no longer be lawyer-driven vehicles. "It is well-settled that the central purpose of the PSLRA is to ensure that plaintiffs, and not their attorneys, control the direction of litigation." *Funke v. Life Fin. Corp.*, 2003 WL 194204, *4 (S.D.N.Y. Jan. 28, 2003); *see also Maiden v. Merge Techs., Inc.*, 2006 WL 3404777, *3 (E.D. Wis. Nov. 21, 2006) ("The purpose behind the PSLRA was to prevent lawyer-driven litigation and to ensure that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions [of] plaintiffs' counsel.") (internal quotation marks omitted). The Lead Plaintiff provision of the PSLRA was intended to ensure that decisions concerning the litigation are made by the clients, rather than the lawyers. *See In re Infospace, Inc. Secs. Litig.*, 330 F. Supp. 2d 1203, 1210 (W.D. Wash. 2004) ("One of Congress' objectives in passing the PSLRA was to prevent lawyer-driven lawsuits by giving control of the litigation to lead plaintiffs with substantial holdings of the securities of the issuer.") (internal quotation marks omitted); *Hill v. Tribune Co.*, 2005 WL 3299144, *3 (N.D. Ill. Oct. 13, 2005) ("The lead plaintiff provision of the PSLRA is designed to contribute to the litigation being investor-driven instead of lawyer-driven."); *see also* S.Rep. No. 104-98, *4 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 683 (The role of the lead plaintiff is "to empower investors so that they – not their lawyers – exercise primary control over private securities litigation.").

Although the PSLRA does not alter the substantive requirements of Rule 23, "in complex class action securities cases governed by the PSLRA, the [Rule 23] adequacy standard must reflect the governing principles of the Act and, particularly, Congress's emphatic command that competent plaintiffs, rather than lawyers, direct such cases." *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 484 (5th Cir. 2001); *accord Asher v. Baxter Int'l, Inc.*, No. 02 CV 5608, slip op. at 3 (N.D. Ill. Sept. 7, 2006). Having competent class representatives with the willingness, ability, and interest in directing the litigation is essential for ensuring that the interests and goals of class members, and not their counsel, are being pursued. *Berger*, 257 F.3d at 484; *In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132, 135-36 (S.D.N.Y. 2008). Thus, while the standard for serving as a class representative is not particularly demanding, there are of course limits on a proposed representative's ignorance and deference to counsel. *See, e.g.*, *In re Ocean Bank*, 2007 WL 1063042, *6-9 (N.D. Ill. Apr. 9, 2007) (St. Eve, J.) (cited in Motion at 9).

In this case, there is no evidence that competent plaintiffs are directing or meaningfully supervising the action. Indeed, rather than this being a case in which proposed class representatives are controlling counsel, it appears that it is counsel that is unilaterally making decisions about who should and should not be selected to play a nominal role as class representative. This has matters upside-down. Moreover, as discussed below, the class representatives selected are deeply flawed in their abilities to carry out the tasks, including meaningful supervision of counsel and the litigation, that one would expect of a class representative.

Courts have denied class certification in circumstances such as this. For example, in *In re Baan Co. Sec. Litig.*, 271 F. Supp. 2d 3 (D.D.C. 2002), the Court denied class certification after finding that the litigation was lawyer-driven and therefore the class was not being adequately represented by the lead plaintiff. The Court noted that there had been no continuity among the "plaintiffs" during the course of the case: "the plaintiffs who filed suit bear no resemblance to the lead plaintiffs, or to those individuals who seek to be certified as class

representatives." *Id.* at 15. The lead plaintiff in that case testified that he "made no decisions regarding the litigation, and that managing the litigation was entirely the responsibility of his attorneys." *Id.* Accordingly, the Court found that there was insufficient evidence to conclude that the lead plaintiff could adequately protect a class of thousands of investors and that a class therefore could not be certified. *Id.* at 16. Likewise, in *Griffin v. GK Intelligent Systems, Inc.*, 196 F.R.D. 298 (S.D. Texas 2000), the Court denied class certification on the ground that the proposed class representatives were not adequate, finding that they "were solicited for this lawsuit and have taken little or no supervisory role over lead counsel." *Id.* at 302. In that regard, the Court noted that the proposed representatives "do not participate in litigation decisions, do not receive regular cost/expense information, and they learn of activity in the case when they are copied on matters already completed." *Id*. Although the proposed class representatives were motivated "to recover their investment," the Court found that they were taking no responsibility for that recovery beyond "lending their names to a proposed class action solely at the suggestion of lead counsel." *Id*. Other courts – before and after passage of the PSLRA – likewise have denied class certification where the proposed class representatives have left the litigation entirely in the hands of counsel. *See, e.g., Umsted v. Intelect Commc'ns, Inc.*, 2003 WL 79750, *2 (N.D. Tex. Jan. 7, 2003) (denying class certification where proposed representatives did not actively participate in key developments in case); *Ballan*, 159 F.R.D. at 486 (denying class certification on grounds that proposed class representative and class counsel were inadequate where, among other things, there was no evidence proposed representative participated in "crucial decisions"); *Kassover v. Computer Depot, Inc.*, 691 F. Supp. 1205, 1213-14 (D. Minn. 1987) (denying class certification where plaintiff was unfamiliar with allegations in the complaint and "contented himself to rely entirely upon his attorney's direction"); *Levine v. Berg*, 79 F.R.D. 95, 98 (S.D.N.Y. 1978) (denying class certification where, after deciding to file suit, plaintiff relied on counsel to investigate and prosecute the case); *see also Eslava v. Gulf Telephone Co.*, 2007 WL 2298222, *4 (S.D. Ala. Aug. 7, 2007) (class representatives who "'virtually abdicated' the representative role to their counsel" inadequate); *Welling v. Alexy*, 155 F.R.D. 654, 659 (N.D.

Cal. 1994) (proposed class representative who "failed to exhibit an interest in supervising the attorneys in this case" inadequate).

A. Mobley Is Not An Adequate Class Representative.

[redacted] Mobley's history of non-involvement (and prior lack of interest) in the litigation itself speaks volumes about his adequacy, as does his mode of selection. Those concerns are underscored and exacerbated by what has occurred since the time that Mobley was put forward as a potential class representative, as well as by his evident lack of understanding of basic matters.

