IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:12-CV-23-D

PHILLIP J. SINGER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**ORDER**
	)	
TRANS1, INC., et al.	)	
	)	
Defendants.	)	

On January 24, 2012, Joel Caplin, on behalf of himself and others similarly situated, filed a complaint against TranS1 Inc., Kenneth Reali, Joseph P. Slattery, Richard Randall, and Michael Luetkemeyer (collectively "defendants") for securities fraud in violation of Sections 10(b) and 20(a) of the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t(a), and 17 C.F.R. § 240.10b-5 ("Rule 10b-5") [D.E. 1]. On May 8, 2012, the court appointed Phillip J. Singer as lead plaintiff ("Singer" or "plaintiff") [D.E. 27]. On July 9, 2012, Singer filed an amended complaint [D.E. 28]. On September 7, 2012, defendants moved to dismiss the complaint for failure to allege falsity, scienter, and loss causation, elements of plaintiff's securities fraud claims. See [D.E. 34, 35]. On September 19, 2013, the court dismissed the amended complaint with prejudice for failure to plead loss causation. See [D.E. 48]. On May 5, 2014, however, the court vacated its judgment, allowed Singer to file a second amended complaint, and held that the proposed amendments adequately alleged loss causation. See [D.E. 54, 55]. On July 3, 2014, defendants moved to dismiss the second amended complaint for failure to allege falsity and scienter. See [D.E. 63, 64]. On November 18, 2014, TranS1 filed a notice of bankruptcy filing and moved for an automatic stay [D.E. 68]. On November 20, 2014 the court took judicial notice of the automatic stay resulting from

the bankruptcy petition and stayed the case concerning any claims against TranS1 [D.E. 69]. On May 14, 2015, the court dismissed all claims against the individual defendants for failure to allege falsity and scienter. See [D.E. 72]. On August 10, 2015, the automatic stay was lifted. See [D.E. 83]. On December 8, 2015, the court dismissed the claims against TranS1 for failure to allege falsity and scienter [D.E. 92].

On December 16, 2015, plaintiff filed a timely notice of appeal concerning the orders of May 14, 2015, and December 8, 2015 [D.E. 94]. On January 6, 2016, defendants cross-appealed concerning the order of May 5, 2014 [D.E. 97]. On January 25, 2016, the parties unsuccessfully engaged in mediation. See [D.E. 114] 9. On February 22, 2018, the United States Court of Appeals for the Fourth Circuit held that plaintiff adequately alleged both scienter and falsity and vacated the court's May 14, 2015 and December 7, 2015 orders. See Singer v. Reali, 883 F.3d 425, 441–44 (4th Cir. 2018). The Fourth Circuit also affirmed the order of May 5, 2014, finding that plaintiff adequately alleged loss causation. See id. at 444–47. On remand, the case was reassigned to the undersigned due to the retirement of the Honorable James C. Fox [D.E. 105].

On April 12, 2018, the parties filed a joint motion to stay to allow the parties to finalize a proposed settlement agreement [D.E. 109]. On April 16, 2018, the court granted the joint motion to stay until May 15, 2018 [D.E. 110]. On May 15, 2018, the parties filed a joint motion to stay the case until May 22, 2018, to allow the parties to finalize their settlement agreement and settlement documents [D.E. 111]. On May 16, 2018, the court granted the joint motion to stay until May 22, 2018 [D.E. 112]. On May 22, 2018, plaintiff moved for preliminary approval of a proposed class action settlement [D.E. 113] and filed a memorandum in support [D.E. 114]. As explained below, the court grants plaintiff's unopposed motion for preliminary approval of a proposed class action settlement.

I.

A.

TranS1 was a medical device company that designed, developed, and marketed products used in minimally invasive surgeries. See 2d Am. Compl. [D.E. 55] ¶ 25.[1] Kennetth Reali served as TranS1's Chief Operating Officer from January 4, 2010, through January 4, 2011, when he was promoted to Chief Executive Officer. See id. ¶ 20. Joseph Slattery served on TranS1's Board of Directors from November 2007 through April 2010, and as TranS1's Executive Vice President and Chief Financial Officer beginning in April 2010. See id. ¶ 21. Richard Randall was TranS1's Chief Executive Officer from June 2002 to January 2011, and its President from June 2002 until January 2010. See id. ¶ 22. Michael Luetkemeyer ("Luetkemeyer") served as TranS1's Chief Financial Officer from April 2007 to March 2010. See id. ¶ 23.

