UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV-14-05263-MWF-RZ **Date: January 5, 2017**
Title: Edward Todd -*v*- STAAR Surgical Company, et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER GRANTING MOTION FOR CLASS CERTIFICATION [157]

Before the Court is Lead Plaintiff Edward Todd's Motion for Class Certification (the "Motion"), filed August 19, 2016. (Docket No. 157). Defendants STAAR Surgical Company ("STAAR"), Barry Caldwell, and John Santos filed their Opposition on October 25, 2016. (Docket No. 162). Lead Plaintiff replied on November 23, 2016. (Docket No. 164). The Court has read and considered the papers filed on the Motion and held a hearing on **December 12, 2016**.

For the reasons set forth below, the Motion is **GRANTED**. Lead Plaintiff has presented sufficient evidence to meet the requirements of Federal Rule of Civil Procedure 23(a) and (b). The main disputed issue is the efficiency of the market, as analyzed under the standard set out in *Cammer*, in satisfaction of the predominance requirement of Rule 23(b)(2). Lead Plaintiff's expert report strongly suggests that STAAR's alleged misstatements artificially inflated the price of its stock, and thus the fraud-on-the-market presumption applies.

I. BACKGROUND

Lead Plaintiff Todd filed this security class action on behalf of investors who acquired STAAR securities between November 1, 2013 and June 30, 2014 ("Class Period"). (See Second Amended Complaint ("SAC") ¶ 1 (Docket No. 88)). The SAC asserts violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 arising from Defendants' alleged statements that STAAR was in compliance with FDA

regulations when, in fact, the FDA had observed serious compliance violations. (SAC ¶ 2). According to Lead Plaintiff, the misleading statements artificially inflated the value of STAAR securities, which declined sharply once the results of the FDA investigation became public. (*Id*.).

On a motion for class certification, "a court must accept the substantive allegations in the complaint as true . . . ." *Vinh Nguyen v. Radient Pharm. Corp.*, 287 F.R.D. 563, 568 (C.D. Cal. 2012). The following allegations are drawn from the SAC:

STAAR designs, manufactures, and sells implantable lenses used in corrective and cataract eye surgery. (*Id*. ¶ 2). The company is relatively small, with 335 employees and, until recently, four manufacturing facilities worldwide. (Id. ¶¶ 3, 20). STAAR's major product is the Implantable Collamer Lens ("ICL") that consists of three models: one to treat myopia, one to treat myopia with astigmatism, and one to treat hyperopia. (Id. ¶ 21). All three models have been marketed overseas for years, but only the myopic version ("MICL") received FDA approval in the United States. (*Id*.). The Toric ICL ("TCIL"), used to cure myopia with astigmatism, is currently under review with the FDA. (*Id*.).

The FDA classifies the ICL as a "Class III" medical device, or a product deemed to pose the greatest risk to health and to require most extensive regulation. (*Id.* ¶ 35). One aspect of such regulation is an inspection of the manufacturing facilities to ensure that the production of a Class III device is done in accordance with the approved specifications. (*Id.* ¶¶ 39, 42); *see* 21 C.F.R. § 820.20, *et seq*. The FDA does not prescribe in exacting detail the production process of every possible device but only establishes a framework within which the manufacturers must operate. (SAC ¶ 45); 21 C.F.R. § 820.20. As is pertinent here, the regulations require manufactures to create "design controls," which safeguard the quality of the device from its inception to obsolescence. (*Id.* ¶ 47); 21 C.F.R. § 820.20-30. Manufacturers are mandated, moreover, to "establish and maintain a [Design History File] for each type of device. The DHF [must] contain or reference the records necessary to demonstrate that the design was developed in accordance with the approved design plan and the requirements of this part." (SAC ¶ 51); 21 C.F.R. § 820.30(j). If a company fails to

comply with such regulations, the FDA may refuse any pending requests for product approval. (SAC ¶ 41).

For much of its history, STAAR manufactured many of its lenses in its Nidau, Switzerland facility. (*Id.* ¶ 3). In 2013, STAAR decided to consolidate its manufacturing operations into one facility in California. (*Id.* ¶ 93). The consolidation process was rife with deficiencies in STAAR's quality assurance practices. (*Id.* ¶¶ 93, 94). The California facility, for example, turned into a "workplace of chaotic decision-making in which no one seemed to know what was going on, and manufacturing during this period became very disorganized." (*Id*. ¶ 94). Two confidential witnesses reported substantial defects in lenses that were supposed to be ready for shipment, including the presence of glass in the bottles of some products. (*Id*. ¶¶ 94–95).

STAAR's Swiss facility experienced similar difficulties prior to the completion of consolidation. (*Id.* ¶ 96). In August 2013, FDA inspectors observed deviations from FDA regulations in the manufacturing process. (*Id.*). The inspectors memorialized their observations in a Form 483 that was provided to and discussed with management on August 3, 2013. (*Id.*). The management nonetheless failed to correct the identified deficiencies, which persisted even after the transfer of manufacturing operations to California in October 2013. (*Id.*).