First, Mobley has not displayed even a basic understanding of the obligations of a class representative. [redacted] His testimony conspicuously omits any consciousness of an obligation "to be a vigorous advocate for the class and to monitor the litigation and conduct of counsel." *Asher*, slip op. at 6. [redacted]

Second, consistent with his mistaken view of his very limited responsibilities as a class representative, [redacted]

Third, and consistent both with his prior lack of active involvement and his inadequate understanding of the responsibilities attendant to being a class representative, [redacted] Moreover, not only does

this lack of basic diligence underscore Mobley's insufficiency as a class representative, it demonstrates an even more troubling dynamic. [redacted] graphically demonstrates that the lawyers are controlling the flow of information and thereby effectively controlling this case on their own.

Fourth, even having been prepared by his counsel to testify, [redacted] (*See supra*, p. 7.) Yet even if Mobley were to attempt to acquire additional knowledge and a better understanding of the case, there would still remain serious questions regarding his ability to fulfill his duties to the class. [redacted]

Because Mobley cannot meaningfully supervise counsel or otherwise assist in directing the action, he is not an adequate class representative. *See supra*, pp. 22-23; *see also Monster Worldwide*, 251 F.R.D. at 135-36 (finding inadequate proposed representative who "admitted that he had mostly learned about the substance of the litigation only in the week before his deposition, and had devoted almost no time to the case before then"); *Asher*, slip op. at 4-9 (finding inadequate proposed representative who understood little about the allegations in the complaint, did not monitor the litigation after receiving a solicitation letter from Milberg at the outset of the case, and did not understand her duties as lead plaintiff); *see also Weiner*, 1999 WL 1011381 at *10 (finding inadequate proposed class representative who lacked "even a minimal grasp of the facts and legal basis of the case"); *Butterworth v. Quick & Reilly, Inc.*, 171 F.R.D. 319, 323 (M.D. Fla. 1997) (plaintiff who was unfamiliar with facts and cause of action was not an adequate class representative).

B. Howell Is Not An Adequate Class Representative.

[redacted] Consistent with his complete lack of involvement in the litigation up until just a few months ago, [redacted][10] This lack of diligence effectively prevents him from exercising any meaningful supervision or control, or being in a position to provide meaningful input with respect to any case decisions.

[redacted]

In short, in the months since he was approached about serving as a class representative, Howell has taken no active monitoring or supervisory role over counsel. Instead, he has done little other than lend his name to the proposed class action – which also has been solely at the behest of counsel – and accordingly is not an adequate representative. *See Griffin*, *supra*, 196 F.R.D. at 302; *Kassover*, 691 F. Supp. at 1213-14.

C. LeBrun Is Not An Adequate Class Representative.

LeBrun also is not an adequate class representative, as his testimony and actions to date demonstrate.

First, LeBrun's inadequacy to fulfill the fiduciary role of being an involved monitor and supervisor with respect to this litigation on behalf of others is amply demonstrated by his actions

[10] [redacted]

with respect to his more limited, individual role as a named plaintiff. LeBrun was named as a plaintiff in the CAC filed on December 3, 2002. One might assume that, as a named plaintiff, he would have had some meaningful involvement in or supervision of the litigation purportedly being conducted on his behalf. That is not the case, however. [redacted] (Ex. 4 at 68, 70.[11])

Instead, LeBrun has served largely as a figurehead from the outset. And, the record shows that Milberg has decided what nominal roles LeBrun will play in this litigation, rather than the other way around. Milberg chose LeBrun to be a named plaintiff.[12] [redacted]

Second, it is clear that LeBrun's proposed appointment as a class representative has done nothing to alter his figurehead status, or his entirely passive approach to this litigation. [redacted]

[11] [redacted]

[12] It appears that LeBrun was chosen by counsel as a named plaintiff because of the dates of his trades in Tellabs stock. *See* CAC ¶ 30(b) ("Plaintiffs LeBrun and Leehy bring the claims asserted herein pursuant to Section 20A of the Exchange Act on behalf of a subclass ("LeBrun-Leehy Subclass") consisting of all persons who purchased Tellabs common stock contemporaneously with sales of Tellabs common stock by Defendants Birck and Kohler on February 2, 2001.")

[redacted]

LeBrun's testimony regarding his verification of Plaintiffs' interrogatory responses illustrates this lack of involvement, as well as his basic lack of understanding of his independent responsibilities. [redacted]

Third, LeBrun does not have an adequate understanding of what his responsibilities would be as a class representative. [redacted] While that understanding is consistent with LeBrun's passivity to date, it is a far cry from the active monitoring and supervisory role demanded of an individual who seeks to be appointed as a representative to look out for the interests of others.

D. Makor Issues Is Not An Adequate Class Representative.

Finally, Makor Issues also is not an adequate class representative – which is to say, given Myr's exclusive function in that regard at Makor Issues, that Myr is not adequate to fulfill that role on Makor Issues' behalf. A lead plaintiff, such as Makor Issues here, arguably has an even greater duty under the PSLRA than a class representative "to participate in [the] litigation and to exercise supervision and control of the lawyers for the class." *Asher*, slip op. at 3 (quoting Joint Explanatory Statement of the Committee of Conference, Statement of Managers, H.R. Conf. Rep. No. 104-369, at 31 (1995), as reprinted in 1995 U.S.C.C.A.N. 730). But there is significant reason to doubt Makor Issues' capabilities and performance in carrying out those roles. And there are other significant reasons as well to doubt Makor Issues' adequacy as a class representative.

First, and perhaps most fundamentally, Myr himself has admitted that despite Makor Issues' appointment as lead plaintiff, [redacted] In this regard, Myr's testimony was strikingly similar to that of the lead plaintiff found to be inadequate to serve as a class representative in *Baan*, who testified that he "made no decisions regarding the litigation, and that managing the litigation was entirely the responsibility of his attorneys." *Baan*, 271 F. Supp. 2d at 15; *see also LaGrasta v. First Union Sec., Inc.*, 2005 WL 1875469, *8 (M.D. Fla. Aug. 8, 2005) (finding inadequate proposed representative who "cannot read English very well" and "has virtually abdicated to his attorneys the conduct of the case").

Second, the concerns about Makor Issues' ability to meaningfully monitor, supervise and participate in decision-making are highlighted by instances which demonstrate that it has effectively forfeited the field to counsel, which, in reality, is unilaterally controlling decision-making. Several points in the record amply bear this out, and give rise to troubling questions.

