IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI, individually and on behalf of all others similarly situated, Plaintiff, v. MOHAWK INDUSTRIES, INC. and JEFFREY S. LORBERBAUM, Defendants.	Civil Action No. 4:20-cv-00005-VMC

ORDER

The matter is before the Court on Lead Plaintiff's Motion for Class Certification, Appointment as Class Representative, and Appointment of Class Counsel. (Doc. 78). For the reasons that follow, the Court will grant Plaintiff's Motion.

I. Background

Plaintiff Public Employees' Retirement System of Mississippi ("MissPERS") brings this action against Defendant Mohawk Industries, Inc. ("Mohawk") and Jeffrey Lorberbaum, Mohawk's Chief Executive Officer ("CEO") for alleged violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. (Doc. 78 at 10). Plaintiff's claims arise out of alleged false statements and material

omissions made by Defendants about Mohawk's earnings and inventory, particularly the Company's performance in the North American luxury vinyl tile ("LVT") space. The Court's Order of September 29, 2021 on Defendants' Motion to Dismiss (Doc. 60, the "MTD Order") summarizes the underlying allegations at length, so the Court will not repeat them here.

MissPERS filed its initial putative class Complaint on January 3, 2020, and on March 18, 2020, the Court appointed MissPERS lead plaintiff and Bernstein Litowitz Berger & Grossman LLP ("Bernstein Litowitz") as lead class counsel pursuant to the requirements of the Private Securities Litigation Reform Act ("PSLRA"). (Doc. 18). On June 29, 2020, MissPERS amended its complaint. (Doc. 37). Defendants moved to dismiss all claims, and the Court largely denied their Motion in the MTD Order. MissPERS now seeks certification for the following class:

> All persons or entities who purchased or otherwise acquired publicly traded common stock of Mohawk between April 28, 2017 and July 25, 2019, inclusive, and who were damaged thereby. Excluded from the Class are: (a) Defendants; (b) the officers and directors of Mohawk at all relevant times; (c) members of Defendants' or the officers' or directors' immediate families and their legal representatives, heirs, agents, affiliates, successors or assigns; (d) Defendants' liability insurance carriers, and any affiliates or subsidiaries thereof; and (e) any entity in which Defendants or their immediate families have or had a controlling interest.

(Doc. 78 at 30).

II. Legal Standard

A class action may be maintained only when it satisfies all the requirements of Fed. R. Civ. P. 23(a) and at least one of the alternative requirements of Rule 23(b). *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997) (footnotes omitted). Rule 23(a) requires Plaintiffs to show that:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). "These four requirements commonly are referred to as the 'prerequisites of numerosity, commonality, typicality, and adequacy of representation,' and they are designed to limit class claims to those 'fairly encompassed' by the named plaintiffs' individual claims." *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1346 (11th Cir. 2001) (quoting *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 156 (1982)).

If Rule 23(a) is satisfied, Rule 23(b) further provides that a class action may be maintained only where one of the three following requirements is met:

> (1) prosecuting separate actions by or against individual members of the class would create a risk of prejudice to the party opposing the class or to those members of

> the class not parties to the subject litigation, *see* Fed. R. Civ. P. 23(b)(1);
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive or declaratory relief is appropriate respecting the class as a whole, *see* Fed. R. Civ. P. 23(b)(2); or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for fair and efficient adjudication of the controversy, *see* Fed. R. Civ. P. 23(b)(3).

Under Fed. R. Civ. P. 23(b)(3), the Court considers matters including:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). The party seeking class certification bears the burden of showing that the Rule 23 requirements are met. *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1187 (11th Cir. 2003).

"Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage," and the merits of a suit may be considered "only to the extent [] that they are relevant to determining whether the Rule 23 prerequisites

for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013). Nevertheless, courts must perform a "rigorous analysis" to ensure that Rule 23's requirements are satisfied before certifying a class, *Falcon*, 457 U.S. at 161, even where some of the requirements are not in dispute, *Valley*, 350 F.3d at 1188, or where the Court must decide disputed questions of fact that bear on the inquiry, *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1233–34 (11th Cir. 2016). *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) ("Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."); *see also In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008) ("Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence."). This "rigorous analysis" frequently "entail[s] some overlap with the merits of the plaintiff's underlying claim." *M. H. v. Berry*, No. 1:15-CV-1427-TWT, 2017 WL 2570262, at *3 (N.D. Ga. June 14, 2017) (citing *Dukes*, 564 U.S. at 351).