In February 2014, the FDA began inspecting STAAR's California facility. (*Id.* ¶ 97). Despite the inspector's numerous requests, the Company could not produce the Design History File for the ICL, which is necessary to ensure proper and safe manufacturing of STAAR's medical devices. (*Id.* ¶ 98). Instead, the management provided certain summary information that the FDA immediately deemed inadequate. (*Id.*). ithout proper documentation, "STAAR was manufacturing the MICL and other products, which were being surgically implanted into patients' eyes, without ensuring that the sign used to manufacture the lenses was correct, that the actual manufacturing of the lenses was using the correct materials, or according to any approved designs." (*Id.* ¶ 102).

After the investigation came to an end on March 23, 2014, the FDA inspector held a close-out meeting where he presented a Form 483 identifying STAAR's myriad violations to a senior regulatory compliance person. (*Id.* ¶ 101). As the inspector explained, STAAR failed to establish, maintain, and implement design controls under 21 C.F.R. § 820.30(a)–(j). (*Id.* ¶ 102). To the extent such design controls existed at all, the necessary documentation — the Design History File — was never transferred to the California facility from Switzerland. (*Id.*). In all, the FDA identified fifteen separate violations of FDA regulations, which culminated in a Warning Letter issued on May 21, 2014. (*Id.* ¶¶ 103–107).

Lead Plaintiff alleges that STAAR made the following statements concerning its products and facilities:

- **November 1, 2013:** In a Form 10-Q, STAAR noted that a "key operational metric" was managing "the manufacturing consolidation with no material disruption to customer supply requirements or quality" and that "our consolidation efforts continue to proceed according to our plan." (*Id.* ¶ 109).

- **March 12, 2014:** In a Form 10-K, STAAR stated that it "believes that it is substantially in compliance with the FDA's Quality System Regulations and Medical Device Reporting regulations." STAAR also reiterated that "our consolidation efforts continue to proceed substantially according to our plan." (*Id.* ¶¶ 113, 115).

- **March 14, 2014:** STAAR CEO Defendant Caldwell told an independent advisory panel to the FDA that the company had improved its regulatory compliance, and that only one of four inspections of the company's various facilities in previous years resulted in negative observations by the FDA. And even those observations, Caldwell stated, did not "warrant regulatory follow-up at this time." (*Id.* ¶ 118).

- **March 17, 2014:** STAAR announced that the advisory panel recommended approval of the TICL. (*Id.* ¶ 120).

- **May 5, 2014:** STAAR filed a Proxy Statement, stating, "STAAR's standing with the FDA and other regulators, and its reputation with customers depends on maintaining a corporate culture that emphasizes compliance at all levels, and STAAR aims for continuous improvement in the quality of its processes and products." (*Id.* ¶ 124).

Investors did not learn of the results of the FDA investigation until the agency published the Warning Letter on June 30, 2014. (*Id.* ¶ 129). The FDA identified the deficiencies discovered at the California facility and advised that any pending applications for Class III devices, such as the TILC, "will not be approved until the violations have been corrected." (*Id.* ¶¶ 130-31). STAAR's shares dropped almost 17.5% in value within two days of the FDA's announcement on heavy trading volume. (*Id.* ¶ 132).

Lead Plaintiff filed this class action approximately a week later.

III. DISCUSSION

Lead Plaintiff seeks to certify a class on behalf of "all investors who purchased or otherwise acquired [STAAR] securities between November 1, 2013 and June 30, 2014, inclusive . . . and were injured by virtue of the misconduct alleged" in the SAC. (SAC ¶ 1). Lead Plaintiff's theory relies on the fraud-on-the-market presumption, which rests on the efficient capital market hypothesis: "The price of a stock traded in an efficient market fully reflects all publicly available information about the company and its business." *Connecticut Ret. Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1173 (9th Cir. 2011), *aff'd*, 133 S. Ct. 1184 (2013). Lead Plaintiff contends that STAAR's misleading statements and omissions during the relevant class period were incorporated into the price of the stock, and potential purchasers relied on the price of the stock when deciding whether and how much to invest.

"As the Ninth Circuit has so aptly stated, securities fraud cases fit Rule 23 'like a glove.'" *In re Cooper Companies Inc. Sec. Litig.*, 254 F.R.D. 628, 632 (C.D. Cal. 2009) (quoting *Epstein v. MCA, Inc.*, 50 F.3d 644, 668 (9th Cir. 1995)). Especially in the case of a class action alleging securities fraud, then, "[a]ny doubts a court has about class certification should be resolved in favor of certification." *Gable v. Land Rover N. Am., Inc.*, No. SACV 07-0376 AG RNBX, 2011 WL 3563097, at *3 (C.D. Cal. July 25, 2011).

