UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

DANIEL TUROCY, et al.,

Plaintiffs,

vs.

EL POLLO LOCO HOLDINGS, INC., et al.

Defendants.

Case No.: SA CV 15-1343-DOC (KESx)

ORDER GRANTING PLAINTIFFS' MOTION TO CERTIFY CLASS [112]; DENYING DEFENDANTS' MOTION TO STRIKE PORTIONS OF REPLY [141]; GRANTING DEFENDANTS' REQUEST TO FILE SUR-REPLY [141-2]; AND GRANTING PLAINTIFFS' REQUEST TO FILE SUR-SUR-REPLY [149-1]

Before the Court is the Lead Plaintiffs' Motion to Certify Class ("Motion") (Dkt. 141). The Court heard oral argument on June 25, 2018.

I. BACKGROUND

El Pollo Loco is a restaurant chain primarily based in California that specializes in Mexican-style grilled chicken, among other food offerings. *See* Plaintiffs' Consolidated Third Amended Complaint ("CTAC") (Dkt. 74) ¶¶ 2, 76. In February 2015, El Pollo Loco raised its menu prices—including by removing its $5 combo meal menu from its menu boards and increasing prices on other value-priced menu items—which ultimately hurt El Pollo Loco's sales. *Id.* ¶¶ 3, 55.

This case arises from allegations that between May and August 2015, El Pollo Loco—and certain of its directors, officers, and shareholders—fraudulently misstated the cause of declining sales trends in order to improve the market perception of El Pollo Loco's value. *Id.* ¶¶ 4–15, 113. This case also arises from allegations that insiders sold about $130 million in El Pollo Loco stock at fraud-inflated prices on May 19, 2015, during that same time period, taking advantage of non-public information to obtain millions of dollars in insider trading profits. *Id.* ¶¶ 11, 12, 113, 131, 133.

Lead Plaintiffs Peter Kim, Dr. Richard J. Levy, Sammy Tanner, and Ron Huston[1] (collectively, "Plaintiffs") are purchasers of the securities of El Pollo Loco Holdings, Inc. ("El Pollo Loco" or the "Company") between May 15, 2015 and August 13, 2015 ("Class Period"). *Id.* ¶¶ 18–22. Plaintiffs bring this putative securities class action against Defendants El Pollo Loco Holdings, Inc. ("El Pollo Loco" or the "Company"), Trimaran Capital Partners, Trimaran Pollo Partners, LLC ("Trimaran Pollo"), Freeman Spogli & Co., Stephen J. Sather (the Company's CEO), Laurence Roberts (the Company's CFO), and Edward J. Valle (the Company's Chief Marketing Officer ("CMO")) (collectively, "Defendants"). *Id.* ¶¶ 23–37. Plaintiffs bring three claims under the Securities Exchange Act of 1934, pursuant to Section 10(b) (securities fraud), Section 20(a) (controlling person liability for securities fraud), and Section 20A (insider trading). *Id.* ¶¶ 118–35. In support of these claims, Plaintiffs allege that

[1] Plaintiff Robert W. Kegley, Sr., named in the CTAC, is not moving for appointment as Class Representative, and is thus omitted from the discussion. *See* Mot. at 1.

Defendants failed to disclose material facts and made materially false or misleading statements as part of a scheme that caused the market prices of El Pollo Loco securities to be artificially inflated during the Class Period. *Id.* ¶ 65. Plaintiffs further allege that Defendants Sather, Valle, and Trimaran Pollo are liable for insider trading for their May 19, 2015 sale of over $129 million in El Pollo Loco common stock while in possession of non-public information about El Pollo Loco's sales trends. *Id.* ¶¶ 92, 130–135.

A. Facts

Plaintiffs allege the following facts regarding Defendants' alleged fraud and insider trading. *See* Mot at 1–2. In February 2015, during the first quarter of 2015, El Pollo Loco began raising its menu prices. *Id.* (citing CTAC ¶¶ 55, 60). Removing $5 combo meals from its menu was one way that El Pollo Loco increased prices, despite the combo meals being a core component of the Company's quick service restaurant plus ("QSR+") positioning. *Id.* (citing CTAC ¶¶ 49–51). The higher priced menu resulted in lower customer traffic and lower same store sales growth. *Id.* (citing CTAC ¶¶ 56–65). On May 12, 2015, two days before Defendants announced the El Pollo Loco's first quarter 2015 earnings results, El Pollo Loco's senior management made a presentation to El Pollo Loco's board of directors. *Id.* (citing CTAC ¶¶ 66–72). The presentation informed the board that, among other things: (a) menu prices increased, (b) the increase in menu prices negatively impacted store traffic and sales, (c) the Company's value score had fallen and moved El Pollo Loco out of its QSR+ position, (d) the second quarter of 2015 same store sales growth was projected to be 2.5%—below the original forecast, and (e) the Company already planned to reinstitute $5 menu items in the third quarter of 2015 to bring back value and lower prices. *Id.* (citing CTAC ¶¶ 66–72). The information in the May 12, 2015 board presentation was not revealed to the public. *Id.* (citing CTAC ¶ 73).

On May 14, 2015, the Company announced lower than expected first quarter of 2015 same store sales growth. *Id.* (citing CTAC ¶¶ 74–77). During the May 14, 2015 conference call, Defendants informed the public that the timing of New Year's Eve, changes to under 500 calorie menu items and marketing missteps were the cause of decreased customer traffic and lower than expected same store sales growth. *Id.* (citing CTAC ¶¶ 85–78). Defendants also

stated that the Company's value scores remained high and that it was on track to report full year 2015 system-wide same store sales growth between 3% and 5%, with the second quarter of 2015 falling in the lower end of that range. *Id.* (citing CTAC ¶¶ 81–82, 88–89). Defendants failed to disclose that higher prices had an impact on the first or second quarter results up to that date. *Id.* (citing CTAC ¶¶ 81–83). On May 19, 2015, seven days after the board presentation, and five days after making allegedly false and misleading statements to investors, a number of insiders, including the Shareholder Defendants and Defendants Sather and Valle, sold over $132 million of El Pollo Loco stock. *Id.* (citing CTAC ¶¶ 91–95).

On June 10, 2015, Sather presented on behalf of the Company at the William Blair Annual Growth Stock Conference. *Id.* (citing CTAC ¶¶ 96–97). During the conference, Sather stated that the Company's average per person spend was above quick service restaurants ("QSRs") but well below fast casual restaurants. *Id*. (citing CTAC ¶¶ 96–97). He stated that the Company wanted to always maintain that value. *Id*. (citing CTAC ¶¶ 96–97). On August 13, 2015, after the stock market closed, the Company issued a press release and hosted a conference call to discuss the second quarter of 2015 financial results. *Id*. (citing CTAC ¶¶ 98). The Company announced that the second quarter of 2015 system-wide same store sales growth was only 1.3%. *Id*. (citing CTAC ¶¶ 98). Sather stated that "second-quarter results were impacted by the combination of higher-priced offerings and a reduction of [the] value portion of [its] menu." *Id*. (citing CTAC ¶¶ 98). He also announced that in the third quarter of 2015 the Company "re-launched the $5 Combo menu which will remain in our restaurants full time to reinforce our value offering. This allows us to return to our winning QSR+ strategy . . . ." *Id*. (citing CTAC ¶¶ 98). In reaction to Defendants' announcement, the price of El Pollo Loco stock declined 20% from a closing price of $18.36 per share on August 13, 2015 to a closing price of $14.56 per share on August 14, 2015. *Id*. (citing CTAC ¶¶ 103).

B. Proposed Class Representatives

Named Plaintiffs Peter Kim, Richard J. Levy, Sammy Tanner, and Ron Huston (collectively, the "Proposed Class Representatives") are individuals who purchased El Pollo

Loco common stock during the Class Period.[2] CTAC ¶¶ 19–22 (citing Certification of Named Plaintiffs ("Plaintiffs Decl.") (Dkt. 22-2)). Each Proposed Class Representative submitted a declaration detailing their purchase of El Pollo Loco common stock during the Class Period. *See generally* Plaintiffs Decl.

Peter Kim purchased 43,000 shares of El Pollo Loco common stock during the Class Period at prices of up to $24.60 per share, held those shares through the end of the Class Period, and suffered losses of approximately $268,008 after the Company's announcement. *See* Plaintiffs Decl.; Plaintiffs Loss Estimate (Dkt. 22-3).

Dr. Richard J. Levy purchased 26,020 shares of El Pollo Loco common stock during the Class Period at prices of up to $21.22 per share, held those shares through the end of the Class Period, and suffered losses of approximately $167,371 after the Company's announcement. *See* Plaintiffs Decl.; Plaintiffs Loss Estimate.

Sammy Tanner purchased 14,590 shares of El Pollo Loco common stock during the Class Period at prices of up to $20.76 per share, held those shares through the end of the Class Period, and suffered losses of approximately $124,841 after the Company's announcement. *See* Plaintiffs Decl.; Plaintiffs Loss Estimate.

Ron Huston purchased 25,000 shares of El Pollo Loco common stock during the Class Period at prices of up to $25.00 per share, and 437 options contracts at prices of up to $3.90/contract, held those shares and options through the end of the Class Period, and suffered losses of approximately $337,084 after the Company's announcement. *See* Plaintiffs Decl.; Plaintiffs Loss Estimate; Declaration of Ron Houston ("Huston Decl") (Dkt. 18-2).

The Proposed Class Representatives each certified that they: (1) reviewed the Complaint filed in this action; (2) did not purchase securities at the direction of counsel, or in order to participate in any private securities action; (3) are willing to serve as a representative party on behalf of the Class; and (4) will not accept any payment for serving as a representative party for the Class beyond their respective pro rata share of any recovery, except as ordered or approved by the Court. *See* Plaintiffs Certification (Dkt. 18-2); Plaintiffs Decl; Huston Decl.