III. Discussion

Before turning to the enumerated Rule 23(a) requirements, the Court must decide that a proposed class is "'adequately defined and clearly ascertainable.'" *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012) (quoting

DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970)). A class is "clearly ascertainable" if its membership is capable of being determined by "objective criteria." *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1303 (11th Cir. 2021). "The requirement of manageability of ascertaining the class in some ways dovetails with the requirement of manageability of the class action under Rule 23(b)(3)(D)." *Githieya v. Glob. Tel*Link Corp.*, No. 1:15-CV-0986-AT, 2020 WL 12948011, at *6 (N.D. Ga. Nov. 30, 2020). Notably, the Eleventh Circuit's ascertainability precedents do not require proof of administrative feasibility. *Cherry*, 986 F.3d at 1303. Here, the Court finds that the proposed class is adequately defined and clearly ascertainable through objective criteria.

A. Fed. R. Civ. P. 23(a) Requirements

Having satisfied the threshold question of ascertainability, the Court turns to the enumerated requirements of Fed. R. Civ. P. 23(a).

1. Numerosity

Under Rule 23(a)(1), MissPERS must show that "the class is so numerous that joinder of all members is impracticable." "[M]ere allegations of numerosity are insufficient to meet this prerequisite, [but] a plaintiff need not show the precise number of members in the class." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009) (quoting *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 930 (11th Cir. 1983)). While Rule 23(a)(1) imposes a "generally low hurdle," "[a] plaintiff . .

. bears the burden of making some showing, affording the district court the means to make a supported factual finding[] that the class actually certified meets the numerosity requirement." *Id*. The general rule of thumb in the Eleventh Circuit for meeting the numerosity requirement is that "less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors." *Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 684 (S.D. Fla. 2013) (quoting *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986)).

Here, MissPERS seeks to meet the numerosity requirement via the number of Mohawk shares outstanding and shares traded during the relevant time period. (*See* Doc. 78 at 14). On or around July 25, 2019, Mohawk had approximately 73.9 million shares outstanding and approximately 3.9 million shares were traded on average each week on the New York Stock Exchange. (Doc. 78 at 14).

As was the case in *In re Netbank, Inc. Securities Litigation*, the Court notes that "the prerequisite expressed in Rule 23(a)(1) is generally assumed to have been met in class action suits involving nationally traded securities." 259 F.R.D. 656, 665 (N.D. Ga. 2009) (citing *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1039 (5th Cir. 1981) (finding numerosity established in a case where the company had 46 million shares of common stock outstanding)); *see also In re HealthSouth Corp. Sec. Litig.*, 257 F.R.D. 260, 274 (N.D. Ala. 2009) (noting that the Court may make a

"common sense assumption" that the proposed class meets the numerosity requirement based on the number of shares outstanding). Accordingly, the Court finds that numerosity is satisfied here due to the amount and trading volume of Mohawk securities.

2. Commonality

Rule 23(a)(2) requires a class proponent to show that there "are questions of law or fact common to the class." The Supreme Court has described the commonality requirement to mean that the plaintiff must "demonstrate that the class members 'have suffered the same injury,'" not merely that they have all suffered a violation of the same provision of law. *Dukes*, 564 U.S. at 349–50 (quoting *Falcon*, 457 U.S. at 157). That common contention "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. at 350. The Court continued,

> What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Id. (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). "Generally, where plaintiffs allege that the action is

a result of a unified scheme to defraud investors, the element of commonality is met." *Monroe Cnty. Emps.' Ret. Sys. v. S. Co.*, 332 F.R.D. 370, 378 (N.D. Ga. 2019) (citing *Netbank*, 259 F.R.D. at 664)).

MissPERS argues that the "common questions of law and fact are numerous and include: (i) whether Defendants omitted or misrepresented material facts; (ii) whether Defendants acted with scienter; (iii) whether Mohawk's common stock price was artificially inflated or maintained during the Class Period; and (iv) whether Defendants' misrepresentations and omissions caused Class members' economic losses."[1] (Doc. 78 at 15). The Court finds that these questions raise common contentions, and the determination of their truth or falsity will resolve issues central to the validity of all class members' claims. Accordingly, the commonality requirement is met here.

3. Typicality

The typicality requirement seeks to ensure that a representative plaintiff "possess[es] the same interest and [has] suffer[ed] the same injury shared by all members of the class he represents." *Netbank*, 259 F.R.D. at 665 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)).

> In other words, there must be a nexus between the class representative's claims or defenses and the common

[1] Defendants do not challenge this assertion except as to whether individualized reliance issues predominate, which the Court discusses in detail in the section analyzing Rule 23(b)(3).