A. Requirements of Rule 23(a)

Numerosity, commonality, and adequacy are present here, and STAAR essentially does not dispute that these requirements are met. (Mot. at 8; Opp. at 1–2),

The typicality requirement is met when "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The "typicality" requirement is a permissive standard. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). "[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Id*. "[T]he court should look at whether the class members have similar injuries, whether the wrongful activity is not unique to the named plaintiffs, and whether other class members have been injured by the same conduct." *Cooper*, 254 F.R.D. at 635 (quoting *Schaefer v. Overland Express Family of Funds*, 169 F.R.D. 124, 129–30 (S.D. Cal. 1996)).

Lead Plaintiff alleges that he purchased shares of STAAR stock during the relevant class period at the market price. (SAC ¶ 18). He obtained all his information from public sources — specifically, Yahoo!'s public finance page — and from conducting his own research about STAAR online. (Declaration of Dan Marmalefsky ("Marmalefsky Decl.") Ex. A ("Todd Transcript") at 33:2–7 (Docket No. 162-3)).

To show liability under § 10(b) of the Securities Act, Plaintiff must show that prospective class members relied on Defendants' misstatements or fraudulent omissions in purchasing STAAR stock. Plaintiff contends that he can show reliance by

application of the fraud-on-the-market presumption. The fraud-on-the-market presumption "is 'based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements . . . ." *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999) (quoting *Basic, Inc. v. Levinson*, 485 U.S. 224, 247 (1988)); *see also, e.g.*, *ScripsAmerica, Inc. v. Ironridge Global LLC*, 119 F. Supp. 3d 1213, 1250–51 (C.D. Cal. 2015) (same). This theory of liability is discussed in more detail below. For purposes of the typicality analysis, however, it is important to emphasize that the fraud-on-the-market presumption ***assumes*** that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." *Basic*, 485 U.S. at 247. Thus, so long as a putative class representative can show that he purchased the stock at the market price and did not consider any unique, *e.g.* insider, information in deciding to purchase it, the putative class representative's claims will likely be typical of the class.

"[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 v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)). Defendants contend that Lead Plaintiff fails to meet the typicality requirement because he is subject to a unique defense: He did not actually rely on STAAR's statements or omissions when deciding whether to buy STAAR stock. (Opp. at 6). Defendants explain that Lead Plaintiff's first stock purchase actually occurred outside of the relevant class period; only his second purchase, in April 2014, occurred within the period at issue in the action. (Opp. at 7–8; Todd Tr. at 62:14–63:2, 64:23–65:6). Defendants contend that even if Lead Plaintiff can succeed in showing that the prospective class is entitled to application of the fraud-on-the-market presumption, Lead Plaintiff's own stated reason for purchasing STAAR in April 2014 was not reliant on any connection to an efficient market for STAAR securities, and therefore the presumption cannot apply as to him. (Opp. at 8–9).

In his deposition, Lead Plaintiff testified that he did not recall exactly what prompted him to call his broker and purchase more of STAAR's stock in April. (Declaration of Michael J. Wernke in Further Support of Lead Plaintiff's Motion for Class Certification ("Wernke Reply Declaration"), Ex. D ("Todd Reply Transcript") at 66:2–10 (Docket No. 164-3)); *see also Gable*, 2011 WL 3563097, at *3 ("The Court may . . . properly consider 'the supplemental evidentiary submissions of the parties'" on a motion for class certification.). However, in response to prompting by STAAR's attorneys, Lead Plaintiff stated that he purchased the stock because he saw the price of another company was also going up. (Todd Reply Tr. 66:14–16). Lead Plaintiff thought there was a connection between the two companies, indicating that STAAR's stock would also increase at that time. (Todd Reply Tr. 64:6–10; 65:23–66:20). Lead Plaintiff also testified, however, that his standard practice before buying stock was to verify from the "Headlines" section on E*TRADE (the website where he bought STAAR stock in April 2014) that there was nothing "bad hanging out there" indicating that he should not buy that stock. (Todd Reply Tr. at 66:22–67:9). Lead Plaintiff purchased the stock at the market price and had no unique, insider information regarding STAAR; he recalled that at the time he bought the stock, the price was affordable (Todd Reply Tr. at 69:1).

District courts generally find that where plaintiffs have bought and sold stock "for investment purposes, subject to the same information and representations as the market at large" those plaintiffs are typical and not subject to a unique defense. *See Cooper*, 254 F.R.D. 3d at 635–36 (finding retirement funds to be typical of the class where they were not "professional" plaintiffs merely buying stock for purposes of later bringing suit); *see also In re Diamond Foods, Inc., Sec. Litig.*, 295 F.R.D. 240, 252–53 (N.D. Cal. 2013) (holding plaintiffs were typical even though they relied on the advice of an investment advisor in deciding to buy stock, rather than relying purely on the price of the stock); *In re Winstar Commc'ns Sec. Litig.*, 290 F.R.D. 437, 444 (S.D.N.Y. 2013) (stating that so long as plaintiffs relied on publicly available information — rather than on insider information — in deciding to buy stock, their claims were typical of the class).