[2] The Court omits further reference to Plaintiff Robert W. Kegley, who is not moving for appointment as Class Representative. *See id.*

C. Procedural History

Daniel Turocy originally filed this lawsuit on August 24, 2015. *See* Complaint (Dkt. 1). On December 8, 2015, the Court appointed Ron Huston, Peter Kim, Robert W. Kegley, Sr., Dr. Richard Levy, and Samuel Tanner as Lead Plaintiffs, and appointed The Rosen Law Firm, P.A. ("Rosen) and Robbins Geller Rudman & Dowd LLP ("Robbins Geller") as Co-Lead Counsel. *See* Appointment Order (Dkt. 42). On April 17, 2017, Plaintiffs filed the operative complaint, the Consolidated Third Amended Complaint, (Dkt. 74). The CTAC brings the following three claims under Sections (10)(b), 20(a) and 20A of the Securities Exchange Act of 1934 ("Exchange Act"). CTAC ¶¶ 118–35.

In their first claim, Plaintiffs assert that Defendant El Pollo Loco as well as Defendants Sather, Roberts and Valle (collectively, the "Individual Defendants") violated Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5—i.e. they committed securities fraud. CTAC ¶¶ 118–25. Section 10(b) prohibits the "use or employ, in connection with the purchase or sale of any security . . . [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b). Rule 10b-5 makes it "unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange" to do the following, "in connection with the purchase or sale of any security":

> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person[.]

17 C.F.R. § 240.10b-5. To prevail on a claim of securities fraud under Section 10(b) and Rule 10b-5, a plaintiff must establish: (1) "a material misrepresentation or omission"; (2) "scienter";

(3) "a connection with the purchase or sale of a security"; (4) "reliance"; (5) "economic loss"; and (6) "loss causation." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341–42 (2005).

In their second claim, Plaintiffs assert that the Individual Defendants as well as Defendants Trimaran Capital Partners, Trimaran Pollo, and Freeman Spogli & Co. (collectively, the "Shareholder Defendants") are liable for the 10(b) and 10b-5 violation under Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), i.e. controlling person liability for securities fraud. CTAC ¶¶ 126–29. Section 20(a) "imposes legal responsibility on a 'controlling person' in a company for Rule 10b-5 violations," and requires a predicate violation of the securities laws and regulations (such as a violation of Section 10(b)). *See*, *e.g.*, *Ross v. Abercrombie & Fitch Co.*, 257 F.R.D. 435, 440 (S.D. Ohio 2009). Section 20(a) provides:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable . . . unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. § 78t.

In their third claim, Plaintiffs assert that Defendants Sather, Valle, and Trimaran Pollo (collectively, "20A Defendants")[3] violated Section 20A of the Exchange Act, 15 U.S.C. § 78t-1, i.e. insider trading. CTAC ¶¶ 130–35. Section 20A imposes liability for insider trading:

> Any person who violates any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased . . . or sold . . . securities of the same class.

[3] While Plaintiffs name Sather, Valle, and the Shareholder Defendants as the Defendants to the 20A claim, Plaintiffs only allege that Sather, Valle, and Trimaran Pollo traded El Pollo Loco shares. *See* CTAC ¶¶ 92, 133; *see also* Opp'n at 2 n.4.

15 U.S.C. § 78t-1. Section 20A, like Section 20(a), requires a predicate violation of the securities laws and regulations (such as a violation of Section 10(b)). *See, e.g.*, *Ross*, 257 F.R.D. at 440.

In their operative pleading, Plaintiffs seek damages, attorneys' fees, and costs. CTAC ¶¶ A–D.

On December 8, 2017, Plaintiffs filed the instant Motion to Certify Class. Defendants filed their Opposition ("Opp'n") (Dkt. 122) on March 8, 2018. Plaintiffs replied ("Reply") (Dkt. 131) on April 24, 2018. After the briefing on that Motion was complete, Defendants filed on May 7, 2018, a Motion to Strike Sections of Plaintiffs' Reply, or, in the alternative, for Leave to File a Proposed Sur-Reply ("Strike Motion") (Dkt. 141). On May 14, 2018, Plaintiffs Opposed, and, in the alternative, Requested Leave to File a Proposed Sur-Sur Reply ("Strike Opp'n") (Dkt. 149). Defendants replied ("Strike Reply") (Dkt. 152) on May 21, 2018. On June 14, 2018, Defendants filed a Notice of Supplemental Evidence (Dkt. 154), and on June 21, 2018, Defendants filed Exhibits to Notice of Supplemental Evidence (Dkt. 161).

II. LEGAL STANDARD

Courts may certify a class action only if it satisfies all four requirements identified in Federal Rule of Civil Procedure 23(a). *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 614 (1997). Rule 23(a) requires Plaintiffs to show the following: (1) the class is so "numerous" that joinder of all members individually is impracticable; (2) there are questions of law or fact "common" to the class; (3) the claims or defenses of the class representatives are "typical" of the claims or defenses of the class; and (4) the person representing the class is able to fairly and "adequately" protect the interests of all class members. Fed. R. Civ. P. 23(a). These requirements are commonly referred to as "numerosity," "commonality," "typicality," and "adequacy." *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO v. ConocoPhillips Co.,* 593 F.3d 802, 806 (9th Cir. 2010).

After satisfying these four prerequisites, a party must also demonstrate compliance with one of the requirements under Rule 23(b). Here, because Plaintiffs seek certification under Rule 23(b)(3) they must demonstrate that common "questions of law or fact" predominate over

questions affecting individual members and that a class action is a superior method "for fairly and efficiently adjudicating" the action, Fed. R. Civ. P. 23(b)(3).

The decision to grant or deny a motion for class certification is committed to the trial court's broad discretion. *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir. 2010). However, "Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 351 (2011). "A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, [the party] must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact[.]" *Id.* "[B]efore certifying a class, the trial court must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of Rule 23." *Sali v. Corona Reg'l Med. Ctr.,* 889 F.3d 623, 631 (9th Cir. 2018). The Ninth Circuit recently explained the evidentiary standard at class certification:

> For practical reasons, we have never equated a district court's rigorous analysis at the class certification stage with conducting a mini-trial . . . . Applying the formal strictures of trial to such an early stage of litigation makes little common sense. Because a class certification decision is far from a conclusive judgment on the merits of the case, it is of necessity not accompanied by the traditional rules and procedure applicable to civil trials . . . . Limiting class-certification-stage proof to admissible evidence risks terminating actions before a putative class may gather crucial admissible evidence. And transforming a preliminary stage into an evidentiary shooting match inhibits an early determination of the best manner to conduct the action.

Id. (internal quotations, quotation marks, and brackets omitted).

In resolving a class certification motion, it is inevitable that the Court will touch on the merits of a plaintiff's claims. *See Wal-Mart,* 131 S. Ct. at 2551–52 ("The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's causes of action.") (quoting *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 156

(1982)). But, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194–95 (2013). Accordingly, any merits consideration must be limited to those issues necessary to deciding class certification. *See id.* at 1195 ("Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."). "[W]hether class members could actually prevail on the merits of their claims is not a proper inquiry in determining the preliminary question of whether common questions exist." *Stockwell v. City & Cnty. of San Francisco*, 749 F.3d 1107, 1112 (9th Cir. 2014) (citing *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011)).

III. DISCUSSION

Plaintiffs seek to certify the following class:

> All persons and entities who purchased or otherwise acquired El Pollo Loco Holdings, Inc. ("El Pollo Loco" or the "Company") common stock or exchange-traded call options, or who sold exchange-traded El Pollo Loco put options (the "Securities"), between May 15, 2015 and August 13, 2015, inclusive (the "Class Period"), and were damaged thereby. Excluded from the Class are Defendants,[4] present or former executive officers of El Pollo Loco and their immediate family members (as defined in 17 C.F.R. §229.404, Instructions (1)(a)(iii) and (1)(b)(ii)).

Mot. at 1.

Plaintiffs contend that the proposed class satisfies Federal Rules of Civil Procedure 23(a)'s four requirements of (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy, for the following four reasons.

[4] "Defendants" are El Pollo Loco, Stephen J. Sather ("Sather") the Company's Chief Executive Officer, Laurance Roberts ("Roberts") the Company's Chief Financial Officer, Edward J. Valle ("Valle") the Company's Chief Marketing Officer, and the Company's shareholders Trimaran Pollo Partners, L.L.C., Trimaran Capital Partners, and Freeman Spogli & Co. Mot. at 1 n.2 (citing CTAC); Defendants' Oral Argument (requesting that, for the purposes of defining the class, the Company's shareholders Trimaran Pollo Partners, L.L.C., Trimaran Capital Partners, and Freeman Spogli & Co. not be described as "controlling," because Defendants factually contest this description).

First, Plaintiffs argue that the class is so numerous that joinder is impractical because there were approximately 38 million shares of the Company's common stock outstanding as of August 6, 2015, and, during the Class Period, on average, more than 975,000 shares of El Pollo Loco stock traded on each of the Class Period's 63 trading days. *See* Mot. at 7–12.

Second, Plaintiffs argue that common questions of law and fact exist because all proposed Class members are alleged to have been harmed as a result of a common course of conduct arising from material misrepresentations and omissions that Defendants made to the investing public, yielding the following questions of law and fact:

(1) whether Defendants violated the Exchange Act;

(2) whether Defendants omitted and/or misrepresented material facts;

(3) whether Defendants knowingly or recklessly disregarded that their statements and omissions were false and misleading;

(4) whether the price of El Pollo Loco's common stock was artificially inflated as a result of Defendants' misrepresentations and/or omissions; and

(5) whether and to what extent disclosure of the truth regarding Defendants' omissions and misrepresentations of material facts caused Class members to suffer economic loss and damages.