> questions of fact or law which unite the class. A sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory. Typicality, however, does not require identical claims or defenses. **A factual variation will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class.**

Id. (citing *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985)) (emphasis added). "Any atypicality or conflict between the named Plaintiffs' claims and those of the Class 'must be clear and must be such that the interests of the class are placed in significant jeopardy.'" *Cheney v. Cyberguard Corp.*, 213 F.R.D. 484, 491 (S.D. Fla. 2003) (quoting *Walco Invs., Inc. v. Thenen*, 168 F.R.D. 315, 326 (S.D. Fla. 1996)).

"Both commonality and typicality serve to determine 'whether under the particular circumstances maintenance of a class action is economical.'" *Netbank*, 259 F.R.D. at 665 (quoting *In re Miva, Inc., Sec. Litig.,* No. 2:05–cv–201–FtM–29DNF, 2008 WL 681755, at *3 n. 2 (M.D. Fla. Mar. 12, 2008)). However, "the Eleventh Circuit has explained that 'commonality refers to the group characteristics of the class as a whole' while 'typicality refers to the individual characteristics of the named plaintiff in relation to the class.'" *Id*. at 665, n.4 (quoting *Prado–Steiman ex rel. Prado v. Bush,* 221 F.3d 1266, 1279 (11th Cir. 2000)).

Defendants challenge typicality here on two grounds. First, they argue that MissPERS is atypical because it "relied exclusively on outside investment advisors" (in particular, Eagle Capital Management, LLC ("Eagle"), which managed the majority of MissPERS's Mohawk stock purchases during the relevant period), to make decisions regarding its Mohawk stock. (Doc. 99-1 at 12). Those investment advisors, according to Defendants, conducted an extensive pre-purchase investigation in which they obtained more information than other class members through private conversations with executives. (Doc. 99-1 at 13-17). Second, Defendants argue that MissPERS is atypical because Eagle "continued to view Mohawk stock favorably even after the alleged truth was revealed to the market, making multiple post-corrective disclosure purchases." (Doc. 99-1 at 13).

On the first point, Plaintiff responds that neither the use of investment advisors nor private conversations are enough to defeat typicality, as neither MissPERS nor its investment advisors ever obtained material non-public information from Mohawk. The Court agrees with Plaintiff. The Eleventh Circuit found that the use of investment advisors by proposed class representatives did not defeat typicality in its *Regions* decision:

> Neither [proposed class] representative's use of investment advisers warrants reversal. Certainly, a large institutional investor is likely to rely on investment advisers to make investment decisions on its behalf. And yet both Congress and the courts have recognized that these sorts of investors are generally preferred as class

> representatives in securities litigation . . . Even sophisticated investment advisers (like those involved in this case) rely on the integrity of the market. This is true even if they do not incorporate particular informational disclosures into their investment strategies.

Loc. 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp., 762 F.3d 1248, 1260 (11th Cir. 2014) (internal citations omitted).

Further, private communications with a company's employees are not enough to defeat typicality. "The weight of authority holds that such private communications are irrelevant where no material, non-public information is exchanged." *City of Sunrise Gen. Emps.' Ret. Plan v. FleetCor Techs., Inc.*, No. 1:17-CV-02207-LMM, 2019 WL 3449671, at *5 (N.D. Ga. July 17, 2019) (citing *City of Riviera Beach Gen. Emps. Ret. Sys. v. Macquarie Infrastructure Corp.*, No. 18-CV-3608 (VSB), 2019 WL 364570, at *7 (S.D.N.Y. Jan. 30, 2019)).

Defendant's arguments that Eagle's continued purchases of Mohawk stock on behalf of MissPERS do not defeat typicality either. In *Regions*, the Eleventh Circuit established the general rule that "[r]eliance on the integrity of the market prior to disclosure of alleged fraud (i.e. during the class period) is unlikely to be defeated by postdisclosure reliance on the integrity of the market." *Regions*, 762 F.3d at 1260 (quoting *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 138 (5th Cir. 2005)). Here, as in *Regions*, the Court sees no reason to "deviate from this general rule." Accordingly, the Court finds that MissPERS meets the typicality requirement.

4. Adequacy of Representation

Finally, Rule 23(a) requires that the court ensure that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Netbank*, 259 F.R.D. at 666 (citing *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625 (1997)). It also "involves questions of whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation." *Id*. (citing *Griffin v. Carlin,* 755 F.2d 1516, 1533 (11th Cir. 1985)). "[A] principal factor in determining the appropriateness of class certification is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class." *Id*. (citing *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987)).