Although Lead Plaintiff's decision-making may have been idiosyncratic, his testimony indicates that he relied on information publicly available on the internet when deciding whether to purchase STAAR's stock. As the court in *Diamond Foods* explained, "[m]ost investors think they are a little smarter than average and see opportunities others have missed. Still, they all rely on publicly available data . . . ." 295 F.R.D. at 253. And indeed, Lead Plaintiff confirmed that he relied not only on information publicly available on Yahoo!'s finance section, but likely relied on the generic news headlines available on E*TRADE in deciding to buy STAAR's stock. Moreover, Lead Plaintiff's account of the nuances of his decision to buy STAAR stock is only relevant inasmuch as it shows that he purchased the stock at a market rate and was not in possession of any unique information at the time he bought the stock. Lead Plaintiff has thus sufficiently shown typicality under Rule 23(a)(3).

Accordingly, the requirements of Rule 23(a) are met.

B. Requirements of Rule 23(b)(3)

1. Predominance

Although there may be "some variation" among individual plaintiffs' claims, *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc*., 244 F.3d 1152, 1163 (9th Cir. 2001), "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)," *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). "A principal purpose behind Rule 23 class actions is to promote efficiency and economy of litigation." *In re Wells Fargo*, 571 F.3d at 958 (internal quotation marks omitted). Thus, "[t]he predominance analysis under Rule 23(b)(3) focuses on 'the relationship between the common and individual issues' in the case," and tests whether the proposed class is "'sufficiently cohesive to warrant adjudication by representation.'" *Wang v. Chinese Daily News, Inc*., 737 F.3d 538, 545 (9th Cir. 2013) (quoting *Hanlon*, 150 F.3d at 1022). "Common issues predominate over individual issues when the common issues 'represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication.'" *Edwards v. First*

Am. Corp., 798 F.3d 1172, 1182 (9th Cir. 2015) (citing 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1778 (3d ed. 1998)).

Lead Plaintiff contends that Defendants' misleading statements and omissions affected all potential class members in the same manner by artificially inflating the price of STAAR's stock. Because the question of liability is the same as to all potential class members, the remaining individualized questions of damages can be computed according to a model, and do not destroy the predominance of the common liability questions. (Mot. at 12).

Among other things, a plaintiff asserting a claim for securities fraud under § 10(b) of the Exchange Act must prove reliance. *See, e.g.*, *Matrixx Initiatives, Inc. v. Siracusano*, 536 U.S. 27, 1317 (2011) (restating the elements of a § 10(b) violation). As briefly discussed above, Lead Plaintiff intends to prove reliance via the fraud-on-the-market presumption. (Mot. at 13). As discussed above, the presumption assumes that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." *Basic*, 485 U.S. at 247. "Thus, the fraud-on-the-market presumption is a way to prove . . . a causal link from the defendant's misrepresentation, reflected in the prevailing market price, to each class member's decision to buy the stock." *Amgen*, 660 F.3d at 1173. Application of the presumption would allow Lead Plaintiff to show that Defendants' misleading statements defrauded those individuals who purchased its securities during the class period, even if Lead Plaintiff cannot prove that all of those purchasers ***directly*** relied on Defendants' statements.

"District courts in the Ninth Circuit have held that when plaintiffs plead a fraud-on-the-market theory, questions of whether misleading conduct occurred, and whether that conduct occurred with fraudulent intent, predominate over other questions." *Cooper*, 254 F.R.D. at 639. Therefore, the question of whether Lead Plaintiff can adequately plead a fraud-on-the-market theory will be strongly determinative as to predominance.

A plaintiff is entitled to application of the fraud-on-the-market presumption if he or she can show that the shares at issue were traded in an "open and developed," *i.e.*, efficient, securities market during the relevant class period. *Cammer v. Bloom*, 711 F. Supp. 1264, 1276 (D.N.J. 1989). Lead Plaintiff contends that STAAR shares were traded on an efficient market. First, Lead Plaintiff argues that a presumption of efficiency should attach because STAAR shares were listed and traded on the NASDAQ National Market System. (Mot. at 16). Second, and even if the Court does not agree that Lead Plaintiff is entitled to a presumption of efficiency, Lead Plaintiff argues that he has provided sufficient evidence of efficiency to meet the five-factor *Cammer* test employed by the Ninth Circuit. (Mot. at 17).