Id.

Third, Plaintiffs argue that they satisfy the typicality requirement because their claims are founded on the same alleged facts and legal theories as the claims of all other proposed Class members, such as:

(1) Plaintiffs purchased El Pollo Loco Securities during the Class Period;

(2) Defendants made material misstatements and/or omissions to the public market'

(3) Defendants concealed the truth from investors throughout the Class Period;

(4) by hiding this information from investors, El Pollo Loco's stock price remained artificially inflated throughout the Class Period; and

(5) Plaintiffs suffered the same type of injury as other Class members when the truth was revealed.

Id.

Fourth, Plaintiffs argue that Proposed Class Representatives will fairly and adequately protect the interests of the class because their interest in establishing Defendants' liability and obtaining the maximum possible recovery is aligned with the interests of absent proposed Class members, and because the Proposed Class Representatives have demonstrated their willingness and ability to serve as Class Representatives. *Id.*

Next, Plaintiffs contend that the proposed class also satisfies Rule 23(b)(3)'s two requirements of: (1) predominance; and (2) superiority, for the following two reasons.

First, Plaintiffs argue that questions of law or fact common to class members predominate over questions affecting only individual members because this case centers around Defendants' alleged material misrepresentations and omissions, and Plaintiffs contend that they can establish the reliance element on a class-wide basis. *Id.* at 12–23. Further, Plaintiffs contend that the Section 20(a) and 20A "are predicated on the same legal and factual basis as Defendants' alleged violations of [Section] 10(b) and will be determined by a common resolution of the same issues." *Id.*

Second, Plaintiffs argue that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy because:

(1) the proposed class consists of a large number of purchasers of El Pollo Loco common stock or call options, or sellers of put options, who are geographically dispersed and whose individual damages likely are small enough to keep individual litigation from being economically worthwhile;

(2) Lead Counsel are not aware of other pending Section 10(b) litigation commenced by any Class member in the United States regarding the alleged fraud;

(3) concentrating the litigation in this Court has many benefits, including eliminating the risk of inconsistent adjudication and promoting the fair and efficient use of the judicial system; and

(4) Plaintiffs do not foresee any management difficulties that will preclude this action from being maintained as a class action.

Id.

In addition, Plaintiffs request that the Court appoint Lead Counsel, Robbins Geller Rudman & Dowd LLP ("Robbins Geller") and The Rosen Law Firm, P.A. ("Rosen"), as Class Counsel, because they "are well-qualified to prosecute this case on behalf of Plaintiffs and the other members of the Class, and have already undertaken a vigorous prosecution of this action . . . ." *Id.* at 24.

In sum, Plaintiffs ask the Court to: (1) certify this action as a class action pursuant to Rule 23(a) and Rule 23(b)(3); (2) appoint Peter Kim, Richard J. Levy, Sammy Tanner, and Ron Huston as Class Representatives; and (3) appoint Robbins Geller and Rosen as Class Counsel. *Id.* at 25.

In response, Defendants oppose Plaintiffs' Motion only as to Plaintiffs' third claim for violation of Section 20A, and Defendants also oppose the appointment of Peter Kim, Richard J. Levy, and Ron Huston as Class Representatives.[5] Opp'n at 1–2. Specifically, Defendants argue that the Proposed Class Representatives lack standing to assert a Section 20A claim and that Plaintiffs have not established numerosity because, in Defendants' view, no Plaintiffs or putative class members traded "contemporaneously" with the 20A Defendants, or were harmed by the 20A Defendants' trading. *Id.* In addition, Defendants argue that Kim, Levy, and Huston should not be appointed Class Representatives because: (1) Kim and Huston are not typical of the class; and (2) Levy would be an inadequate Class Representative. *Id.* at 15–18.

Thus, at the outset, the Court GRANTS Plaintiffs' unopposed request for the appointment of Robbins Geller and Rosen as Class Counsel—considering counsel's work "in identifying or investigating potential claims in the action," "counsel's experience in handling class actions," "counsel's knowledge of the applicable law" and "the resources that counsel will commit to representing the class." *See* Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv); *see also* Mot. at 24. Next, with respect to Plaintiffs first and second claims under Section 10(b) (securities fraud) and Section 20(a) (controlling person liability for securities fraud), Plaintiffs' unopposed motion for class certification meets the requirements for a class action, pursuant to Rule 23(a)

[5] Defendants reserve their right to seek to decertify a class on the Section 10(b) and Section 20(a) claims should subsequent circumstances warrant it. Opp'n at 1 n.2.

and (b)(3), with Sammy Tanner as a Class Representative. *See* Opp'n at 1–2. Accordingly, the Court GRANTS Plaintiffs' Motion to Certify the Proposed Class to the extent that it is based on Plaintiffs' first and second claims brought under Sections 10(b) and Section 20(a) of the Exchange Act, and the Court APPOINTS Sammy Tanner as a Class Representative.

Nonetheless, Defendants oppose Plaintiffs' Motion with respect to Plaintiffs' Section 20A claim, and oppose as Proposed Class Representatives Peter Kim, Richard J. Levy, and Ron Huston. *See id.* Thus, the Court will address in turn: (1) the Section 20A claim; (2) the typicality of Kim and Huston; and (3) the adequacy of Levy.

A. Section 20A

In their Opposition, Defendants argue that because the 20A Defendants sold their stock directly to Jefferies, a global investment banking firm, through "a private, off-market transaction with one known counterparty," no other parties—including Plaintiffs and putative class members—could have traded "contemporaneously" with the 20A Defendants (or be harmed by the 20A Defendants). *See* Opp'n at 5–13; Strike Opp'n at 4. Therefore, Defendants argue, Plaintiffs (and all putative class members) lack standing to sue. Opp'n at 5–13. Relatedly, Defendants argue that because no open-market purchasers of El Pollo Loco securities traded "contemporaneously" with the 20A Defendants, Plaintiffs have not established numerosity. *Id.*

Section 20A provides a private right of action to any person who traded "securities of the same class" "contemporaneously" with an insider trader. 15 U.S.C. § 78t-1. "Section 20A was added to the [Exchange] Act in 1988 to "provide greater deterrence, detection and punishment of violations of insider trading." *Johnson v. Aljian*, 394 F. Supp. 2d 1184, 1193–94 (C.D. Cal. 2004), *aff'd in part*, 490 F.3d 778 (9th Cir. 2007) (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 361 (1991) (internal citations and quotation marks omitted)). "The [Supreme] Court noted that the 1988 addition 'focused upon a specific problem, namely, the purchasing or selling of a security while in possession of material, nonpublic information.'" *Id.* (quoting *Lampf*, 501 U.S. at 361 (internal quotations marks, alterations, and citations omitted)). A Section 20A claim must be predicated on a separate

violation of the securities laws and regulations, and here Plaintiffs' Section 20A claim here is predicated on a violation of Section 10(b). *See, e.g.*, *Ross*, 257 F.R.D. at 440.

"Congress did not define the term 'contemporaneous' as used in § 20A, but instead apparently intended to adopt the definition 'which has developed through the case law.'" *Neubronner v. Milken*, 6 F.3d 666, 670 (9th Cir. 1993) (citing H.R. Rep. No. 910, 100th Cong., 2d Sess. 27 (1988)). "The House Report cited *Wilson v. Comtech Telecommunications Corp.*, 648 F.2d 88 (2d Cir. 1981); *Shapiro v. Merrill, Lynch, Pierce Fenner & Smith, Inc.*, 495 F.2d 228 (2d Cir. 1974) and *O'Connor & Associates v. Dean Witter Reynolds, Inc.*, 559 F. Supp. 800 (S.D.N.Y. 1983) as examples of three cases which have 'developed' the definition of 'contemporaneous.'" *In re Verifone Sec. Litig.*, 784 F. Supp. 1471, 1488–89 (N.D. Cal. 1992), *aff'd sub nom. In re VeriFone Sec. Litig.*, 11 F.3d 865 (9th Cir. 1993) (quoting H.R. Rep. No. 910, 100th Cong., 2d Sess. 27 n.22 (1988)). "By reference to these cases, the drafters of [Section 20A] meant to protect and compensate investors who trade at the same time as the insider or for some short period thereafter, and [meant] that a reasonable period of liability could be as short as a few days, but no longer than a month." *Id.* As the district court in *In re Verifone Securities Litigation* explained:

> In *Shapiro* and *O'Connor*, the plaintiffs' and defendants' trades occurred less than a week apart, and the courts found that plaintiffs had stated causes of action for insider trading under 10b-5. The *O'Connor* court further held that plaintiffs who trade prior to the time that the defendant does are not harmed. In *Wilson*, the court recognized that a rule which allowed all parties who purchased or sold securities during the full period from when the insider traded to when the insider disclosed would not serve the purpose of the insider trading cause of action because noncontemporaneous traders do not require protection. Thus, the *Wilson* court held that parties who trade a month after defendants do not trade "contemporaneously."

In re Verifone Sec. Litig., 784 F. Supp. at 1488–89 (internal citations omitted). "[The] 1988 House Report indicates that Congress specifically contemplated a case-by-case

approach to defining 'contemporaneousness.'" *Buban v. O'Brien*, No. C 94–0331 FMS, 1994 WL 324093, at *4 (N.D. Cal. June 22, 1994) (quoting H.R.Rep. No. 910, 100th Cong., 2d Sess. 27 (1988)). The contemporaneous trading requirement in Section 20A was designed to "preserve the notion that only plaintiffs who were harmed by the insider could bring suit, while nonetheless making it possible for such persons to bring suit." *Basile v. Valeant Pharm. Int'l, Inc.*, No. SA CV 14-2004-DOC (JCGx), 2015 WL 7352005, at *4 (C.D. Cal. Nov. 9, 2015) ("*Valeant* MTD Order") (quoting *Buban*, 1994 WL 324093, at *1).