TranS1 developed the AxiaLIF family of products which uses a "'pre-sacral' approach designed to provide the least invasive means for surgeons to perform fusion and motion preserving surgeries in the L4/L5/S1 region of the spine as compared to the current alternative lumbar fusion procedures." Id. ¶ 26. The American Medical Association ("AMA") develops and maintains the Current Procedural Terminology ("CPT") coding system which classifies surgical procedures and helps insurance companies determine whether a procedure qualifies for reimbursement. See id. ¶ 4. In January 2009, the AMA assigned AxiaLIF a category III code. See id. ¶ 5. A category III code denotes that the surgical procedure is largely experimental, and as a result, providers are rarely reimbursed for such procedures. See id. ¶¶ 5–6. Before January 2009, however, surgeons using AxiaLIF were often able to code procedures that used AxiaLIF as category I and obtain full

[1] On August 10, 2015, TranS1 was dissolved. See [D.E. 114] 6.

reimbursement. See id. ¶ 5.

Plaintiff alleges that due to the coding change, defendants "embarked on a campaign to encourage surgeons to disregard the Category III code and employ alternate, wholly inapplicable, CPT codes to receive reimbursement." Id. ¶ 7. As a result of these practices, on April 21, 2011, a qui tam plaintiff brought a False Claims Act action against TranS1. See id. ¶ 8. The False Claims Act action caught the attention of regulators, and on October 18, 2011, TranS1 informed the market that it had received a subpoena from the Department of Health and Human Services, Office of Inspector General. See id. ¶ 9. Plaintiff contends that public disclosure concerning the subpoena resulted in a massive sell-off of TranS1 shares which caused the share price to plummet more than 40%. See id. ¶ 10. On January 24, 2012, plaintiff filed this action alleging that defendants violated Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 by knowingly and recklessly making material misstatements and omissions concerning TranS1's reimbursement practices and efforts to encourage surgeons to improperly code the procedure.

B.

The Stipulation and Agreement of Settlement (the "stipulation") defines the settlement class as "all Persons who purchased or acquired TranS1 securities (including through the exercise of warrants or options) during the Class Period who were allegedly damaged thereby." [D.E. 115-1] ¶ 1.28. The "class period" is the period between February 23, 2009 and October 17, 2011. Id. ¶ 1.5. Numerous individuals and entities are excluded from the settlement class including:

> (i) the Defendants; (ii) the officers and directors of TranS1 during the Class Period; (iii) members of the immediate families of the Individual Defendants and the officers and directors of TranS1 during the Class Period; (iv) any entity in which any Defendant had a controlling interest during the Class Period; and (v) the successors, heirs, and assigns of any such excluded Person. Also excluded from the Settlement Class are those Persons who timely and validly seek exclusion from the Settlement Class.

Id. ¶ 1.28.

The stipulation establishes a claims program whereby the settlement class will receive cash payments in exchange for release of the disputed claims. See id. ¶¶ 5.0–5.2. The defendants and/or the defendants' insurance carrier(s) will pay $3,250,000.00 to an escrow agent who will put the settlement funds in an interest-bearing settlement account within fifteen business days after the latter of preliminary approval of the stipulation and defendants' counsel receiving complete payment instructions. See id. ¶¶ 1.27, 2.0–2.5.

The proposed stipulation allows the escrow agent to establish a notice and administration fund within seven calendar days after the settlement amount is put in the settlement fund. See id.¶¶ 2.6–2.7. The escrow agent may deposit up to $250,000.00 from the settlement fund into a notice and administration fund to pay notice and administrative costs. See id. If notice and administration costs exceed $250,000.00, the escrow agent will transfer additional monies from the settlement account to the notice and administration fund after seeking approval from the court. See id. Any monies remaining in the notice and administration fund after notice and administration has been completed will be transferred back to the settlement account. See id. Plaintiff's counsel will ask the court for a fee award of up to 30% of the settlement amount and up to $75,000.00 in out-of-pocket litigation expenses. See id. ¶7.0–7.4; [D.E. 115-3] 3. Plaintiff's counsel also will ask the court to award lead plaintiff an amount not to exceed $3,000.00 to cover his reasonable costs and expenses. See [D.E. 115-3] 3. The settlement fund will be administered as follows: (1) to pay tax expenses; (2) to pay notice and administration costs; (3) to pay the fee and expense award to lead counsel to the extent approved by the court; (4) to reimburse the plaintiff for cost and expenses to the extent allowed by the court; and (5) to pay claimants in accordance with the stipulation, plan of allocation, or the court. See [D.E. 115-1] ¶ 6.2.

Class members seeking to recover under the settlement must submit a proof of claim and release form. See [D.E. 115-1] ¶ 6.3; [D.E. 115-5]. The proof of claim and release form will be mailed by first-class mail to every settlement class member who can be identified through reasonable effort and will also be posted on the claims administrator's website. See [D.E. 114] 17. The claims administrator will administer and calculate the claims submitted by the settlement class members. See [D.E. 115-1] ¶ 6.0. The claims administrator will distribute the settlement fund in accordance with the plan of allocation that is described in the notice and approved by the court. See id. ¶¶ 6.3–6.7.