[redacted]

[redacted]

Third, Myr apparently does not accurately understand, and cannot articulate, the allegations in Makor Issues' own pleading, [redacted]

Fourth, Myr's conduct in other instances reveals what is at best a casual approach to accuracy with respect to legal obligations [redacted] and at worst an outright willingness to dissemble when he believes it serves Makor Issues' purposes [redacted] (*See* pp. 17-19, *supra*.) None of this is consistent with the qualities required of a person who seeks to be appointed as a fiduciary for others.[13]

Finally, whether it is due to language difficulties, inattentiveness, or this sort of failure to take legal requirements seriously, Makor Issues has already demonstrably failed to abide by even its own individual obligations in this case. As described earlier (*see* pp. 18-19, supra), Myr admitted that in responding to discovery in this case [redacted] Makor Issues's failure to comply with discovery requests, until that failure was uncovered two years later during his deposition, alone raises substantial questions regarding whether it is a suitable representative of the class. *See Darvin v. Int'l Harvester Co.*, 610 F. Supp. 255, 257 (S.D.N.Y. 1985).

[13] Those concerns are only exacerbated by the fact that it is impossible to know on whose behalf Myr and Makor Issues are truly acting – or who is in a position to give them controlling directions – [redacted] (*See* pp. 12-13, supra.) It is one thing to assert privacy or secrecy concerns when dealing with one's own affairs. It is another thing entirely to do so while asking the Court to entrust the welfare of a putative class to a non-public entity that hides the identity of controlling persons.

Each of these concerns is quite serious in its own right. Considering them in the aggregate, there should be little question that Makor Issues would not be an adequate class representative here.

II. THE PROPOSED CLASS REPRESENTATIVES DO NOT MEET THE TYPICALITY REQUIREMENT OF RULE 23(a)(3).

In addition to the deficiencies described above, the proposed class representatives should not be appointed because their claims are not typical of those of the proposed class. "A plaintiff's claim is typical if it arises out of the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). The Seventh Circuit has long held, however, that "[w]here it is predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff or a small subclass, then the named plaintiff is not a proper class representative." *Koos v. First Nat'l Bank of Peoria*, 496 F.2d 1162, 1164 (7th Cir. 1974); *see also Katz v. Comdisco, Inc.*, 117 F.R.D. 403, 407 (N.D. Ill. 1987); *Weizeorick v. ABN Amro Mortg. Group, Inc.*, 2004 WL 1880008, *5 (N.D. Ill. Aug. 3, 2004) ("Although there may be factual distinctions between the claims of the representative and the class members, colorable defenses unique to the named representative may destroy typicality as well as bring into question the adequacy of the named plaintiff.")

In this case, proposed class representatives Mobley and LeBrun are subject to the unique defense that they did not suffer a cognizable injury from the alleged wrongdoing and therefore lack standing, although for factually distinct reasons.[14] Accordingly, they are not suitable class

[14] This Court does not need to find that each of the proposed class representatives actually lacks standing in order to find that they did not satisfy the typicality requirement. The Seventh Circuit has indicated that "the presence of even an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff's representation. The fear is that the named plaintiff will become distracted by the presence of a possible defense applicable only to him so that the representation of the rest of the class will suffer." *J.H. Cohn & Co. v. Am. Appraisal Assocs., Inc.*, 628 F.2d 994, 999 (7th Cir. 1980) (internal citation omitted). *See also Williams v. Balcor Pension Investors*, 150 F.R.D. 109, 112 (N.D. Ill. 1993) (observing that a defense to a proposed class representative's claim "need not be a sure-fire winner" in order to defeat

representatives. *See Mintz v. Mathers Fund, Inc.*, 463 F.2d 495, 499 (7th Cir. 1972) ("Before one may successfully institute a class action, it is, of course, necessary generally [to] be able to show injury to himself in order to entitle him to seek judicial relief. A plaintiff who is unable to secure standing for himself is certainly not in a position to fairly insure the adequate representation of those alleged to be similarly situated.") (internal quotation marks omitted); *see also Katz*, 117 F.R.D. at 407 ("One such unique defense that precludes a plaintiff from representing a class is lack of standing."). In addition, for reasons discussed at greater length in section C below, Makor Issues and Howell are also not typical, particularly with respect to those putative class members who purchased prior to April 18, 2001.

A. Mobley's Claim Is Not Typical Because He Is Subject To The Unique Defense That He Lacks Standing.

Mobley is subject to the unique defense that he lacks standing because he did not suffer an injury from the alleged fraud. Mobley's corrected certification shows that on December 15, 2000, he sold for $62.44 per share 1200 shares of Tellabs stock that he had purchased prior to the beginning of the class period; he then bought 700 shares of Tellabs stock on January 4, 2001 for $60.09 per share. (Docket No. 219, Ex. B.) In short, Mobley sold more shares at an allegedly inflated price than he bought. Mobley therefore likely had a net benefit from the alleged fraud due to his sale on December 15, 2000, and therefore cannot show an injury-in-fact from the alleged fraud. *See In re Comdisco Sec. Litig.*, 150 F. Supp. 2d 943, 946 (N.D. Ill. 2001) (net seller during class period benefited from fraud and could not serve as lead plaintiff); *In re Bausch & Lomb Inc. Sec. Litig.*, 244 F.R.D. 169, 173 (W.D.N.Y. 2007) (same); *In re Boston Scientific Corp. ERISA Litig.*, 2008 WL 4768030, *5 (D. Mass. Nov. 3, 2008) (holding "net sellers" during class period to be inadequate class representatives: "Where a plaintiff's class period sales exceed purchases, the plaintiff has most likely benefited from any alleged inflation of the stock price for that period").

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typicality).

Of course, whether Mobley was a net beneficiary of the "truth" not having been revealed on December 11, 2000 depends, in part, upon how much the price of Tellabs' stock would allegedly have dropped at that time (when the stock was trading in excess of $60 per share) if the "truth" had been made known, compared to the amount it later dropped due to the alleged revelation of the "truth."[15] It is Plaintiffs' burden to come forward and explain how their potential damages claims relate to the duration of the class period, and to their class certification requests. They have not done so here. But if, for example, the drop which allegedly would have occurred on December 11, 2000 if the "truth" had become known is equal to or greater than that which causally occurred later due to the "truth" having been revealed, it is clear that Mobley would have been a net beneficiary of the alleged fraud and not injured. Moreover, while Mobley may have some personal interest in claiming that the drop which would have occurred on December 11, 2000 is not as great as that which subsequently occurred due to the "truth" being revealed, it is clear that other class members would have diametrically opposite interests. All of this supports a conclusion that Mobley's greater number of sales during the class period make him atypical in several respects, and an inappropriate choice for class representative.