"There is no law binding on this Court as to what constitutes 'contemporaneous' trading." *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1203–04 (C.D. Cal. 2008). "The Ninth Circuit has said that the timeframe required for an insider's trade to be 'contemporaneous' with a plaintiff's trade is "not fixed." *Id.* (quoting *Neubronner*, 6 F.3d at 670). The Ninth Circuit in *Brody* declined to elaborate on the period's "exact contours," but stated that a period of two months is too long. *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1004 (9th Cir. 2002).

Defendants raise the contemporaneous trading issue as a standing argument, but the contemporaneous trading requirement of Section 20A is a statutory standing requirement that "delineate[s] the scope" of the cause of action—and it is not a prerequisite for Article III standing. *In re Connetics Corp. Sec. Litig.*, No. C 07-02940 SI, 2008 WL 3842938, at *13 (N.D. Cal. Aug. 14, 2008) (quoting *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1001 n. 3 (9th Cir. 2002)); *see also Valeant* MTD Order at *4 (addressing a motion to dismiss for failure to allege contemporaneous trading under the failure to state a claim standard rather than the lack of subject matter jurisdiction standard). A question of statutory standing, like contemporaneous trading, "does not implicate subject-matter jurisdiction, i.e., the court's statutory or constitutional power to adjudicate the case." *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 n.4 (2014). Rather, a question of statutory standing goes to the merits, and concerns "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Id.* at 1382; *see also Innovative Sports Mgmt., Inc.*

v. Robles, No. 13-CV-00660-LHK, 2014 WL 129308, at *2 (N.D. Cal. Jan. 14, 2014) (citing *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 907 n.4 (9th Cir. 2011)).

At class certification, Courts do not have "license to engage in free-ranging merits inquiries." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013). "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* ("[A] district court has no authority to conduct a preliminary inquiry into the merits of a suit at class certification unless it is necessary to determine the propriety of certification[.]" (internal marks and citation omitted)). Thus, the Court will consider Defendants' contemporaneous trading challenges to the certification of Plaintiffs' 20A claim only to the extent that such arguments are "relevant to the Court's assessment of whether a class should be certified." *Cf. In re Merck & Co., Inc. Sec., Derivative & ERISA Litig.*, No. CIV.A. 05-1151 SRC, 2013 WL 396117, at *8 (D.N.J. Jan. 30, 2013) (declining to address, at the motion for class certification stage, the defendant's argument that a lack of privity between the insider and the Lead Plaintiff established a lack of contemporaneous trading and a lack of standing for a 20A claim).

Thus, a free-standing contemporaneous trading standing inquiry is not warranted, but only an analysis of whether the Rule 23 requirements are met. *See* Reply at 14.[6] *In re Merck* is instructive. In that case, the defendant argued—in opposition to the class certification motion—that the lead plaintiff lacked standing to certify a class on a 20A claim because the plaintiff and defendant had traded in Merck stock at difference prices and in different quantities, and therefore, according to the defendant, the plaintiff could not prove contemporaneous trading with the defendant. *In re Merck*, 2013 WL 396117, at *8. The district court, having previously held that the plaintiff had stated a plausible 20A claim, rejected the defendant's argument, finding that it raised an issue going solely to the merits:

[6] While Defendants cite cases such as *Middlesex Ret. Sys. v. Quest Software, Inc.*, No. CV066863DOCRNBX, 2008 WL 7084629, at *15 (C.D. Cal. July 10, 2008); *In re Verifone Sec. Litig.*, 784 F. Supp. 1471, 1489 (N.D. Cal. 1992); and *In re Cypress Semiconductors Sec. Litig.*, 1994 WL 669856, at *2 (N.D. Cal. Nov. 29, 1994), for the proposition that Lead Plaintiffs must demonstrate contemporaneous trading to establish standing for the purposes of class certification, those cases were decided before Ninth Circuit in *Vaughn v. Bay Envtl. Mgmt., Inc.*, 567 F.3d 1021 (9th Cir. 2009) and the Supreme Court in *Lexmark*, 134 S. Ct. at 1388 n.4 made clear that statutory standing is a merits rather than jurisdictional issue. *See* Sur-Sur-Reply at 4–5.

> [The defendant] attacks the merits of [the plaintiff's] insider trading claim based on his view of what the law requires to prove contemporaneous transactions under § 20A. Such an argument is not relevant to the Court's assessment of whether a class should be certified under Rule 23. "An analysis into the legal viability of asserted claims is properly considered through a motion to dismiss under Rule 12(b) or summary judgment pursuant to Rule 56, not as part of a Rule 23 certification process." An examination of the elements of a plaintiff's claims may be conducted only insofar as needed to determine whether the requirements of Rule 23 are met.

Id. (internal citations omitted). But unlike *In re Merck*, here the Court has yet to address whether Plaintiffs' 20A claim is plausible. Thus, the decision in *In re Merck* is not exactly on point, and the Court must undertake at least some analysis of contemporaneous trading to determine whether Plaintiffs can satisfy the requirements of Rule 23. *Cf. Dukes*, 564 U.S. at 351 ("A party seeking class certification must . . . be prepared to prove that there are in fact sufficiently numerous parties . . . ."). Specifically, the Court will address Defendants' contention that Plaintiffs cannot meet the numerosity requirement of Rule 23 for the 20A claim because no Plaintiffs or putative class members can possibly demonstrate contemporaneous trading with the 20A Defendants. *See, e.g.*, Opp'n at 14 (discussing Fed. R. Civ. P. 23(a)(1) ("[T]he class is so numerous that joinder of all members is impracticable[.]")). In addition (even though Defendants did not argue this) it logically follows that if no Proposed Class Representatives can demonstrate contemporaneous trading, they would not be adequate class representatives for the 20A claim. *See* Fed. R. Civ. P. 23(a)(4) ("[T]he representative parties will fairly and adequately protect the interests of the class."). Accordingly, the Court will turn to Section 20A's contemporaneous trading requirement as it pertains to whether Plaintiffs have met Rule 23's numerosity and adequacy requirements.

1. Contemporaneous Trading

Plaintiffs allege, under their Section 20A claim, that the 20A Defendants' sales "were made contemporaneously with Plaintiffs' purchases of El Pollo Loco common stock during the Class Period. For example, on May 19, 2015, [20A Defendants] sold the following shares of El Pollo Loco common stock for total proceeds of excess of $129 million":

Defendant	Date of Sale	Amount	Price
Trimaran Pollo	5/19/2015	5,402,500	$21.85
Sather	5/19/2015	360,000	$21.85
Valle	5/19/2015	175,000	$21.85

Id. ¶¶ 133-32. Plaintiffs allege that "[d]uring the period from May 19, 2015 through June 2, 2015, the following Plaintiffs purchased the following shares of El Pollo Loco common stock":

Plaintiff[7]	Date of Purchase	Amount	Price
Peter Kim	5/19/2015	1,000	$22.90
Ron Huston	5/19/2015	2,000	$23.21
Ron Huston	5/29/2015	3,000	$20.88

Id. ¶ 134. In their opening brief, Plaintiffs cite to the Plaintiffs and Huston Declarations, which show the following stock purchases by Kim and Huston on or around May 19, 2015:

Plaintiff	Date of Purchase	Amount	Price
Peter Kim	5/15/2015	3,000	$24.60
Peter Kim	5/19/2015	1,000	$22.90
Peter Kim	5/22/2015	1,000	$22.51
Peter Kim	5/26/2015	5,000	$22.00
Peter Kim	5/27/2015	5,000	$21.70
Peter Kim	5/29/2015	1,000	$20.70
Ron Huston	5/15/2015	6,000	$24.88
Ron Huston	5/15/2015	6,000	$25.00
Ron Huston	5/19/2015	2,000	$23.21

[7] Lead Plaintiff Robert W. Kegley, Sr. is omitted from the chart because he is not a Proposed Class Representative.

Ron Huston	5/20/2015	3,000	$22.13
Ron Huston	5/29/2015	3,000	$20.88

Plaintiffs Decl.; Huston Decl. Huston also purchased, on May 20, 2015, 100 options contracts ("January 20, 2017 Call, $25.00 Strike Price") on El Pollo Loco common stock, at a price of $3.90 per contract. *See* Huston Decl.

In their Opposition, Defendants contend that a plaintiff does not have standing to sue for insider trading under Section 20A when that plaintiff could not have traded with the defendant. Opp'n at 7. Defendants put forward the expert report of Daniel R. Fischel, which states that on May 19, 2015, the 20A Defendants sold all of their shares to Jefferies through a block trade—which is a private transaction conducted off-market pursuant to SEC Rule 144, 17 C.F.R. § 230.144. *See* Declaration of Jason D. Russell (Dkt. 122-1) ("Russel Decl.") Ex. 5 ("Fischel Report") ¶¶ 8–9. Fischel opines that because Lead Plaintiffs were not parties to the private transaction, they did not suffer any economic injury. *Id.* ¶ 10. In other words, Defendants assert that they have shown that only Jefferies could possibly have traded with the 20A Defendants, and therefore, Defendants argue, no other parties could have traded "contemporaneously" with the 20A Defendants under the meaning of Section 20A. Opp'n at 7. More specifically, Defendants suggest that because the contemporaneous trading requirement originally "developed as a proxy for the traditional requirement of contractual privity between plaintiffs and defendants" in insider trading cases, if Defendants can prove the absence of privity, the contemporaneous trading requirement cannot be satisfied, and the 20A Defendants could not have harmed any putative class members.[8] *Id.* at 7–10. In addition, Defendants seek to distinguish this Court's decision in *Valeant*, where the Court held that Section 20A plaintiffs had plausibly alleged contemporaneous trading, even though the 20A defendants in that case had only traded with a private party. *Id.* at 13 (discussing *Valeant* MTD Order). In *Valeant*, this Court held that the plaintiffs had plausibly pled contemporaneous trading by alleging that the defendants had caused the private party to buy shares in the open market, and then caused the private party to sell those shares to the defendants. *Id*; *Valeant* MTD Order at *6–*8. Here,

[8] Relatedly, Defendants argue that Plaintiff have not established a basis to calculate class-wide damages, which the Court will address below. *See* Opp'n at 11.