a. Presumption of Efficiency

"[T]he federal courts are unanimous in their agreement that a listing on the NASDAQ or a similar national market is a good indicator of efficiency." *Vinh Nguyen*, 287 F.R.D. at 573 n.7 (quoting *In re Initial Public Offering Securities Litigation*, 544 F.Supp.2d 277, 296 n.133 (S.D.N.Y. 2008)); *see also, e.g.*, *Oran v. Stafford*, 226 F.3d 275, 282 (3d Cir.2000) (describing the NYSE as "open and developed [where] the price of a company's stock is determined by all available material information regarding the company and its business"); *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir.1990) ("[I]t appears that securities traded in national secondary markets such as the New York Stock Exchange . . . are well suited for application of the fraud-on-the-market theory. The high level of trading activity ensures that information from many sources is disseminated into the marketplace and consequently is reflected in the market price. This is the premise upon which the fraud on the market theory rests."); *ScripsAmerica, Inc. v. Ironridge Glob. LLC*, 119 F. Supp. 3d 1213, 1252 (C.D. Cal. 2015) (contrasting the NASDAQ, which "is recognized as maintaining an efficient market," with over the counter markets, which are not efficient as a matter of law); *Loritz v. Exide Techs.*, No. 2:13-CV-02607-SVW-E, 2015 WL 6790247, at *9 (C.D. Cal. July 21, 2015) ("Courts have found a stock's listing on NASDAQ to be a good indicator of efficiency.").

Defendants essentially respond that the fact that a stock is traded on the NASDAQ is not a *per se* indicator of efficiency — rather, the efficient market inquiry must focus on the market for the individual security. (Opp. at 12–13). This argument is not uncommon in cases such as this, and other courts have answered it well: "While Defendants are correct that trading on a national exchange is not a *per se* indicator of market efficiency, . . . the fact that DVI common stock was traded on the NYSE strongly favors a finding of market efficiency." *In re DVI Inc. Sec. Litig.*, 249 F.R.D. 196, 208 (E.D.Pa.2008) *aff'd sub nom. In re DVI, Inc. Sec. Litig.*, 639 F.3d 623 (3d Cir.2011) (internal citations omitted).

Accordingly, while the fact that STAAR stock was traded on the NASDAQ is, in itself, a strong indicator of market efficiency, the Court must also consider the five *Cammer* factors to determine whether the market ***for STAAR stock*** was efficient.

b. *Cammer* Factors

"The Ninth Circuit has used [the] *Cammer* factors[] to help determine if the particular market for a stock is efficient." *Vinh Nguyen*, 287 F.R.D. at 571 (citing *Binder*, 184 F.3d at 1065) (internal citation omitted). Under *Cammer*, the Court should consider: ""***first***, whether the stock trades at a high weekly volume; ***second***, whether securities analysts follow and report on the stock; ***third***, whether the stock has market makers and arbitrageurs; ***fourth***, whether the company is eligible to file SEC registration form S-3, as opposed to form S-1 or S-2; and ***fifth***, whether there are "empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price." *Id.* (quoting *Binder*, 184 F.3d at 1065) (emphasis added).

Here, Lead Plaintiff has provided sufficient evidence to support a finding that the market for STAAR securities was efficient. Much of the following discussion relies on data contained in Lead Plaintiff's expert report. (*See* Wernke Decl., Ex. A ("Feinstein Report") (Docket No. 158-1)).

First, the average weekly share trading volume for STAAR's stock during the Class Period was about 1.14 million shares, or 3.01% of shares outstanding. (Feinstein Report ¶ 48). This is higher than the 2.0% weekly turnover that the *Cammer* court explained would justify a "strong presumption that the market for the security is an efficient one." *Cammer*, 711 F. Supp. at 1286. Defendants do not contest that the first factor weighs in favor of a finding of market efficiency.

Second, STAAR received broad coverage from analysts throughout the relevant class period. At least six different securities analysts covered STAAR and provided investment recommendations regarding its stock. (Feinstein Report ¶¶ 51–53). Additionally, at least 122 major institutions owned and analyzed STAAR common stock during the class period. (*Id.* ¶ 55). Although "[t]here is no bright-line rule regarding how many analysts it takes to constitute a 'significant' number," *Petrie v. Elec. Game Card, Inc.*, 308 F.R.D. 336, 350 (C.D. Cal. 2015), Lead Plaintiff's evidence is sufficient to support a finding of efficiency. *See, e.g., In re Nature's Sunshine Prods. Inc. Sec. Litig.*, 251 F.R.D. 656, 663 (D. Utah 2008) (suggesting that coverage by four analysts over the course of a year is sufficient); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, No. 05 CIV. 1898 (SAS), 2006 WL 2161887, at *6 (S.D.N.Y. Aug. 1, 2006), *aff'd*, 546 F.3d 196 (2d Cir. 2008) ("If a large number of financial analysts report on the stock, one can infer that financial statements are "closely reviewed by investment professionals, who would in turn make buy/sell recommendations to client investors."); *see also id.*, n. 82 (collecting cases). Defendants do not dispute that Lead Plaintiff has met his burden as to this factor.