B. LeBrun's Claim Also Is Not Typical Because He Cannot Establish Loss Causation.

LeBrun also should not be appointed as a class representative because he is atypical with respect to a fundamental issue of loss causation. LeBrun purchased 300 shares of Tellabs stock on February 2, 2001 and sold all of those shares on March 12, 2001. As the Supreme Court made clear in *Dura*, a plaintiff who sells before the relevant truth is revealed cannot establish loss causation: "But if, say, the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342 (2005); *see also Arduini/Messina P'ship v. Nat'l Med. Fin. Servs.*

[15] The SAC alleges that Tellabs common stock fell $5.16 per share, i.e., from $21.20 to $16.04, due to the June 19, 2001 announcements. (*See* SAC, ¶7.) It is the rare securities class action in which plaintiffs do not claim that, had the truth been revealed from the outset, the stock price would not have fallen by at least as much as is alleged to have occurred subsequently.

Corp., 74 F. Supp. 2d 352, 361-62 (S.D.N.Y. 1999) (dismissing claim for failure to allege loss causation where plaintiffs had sold stock before disclosure of alleged fraud); *Wieland v. Stone Energy Corp.*, 2007 WL 2903178, *13-14 (W.D. La. Aug. 17, 2007) (same). Plaintiffs do not allege that the alleged truth was revealed, either fully or partially, between February 2 and March 12. To the contrary, Plaintiffs allege that Tellabs made a false statement on March 7, 2001 that artificially inflated the stock price. (*See* SAC ¶¶ 99-100, 104.) [redacted] (Ex. 4 at 135-36.) Thus, under Plaintiffs' own theory, any loss LeBrun suffered from his sale must be attributable to factors other than the revelation of the alleged fraud. Because LeBrun therefore will not be able to establish loss causation, his claim is atypical and he too is not a suitable class representative. *See In re Bally Total Fitness Sec. Litig.*, 2005 WL 627960, *6 (N.D. Ill. Mar. 15, 2005) (in-and-out trader was not suitable class representative because of unique problems in establishing element of loss causation); *In re Silicon Storage Tech., Inc.*, 2005 U.S. Dist. LEXIS 45246, *24-26 (N.D. Cal. May 3, 2005) (plaintiff who sold all of his shares before alleged corrective disclosure was subject to unique defense); *In re Cable & Wireless, PLC Sec. Litig.*, 217 F.R.D. 372, 379 (E.D. Va. 2003) (plaintiff who sold all shares before alleged fraud was revealed lacked standing).[16]

C. The Late Class Period Purchases By Makor Issues And Howell Create Typicality Issues.

As discussed in section III below, the class period should be circumscribed and include only purchases up to April 18, 2001. And, of course, under these circumstances Makor Issues and Howell could not serve as class representatives for the remainder of the class, since neither purports to have an actionable purchase during the period prior to April 18. (*See* p. 41, *infra*.) But even if, *arguendo*, the class period were not so limited in duration, it would be inappropriate

[16] As set forth in Part IV below, all in-and-out traders like LeBrun should be excluded from the class.

in any event to allow Makor Issues and Howell to represent those who purchased before April 18.

That is because the conduct and representations at issue, and nature of the claims for, purchases before April 18, 2001 differ in certain fundamental respects from those at issue for purchases after April 18. As discussed in Part III below, one key aspect of that difference pertains to core claims regarding alleged misstatements about continued high demand for the TITAN 5500 – all of which pre-date the April 18 announcements, which indisputably acknowledged deteriorating demand. But there are other fundamental differences as well. The April 18 announcements for the first time reduced full-year guidance for 2001, and did so very significantly (by $800 million). (Ex. 16.) Indeed, as has previously been noted, the April 18 guidance reduction was ***double*** the $400 million decline in revenue allegedly predicted by a Tellabs' internal report. (SAC ¶ 39.)

All of this underscores that any claims regarding post-April 18 purchases will differ in numerous fundamental respects – ranging from the alleged misrepresentations at issue, to the evidence of scienter as of April 18, to separate matters of loss causation – compared to claims arising from pre-April 18 purchases. While, as discussed next, for some of these reasons post-April 18 purchases should not be included at all in class proceedings, at a minimum these differences make Makor Issues and Howell – each of whose claims relies solely on post-April 18 purchases – atypical representatives of those purchasing before April 18.

III. IF A CLASS IS CERTIFIED, THE CLASS PERIOD SHOULD END ON APRIL 18, 2001.

For the reasons set forth in Parts I and II above, the proposed class representatives should be rejected and this case should not be certified as a class action, but rather should proceed on the named plaintiffs' individual claims. However, if the Court does certify a class, the class period should run from December 11, 2000 to no longer than April 18, 2001, the date on which Tellabs lowered its 2001 projections by $800 million and revealed a significant drop in demand for the TITAN 5500.

The key theory underlying the SAC is that demand for the TITAN 5500 series was dropping, but that was not disclosed to the market. (*See, e.g.*, SAC ¶ 7 (alleging "Defendants' efforts to obscure and conceal the truth concerning Tellabs' deteriorating sales and diminishing value….").) In that regard, the SAC alleges that the "truth" was revealed on June 19, 2001 when Tellabs made an announcement regarding declining demand for the TITAN 5500. (SAC ¶ 132.) But the fact is that, no later than April 18, 2001, even according to the documents relied upon by the SAC, Tellabs had already announced a significant deterioration in demand to the market.

This has two implications for the class period in this case. First, it creates a fundamental divide between those who purchased before April 18 and those who purchased after April 18, a divide that potentially affects litigation strategy and the claims to be made. To put it simply, those who purchased after April 18 have every incentive to minimize or ignore the April 18 disclosures, given the questions those disclosures raise regarding the risks known at the time of subsequent purchases.[17] By contrast, those who purchased before April 18 have a potentially very different set of incentives if the case is presented and tried.

Second, there is also a fundamental difference in terms of loss causation. As discussed below, any putative class member who purchased Tellabs stock after April 18 cannot, as a matter of law, establish loss causation with respect to Plaintiffs' core claims based on alleged concealment of "deteriorating sales" (SAC, ¶ 7) and declining demand for the TITAN 5500.[18] This undermines the notion that common issues predominate across the entire proposed class.

[17] [redacted]

[18] As set forth in Defendants' currently pending Motion For Partial Judgment on the Pleadings and supporting memoranda, the SAC fails adequately to allege loss causation at all with respect to Plaintiffs claims based on the alleged misstatements regarding the TITAN 6500 system and the alleged inaccuracy of Tellabs' financial statements for the fourth quarter of 2000 due to its allegedly sending downstream customers unordered TITAN 5500s. (*See* Docket Nos. 200, 202, and 220.)