Defendants argue that "there is no critical link in the causal chain connecting the 20A Defendants to the open market; instead, the 20A Defendants were a party to an agreement pursuant to which Jefferies agreed to buy their shares in a block trade." Opp'n at 13.

In their Reply, Plaintiffs argue that Lead Plaintiffs Huston and Kim (as well as numerous putative class members[9]) traded contemporaneously with the 20A Defendants because the contemporaneous trading requirement is temporal and is not restricted based on the manner in which a defendant decides to structure its insider trading. Reply at 3–4. In other words, Plaintiffs argue that Section 20A does not require that Plaintiffs traded directly with inside traders, and Section 20A is applicable even if an insiders' sale is a private transaction, and not on the public market. *Id.* at 8–11. It follows, Plaintiffs contend, that when investors trade in a class of securities at or about the same time as an insider trader, regardless of whether they could have traded directly with the insider, such investors are damaged when they pay more for the security than they otherwise would have had the inside information been made public. *Id.* at 12. Regardless, Plaintiffs also argue that the 20A Defendants' trading was directly linked to trading on the public market, because Jefferies' involvement in the 20A Defendants' sales was merely as a broker (and agent) through whom the securities were intended to be sold onto the public market. *Id.* at 5–7. Therefore, Plaintiffs assert that they have established the requirements of Rule 23 to certify the class, including numerosity. *Id.*

Next, Defendants move to strike portions of Plaintiffs' Reply, arguing that Plaintiffs failed to provide any evidence in their opening brief that they have standing as "contemporaneous traders" under Section 20A, failed to submit an expert report on the Section 20A claim, and failed to put forth evidence of numerosity. *See generally* Strike Motion. Defendants argue that because Plaintiffs bear the burden of establishing the elements of class certification and standing in their opening brief, Plaintiffs cannot make arguments and submit additional evidence on these issues for the first time in their Reply.[10] In the alternative to

[9] Almost three million shares of El Pollo Loco traded on May 19, 2015, over 3.9 million shares traded May 20, 2015, and over a million shares traded each day on May 21, 22, and May 26, 2015. Reply at 15 (citing Declaration of Professor Steven P. Feinstein ("Feinstein Decl.") (Dkt. 115) at 67.

[10] Defendants also move to strike certain of Plaintiffs' submitted exhibits about the Jefferies transaction as unreliable, which Plaintiff argue should be denied under a recent Ninth Circuit decision, but resolving this issue is not material to the disposition of the instant Motion, for reasons discussed below. *See generally* Strike Mot.; Strike Opp'n.

Defendants' request to strike portions of the Reply, Defendants submit a proposed Sur-Reply (Dkt. 141-2), to have an opportunity to respond to the Reply.

Plaintiffs oppose the Motion to Strike, arguing that Plaintiffs' opening papers established their Section 20A standing by adducing evidence that Lead Plaintiff Kim purchased El Pollo Loco stock on May 19, 22, and 26, 2015, and that Lead Plaintiff Huston purchased El Pollo Loco stock on May 19 and 20, 2015, and options on May 20, 2015. Strike Opp'n at 3; Mot. at 5–6 (citing Plaintiffs Decl.; Plaintiffs Loss Estimate; Huston Decl.). Further, Plaintiffs argue that they have every right to rebut Defendants' new-found 20A private transaction argument—made for the first time in this case in the Opposition—pursuant the Local Rules of this District, which expressly provide for such "rebuttal evidence" and argument on reply. *See id.* at 9 (quoting L.R. 7-10). Further, Plaintiffs argue that "Defendants' Motion to Strike is a brazen attempt to circumvent the local rules and the parties' previously agreed to briefing schedule to get the last word on class certification." *Id.* at 2. Finally, in the event the Court considers Defendants' Sur-Reply, Plaintiffs submit a proposed Sur-Sur-Reply (Dkt. 149-1).

The contemporaneous trading requirement, as discussed above, is a merits question. Defendants' position is that Plaintiffs cannot possibly show contemporaneous trading because of the private nature of the transaction with Jefferies. Essentially, Defendants are arguing that they are entitled to summary judgment on their affirmative defense of absence of contemporaneous trading. *See* Answer (Dkt. 99) at 31. But in general, a plaintiff moving to certify a class should not be expected—in the opening brief—to anticipate and rebut all possible affirmative defense arguments challenging the merits of the plaintiff's claims. In addition, only if Defendants' "private transaction" argument is correct, did Plaintiffs fail to establish the class certification elements in their opening brief.

Accordingly, because Plaintiffs were not required to anticipate and rebut the "private transaction" argument in their opening brief, the Court DENIES Defendants' Motion to Strike portions of the Reply. Nonetheless, because of this Court and the Ninth's Circuit's strong preference for deciding issues on the merits—especially given the limited case law addressing

the contemporaneous trading requirement—the Court GRANTS Defendants' Request to File a Sur-Reply (Dkt. 141-2) and Plaintiffs' Request To File a Sur-Sur-Reply (Dkt. 149-1).

In Defendants' Sur-Reply, Defendants challenge Plaintiffs' contention that contemporaneous trading is a temporal requirement. Sur-Reply at 20. Specifically, Defendants suggest that this Court's *Valeant* decision illustrates that contemporaneous trading is not just about timing, but also the specific nature of the insiders' transaction, because otherwise, Defendants suggest, this Court would not have needed to analyze whether the defendants' private trade in *Valeant* should be "exempt from the contemporaneous trading analysis." *Id.* (citing *Valeant* MTD Order at *5). But Defendants' reliance on *Valeant* is misplaced. In that case, the plaintiffs had brought a Section 20A claim based on a predicate violation of Rule 14e-3, 17 C.F.R. § 240.14e-3, which addresses inside trading on information about a tender offer (a public offer to acquire a company). *See Valeant* MTD Order at *6. Rule 14e-3, in conjunction with Section 20A, provides a cause of action for those who not only traded contemporaneous with an insider trade, but also for a trade "cause[d]" by the insider. 17 C.F.R. § 240.14e-3. Thus, when the Court determined that a private trade in *Valeant* plausibly caused a trade on the open market, the Court included the open market trade in the contemporaneous trading analysis because it was "cause[d]" by the insider for the purposes of a Section 20A claim predicated on a Rule 14e-3 violation. *See Valeant* MTD Order at *6. In addition, the Court in *Valeant* was analyzing which trades were "caused" by the defendants because Section 20A only includes contemporaneous trading in the securities that are the subject of the predicate violation, which in that case was Rule 14e-3. *See id.* And because the *Valeant* defendants had only at first purchased options on the common stock, only if the defendants "caused" the purchase of the common stock within the meaning of Rule 14e-3, could common stock be a security that was the subject of the underlying violation for the purposes of Section 20A (and for the contemporaneous trading analysis). *See id.* Thus, *Valeant* did not precisely address whether a private trade (even assuming here that the Jefferies transaction was purely private, which Plaintiffs hotly dispute) can be excluded from the contemporaneous trading analysis requirement for the purposes of a Section 20A claim predicated on a Section 10(b) violation.

At this stage of litigation, as discussed above, the Court need not fully resolve whether a private trade can ever be excluded from the contemporaneous trading analysis—the Court only need to analyze this issue to determine whether the Rule 23 prerequisites for class certification are satisfied. But various authorities, including decisions from this Court, suggest that inside traders should not be able to avoid Section 20A liability by trading with private counterparties. *See, e.g.*, *In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig.*, No. CIV.A. 05-1151 SRC, 2015 WL 2250472, at *27 (D.N.J. May 13, 2015) (rejecting the 20A defendant's summary judgment argument that because the record showed that the 20A plaintiff and 20A defendant traded at different prices and quantities, and thus could not be counterparties to the same transaction, that they did not trade contemporaneously, explaining that "[the defendant] cites no binding authority for such a restrictive definition of Section 20A's requirement that trades be contemporaneous," and declining to follow *Buban v. O'Brien*, No. C 94-0331 FMS, 1994 WL 324093, at *3 (N.D. Cal. June 22, 1994) ("[W]here it is clear that plaintiff could not have traded with defendant, there is no reason for the Court to apply a more liberal standard to determine contemporaneousness.")); *Valeant* MTD Order at *6 ("[I]ndividuals and entities should not be permitted to use third parties in order to avoid liability under the insider trading laws.").

As an initial matter, Defendants are correct that the contemporaneous trading requirement emerged in part as a proxy for privity, *see, e.g.*, *In re AST Research Sec. Litig.*, 887 F. Supp. 231, 234 (C.D. Cal. 1995) ("Since the 'contemporaneous' concept acts as a proxy for common law privity, there must be some logical limit on those plaintiffs that can bring insider trading claims"), and that some district courts have suggested or held that there needs to be a possibility that a plaintiff traded with the insider in order for the plaintiff to be consider a contemporaneous trader. *See, e,g.*, *Buban v. O'Brien*, 1994 WL 324093, at *3; *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1204 (C.D. Cal. 2008) ("On this 'privity-substitute' view, the insider must have offered his security for sale before the outsider purchased in order for there to be a possibility that the trade was between them.").