Third, Lead Plaintiff identifies at least 91 market makers for STAAR common stock, including Barclays, Deutsche Bank, Goldman Sachs, JPMorgan, Morgan Stanley, and UBS. (Feinstein Report ¶ 60). "A market-maker is one who helps establish a market for securities by reporting bid-and-asked quotations (the price a buyer will pay for a security and the price a seller will sell a security) and who stands ready to buy or sell at these publicly quoted prices." *Petrie*, 308 F.R.D. at 351 (quoting *In re Countrywide Fin. Corp. Sec. Litig.*, 273 F.R.D. 586, 613–14 (C.D. Cal. 2009)). "The more market-makers for a particular security (and, relatedly, the greater the volume of the security the market-makers are prepared to handle), the more

reasonable it is to infer that the security is liquid, and, therefore, more likely the market for that security is efficient." *Id.* Although it is true, as Defendants contend, that *Cammer* also mentions arbitrageurs, "most courts consider only the number of market makers." *Id.*; *see also In re Juniper Networks, Inc. Sec. Litig.*, 264 F.R.D. 584, 591 (N.D. Cal. 2009) (finding third factor weighed in favor of market efficiency where "over 100 market makers traded [Defendant's] stock").

Moreover, where institutional investors (such as Barclays, Deutsche Bank, etc.) are involved in trading a particular stock, their presence "may be similar to the presence of market-makers ***and arbitrageurs***: large investors, with more money at stake, may be more likely to inform themselves well before trading." *In re Countrywide*, 273 F.R.D. at 614 (emphasis added). The market makers identified by Lead Plaintiff accounted for more than 45% of STAAR's trading volume during the class period, which is sufficient to support a finding of market efficiency. (*See* Wernke Reply Decl., Ex. E); *see, e.g.*, *Krogman v. Sterritt*, 202 F.R.D. 467, 476 (N.D. Tex. 2001) ("[W]hat is important is 'the volume of shares that [the market makers] committed to trade, the volume of shares they actually traded, and the prices at which they did so.'" (quoting *O'Neil v. Appel*, 165 F.R.D. 479, 501–02 (W.D. Mich. 1996))); *Serfaty v. Int'l Automated Sys., Inc.*, 180 F.R.D. 418, 422 (D. Utah 1998) (same). Although the changing nature of the academic literature makes analyzing this factor more difficult, the presence of large institutional investors and the volume of participating market makers indicate that this factor also favors Lead Plaintiff.

Fourth, STAAR is eligible to file, and indeed did file, S-3 registration statements with the SEC during the relevant class period. (Feinstein Report ¶ 67). Defendants do not contest this fact.

Finally, Lead Plaintiff submits an event study, conducted by his expert, Dr. Feinstein, which putatively determines the impact of new material information on STAAR's stock price. (Feinstein Report ¶ 84). As Dr. Feinstein explains, "[s]ignificant stock price reactions to disclosures of information related to . . . new information indicate market efficiency, not only generally, but also specifically with

respect to the information at issue in this case." (*Id.*). Defendants dispute this factor vigorously, and thus the Court takes special care to examine Dr. Feinstein's study.

Dr. Feinstein selected three events to examine for statistically significant reactions to news or events relevant to the allegations in the action. (Feinstein Report ¶ 96). Defendants contend that these events were not picked based on objective criteria. (Opp. at 22–23). Dr. Feinstein explains in his report, however, that the dates were selected after a review of "major FDA-related news events during the [c]lass [p]eriod concerning the approval and compliance of [STAAR] and its products" and identified "three such events during the [c]lass [p]eriod." (Feinstein Report ¶ 96). Dr. Feinstein then "reviewed news media and analyst reports published around the three relevant dates to determine whether the information conveyed in these events . . . could reasonably be expected to cause the Company's stock price to move by a statistically significant amount." (*Id.*). Dr. Feinstein determined that the three events he identified met those criteria. This process employed objective standards to select event dates that were relevant to the underlying question of whether STAAR's allegedly misleading statements caused the stock to be artificially inflated.

At the hearing, Defendants contended that the study was flawed because Dr. Feinstein failed to select events at the beginning of the class period. As a result, Defendants urged, the event study cannot be used to argue for an efficient market prior to February 12, 2014. The Court disagrees. The various factors already identified strongly indicate that the market was efficient during the entire class period. Defendants point to no precipitating event indicating that the market had pivoted from a state of inefficiency to efficiency on or around February 12, 2014. Therefore if (as the Court concludes) Dr. Feinstein's study indicates that the market for STAAR securities was efficient on or around February 12, 2014 and continuing through the class period, then there is no reason that the presumption of market efficiency should not extend through the duration of the class period identified by Lead Plaintiff.