Defendants challenge MissPERS's adequacy and its selection of Bernstein Litowitz as class counsel on several grounds. First, they raise an alleged kickback scheme which resulted in a Bernstein Litowitz lawyer resigning and bringing suit against the firm. (Doc. 99-1 at 28-30); *see Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 143 (2d Cir. 2016). Second, they note an opinion from the Northern District of California imposing a reporting requirement on Bernstein Litowitz based on "misleading conduct" and possible evidence of a quid pro quo

arrangement between an in-house lawyer for a class representative and Bernstein Litowitz lawyers. (*Id*. at 30-31); *see Seb Inv. Mgmt. Ab v. Symantec Corp.*, No. C 18-02902 WHA, 2021 U.S. Dist. LEXIS 77040, at *5 (N.D. Cal. Apr. 20, 2021). Third, Defendants point to the monitoring agreement in place between Bernstein Litowitz and MissPERS. (*Id*. at 31-32). Finally, Defendants raise the sheer number of securities class actions in which MissPERS has sought to become lead plaintiff or class representative in recent years. (*Id*. at 32-33). They argue that the PSLRA's bar on professional plaintiffs, which states that a person may be a lead plaintiff in "no more than 5 securities class actions . . . during any 3-year period" "[e]xcept as the court may otherwise permit," should be applied here to prohibit MissPERS from serving as lead plaintiff. (*Id*.).

The Court has considered each of these objections to adequacy in detail, and notes its concern with the allegations of kickbacks and quid pro quo arrangements that have been raised by other courts. Importantly, however, Defendants have not raised any concerns about Plaintiff's (or Bernstein Litowitz's) conduct in this action. Thus far in this case, MissPERS, through its Bernstein Litowitz counsel, has investigated and filed a detailed complaint, including numerous allegations obtained from confidential witness interviews; successfully navigated a motion to dismiss; participated in detailed discovery; and now briefed this Motion. The

Court has no reason to believe MissPERS and its counsel will not continue to zealously pursue this action on behalf of the class.

Monitoring agreements, including the one MissPERS has in place with Bernstein Litowitz, have been the subject of much scrutiny in class action cases across the country. *See Pub. Emps.' Ret. Sys. of Miss. v. TreeHouse Foods, Inc.*, No. 16-CV-10632, 2020 WL 919249, at *6-8 (N.D. Ill. Feb. 26, 2020) (collecting cases). Defendants point out that at the time this action was filed, MissPERS had a "first-in-time" policy, which allowed the first of its monitoring firms to present a potential securities fraud case to MissPERS to serve as its counsel, effectively arguing that MissPERS's hiring of Bernstein Litowitz was a foregone conclusion. (*See* Doc. 88-4 at 11-14). But that fact does not establish that Bernstein Litowitz is inadequate. According to the testimony, the Mississippi Attorney General's Office made an independent determination whether it wanted to pursue this litigation. (*Id.* at 13). And MissPERS's decision to pursue the litigation using Bernstein Litowitz as counsel was certainly reasonable, given the firm's significant experience in securities litigation cases such as this one and depth of knowledge of this area of law.

Finally, MissPERS does not dispute that it has been a class representative in a substantial number of actions; indeed, MissPERS itself states that at least a dozen courts have found it "eminently adequate" to serve as lead plaintiff or class

representative. (Doc. 100 at 16-17; Doc. 100-1 ¶ 15). Further, another court in this district has previously found that the 5-in-3 PSLRA provision is inapplicable to institutional investors, and even if it was applicable, it was appropriate to lift the bar where the proposed lead plaintiff was a sophisticated investor with a large financial interest in the case and significant experience and expertise in class action securities litigation. *See Emps.' Ret. Sys. of the City of Baton Rouge v. Aaron's, Inc.*, 283 F. Supp. 3d 1348, 1351 (N.D. Ga. 2017). The Court follows the reasoning in *Aaron's* here to find that the PSLRA professional plaintiffs bar should be lifted in this case. Further, the declaration and testimony of Ta'Shia Gordon, Special Assistant Attorney General for the State of Mississippi, are persuasive in establishing that MissPERS understands its obligations as class representative and will diligently manage them throughout the litigation. (*See generally* Doc. 78-3; Doc. 88-4).

Based on the record in this case, the Court finds that MissPERS is an adequate class representative and Bernstein Litowitz is adequate class counsel. After thorough consideration, the Court finds that each of the Rule 23(a) requirements are met.

B. Fed. R. Civ. P. 23(b)(3) Analysis

In addition to meeting the Rule 23(a) requirements, a class action must meet "at least one of the alternative requirements of Rule 23(b)." *Netbank*, 259 F.R.D. at 667 (quoting *Rutstein v. Avis Rent–A–Car Sys., Inc.*, 211 F.3d 1228, 1233 (11th Cir.