II.

Federal Rule of Civil Procedure 23(e) provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). The primary concern of Rule 23(e) is "the protection of class members whose rights may not have been given adequate consideration during the settlement negotiations." In re Jiffy Lube Secs. Litig., 927 F.2d 155, 158 (4th Cir. 1991). Courts generally follow a two-step procedure in reviewing the proposed settlement. See Beaulieu v. EQ Indus. Servs., Inc., No. 5:06–CV–00400–BR, 2009 WL 2208131, at *23 (E.D.N.C. July 22, 2009) (unpublished); Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 855 F. Supp. 825, 827 (E.D.N.C. 1994). First, the court preliminarily reviews the settlement to determine whether there is "probable cause to notify the class of the proposed settlement." Horton, 855 F. Supp. at 827 (quotation omitted); see Armstrong v. Bd. Sch. Dir. of Milwaukee, 616 F.2d 305, 314 (7th Cir. 1980), overruled on other grounds by Felzen v. Andreas, 134 F.3d 873 (7th Cir. 1998). Second, after notice has been sent to putative class members, the court conducts a final fairness hearing at which "all interested parties are afforded an opportunity to be heard on the proposed settlement." Horton, 855 F. Supp. at 827.

Preliminary approval of a class action settlement "is at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." Menkes v. Stolt-Nielsen S.A., 270 F.R.D. 80, 101 (D. Conn. 2010); see In re Titanium Dioxide Antitrust Litig., No. RDB–10–0318, 2013 WL 5182093, at *3 (D. Md. Sept. 13, 2013) (unpublished); Horton, 855 F. Supp. at 827. In other words, the purpose of the preliminary approval is for the court to determine that the proposed settlement agreement is "sufficiently within the range of reasonableness." In re Titanium Dioxide Antitrust Litig., 2013 WL 5182093, at *3; see Richardson v. L'Oreal USA, Inc., 951 F. Supp. 2d 104, 106–07 (D.D.C. 2013); Smith v. Wm. Wrigley Jr. Co., No. 09–60646–CIV, 2010 WL 2401149, at *2 (S.D. Fla. June 15, 2010) (unpublished); 4 William B. Rubenstein, Newberg on Class Actions § 13:10 (5th ed. 2017).

The settlement agreement and stipulation "is within the range of possible final settlement approval, such that notice to the class is appropriate." DeLeon v. Wells Fargo Bank N.A., No. 12 Civ. 4494(RA), 2015 WL 821751, at *2 (S.D.N.Y. Jan. 12, 2015) (unpublished); see In re Vitamins Antitrust Litig., Nos. MISC. 99–197(TFH), MDL 1285, 2001 WL 856292, at *4–5 (D.D.C. July 25, 2001) (unpublished). The settlement results from extensive litigation which commenced over six years ago. Plaintiff briefed two separate motions to dismiss, a motion to alter or amend the order and judgment of dismissal, and an appeal and cross-appeal in the Fourth Circuit. Highly experienced counsel represents plaintiff, and plaintiff and lead counsel have a thorough understanding of the strengths and weaknesses of the case. Moreover, the settlement agreement results from extensive, arms-length negotiations which included mediation with a highly experienced mediator. See [D.E. 114] 13.

The court also preliminary finds that plaintiff would have to overcome numerous defenses in order to recover at trial and would face substantial time and expense in proceeding through

discovery and any dispositive motions. Moreover, even if plaintiff did litigate to final judgment and succeed, plaintiff may not be able to recover the full value of the judgment because TranS1 was dissolved on August 10, 2015. See id. at 15. Accordingly, the court finds that there is probable cause to direct notice to putative class members. See, e.g., Dewhurst v. Century Aluminum Co., No. 2:09-1546, 2017 WL 2374393, at *3 (S.D. W. Va. May 31, 2017) (unpublished); Nakkhumpun v. Taylor, No. 12-CV-01038-CMA-CBS, 2015 WL 6689399, at *7 (D. Colo. Nov. 3, 2015) (unpublished).

III.