The three dates Dr. Feinstein identified as appropriate for inclusion in the event study were:

- **February 12, 2014** – The FDA released an executive summary of its commentary and questions regarding the Company's premarket approval application for the TICL. The executive summary was released in advance of the Ophthalmic Devices Advisory Panel Meeting.
    - Analysts noted that "[t]he pre-panel commentary carried a negative slant" and opined that "the panel will not be easy for STAAR . . . ." (Feinstein Report ¶ 124). Therefore, one would expect an efficient market to react negatively to this event.
- **March 17, 2014** – STAAR announced that the Ophthalmic Devices Advisory Panel voted in favor of the TICL's premarket approval application. Lead Plaintiff alleges that this announcement was a misstatement by STAAR, intended to conceal violations that STAAR knew would delay FDA approval of TICL. (SAC ¶ 120–22).
    - Analysts responded to this announcement positively, prognosticating clear sailing ahead for STAAR: "Importantly, having successfully emerged from the regulatory crucible, [STAAR] can now effect a fundamental shift from atoning for past issues to focusing on driving category growth and advancing new products through the regulatory pipeline in the United States." (Feinstein Report ¶ 127). Accordingly, one would expect an efficient market to react positively to this event.
- **June 30, 2014** – The FDA published the Warning Letter on its website, in response to the February 2014 inspection of the Monrovia facility.
    - Lead Plaintiff contends that the Warning Letter was unexpected after STAAR's March 17, 2014 statements, and that those previous statements had inspired unsupported confidence in STAAR's stock. Therefore, one would expect an efficient market to react negatively to this event.

(Feinstein Report ¶98).

Defendants point out that these events do not account for all of the alleged misstatements in the SAC and argue that the failure to analyze events like the release of the 2014 Proxy 14A Form or the 2014 Form 10-Q fatally compromises the event analysis. (Opp. at 19–20). However, these events do not include any new, unexpected information that would be expected to affect the stock price. *See McIntire v. China MediaExpress Holdings, Inc.*, 38 F. Supp. 3d 415, 434 (S.D.N.Y. 2014) ("A material misstatement can impact a stock's value either by improperly causing the value to increase ***or*** by improperly maintaining the existing stock price." (emphasis in original)).

Moreover, Dr. Feinstein's expert report also explains his decision not to analyze earnings announcements in the event study. Although Dr. Feinstein considered testing earnings announcements during the class period, he concluded that such announcements were unlikely to significantly affect valuation in STAAR's case. (Feinstein Report ¶ 99–101). During the class period, STAAR was a "growth company," meaning market participants were more interested in events likely to affect future earnings than past earnings — *i.e.*, whether STAAR was likely to receive regulatory approval for the TICL. (*Id.*). Accordingly, "new affecting future earnings and the prospects of [STAAR's] new product pipeline is far more important than it recent past financial results reported in earnings announcements." (*Id.* ¶ 101). Dr. Feinstein confirmed his analysis via contemporary analysis and news reports indicating that STAAR's sales guidance and financial results were consistently in line with expectations throughout the class period. (*Id.* ¶¶ 103–06).

After analyzing the events identified above, Dr. Feinstein found a cause-and-effect relationship between STAAR's alleged misstatements and the price of its stock. Dr. Feinstein used the year leading up to the last day of the class period (July 1, 2013 – June 30, 0214) as a control period. (Feinstein Report ¶ 115). He included dummy variables to control for potentially abnormal returns on dates when earnings announcements and FDA-related disclosures not at issue in the action were made. (*Id.*). Dr. Feinstein then compared the residual return of STAAR stock on the pre-

selected event dates with the typical residual return exhibited over the regression period. (*Id.* ¶ 121). He found that the difference was statistically significant on each event date. (*Id.* ¶ 134). That is, his results showed that the market responded exactly as predicted on each event date, reacting negatively to the February and June events, and positively to the March event; and that the results were highly unlikely to be the result of random chance, at .24% for the February event, and less than .001% for the March and June events. (*Id.* ¶¶ 123–33). Based on these results, Dr. Feinstein opined that his results proved "not only that the market for STAAR common stock was efficient, but also that it was efficient specifically with respect to the information at issue in this case." (*Id.* ¶ 134).

At the hearing, Defendants challenged Dr. Feinstein's use of dummy variables for earnings announcements, arguing that the decision to ignore the effect of those dates amounts to a concession that the dates' inclusion would result in "potentially abnormal returns." (*See also* Opp. at 21). However, as Dr. Feinstein explained in his report, including these events in the study would not have materially affected the outcome. (*See* Feinstein Report ¶ 115 n.51 ("The results of [the] regression model are robust to the choice of using dummy variables to control for earnings announcement events.").

Although Defendants vigorously protest the adequacy of Lead Plaintiff's evidentiary showing, Defendants have not brought forth any expert or other evidence to contest Dr. Feinstein's findings. This absence, too, weighs in favor of finding that Lead Plaintiff has met his evidentiary burden. *See Vinh Nguyen*, 287 F.R.D. at 574 (finding plaintiff adequately proved market efficiency where, "[d]espite the importance of [the fifth *Cammer*] factor, no Defendant has provided an expert's report to contest the analysis by Plaintiffs' expert").

The Court finds that Lead Plaintiff has met his burden to show an efficient market. Not only is there a presumption that stocks traded on the NASDAQ are efficient, every *Cammer* factor — including the fifth factor, which Defendants contend is the most important — weights in favor of market efficiency.