2000)). Because all of the Rule 23(a) requirements are met, the Court now turns to Rule 23(b).

MissPERS seeks class certification under Fed. R. Civ. P. 23(b)(3). To maintain a class action under Rule 23(b)(3), the class proponent must show: 1) that the questions of law or fact common to class members predominate over any questions affecting only individual members; and 2) that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). "The key to certification of a class under Rule 23(b)(3) is whether the efficiency and economy of class adjudication outweighs the difficulties and complexity of individual adjudication." *Netbank,* 259 F.R.D. at 667 (citing *AAL High Yield Bond Fund v. Ruttenberg*, 229 F.R.D. 676, 681 (N.D. Ala. 2005)). In making this finding, the Court may consider:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). The court first analyzes the predominance prong, followed by the superiority prong.

1. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Netbank*, 259 F.R.D. at 667 (quoting *Amchem Prods.*, 521 U.S. at 623). "Whether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008) (quoting *Rutstein v. Avis Rent–A–Car Sys.*, 211 F.3d 1228, 1234 (11th Cir. 2000)). In other words, "resolution of the common questions [must] affect all or a substantial number of the class members." *Netbank*, 259 F.R.D. at 667 (quoting *In re Tri–State Crematory Litig.*, 215 F.R.D. 660, 692 (N.D. Ga. 2003)). "In determining whether class or individual issues predominate in a putative class action suit, [the Court] must take into account 'the claims, defenses, relevant facts, and applicable substantive law[]' . . . to assess the degree to which resolution of the classwide issues will further each individual class member's claim against the defendant." *Klay*, 382 F.3d at 1254 (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996)). "Where, after adjudication of the classwide issues, plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish . . . the elements of their individual claims, such claims are

not suitable for class certification under Rule 23(b)(3)." *Netbank*, 259 F.R.D. at 667 (quoting *Klay*, 382 F.3d at 1255). Accordingly, the Court turns to the causes of action asserted in the Amended Complaint on behalf of the putative class.

Here, as in *Netbank*, "[t]he Amended Complaint lists two bases for relief: (1) violation of § 10(b) of the Exchange Act and Rule 10b–5 promulgated thereunder; and (2) violation of § 20(a) of the Exchange Act." 259 F.R.D. at 667. The Court must consider "the requirements necessary to prevail on these claims, and whether the elements of the claims are 'susceptible to class-wide proof.'" *Id*. (quoting *In re Sci.-Atlanta, Inc. Sec. Litig.*, 571 F. Supp. 2d 1315, 1336 (N.D. Ga. 2007)). "Whether common questions of law or fact predominate in a securities fraud action often turns on the element of reliance." *Regions*, 762 F.3d at 1253 (quoting *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 810 (2011) ("*Halliburton I*")).

a. Demonstrating Reliance on Material Misrepresentations

A plaintiff may show reliance on material misrepresentations in either a direct or indirect fashion. "The traditional (and most direct) way a plaintiff can demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction—e.g., purchasing common stock—based on that specific misrepresentation." *Halliburton I*, 563 U.S. at 810. But the Supreme Court "recognized in *Basic* . . . that limiting proof of reliance in such a way 'would place an unnecessarily unrealistic evidentiary burden on the Rule 10b–5 plaintiff

who has traded on an impersonal market.'" *Id*. (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988)).

Therefore, as the Supreme Court set out in *Basic*, plaintiffs may also indirectly establish reliance using the "fraud-on-the-market theory," which allows for a rebuttable presumption of class-wide reliance on material misrepresentation(s). *Regions*, 762 F.3d at 1254 (citing *Halliburton I*, 563 U.S. at 811).

> According to that theory, the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations. The theory thus allows us to presume that an investor relies on public misstatements whenever he buys or sells stock at the price set by the market.

Id. (internal citations and quotation marks omitted); *see also Netbank*, 259 F.R.D. at 668 (quoting *Basic*, 485 U.S. at 241–42) (describing how, under the fraud-on-the-market theory, "[m]isleading statements will . . . defraud purchasers of stock even if the purchasers do not directly rely on the misstatements"). "Pursuant to the fraud-on-the-market theory, a plaintiff is entitled to a rebuttable presumption of reliance if he can show: '(1) the defendant made public material misrepresentations, (2) the defendant's shares were traded in an efficient market, and (3) the plaintiffs traded shares between the time the misrepresentations were made and the time the truth was revealed.'" *Netbank*, 259 F.R.D. at 668 (quoting *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 661 (5th Cir. 2004)). Defendants here

argue that Mohawk's shares were not traded in an efficient market, so MissPERS should not be entitled to the presumption of reliance.