The divide among pre- and post-April 18 purchasers is a stark one, and a unitary class action ignoring this distinction would be inappropriate.

A. The Alleged "Truth" Regarding Declining Demand For The TITAN 5500 Was Revealed No Later Than April 18, 2001.

Plaintiffs seek to have this case certified as a class action based on the fraud-on-the-market presumption of reliance. Absent that presumption, individual issues of reliance predominate and class certification is inappropriate. *See Basic Inc. v. Levinson*, 485 U.S. 224, 241-42 (1988); *see also In re Fed. Nat'l Mortg. Ass'n Sec., Deriv. & "ERISA" Litig.*, 247 F.R.D. 32, 38-39 (D.D.C. 2008).

In evaluating whether class certification is appropriate, the Court must take into account whether there is support for a claim that it was not until the end of the proposed class period or some later date that the core alleged misrepresentations were cured. If, on the other hand, the class certification proceedings reveal that, as a matter of law, a corrective disclosure occurred at some earlier date, there is no reason to certify a class for later periods. *Fed. Nat'l Mortage*, 247 F.R.D. at 38. That is because after a curative disclosure, the market price is no longer assumed to be influenced by the alleged misrepresentations or omissions and the fraud-on-the-market presumption no longer applies. *See id.* at 39 (shortening proposed class period because earlier disclosure "severed the link between the alleged misrepresentations and the stock price"). *See also Ryan v. Flowserve Corp.*, 245 F.R.D. 560, 577 (N.D. Tex. 2007) (denying class certification because plaintiffs did not prove loss causation and therefore could not rely on the fraud-on-the-market presumption of reliance); *In re SCOR Holding (Switzerland) AG Litig.*, 537 F. Supp. 2d 556, 570 (S.D.N.Y. 2008) (shortening class period because market in security not efficient until end of "quiet period" following IPO); *Lerch v. Citizens First Bancorp, Inc.*, 144 F.R.D. 247, 254-55 (D.N.J. 1992) (shortening proposed class period because allege fraud disclosed earlier); *In re LTV Sec. Litig.*, 88 F.R.D. 134, 147-48 (N.D. Tex. 1980) (same).[19] While individual

[19] Although determining the date of the curative disclosure touches on the merits, that does not make the inquiry inappropriate at the class certification stage. *See Szabo*, 249 F.3d at 676 ("And if some of the considerations under Rule 23(b)(3) … overlap the merits … then the judge must

plaintiffs may still seek to maintain individual claims, alleging that they somehow were individually misled as to the matter, claims based in whole ***or*** in part on disproven fraud-on-the-market presumptions cannot be treated on a classwide basis.

1. The nature of Plaintiffs' claims for purchasers on or after April 18, 2001.

As noted above, the key theory underlying Plaintiffs' claims is that Tellabs hid declining demand for the TITAN 5500 and the existence of "deteriorating sales." But on April 18, 2001, Tellabs issued a press release reducing its full-year revenue projections from approximately $4.4 billion to a range of $3.6 to $3.7 billion – an $800 million decrease. (Ex. 16.) Tellabs also announced that "[i]n light of reduced and deferred spending by major communications carriers, Tellabs will realign its cost structure with its current expectations for lower revenue growth." (*Id*.) In that regard, it listed a variety of cost-reduction measures, including job cuts, pay-cuts for all corporate officers, eliminating salary increases for others, and "align[ing] manufacturing capability with demand expectations…." (*Id*.) Moreover, in a conference call with analysts held later that day, Tellabs expressly acknowledged "declining business trends," and "a very different environment than it was just a few weeks ago" due to customers' reductions in their capital spending plans. (Ex. 17 at 1-2.)

These statements are flatly inconsistent, at least for post-April 18 purchasers, with Plaintiffs' claims that an anticipated decline in product sales and demand for Tellabs' core product was somehow not revealed. Indeed, it is no accident that Plaintiffs' cite only pre-April 18 statements pertaining to the TITAN 5500 in that regard. (See Docket No. 149, p. 4.) This alone reflects a fundamental divide between pre-April 18 purchasers and post-April 18 purchasers, and raises fundamentally different issues of reliance and loss causation as between the two groups with respect to this key component of Plaintiffs' claim. Put simply, post-April 18 purchasers cannot maintain a classwide fraud-on the-market-claim that declining demand was

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make a preliminary inquiry into the merits.").

not revealed; at best, any such claim would have to be based on some individualized showing. That alone requires excluding post-April 18 purchasers from any class-wide proceeding.

It is not only Plaintiffs' claims regarding declining demand that fall prey to these fundamental distinctions, however. On close inspection, the same is true of Plaintiffs' (wholly conclusory) allegation that the revised April 18, 2001 projection lacked a reasonable basis. (SAC ¶ 122.) In fact, a close reading of the SAC reveals that Plaintiffs' allegations in that regard are directly tied to their allegations regarding declining demand for the TITAN 5500.

Paragraph 122 of the SAC alleges that Tellabs' April 18 revenue projections "were materially false and misleading and lacked a reasonable basis" for the reasons set forth in four earlier paragraphs (¶¶ 74, 80, 86, and 119). Putting to one side Plaintiffs allegations regarding the availability of the TITAN 6500 (¶ 74) and the accuracy of Tellabs' fourth quarter of 2000 financial statements (¶¶ 80(b), 86(a), and 119(b)), which are the subject of Defendants' currently pending motion for partial judgment on the pleadings for failure to allege loss causation, Plaintiffs' claim regarding the April 18 projection is based entirely on the contention that the Company knew there was a decline in demand for TITAN 5500 products but purportedly did not reveal it. (*See, e.g.*, ¶ 80(a) ("in truth, Tellabs was experiencing a substantial decline in the demand for its TITAN 5500 products"); ¶ 86(b) ("a market research study performed by Defendants and an outside research firm was accurately forecasting a significant additional drop in TITAN 5500 sales").)[20] Yet that is precisely what ***was*** revealed by the April 18 announcements, including the very substantial downward revision in guidance.

And there is no question that the market absorbed this message at the time. Indeed, in response to the April 18 announcements, analysts raised the alarm about weakening demand for the TITAN 5500. (*See* Ex. 18 at 1 ("TITAN 5500 revenues, in contrast, appear to continue to lag well below historical growth rate levels…."); Ex. 19 at 1 (noting "[w]eakness in the core TITAN 5500 business"); Ex. 20 at 96 ("near-term growth expectations for the TITAN 5500 have been

[20] Paragraph 119(a) alleges a "severe and continuing collapse in demand for Tellabs' products."

moderated"); Ex. 21 at 2 (expressing concern over "TITAN 5500 weakness"); Ex. 22 at 2 ("Looking forward, our primary concern is new order rates for that TITAN 5500 – particularly in the current environment when carriers are looking to defer large capital expenditures.").)