However, the plain language of the 20A statute only requires trading "contemporaneously," and contemporaneous is a temporal word meaning "existing, occurring, or originating during the same time." *See Contemporaneous*, Merriam-Webster (June 21, 2018, 6:53 PM), https://www.merriam-webster.com/dictionary/contemporaneous; *see also Valeant* MTD Order at *6 ("While the Ninth Circuit has not defined a specific time period, it has advised that trades must occur at 'about the same time' to be considered contemporaneous." (quoting *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1001 (9th Cir. 2002))). Further, many courts have held that investors' trade in a security several days apart from the insider trade, are "contemporaneous," despite the fact that it would be impossible (or at least very unlikely) for such investors to have traded directly with the inside trader. *See, e.g.*, *Middlesex Ret. Sys. v. Quest Software Inc.*, 527 F. Supp. 2d 1164, 1196 (C.D. Cal. 2007) (finding that eight days is contemporaneous); *City of Westland Police & Fire Ret. Sys. v. Sonic Solutions*, No. C 07–0511 CW, 2009 WL 942182, at *12 (N.D. Cal. Apr. 6, 2009) (finding purchase of stock nine days after a sale was contemporaneous).

In support of Defendants' position that contemporaneous trading does require that a plaintiff could have traded directly with an insider trader, Defendants cite two Ninth Circuit cases—*Neubronner* and *Brody*—which adopted the contemporaneous trading requirement for implied causes of action for inside trading, and endorsed a proxy for privity understanding of the contemporaneous trading requirement. *See* Opp'n at 7–10 (quoting *Neubronner v. Milken*, 6 F.3d 666, 670 (9th Cir. 1993) ("the contemporaneous trading rule ensures that only private parties who have traded with someone who had an unfair advantage will be able to maintain insider trading claims."); *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1002, (9th Cir. 2002) ("[T]he contemporaneous trading rule's premise [is] that there is a need to filter out plaintiffs who could not possibly have traded with the insider[.]").

In *Neubronner*, the Ninth Circuit established a contemporaneous trading requirement for implied private causes of action under Section 10(b) and Rule 10b-5 brought against inside traders. *Neubronner*, 6 F.3d at 671. The *Neubronner* court made clear that it was not addressing Section 20A, noting that although Congress had enacted Section 20A in 1988, Section 20A

expressly does not preempt existing remedies—including the availability of existing implied causes of action—and that Neubronner did not proceed under Section 20A. *See id.* at 671 n.5 Next, the *Neubronner* Court considered the scope of liability for section 10(b) and Rule 10b-5 implied private causes of action, and adopted the Second Circuit's approach in *Wilson* as persuasive, holding that the scope of liability is confined to persons who traded "contemporaneously" with the insider as understood in *Wilson*, explaining:

> [T]he district courts in this circuit have followed the Second Circuit's interpretation of the [contemporaneous trading] requirement. In *Wilson v. Comtech Telecommunications Corp.*, 648 F.2d 88 (2d Cir. 1981), the Second Circuit held that any duty of disclosure on the part of insiders trading in the open market "is owed only to those investors trading contemporaneously with the insider; noncontemporaneous traders do not require the protection of the 'disclose or abstain' rule because they do not suffer the disadvantage of trading with someone who has superior access to information." In reaching this conclusion, the court commented that to "extend the period of liability well beyond the time of the insider's trading simply because disclosure was never made could make the insider liable to all the world." In *Wilson*, the court held that trades approximately one month apart were not contemporaneous, and that because the plaintiff did not trade contemporaneously with the insiders he had no standing to sue them . . . . We now adopt the Second Circuit's approach in *Wilson* and hold that the scope of liability for insider trading claims under section 10(b) and Rule 10b-5 is confined to persons who traded contemporaneously with the insider. We further hold that contemporaneous trading is necessarily a "circumstance constituting fraud" because an insider can not be liable to a private party under section 10(b) and Rule 10b-5 without having traded contemporaneously; thus, contemporaneous trading must be pleaded with particularity under Rule 9(b) . . . . As the *Wilson* court explained, the

> contemporaneous trading rule ensures that only private parties who have traded with someone who had an unfair advantage will be able to maintain insider trading claims. Neubronner does not propose an alternative rule, but instead suggests he should be permitted to allege generally that contemporaneous trading occurred, and then amend his complaint following discovery of any particular instances of contemporaneous trading. In light of the obvious need to protect parties from having to defend suits against plaintiffs who may be merely guessing that contemporaneous trading occurred, and in the absence of an alternative rule for limiting the scope of liability, the *Wilson* court's reasoning is persuasive. We do not determine in this case the exact contours of "contemporaneous trading" because under the approach outlined in *Wilson*, Neubronner's allegation of a three-year period of contemporaneous trading is clearly insufficiently specific to establish contemporaneity. The delineation of how far apart in time trades may be without being too far apart to satisfy the contemporaneous trading requirement is best worked out in cases much closer to a probable borderline than this one.

Id. at 670. Then, in *Brody*, the Ninth Circuit extended the contemporaneous trading requirement adopted in *Neubronner* to insider trading causes of actions brought under Section 14(e) and Rule 14e-3. *Brody*, 280 F.3d at 1005 ("The contemporaneous trading requirement, designed to limit the class of potential plaintiffs to only those who could have possibly traded with the insider, is [] precisely congruent with the SEC's expressed purpose in promulgating Rule 14e-3."). Thus, *Neubronner* and *Brody*—in interpreting implied causes of action under Section 10(b) and Rule 10b-5, and under Section 14(e) and Rule 14e-3 (but not claims brought under Section 20A)—adopted the "proxy for privity" understanding of contemporaneous trading, as reasoned in *Wilson*. *See Brody*, 280 F.3d at 1005; *Neubronner*, 6 F.3d at 671. Relying on *Brody* and *Neubronner*, Defendants argue that the Court should adopt the "proxy for privity" understanding of contemporaneous trading for the Section 20A context. Opp'n at 9–10.

But there is no binding authority suggesting that Congress, in enacting Section 20A, restricted the availability of Section 20A to those investors who could have possibly traded with an insider. *See* H.R. Rep. No. 910, 100th Cong., 2d Sess. 27 n.22 (1988); *In re Merck*, 2015 WL 2250472 (rejecting the defendant's argument that Section 20A only affords a cause to action to investors who could have traded directly with an inside trader). The House Report suggests that in enacting Section 20A, Congress intended to adopt the definition of the term "contemporaneous" as it had "developed through the case law." *See Neubronner*, 6 F.3d at 671 (citing H.R. Rep. No. 910, 100th Cong., 2d Sess. 27 n.22 (1988)). As examples of such case law, the House Report cited not only *Wilson*—which *Brody* and *Neubronner* found persuasive for implied causes of action—but also two other cases: *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228 (2d Cir. 1974) and *O'Connor & Associates v. Dean Witter Reynolds, Inc.*, 559 F. Supp. 800 (S.D.N.Y. 1983), two cases that understood contemporaneous trading to be a temporal test, rather than one based on the possibility of privity. *See id.* (citing H.R. Rep. No. 910, 100th Cong., 2d Sess. 27 n.22 (1988) (citing *Wilson*, 648 F.2d at 88 (2d Cir. 1981); *Shapiro*, 495 F.2d at 237; *O'Connor*, 559 F. Supp. at 805)).[11]

In the first case, *Shapiro*, which involved an implied cause of action under Setion 10(b) and Rule 10b-5, the Second Circuit held that "privity between plaintiffs and defendants is not a requisite element of a Rule 10b-5 cause of action for damages." *Shapiro*, 495 F.2d at 237 ("We hold that defendants owed a duty—for the breach of which they may be held liable in this private action for damages—not only to the purchasers of the actual shares sold by defendants (in the unlikely event they can be identified) but to all persons who *during the same period* purchased [the relevant] stock in the open market without knowledge of the material inside information which was in the possession of defendants." (emphasis added)). The *Shapiro* court further explained:

[11] *See also* Neil V. Shah, *Section 20a and the Struggle for Coherence, Meaning, and Fundamental Fairness in the Express Right of Action for Contemporaneous Insider Trading Liability*, 61 Rutgers L. Rev. 791, 812 (2009) ("Section 20A provides an express cause of action to those victims of insider trading that are otherwise excluded from bringing suit under § 10(b) and Rule 10b-5's implied right of action . . . . This is not to suggest that individuals who can bring suit under § 10(b) and Rule 10b-5 are somehow precluded from doing so under § 20A, but that Congress was specifically responding to the inability of this class of plaintiffs to recover.").

> To hold that Section 10(b) and Rule 10b-5 impose a duty to disclose material inside information only in face-to-face transactions or to the actual purchasers or sellers on an anonymous public stock exchange, would be to frustrate a major purpose of the antifraud provisions of the securities laws: to insure the integrity and efficiency of the securities markets.

Id. In the second case, *O'Connor*, the district court applied *Shapiro* in the context of options trading, holding that even if the defendants in that case could identify those with whom they had actually traded (the defendants had argued that the buyers and sellers of the options at issue could be readily matched), the implied cause of action would still not be limited to counterparties, explaining as follows:

> The duty to "disclose or abstain," in other words, is a duty imposed "to insure the integrity and efficiency of the securities market," a purpose which in *Shapiro* was held to require that liability extend to all those who traded during the same period as the defendants and who would not have traded had they known of the inside information possessed by the defendants. This rationale for the contemporaneous trading standard applies equally to options cases, regardless whether particular sales can be matched with particular purchases.