i. Efficient Market Inquiry

In determining whether a security trades on an efficient market, courts have considered the following factors:

> (1) the average weekly trading volume expressed as a percentage of total outstanding shares; (2) the number of securities analysts following and reporting on the stock; (3) the extent to which market makers and arbitrageurs trade in the stock; (4) the company's eligibility to file SEC registration Form S–3 (as opposed to Form S–1 or S–2); (5) the existence of empirical facts 'showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price'; (6) the company's market capitalization; (7) the bid-ask spread for stock sales; and (8) float, the stock's trading volume without counting insider-owned stock.

Netbank, 259 F.R.D. at 669 (collecting cases).[2] The Eleventh Circuit has stated that "the market for a stock is generally efficient when 'millions of shares change hands daily and a critical mass of' investors and/or analysts [] "study the available information and influence the stock price through trades and recommendations.'" *Regions*, 762 F.3d 1248, 1255 (11th Cir. 2014) (quoting *FindWhat Inv. Grp. v. FindWhat.com*, 658 F.3d 1282, 1310 (11th Cir. 2011)).

[2] Factors 1-5 come from *Cammer v. Bloom*, 711 F. Supp. 1264, 1286–87 (D. N. J. 1989); factors 6-8 come from *Krogman v. Sterritt*, 202 F.R.D. 467, 477–78 (N.D. Tex. 2001).

The Court agrees with Plaintiff that Mohawk's high trading volume (3.9 million shares traded on average per week, average ratio of weekly trading volume to outstanding shares of 5.2% during the relevant period), significant analyst coverage (at least 41 analysts following), substantial holdings by institutional investors (approximately 1,200 institutions holding shares during the Class Period, representing the majority of outstanding shares), eligibility to file Form S-3 (and actual filing of Form S-3 on August 4, 2017), high market capitalization (between $8.2 and $21.2 billion during the relevant period), narrow daily bid-ask spread (average spread of $0.03, representing 0.01%), and large public float (on average, 83% of total shares) all weigh in favor of a finding of market efficiency.

Defendants' challenges to market efficiency focus on *Cammer* factor 5 – "the existence of empirical facts 'showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price.'" Defendants contend that the analysis of Plaintiff's expert, Dr. Michael L. Hartzmark, seeking to show that cause and effect relationship "must be disregarded" due to its flawed methodology. (Doc. 99-1 at 22-23). Dr. Hartzmark performed two tests: first, a test of autocorrelation, and second, an event study. (*Id*. at 22-24). Defendants use their own expert, Lucy P. Allen, to attempt to debunk Dr. Hartzmark's analysis. (*See* Doc. 88-2).

As to autocorrelation, "[a] security exhibits autocorrelation if the change in price of the security on a given day provides an indication of what the change in price for the security will be on the following day." *Petrie v. Elec. Game Card, Inc.*, 308 F.R.D. 336, 356 (C.D. Cal. 2015) (quoting *In re DVI Inc. Sec. Litig.*, 249 F.R.D. 196, 213 (E.D. Pa. 2008), *aff'd*, 639 F.3d 623 (3d Cir. 2011), *abrogated on other grounds by Amgen*, 568 U.S. at 465). "The more likely past price movement is to predict future price movement, the less efficient a market is likely to be because an efficient market incorporates information quickly into the first day's price, whereas an inefficient market would not fully digest the information until later." *Id.*

Ms. Allen discusses how Dr. Hartzmark's initial test of the full class period revealed autocorrelation, indicating some level of market inefficiency. (Doc. 88-2 ¶ 81). Then, in his further analysis, Dr. Hartzmark divided the class period into two parts, which resulted in an absence of autocorrelation. (Doc. 88-2 ¶¶ 81-82). Ms. Allen describes this method of division as "unscientific," "arbitrary," and "results-driven." (*Id.* ¶¶ 4, 82). Dr. Hartzmark, in reply, cites to various prior analyses using a "sub-period" method. (Doc. 100-4 at 54-59). He argues that autocorrelation must be "persistent and systematic" in order to show a lack of market efficiency, and uses the sub-period analysis to show the lack of price predictability over time. (Doc. 78-2 at 40; Doc. 100-4 at 52-55). The Court finds that

Dr. Hartzmark's autocorrelation analysis should be given some weight toward establishing the cause and effect relationship here.