2. Because the alleged "truth" regarding declining demand for the TITAN 5500 was revealed no later than April 18, 2001, purchasers after that date cannot establish loss causation or reliance through fraud-on-the-market presumptions.

After the April 18 announcement, a reasonable investor could not believe that the TITAN 5500 would continue its long history of substantial year-over-year growth, as Tellabs' previous statements regarding strong demand for the TITAN 5500 and revenue projections allegedly suggested. Because the April 18, 2001 announcement "severed the link" between the alleged misrepresentations and the stock price, the fraud-on-the-market presumption of reliance cannot apply after that date and the class period should end on April 18, 2001. *See Fed. Nat'l Mortgage*, 247 F.R.D. at 39-40 (announcement of restatement was corrective disclosure and marked end of class period even though additional information concerning accounting irregularities was later disclosed); *see also Semerenko v. Cendant Corp.*, 223 F.3d 165, 181 (3d Cir. 2000).

The fact that yet additional projected declines occurred subsequently, and were revealed on June 19, 2001, does nothing to alter this conclusion. As several courts have observed, failures to meet forecasts and downward revisions of forecasts, standing alone, have a negative effect on the stock price, but not a *corrective* effect.[21] The announcement of further revised guidance on June 19, 2001 was undoubtedly bad news, but it did not reveal any undisclosed risk or correct any allegedly false impression in the market that demand for the TITAN 5500 remained unhampered. After April 18, there simply was no such misimpression in the marketplace.

[21] *See, e.g., In re IPO Sec. Litig.*, 399 F. Supp. 2d 261, 266-67 (S.D.N.Y. 2005); *see also, Congregation of Ezra Sholom v. Blockbuster, Inc.*, 504 F. Supp. 2d 151, 168 (N.D. Tex. 2007) (rejecting argument that "disclosure of lower than expected earnings constitutes an admission that the company's prior positive statements about its financial health and business were false"); *In re Motorola Sec. Litig.*, 505 F. Supp. 2d 501, 546 (N.D. Ill. 2007); *Flowserve*, 245 F.R.D. at 577 (reduction in guidance that caused stock price decline was not a corrective disclosure).

Indeed, in the wake of the June 19 announcements, many analysts observed that the June 19 announcement contained no "new" news regarding the causes of the shortfall, even if the drop-off in demand was more precipitous than anticipated. (*See, e.g.*, Ex. 23 at 1 ("The significant shortfall is largely attributable to a significant reduction in large carrier purchases of the TITAN 5500…. While these factors are *not new*, the impact of these macro trends were more pronounced than expected during the June quarter. In our view, *the June miss was quite predictable*.") (emphasis added); Ex. 24 ("for the most part, *there is no 'new' incremental news*; deteriorating conditions continue to affect the majority of hardware and software vendors") (emphasis added); Ex. 25 ("shortfall in line with our previous commentary"); Ex. 26 at ML072 ("many of these issues are not new"); Ex. 27 at 2 ("We view TLAB's pre-announcement as consistent with our sector-wide downgrade ….").)

In short, because the market was made aware by April 18 that demand for the TITAN 5500 series was declining, and that Tellabs' future revenues would not be consistent with prior performance, the class period should end no later than that date, even if additional information regarding the extent of the decline later may have come to light. *See Fed. Nat'l Mortg.*, 247 F.R.D. at 39-40; *see also Lerch*, 144 F.R.D. at 254-55 (ending class period on date loans in default disclosed, not when impact of loans on financial condition of company disclosed because as of earlier date "the investing public was in a qualitatively different position with regard to reliance" on the allegedly false statements); *LTV*, 88 F.R.D. at 147-48 (ending class period on day company reported that adjustments to inventory value would have a "materially adverse impact on the reported results," even though amount of the restatement disclosed later).

B. If The Class Period Ends On April 18, 2001, Makor Issues And Howell Cannot Establish Loss Causation.

If a class is certified but with a class period ending on April 18, 2001, Makor Issues and Howell cannot be appointed as class representatives.

To begin with, Howell's only purchase occurred after April 18, 2001, *i.e.*, on May 30, 2001. If the class period ends on April 18, he would therefore not be a member of the class and could not serve as a class representative.

The same conclusion holds with respect to Makor Issues. While Makor Issues did make a purchase before April 18 – on March 30 – it sold all of those shares on the very same day, for a profit. *See* p. 14, *supra*. In the absence of injury, Makor Issues has no cognizable claim for its pre-April 18 purchases, and therefore cannot serve as a class representative for those having claims arising during this earlier period.

IV. IF A CLASS IS CERTIFIED, IN-AND-OUT PURCHASERS SHOULD BE EXCLUDED FROM THE CLASS DEFINITION.

If a class is certified, the class should be defined to exclude investors who purchased Tellabs stock during the class period at allegedly inflated prices, but who then sold their Tellabs stock prior to the alleged "corrective" disclosures or events – the only such corrective alleged in the SAC being the June 19, 2001 events which it is alleged caused the "truth" to emerge. (SAC ¶ 132.) For example, the class should not include (but as proposed would include) an investor who purchased Tellabs stock in late December 2000 but then sold all of his Tellabs stock in February 2001. Such proposed class members have suffered no cognizable harm, since they sold their stock before any alleged corrective event.

Investors who sold before such a corrective event emerged have not suffered any loss as a matter of law, and therefore should not be part of a class, as other courts have held. *See, e.g., In re Cornerstone Propane Partners, L.P. Sec. Litig.*, 2006 WL 1180267, *9 (N.D. Cal. May 3, 2006); *see also Guillory v. Am. Tobacco Co.*, 2001 WL 290603, *2 (N.D. Ill. March 20, 2001) (proposed class definition "must not be so broad as to include individuals who are without standing to maintain the action on their own behalf"). This is because, as the Supreme Court clarified in *Dura*, investors who purchase during the class period but sell before an alleged corrective event cannot satisfy the essential element of proximate loss causation. And, cases

decided both prior and subsequent to *Dura* have rejected claims brought by "in-and-out" investors.[22]

In *Dura*, the Supreme Court reversed the Ninth Circuit's holding that a plaintiff adequately alleged loss causation in a federal securities fraud case by merely alleging that it purchased a security at an artificially inflated price due to a defendant's misrepresentation. 544 U.S. 336. The Court held that a plaintiff must also allege that there was a later decline in the value of the stock caused by correction or revelation of the alleged earlier misrepresentation. *Id.* at 345. The Court reasoned that buying at an artificially inflated price may not necessarily cause damages. *Id*. at 342-43. For example, the Court noted that if shares purchased at a price artificially inflated by a misrepresentation were sold before the inaccuracy of the misrepresentation was revealed – *i.e.*, the precise situation of the "in-and-out" traders who are proposed to be included in the class – there would be no loss caused by the misrepresentation. *Id*. ("[I]f . . . the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss.").