O'Connor, 559 F. Supp. at 805 (internal citations omitted). Thus, Congress' citation to not only *Wilson*, but also *Shapiro* and *O'Connor*, suggests that the definition of contemporaneous trading in Section 20A is not restricted to those investors who could have possibly traded with inside traders. If Congress wanted to confine Section 20A in that way, Congress could have stated that proof of lack of privity between an investor and an insider is an affirmative defense (or a safe harbor) to a Section 20A claim, but Congress did not do so.

Regardless, "for purposes of class certification," as the district court explained in *Johnson*, plaintiffs asserting a Section 20A claim predicated on a Section 10(b) violation, "need [not] allege or show more than purchase(s) of a security that is actively traded in an efficient market made contemporaneous with a sale by an insider in possession of material, non-public

information." *Johnson v. Aljian*, 257 F.R.D. 587, 593 (C.D. Cal. 2009) (rejecting the defendant's argument that the defendant's stock sales to its brokers "must be excluded from class treatment because they are private sales," and finding persuasive the plaintiffs' argument that "if Defendants' argument were adopted as law, then all a person would need to do to avoid liability under [Section] 20A would be to runnel sales of shares through a broker."); *see also In re Merck*, 2013 WL 396117, at *8 (declining to address the defendant's class certification argument that a lack of direct trading between the defendant and the plaintiff established a lack of contemporaneous trading, where the plaintiff had plausibly alleged contemporaneous trading).

Here, Plaintiffs have sufficiently alleged and shown what is required by *Johnson* to demonstrate contemporaneous trading for the purposes of certifying a class, namely:

- that there were "purchases"—Kim and Huston (and putative class members) purchased El Pollo Loco common stock (and options) on and around May 19, 2015[12];
- of "a security that is actively traded in an efficient market"—El Pollo Loco common stock (and options on it)[13] is actively traded in an efficient market[14];
- "made contemporaneous with a sale by an insider"— the 20A Defendants sold El Pollo Loco common stock on May 19, 2015[15]; and
- "in possession of material, non-public information"—Plaintiffs plausibly allege that the 20A Defendant possessed and failed to disclose information about the cause of El Pollo Loco's declining sales trends.[16]

See Johnson, 257 F.R.D. at 593. Accordingly, the Court is satisfied that Plaintiffs have established the Rule 23 elements as to their 20A claim, including adequacy and numerosity.[17] Because the Class Period runs from May 15, 2015 to August 13, 2015, and thus covers all

[12] *See* Reply at 4–5, 15 (citing Feinstein Decl. at 67); Plaintiffs Decl.; Houston Decl.
[13] *See, e.g.*, CTAC ¶¶ 133–34; *see also Valeant* MTD Order at *8–*9 (concluding that the plaintiff had sufficiently alleged that common stock and options on common stock were "securities of the same class" for the purposes of Section 20A).
[14] *See* Mot. at 15–20 (citing Feinstein Decl.) (providing extensive evidence that the market for El Pollo Loco common stock was efficient during the Class Period).
[15] This fact is undisputed. *See e.g.*, CTAC ¶¶ 4–15, 113; Opp'n at 3.
[16] *See* Order Denying Motion to Dismiss (Dkt. 96).
[17] That is, assuming Plaintiffs have established that Kim and/or Houston satisfy the typically requirement (which Defendants dispute), which is discussed further below.

possible trading days that could be considered contemporaneous with the 20A Defendants' May 19, 2015 sale, and includes all potential class members for the 20A claim, the Court need not certify a 20A sub-class or determine at this time how many trading days were contemporaneous with the May 19, 2015 sale, which is ultimately a merits question. *See, e.g.*, *Middlesex Ret. Sys. v. Quest Software, Inc.*, No. CV 06-6863-DOC (RNBx), 2009 WL 10669638, at *1 (C.D. Cal. Sept. 8, 2009) (certifying one class for Section 10(b), 20(a), and 20A claims).

It bears further discussion that Plaintiffs argue and put forward evidence to suggest that the 20A Defendants in fact traded on the public market through Jefferies, who Plaintiffs assert functioned as a broker, and that Defendants contend and put forward evidence to suggest that the Jefferies transaction was a "market-maker transaction" and that therefore Jefferies "alone bore the economic consequences" of the transaction with the 20A defendants. *See, e.g.*, Reply at 5–7; Sur-Reply at 13. For the purposes of class certification, the Court need not resolve this dispute or weigh the evidence that the parties have submitted, because Plaintiffs have already satisfied the Rule 23 requirements.

2. Common Questions on Section 20A Damages

Defendants also argue that Plaintiffs cannot demonstrate a class-wide calculation of Section 20A damages, because Plaintiffs' expert's report did not address it, and because the expert's deposition testimony did not provide sufficient details about the methodology. Opp'n at 11–12. In Plaintiffs' expert's deposition, he acknowledged that his report did not explicitly address Section 20A damages, but he stated that there are statutory and case law formulas for Section 20A damages cited in his report that can be applied to Section 20A damages here. *See* Russell Decl. Ex. 3 (Deposition of Professor Steven Feinstein) at 16–17, 155–58.

Plaintiffs respond that Section 20A claims "are ideally suited for class treatment because they are simple and mechanical." Reply at 12 (quoting *Kaplan v. S.A.C. Capital Advisors, L.P.*, 311 F.R.D. 373, 382 (S.D.N.Y. 2015) (The plaintiff's damages can be "calculated based on the overall price change from the time of the contemporaneous trade up to the time [the plaintiff] learned the tipped information or at a reasonable time after it became public." (internal quotation marks omitted))). Plaintiffs also argue that Section 20A damages can be calculated

using an event study like the one that their expert referenced in his report. *Id.* (citing *In re Novatel Wireless Sec. Litig.*, No. 08cv1689-AJB (RBB), 2013 WL 12144150, at *11–*12 (S.D. Cal. Oct. 25, 2013); Feinstein Decl. ¶¶ 166–69 ("[C]lass-wide damages in response to the specific misrepresentations and omissions ultimately established by the Plaintiffs can be calculated in a straightforward manner common to all Class members. Out-of-pocket damages can be measured as the difference between the amount of security price inflation at purchase and the amount of inflation in the security price at sale taking into account formulaic prescriptions in relevant case law and statutes . . . ."). Finally, Plaintiffs point out that in this Court's class certification opinion in *Valeant*, the Court rejected the defendants' argument that a "common formula [for calculating damages] that measures the difference between the selling price actually received and the true value of the shares had there been no material omissions and misconduct by Defendants" was at too high of a level of generality to constitute a meaningful methodology. *Id.*; *Basile v. Valeant Pharm. Int'l, Inc.*, No. SACV142004DOCKES, 2017 WL 3641591, at *14 (C.D. Cal. Mar. 15, 2017) ("the Supreme Court has endorsed similar damages calculations. Further, the Ninth Circuit has dismissed any concerns about damages calculations in a similar context, stating 'the amount of price inflation during the period can be charted and the process of computing individual damages will be virtually a mechanical task.'" (citations omitted)).

Ultimately, because the process of computing individual damages for Section 20A class action claims is relatively straightforward and guided by the statute and case law, the Court is satisfied, as required by Rule 23, that there are common questions of law and fact as to class-wide damages and that individual damages issues do not predominate. *See Basile v. Valeant Pharm. Int'l, Inc.*, 2017 WL 3641591, at *14; Fed. R. Civ. P. 23(b)(3). Specific disputes about the reliability and validity of a class-wide Section 20A damages formula would be better addressed through class discovery, summary judgment motions, and/or motions in limine.

B. Typicality of Kim and Huston

Next, Defendants argue that Lead Plaintiffs Kim and Huston are atypical because they are subject to unique defenses that will become the focus of the litigation.[18] Opp'n at 15–17.

A class representative's claims or defenses must be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Courts assess typicality by determining whether the class representatives and the rest of the putative class have similar injuries and conduct. *Hanlon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). The Ninth Circuit has stated, "[t]he purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon*, 976 F.2d at 508. The "test of typicality is 'whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct. *Id.* (citing *Schwartz v. Harp*, 105 F.R.D. 279, 282 (C.D. Cal. 1985)). Representative claims "are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.'" *Hanlon* 150 F.3d at 1020. "[C]lass certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." *Hanon,* 976 F.2d at 508. Unique defenses can go to either the typicality or adequacy of class representatives. *Petrie v. Elec. Game Card, Inc.*, No. SACV100252DOCRNBX, 2015 WL 4608227, at *4 (C.D. Cal. July 31, 2015) (citing *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)).

Defendants contend that Kim and Huston are subject to unique loss causation and materiality defenses due to: (1) their belief that El Pollo Loco's stock was still inflated following the alleged August 13, 2015 corrective disclosure by the Company; and (2) their purchases of El Pollo Loco shares after August 13, 2015. *Id.* As to the first argument,

[18] The Court initially granted Defendants' Request (pursuant to a request from Plaintiffs) to file portions of the Kim, Levy, and Huston's deposition transcripts under seal, as well as portions of the briefs that rely on these sections. *See, e.g.* Order Granting Sealing (Dkts. 125, 135). But upon further review of the materials and sealing requests, the Court does not see why sealing these materials is appropriate, except to the extent that personally identifying information such as addresses is included. Thus, the Court will not redact its own references to these materials or arguments, and the Court directs the parties to file a stipulation unsealing these documents and briefs, except to the extent that these excerpts contain personally identifying information such as addresses.