STAAR's arguments to the contrary essentially appear to boil down to the following: Dr. Feinstein's argument is fatally flawed, and thus Lead Plaintiff failed to provide sufficient evidence of market efficiency to show predominance under Rule 23(b). STAAR relies on *Smilovits v. First Solar, Inc.*, 295 F.R.D. 423 (D. Ariz. 2013) to argue that even though the plaintiff in that case submitted a far more rigorous market event study, the court nevertheless found the fifth *Cammer* factor in equipoise. (Opp. 14). Yet the Court finds *Smilovits* instructive because, in that case, the district court ultimately found that the fifth *Cammer* factor weighed slightly in favor of the plaintiff — even though the defendants submitted evidence that the market moved contrary to the efficient market hypothesis on some days. *See Smilovits*, 295 F.R.D. at 437. Moreover, the court determined that where the plaintiffs had shown "without dispute that three of the five *Cammer* factors are satisfied, that another is partially satisfied, and that the stock traded on the NASDAQ," defendants' evidence "that the third *Cammer* factor is partially unsatisfied, and the stand-off on the fifth *Cammer* factor, simply do not outweigh Plaintiffs' evidence, even if the fifth factor is considered most important." *Id.*

Here, STAAR presents ***no*** evidence to contradict Lead Plaintiff's showing, and the Court has found that the third and fifth factors favor Lead Plaintiff. Furthermore, the fact that STAAR's stock was traded on the NASDAQ strongly favors a finding of market efficiency. Ultimately, the *Cammer* factors are not an end in themselves, but a means to determine whether the market was efficient during the relevant class period. Stepping back from the wrangling over whether Dr. Feinstein's study could have been more robust, or other evidence produced, the Court simply finds it difficult to conclude based on the evidence that has been presented that STAAR's stock was not traded on an efficient market. Under the approach taken by district courts in the Ninth Circuit, Lead Plaintiff's evidence is sufficient to show that STAAR's stock traded in an efficient market.

c. Damages Calculations

Finally, there is no indication that the individual damages calculations that this action will require are sufficiently involved to destroy predominance. In *Yokoyama v.*

Midland National Life Insurance Company, the Ninth Circuit held that "damage calculations alone cannot defeat certification" because the "amount of damages is invariably an individual question and does not defeat class action treatment." 594 F.3d 1087, 1094 (9th Cir. 2010) (quoting *Blackie*, 524 F.2d at 905). The Ninth Circuit has since regularly reaffirmed that holding. *See Vaquero v. Ashley Furniture Industries, Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016) ("*Yokoyama* remains the law of this court, even after *Comcast* [*Corp. v. Behrend*, 133 S. Ct. 1426 (2013)]." (quoting *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 988 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2410 (2016))).

Defendants contend that Lead Plaintiff has failed to demonstrate a common method of calculating damages, and therefore cannot meet the predominance requirement. (Opp. at 23–25). However, "[t]he event study method is an accepted method for the evaluation of materiality damages to a class of stockholders in a defendant corporation." *In re Diamond Foods*, 295 F.R.D. at 251. Moreover, the event study ***did*** include a viable damages model, in a section titled "Per Share Damage Methodology." (Feinstein Report ¶¶ 140–45).

Accordingly, the Court concludes that common questions of fact and law predominate in the action.

2. Superiority

Class certification is appropriate only if class resolution is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) lays out four non-exhaustive factors for courts to take into consideration: (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).

All of the superiority factors are satisfied in this action, and Defendants do not contest this factor. "If united by a common core of facts, and a presumption of reliance on an efficient market, class actions are the superior way to litigate a case alleging violations of securities fraud." *Vinh Nguyen*, 287 F.R.D. at 575. Here, the class is too large and the typical claim too small for each member to have an incentive to maintain and prosecute a separate action. No other litigation appears to have begun concerning this controversy, and the federal courts are an appropriate forum for a class action alleging violations of federal securities law. *See id.* ("Concentrating litigation in one forum is desirable where a company was listed on a national exchange, and no one has identified a meaningful difficulty in managing this class action."). Neither party has identified specific management difficulties that are likely to arise out of this action.

Accordingly, the Court concludes that the class action is a superior method of adjudicating this controversy. Lead Plaintiff has met the required evidentiary showing and the class will be certified.

C. Shortening the Class Period

Finally, Defendants contend that even if the Court determines that class certification is appropriate, the Court should shorten the class period to start on February 12, 2014 because Lead "Plaintiff's market event study does not evaluate any dates prior to" that one. (Opp. at 25). Defendants' assertion is simply incorrect. The event study evaluated a control period starting on July 1, 2013, four months before the first date of the class period. (Feinstein Report ¶ 115; SAC ¶ 1). The event study is sufficient to show that the market was efficient even prior to February 12, 2014, for all of the reasons discussed above.

IV. CONCLUSION

For the foregoing reasons, Lead Plaintiff's Motion is **GRANTED.** The Court certifies a class of all investors who acquired STAAR securities between November 1, 2013 and June 30, 2014, appoints Lead Plaintiff Edward Todd as class representative, and appoints Pomerantz LLP as class counsel.

IT IS SO ORDERED.