With regard to the event study, Dr. Hartzmark selected ten "news days" out of a two-year period in an effort to determine whether Mohawk's stock price reacted quickly to disclosures of new information. (Doc. 99-1 at 24). Dr. Hartzmark selected the dates during the Class Period where there was an "earnings or guidance disclosure," and found that on eight of those days, Mohawk stock had an "abnormal price reaction." (Doc. 78-2 at 36-37). He concluded that Mohawk stock behaved differently on news days versus non-news days for reasons beyond market factors or general volatility, indicating it did react quickly to new information. (Doc. 78-2 at 37-38).

According to Defendants and Ms. Allen, selecting only ten news days to consider, versus over 500 non-news days, was too small a sample to reach a reliable conclusion. (Doc. 99-1 at 24; Doc. 88-2 ¶¶ 77-79). Ms. Allen also argues that selection of these news days improperly excluded consideration of "any other types of news that are unexpected and material" and that it was improper to include three alleged corrective disclosure days in the sample. (Doc. 88-2 ¶¶ 78-79). While ten days may be a small sample, Defendants do not show that inclusion of different or additional news days would have yielded a different result. Even with this limited sample, Dr. Hartzmark's analysis did show that Mohawk stock

reacted quickly to news, which lends support to a finding of market efficiency. Further, this Court has previously recognized that "[e]arnings announcement dates are appropriate event dates in event studies investigating a cause-and-effect relationship between the release of company-specific news and company stock price movement." *Monroe*, 332 F.R.D. at 385.

The Court finds Plaintiff has presented at least some empirical facts "showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price." But even if the cause and effect factor did not weigh in favor of market efficiency, each of the other factors do weigh in favor of market efficiency, and those factors alone would be enough to afford Plaintiff the presumption of reliance. *See id.* at 384 ("the Court is not aware of any case in the Eleventh Circuit, and Defendants cite none, finding a market inefficient where all *Cammer*/*Krogman* factors but *Cammer* factor five were satisfied."). Accordingly, the Court finds that Plaintiff is entitled to rely on the *Basic* presumption.

b. Rebutting the *Basic* Presumption

If a plaintiff establishes that the *Basic* presumption is applicable, Defendants may rebut the presumption of reliance by "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." *Netbank*, 259 F.R.D. at

668 (citing *Basic*, 485 U.S. at 248). In addition, "*Halliburton II* held that defendants may rebut the *Basic* presumption at class certification 'by showing . . . that the particular misrepresentation at issue did not affect the stock's market price.'" *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1962 (2021) (citing *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 279-280 (2014) ("*Halliburton II*"). In assessing price impact at class certification, courts "should be open to *all* probative evidence on that question—qualitative as well as quantitative—aided by a good dose of common sense." *Id.* at 1960 (quoting *In re Allstate Corp. Securities Litig.*, 966 F.3d 595, 613, n. 6 (7th Cir. 2020)). The Court's task is "simply to assess all the evidence of price impact—direct and indirect—and determine whether it is more likely than not that the alleged misrepresentations had a price impact." *Id.* at 1963.

Here, Defendants argue that there was no price impact based on the alleged material misrepresentations. Under the "Saturday Scheme" alleged in the Complaint, Defendants, at the end of several quarters during the relevant period, directed Mohawk's North American distribution centers to deliver product on Saturdays, when most customers were closed for delivery and thus would not reject the shipment. Then, Mohawk would count those delivery attempts as "sales" for the current quarter, violating Mohawk's revenue recognition policies and generally accepted accounting principles ("GAAP"). Defendants and their

expert argue that this Scheme could not have impacted Mohawk's revenue expectations, earnings per share, or cash flows because it involved a "mere four to five million pounds of product each quarter," or "around $4 to $5 million in revenue." (Doc. 99-1 at 25-26). Under Defendants' theory, because the Scheme did not impact Mohawk's financials, any corrective announcement could not have been significant enough to have any price impact. The Court disagrees. As Plaintiff points out, the difference between hitting and missing revenue expectations for the Flooring North America segment in at least one quarter of the class period was $2.3 million; certainly, an extra $4 to $5 million in revenue for a given quarter is more likely than not to have influenced analyst and market expectations. (Doc. 100-4 at 15-16).