Defendants point out that Kim testified that he thought the El Pollo Loco stock was still inflated on August 14, 2015.[19] *Id.* This testimony, Defendants assert, puts Kim (and Huston) at odds with the other class member for purposes of loss causation, because the class is asserting that the inflation in the stock dissipated after August 13, 2015. *Id.*

In response, Plaintiffs argue that Kim and Huston are typical and there is no conflict between them and other punitive class members because Kim and Huston are laypersons, not experts in artificial inflation or loss causation, and Plaintiffs will rely on experts to determine these issues. *Id.* Further, Plaintiffs contend that all class members, including Kim and Huston, "are united in showing El Pollo Loco shares were artificially inflated during the Class Period." *Id.* Plaintiffs argue that Defendants' attempt to turn Kim and Huston's lack of expert knowledge into a "gotcha" moment, and that it is unreasonable to expect Huston and Kim to determine in the middle of a deposition when the artificial inflation left El Pollo Loco's stock price. *Id.* Further, Huston initially testified that he did not know, and Kim initially testified that he could not recall, if the stock price was artificially inflated on August 14, 2015. *Id.* Thus, Plaintiffs argue, Kim and Huston's attempts to answer defense counsel's repeated questioning to the best of their abilities does not make them atypical. *Id.* Plaintiffs also argue that because the alleged corrective information on August 13, 2015 was announced after the close of trading, it is possible that at some point on August 14, 2015, the stock was still artificially inflated. Reply at 18 n.11.

"A representative plaintiff's lack of detailed, comprehensive knowledge about the legal technicalities of the claims asserted in class litigation . . . provides no basis on which to deny a motion for class certification." *In re Silver Wheaton Corp. Sec. Litig.*, No. 215CV05146CASJEMX, 2017 WL 2039171, at *8 (C.D. Cal. May 11, 2017) (citing *Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417, 430 (4th Cir. 2003) ("It is hornbook law . . . that in a complex lawsuit, such as one in which the defendant's liability can be established only after a great deal of investigation and discovery by counsel against a background of legal knowledge,

[19] Defendants also assert that Huston testified that he believed the stock price was inflated until at least August 20, 2015, but Defendants do not appear to have filed any unredacted version of the deposition transcript that they cite to—page 110. *See* Opp'n at 16 (citing Russell Decl. Ex. 2 at 110:2–19).

the representative need not have extensive knowledge of the facts of the case in order to be an adequate representative."); *Baffa v. Donaldson, Lufkin & Jenrette Securities Corp.*, 222 F.3d 52, 61 (2d. Cir. 2000)). Given that "loss causation is often highly contentious and complicated, necessitating expert testimony," Kim and Huston's deposition lay opinion answers, as to whether or not the stock was still inflated shortly after the August 13, 2015 date on which Plaintiffs allege dissipation occurred, does not threaten to become the focus of litigation. *See* 26 Sec. Lit. Damages § 3:12.30.

Next, Defendants argue that Huston and Kim made unusual post-Class Period trades, which make them subject to unique defenses and thus make them inappropriate class members. Opp'n at 15–17.

While post-disclosure purchases on their own do not defeat typicality, "unusual post-disclosure trading patterns present typicality problems." *Petrie v. Elec. Game Card, Inc.*, 308 F.R.D. 336, 347 (C.D. Cal. 2015) (citation omitted). Examples of "unusual" trading include continuing to increase holdings "even after the securities' price remained unaltered following the disclosure of irregularities." *Id.* (quoting *In re DVI Inc. Sec. Litig.*, 249 F.R.D. 196, 204 n.12 (E.D. Pa. 2008), *aff'd sub nom. In re DVI, Inc. Sec. Litig.*, 639 F.3d 623 (3d Cir. 2011)).

Defendants point out that Kim continued to purchase shares beginning in November 2015 (even after he moved for appointment as Lead Plaintiff) until November 2017; and Huston purchased a significant amount of shares just ten days after August 13, 2015, increasing his holdings in the stock by 35%. *See* Opp'n at 15–17. These purchases, Defendants argue, are unusual and make Kim and Huston atypical. *Id.* However, Defendants do not offer any explanation as to what makes these purchases "unusual," *see* Opp'n at 17, which is fatal to their argument, particularly in light of the fact that the price of El Pollo Loco shares dropped by 20% from a closing price of $18.36 per share on August 13, 2015 to a closing price of $14.56 per share on August 14, 2015, following the alleged disclosure, which presumably would not render post-disclosure purchases unusual. *See* CTAC ¶ 103; *Petrie*, 308 F.R.D. at 347 ("[R]eliance on the integrity of the market price during the class period is unlikely to be defeated by post-disclosure reliance on the integrity of the market, especially when the market's

assimilation of new information 'corrected' the stock price." (citing *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 138 (5th Cir. 2005)).

Plaintiffs argue that post-Class Period purchases do not render Kim and Huston atypical because the purchases are not unusual. Reply at 18–20. Huston, Plaintiffs point out, testified that he purchased additional shares after the Class Period, when prices had fallen, to lower his average cost, and Kim purchased shares after November 2015, when the price declined from $14.56 to $11.47, hoping that the stock would perform better after it declined in price. *Id.* (quoting Russell Decl. Exs. 2, 4). There is nothing to suggest that Huston or Kim's post-Class Period transactions were unusual or did not rely on the integrity of the market. *See id.*; *In re Frontier Ins. Grp., Inc. Sec. Litig.*, 172 F.R.D. 31, 42 (E.D.N.Y. 1997) ("The fact that [the plaintiff] attempted to recoup her losses by continuing to purchase [defendant's] stock after the disclosure of the alleged misrepresentations has no bearing on whether or not she relied on the integrity of the market during the class period.").

Accordingly, Huston and Kim are typical Class Representatives under Rule 23(a)(3).

C. Adequacy of Levy

Finally, Defendants argue that Dr. Levy's deposition testimony raises serious concerns about whether he is an adequate Class Representative because he works 50–60 hours per week including weekends, as a practicing and teaching physician and medical researcher, and because he testified that he requires six months' lead time to attend litigation proceedings in California. Opp'n at 18. Therefore, Defendants have concerns about his ability to vigorously litigate this action. *Id.* In response, Plaintiffs argue that Dr. Levy has testified that he intends to see this process through, and that he actually testified that he would be able to travel to California, and that it could require, *at most*, six months of lead time. Reply at 20–21; Russell Decl. Ex. 1 at 29. Further, Plaintiffs point out Dr. Levy has made time to fulfill all of his Lead Plaintiff duties, including reviewing pleadings, communicating with counsel and other Plaintiffs, locating documents, and sitting for deposition at a place and time chosen by Defendants, and thus Plaintiffs contend that Dr. Levy has demonstrated that he is available and engaged to vigorously litigate the action. *Id.*

In order to satisfy Rule 23(a)'s adequacy requirement, named plaintiffs "must be able to prosecute the action vigorously on behalf of the class." *Smyth v. China Agritech, Inc.*, No. CV1303008RGKPJWX, 2013 WL 12136605, at *5 (C.D. Cal. Sept. 26, 2013). Working 50–60 hours per week including weekends is by no means an unusual or disqualifying responsibility that would preclude vigorous prosecution as a class representative. Further, Dr. Levy has demonstrated his willingness to participate and vigorously prosecute the action until this point in the proceedings. Finally, it is not unreasonable for Dr. Levy to require some lead time to coordinate a trip to California. If Defendants believe that his amount of necessary lead time is unreasonable, they can raise that issue with the Court if it arises. Accordingly, Dr. Levy is an adequate Class Representative under Rule 23(a)(4). *See* Fed. R. Civ. P. 23(a)(4).

Thus, for the reasons stated above, Plaintiffs have satisfied the Rule 23 requirements to certify their proposed class. Accordingly, in summary, the Court: (1) GRANTS Plaintiff's Motion to Certify Class; (2) DENIES Defendants' Motion to Strike; (3) GRANTS Defendants' Request to File a Sur-Reply; and (4) GRANTS Plaintiffs' Request to File a Sur-Sur-Reply.

IV. DISPOSITION

For the foregoing reasons, the Court GRANTS Plaintiff's Motion to Certify Class. The Court CERTIFIES the following class as to Plaintiffs' three claims under Sections 10(b), 20(a) and 20A of the Exchange Act:

> All persons and entities who purchased or otherwise acquired El Pollo Loco Holdings, Inc. ("El Pollo Loco" or the "Company") common stock or exchange-traded call options, or who sold exchange-traded El Pollo Loco put options (the "Securities"), between May 15, 2015 and August 13, 2015, inclusive (the "Class Period"), and were damaged thereby. Excluded from the Class are Defendants,[20] present or former executive officers of El Pollo Loco and their immediate family members (as defined in 17 C.F.R. §229.404, Instructions (1)(a)(iii) and (1)(b)(ii)).

[20] "Defendants" are El Pollo Loco, Stephen J. Sather ("Sather") the Company's Chief Executive Officer, Laurance Roberts ("Roberts") the Company's Chief Financial Officer, Edward J. Valle ("Valle") the Company's Chief Marketing Officer, and the Company's shareholders Trimaran Pollo Partners, L.L.C., Trimaran Capital Partners, and Freeman Spogli & Co.

The Court APPOINTS Peter Kim, Richard J. Levy, Sammy Tanner, and Ron Huston as a Class Representatives, and Robbins Geller and Rosen as Class Counsel. Further, the Court DENIES Defendants' Motion to Strike, GRANTS Defendants' Request to File a Sur-Reply, and GRANTS Plaintiffs' Request to File a Sur-Sur-Reply.

DATED: July 3, 2018

DAVID O. CARTER
UNITED STATES DISTRICT JUDGE