Instead, as *Dura* emphasized, for loss causation to exist, the decline in stock price allegedly constituting the loss must be in response to a subsequent event or disclosure that is "corrective" of the alleged misrepresentation. *Id*. at 344. This requirement ensures that a proper nexus links the alleged fraud (the purported misrepresentations that are alleged to have distorted the stock price) to an investor's actual losses caused by a price decline. *See id*. (defendant "becomes liable to a relying purchaser 'for the loss' the purchaser sustains 'when the facts become generally known' and 'as a result' share value 'depreciates.'").

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[22] *See, e.g., In re Compuware Sec. Litig.*, 386 F.Supp.2d 913, 920 (E.D. Mich. 2005) (granting summary judgment to defendants because plaintiff had sold defendant's shares before disclosure of the misrepresentation); *In re Bally Total Fitness Sec. Litig.*, 2005 WL 627960, *6 (refusing to appoint an in-and-out trader as lead plaintiff because it would "have to use considerable resources to establish that even though it was an in-and-out trader, its losses nevertheless were caused by the alleged fraudulent statements."); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 272 F. Supp.2d 243, 254 (S.D.N.Y. 2003) (dismissing claims of plaintiff who sold prior to corrective disclosure); *Arduini/Messina P'ship*, 74 F. Supp.2d at 361-62 (same).

Recent opinions demonstrate that, in light of *Dura*, "in-and-out" investors should be excluded from a Section 10(b) class. In *In re Cornerstone*, 2006 WL 1180267, the court applied the analysis above and held on similar facts that investors who both purchased and sold their stock at artificially high prices prior to the "truth" allegedly being revealed should be excluded from the proposed class. *Id*. at *8. The court reasoned that such investors could not allege that any losses they may have suffered were caused by the correction of the alleged misrepresentations. *Id*. The court rejected the plaintiffs' argument that the element of loss causation should not bar class certification because it was merely a damages issue. *Id*. Instead, it explained that loss causation bars putative class members from proceeding beyond the class certification stage where they cannot allege loss causation by virtue of their purchases and sales at artificially inflated prices. *Id*.

Likewise, the District Court in the Enron securities litigation stated, in connection with class certification proceedings in that case, that *Dura* and other cases "make clear that investors who purchased during the Class Period and then sell before the corrective disclosures ('in-and-out traders') do not suffer loss because of defendants' alleged fraud." *In re Enron Corp. Sec. Deriv. & "ERISA" Litig.*, 529 F. Supp. 2d 644, 719 (S.D. Tex. 2006). Accordingly, the Enron court held that the class definition must be restricted to those who actually lost money and suffered damages attributable to the defendants' misconduct, and instructed the lead plaintiff to modify the class definition to exclude in-and-out traders. *Id*. at 720. *See also In re Scientific-Atlanta, Inc. Sec. Litig.*, 571 F.Supp.2d 1315, 1328 (N.D. Ga. 2007); *Wieland*, 2007 WL 2903178, *13-14.

Here, Plaintiffs allege that it was only on June 19, 2001 that the "truth" emerged. (SAC ¶ 132.) Therefore, according to Plaintiffs' own allegations, investors who bought and sold Tellabs stock before the June 19, 2001 press release and conference call could not have suffered any loss attributable to some earlier revelation of defendants' purported misconduct.

Although some courts have declined to exclude in-and-out purchasers post *Dura*, those cases are readily distinguishable. Those courts have concluded that where there are multiple

corrective disclosures alleged, or where plaintiffs otherwise allege that the truth leaked to the market prior to the end of the class period, in-and-out traders cannot categorically be excluded because there is a chance that they were harmed. *E.g., In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 245 F.R.D. 147, 166 (S.D.N.Y. 2007) (plaintiffs alleged that true financial condition began to leak to the market prior to announcemet); *In re Priceline.com Inc. Sec. Litig.*, 236 F.R.D. 89, 94 (D. Conn. 2006) (multiple corrective disclosures); *In re BearingPoint, Inc. Sec. Litig.*, 232 F.R.D. 534, 544 (E.D. Va. 2006) (same). In contrast, in this case, there is only a single alleged corrective date. Plaintiffs have never alleged that the supposed "truth" was partially revealed or otherwise leaked to the market before June 19, 2001. (*See also, e.g.*, SAC ¶7 ("Defendants' efforts to obscure and conceal the truth concerning Tellabs' deteriorating sales and diminishing value continued until, at the earliest, June 19, 2001….")) To the contrary, the Motion claims that issues of "loss causation" are entirely common (Motion, p. 11), and that calculation of each class member's damages will therefore be no more than a mechanical exercise (*id*. at 12).[23] So for any individuals who bought and sold during the class period, any loss suffered is not attributable to the alleged misrepresentations. *See Wieland*, 2007 WL 2903178, *13-14 (distinguishing cases where disclosure occurs during the class period).[24]

[23] This can only be the case if there is a single, shared "corrective" date. Otherwise, separate issues of loss causation would abound, *e.g.*, with respect to each alleged partial correction, and vary according to when a class member purchased and sold. In effect, claims of partial correction would turn any trial into a series of mini-trials, each addressed to a separate time interval between alleged partial corrections. And this, in turn, would introduce a host of issues with respect to the class, including whether the focus on different time periods would predominate over common issues, whether adequate representatives are needed or exist with respect to each different time period, whether intra-class conflicts might then exist (including in the emphasis given to just how "corrective" any alleged partial correction is claimed to be), whether sub-classes might be required, etc. None of this is even touched on in Plaintiffs' Motion, for the simple reason that the SAC alleges only a single corrective disclosure and the Motion itself claims that all such issues are common. Accordingly, Defendants do not address these hypothetical matters further. And it is far too late in the day, at least with respect to class certification, for Plaintiffs to advance new claims for the first time in their reply brief.