In addition, Defendants and Ms. Allen attribute the stock price decline at the end of the Class Period to factors unrelated to the alleged misrepresentations. (Doc. 88-2 at 30-35). Notably, with this argument, they appear to concede that the price was, in fact, impacted, just not by the material misrepresentations. *See Monroe*, 332 F.R.D. at 396 ("[a]s the court in *Regions* found when considering price impact, the existence of a price decline and analyst commentary highlighting the negative news is, 'of course... evidence of price impact'") (quoting *Regions*, 2014 WL 6661918, at *7). Dr. Hartzmark agrees that some portion of the stock price decline may have been due to other factors, but notes that his analysis sought to

control for those factors, and still found that some portion of the price decline at the end of the second quarter of 2019 was related to the alleged misrepresentations. (Doc. 100-4 at 27-29). He further points to direct statements from Mohawk and analysts showing the differences in Mohawk's reporting for that quarter (including Mohawk's 7% decline in Flooring North America sales) versus other comparable flooring companies. (Doc. 100-4 at 30).

The Court finds that Defendants have not shown an absence of price impact based on the alleged misrepresentations, and that they have not severed the link between those misrepresentations and the stock price paid. They have therefore not rebutted the presumption of reliance under *Basic*. Overall, the Court finds that class issues predominate over individual ones, and Rule 23(b)(3)'s predominance prong is satisfied.

2. Superiority

Finally, Rule 23(b)(3) requires that the Court find that the class action is superior to other available methods of adjudication. "[T]he focus of this analysis is on the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs." *FleetCor*, 2019 WL 3449671, at *7 (quoting *Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc.*, 601 F.3d 1159, 1183-1184 (11th Cir. 2010)). "As a general rule, class action treatment presents a superior method for the fair and efficient resolution of

securities fraud cases." *Netbank*, 259 F.R.D. at 676*; see also In re Recoton Corp. Sec. Litig.*, 248 F.R.D. 606, 619 (M.D. Fla. 2006) ("[t]he case law is clear that class actions are 'a particularly appropriate means for resolving securities fraud actions.'" (quoting *In re AmeriFirst Sec. Litig.*, 139 F.R.D. 423, 427 (S.D. Fla. 1991)).

Here, Defendants have not argued that Plaintiff fails to meet the superiority prong under Rule 23(b)(3), and the Court finds that it is met here. Moreover, as in *FleetCor*, "the Court's finding that common issues predominate cuts strongly in favor of certifying the class." 2019 WL 3449671, at *7 (citing *Sacred Heart*, 601 F.3d at 1184 ("[T]he predominance analysis has a tremendous impact on the superiority analysis for the simple reason that, the more common issues predominate over individual issues, the more desirable a class action lawsuit will be as a vehicle for adjudicating the plaintiff['s] claims."")). While several class members have filed individual actions based on the same allegations, those were filed well after this action and those class members' interests will not be prejudiced by the certification of the class, as they may opt out of the class if they choose and continue the prosecution of their individual actions. *See* Fed. R. Civ. P. 23(c)(2)(B). Additionally, it is desirable to concentrate the litigation in this forum, where Mohawk is principally located. The Court finds no particular difficulties in managing this class action. Having found that MissPERS has met the Rule 23(a) and Rule 23(b)(3)

requirements for class certification of the present action, the Court hereby certifies the following class:

> All persons or entities who purchased or otherwise acquired publicly traded common stock of Mohawk between April 28, 2017 and July 25, 2019, inclusive, and who were damaged thereby.[3]

C. Fed. R. Civ. P. 23(g) - Appointment of Class Counsel

As discussed in the Rule 23(a)(4) analysis above, after considering the requirements of Rule 23(g), the Court finds that Bernstein Litowitz will be able to fairly and adequately represent the class, and therefore finds it appropriate to appoint Bernstein Litowitz as Class Counsel.

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[3] Excluded from the Class are:

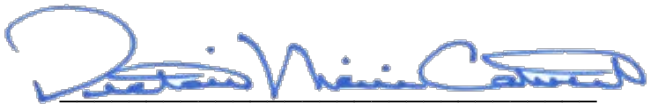
> (a) Defendants;
>
> (b) the officers and directors of Mohawk at all relevant times;
>
> (c) members of the officers' or directors' immediate families and their legal representatives, heirs, agents, affiliates, successors or assigns;
>
> (d) Defendants' liability insurance carriers, and any affiliates or subsidiaries thereof; and
>
> (e) any entity in which Defendants or their immediate families have or had a controlling interest.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS** Plaintiff's Motion for Class Certification (Doc. 78), and certifies the following Class: All persons or entities who purchased or otherwise acquired publicly traded common stock of Mohawk between April 28, 2017 and July 25, 2019, inclusive, and who were damaged thereby (with the exclusions listed in footnote 3).

Plaintiff Public Employees' Retirement System of Mississippi is appointed Class Representative, and Bernstein Litowitz is appointed as Class Counsel.

SO ORDERED this 28th day of November, 2022.



Victoria Marie Calvert
United States District Judge