[24] Some courts have refused to exclude in-an-out traders at the class certification stage on the ground that the inquiry touches on the merits. *E.g., Roth v. Aon Corp.*, 238 F.R.D. 603, 607-08 (N.D. Ill. 2006); *In re Tyco Int'l, Ltd.*, 236 F.R.D. 62, 71 (D.N.H. 2006). This approach is

Finally, even if, *arguendo*, there were some claim of partially corrective disclosures or events predating June 19, 2001 – which there is not – it would still be appropriate, at a minimum, to exclude from the class (a) the trades of those persons who purchased and then sold before the first of such events, and (b) the trades of those persons who purchased and then sold in any interval between any partially corrective disclosures. *See, e.g.*, *Scientific-Atlanta*, 571 F.Supp.2d at 1328 (excluding "purchasers who bought shares of SA stock during the class period but sold all of their shares prior to" the first disclosure date because they "have not arguably alleged a curative disclosure as required to prove loss causation").

V. IF A CLASS IS CERTIFIED, MEMBERS OF THE *BRIEGER* CLASS AND TELLABS EMPLOYEES DURING THE CLASS PERIOD SHOULD BE EXCLUDED FROM THE CLASS DEFINITION.

A. Members Of The Class In *Brieger v. Tellabs* Should Be Excluded From The Class In This Action.

Individuals who owned Tellabs stock through the Tellabs, Inc. Profit Sharing and Savings Plan (Plan) should be excluded from any class that is certified in this action. Currently, that subset of the proposed class here has a lawsuit pending against Tellabs claiming damages under ERISA. (*See Brieger v. Tellabs, Inc.*, Case No. 06-1882 (N.D. Ill.).) In *Brieger*, a class has been certified, defined as: "All persons who were participants in or beneficiaries of the Tellabs, Inc. Profit Sharing and Savings Plan at any time between December 11, 2000 and July 1, 2003 and whose accounts included investments in Tellabs stock." (*See Brieger*, Docket No. 107, p. 24.) To allow those same plaintiffs to be class members in this case would allow those plaintiffs to impermissibly split their claims between the two lawsuits.

"Courts prohibit a litigant from splitting its claims into multiple actions when the litigant should have brought the claims in a single action." *Civix-DDI, LLC v. Expedia, Inc.*, 2005 WL 1126906, at *4 (N.D. Ill. May 2, 2005); *see also American Stock Exch., LLC, v. Mopex, Inc.*, 215

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directly contrary to the standard in the Seventh Circuit, however, where courts are required to consider all facts necessary to resolve class certification issues. *See Szabo*, 249 F.3d at 675-676; *see also Hamilton v. O'Connor Cherolet, Inc.*, 2006 WL 1697171, at *3.

F.R.D. 87, 91 (S.D.N.Y. 2002). The plaintiffs in *Brieger* should have brought all of their claims against Tellabs arising out of the facts and circumstances at issue here in one action. Each of the defendants in this suit are also named as defendants in the ERISA lawsuit. Moreover, the claims in both lawsuits clearly arise out of the "same core of operative facts." *Cassady v. Quaker Oats Co.*, 2003 WL 22282516, *4 (N.D. Ill. Sept. 30, 2003); *see also Okoro v. Bohman*, 164 F.3d 1059, 1062 (7th Cir. 1999). Indeed, the core of facts in the two cases is nearly identical, at least with respect to the overlapping class periods. The *Brieger* plaintiffs argue that the company's representations regarding the TITAN 5500, the TITAN 6500 and Tellabs' financial projections were misleading, in many cases pointing to the exact same statements as Plaintiffs in this case. Having failed to bring all of their claims against Tellabs arising out of these facts in one lawsuit, the *Brieger* plaintiffs are precluded from pursuing both actions. *See Civix-DDI*, 2005 WL 1126906, *4. To remedy this claim splitting, the Court should exclude the members of the *Brieger* class from the class definition in this litigation.

B. Tellabs Employees During The Class Period Should Be Excluded From The Class.

Employees of Tellabs during the class period also should be excluded from any class that is certified because they are subject to a unique non-reliance defense. Plaintiffs intend to rely on the fraud on the market presumption in order to establish reliance on a class-wide basis. However, individuals who hold inside information may not take advantage of that presumption. *See In re VMS Sec. Litig.*, 136 F.R.D. 466, 476-477 (N.D. Ill. 1991); *Endo v. Albertine*, 147 F.R.D. 164, 168 (N.D. Ill. 1993). Indeed, even according to Plaintiffs, many Tellabs employees were privy to relevant inside information that was not disclosed to the market. For example, in the SAC, Plaintiffs cite 27 confidential sources as providing information regarding the alleged true state of affairs at the Company, at least 24 of whom were employees at the Company during the relevant time period. (*See, e.g.*, SAC ¶¶ 34-45, 46-55, 62-72.) Under Plaintiff's own allegations, there is substantial doubt whether these Tellabs employees could rely on the fraud-on-the-market presumption of reliance.

Thus, with respect to these putative employee class members, proof of individualized reliance would need to be explored in detail, because there is reason to believe that a significant issue may exist (unlike in most circumstances, or with respect to most class members). That would necessitate potentially extensive individualized discovery proceedings directed toward these putative employee class members, as well as individual hearings or adjudications regarding this predictable issue; indeed, in the absence of access to such individualized discovery and proceedings, Defendants would effectively be stripped of their own due process rights. But these sorts of individualized procedures and proceedings are inconsistent with a common class action proceeding, and, as to these employees, would not render participation in a class action superior or manageable. *See Basic Inc.*, 485 U.S. at 242. Accordingly, individuals who were employees of Tellabs during the class period should be excluded from the class if a class is certified. *Id*.

CONCLUSION

For the foregoing reasons, Defendants Tellabs, Inc., Michael J. Birck, Richard C. Notebaert, Brian Jackman and Joan E. Ryan respectfully request that this Court deny Plaintiffs' Motion for Class Certification, Appointment of Class Representatives, and Appointment of Class Counsel.

Dated: December 19, 2008

Respectfully submitted,

TELLABS, INC., MICHAEL J. BIRCK, RICHARD C. NOTEBAERT, BRIAN JACKMAN AND JOAN E. RYAN

/s/ Melanie E. Walker
One of the attorneys for Defendants

CERTIFICATE OF SERVICE

I, Melanie E. Walker, an attorney, hereby certify that on December 19, 2008, service of Defendants' Opposition to Plaintiffs' Motion for Class Certification, Appointment of Class Representatives, and Appointment of Class Counsel was accomplished pursuant to ECF as to Filing Users and in compliance with LR 5.5 as to any party who is not a Filing User or represented by a Filing User.

/s/ Melanie E. Walker
Melanie E. Walker