The court preliminarily considers whether the proposed settlement classes meet the requirements of Fed. R. Civ. P. 23(a) and (b)(3). See, e.g., Wm. Wrigley Jr. Co., 2010 WL 2401149, at *3–6; Smith v. Prof'l Billing & Mgmt. Servs. Inc., No. 06-4453 (JEI), 2007 WL 4191749, at *3 (D.N.J. Nov. 21, 2007) (unpublished). The requirements for certification of a settlement class parallel the requirements for certification of a litigation class. See Berry v. Schulman, 807 F.3d 600, 608 (4th Cir. 2015); Decohen v. Abbasi, LLC, 299 F.R.D. 469, 476 (D. Md. 2014). In order to be certified, the putative class must meet the four Rule 23(a) prerequisites and fit within one of the three Rule 23(b) categories. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620–21 (1997); Berry, 807 F.3d at 608. The parties seek certification under Rule 23(b)(3).

A.

Under Federal Rule of Civil Procedure 23(a), class certification is appropriate if: "(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).

As for numerosity, "[t]here is no mechanical test for determining whether in a particular case the requirement of numerosity has been satisfied." Kelley v. Norfolk & W. Ry., 584 F.2d 34, 35 (4th Cir. 1978) (per curiam). In a securities class action suit, "a showing that a large number of shares were outstanding and traded during the relevant period" is sufficient to prove numerosity. In re NeuStar, Inc. Sec. Litig., No. 1:14-CV-885, 2015 WL 5674798, at *3 (E.D. Va. 2015) (unpublished); see Nakkhumpun, 2015 WL 6689399, at *4. During the class period, there were approximately 28 million shares of TranS1 securities issued and outstanding and an average of 90,993 TranS1 shares traded each day. See [D.E. 114] 19. Accordingly, the settlement class meets Rule 23(a)'s numerosity requirement. See, e.g., Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 425–27 (4th Cir. 2003); In re NeuStar, Inc. Sec. Litig., 2015 WL 5674798, at *3.

As for commonality, at least one common question of law or fact must exist among class members. See EQT Prod. Co. v. Adair, 764 F.3d 347, 360 (4th Cir. 2014); Brown v. Nucor Corp., 576 F.3d 149, 153 (4th Cir. 2009); Haywood v. Barnes, 109 F.R.D. 568, 577 (E.D.N.C. 1986). In a securities class action, "[t]his is not a heavy burden . . . as members of a proposed class in a securities case are especially likely to share common claims and defenses." In re NeuStar, Inc., 2015 WL 5674798, at *3 (quotation and alteration omitted); see In re BearingPoint, Inc. Sec. Litig., 232 F.R.D. 534, 539 (E.D. Va. 2006). Here, the plaintiff and class members share common questions of law and fact, including, among others: (1) whether defendants made any material misstatements or omissions during the class period concerning TranS1's reimbursement practices and compliance with regulatory requirements; (2) whether defendants made any material representations or omissions with the requisite scienter; (3) whether the market price of TranS1's stock was artificially inflated during the class period due to the alleged material misstatements or omissions; and (4) whether settlement class members were damaged by the alleged material

misstatements or omissions.

As for typicality, this requirement is met if, "the claims of the representative parties [are] typical of the claims of the class." Haywood, 109 F.R.D. at 578; see Soutter v. Equifax Info. Servs., LLC, 498 F. App'x 260, 264–65 (4th Cir. 2012) (unpublished); Deiter v. Microsoft Corp., 436 F.3d 461, 466 (4th Cir. 2006). A claim is typical if "it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." Beattie v. CenturyTel, Inc., 511 F.3d 554, 561 (6th Cir. 2007). The typicality requirement is "captured by the notion that as goes the claim of the named plaintiff, so go the claims of the class." Deiter, 436 F.3d at 466 (quotation omitted); see Soutter, 498 F. App'x at 264–65; Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 340 (4th Cir. 1998). Here, the claims of the lead plaintiff are typical of all other putative class members because the claims arise from the same course of conduct, rest on the same legal theory, and require the same evidence. Accordingly, the typicality requirement is satisfied. See Nakkhumpun, 2015 WL 6689399, at *5; In re NeuStar, Inc., 2015 WL 5674798, at *4.

As for the fourth requirement, the lead plaintiff "must be part of the class and possess the same interest and suffer the same injury as the class members." Amchem, 521 U.S. at 625–26 (alteration and quotation omitted); see In re Red Hat, Inc. Secs. Litig., 261 F.R.D. 83, 87 (E.D.N.C. 2009). The adequacy inquiry also "serves to uncover conflicts of interest between named parties and the class they seek to represent." Amchem, 521 U.S. at 625; see Beattie, 511 F.3d at 562; In re Comput. Sci. Corp. Sec. Litig., 288 F.R.D. 112, 118 (E.D Va. 2012). A conflict must be considered "fundamental" to defeat the adequacy requirement. See Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d 170, 184 (3d Cir. 2012); Ward v. Dixie Nat'l Life Ins. Co., 595 F.3d 164, 180 (4th Cir. 2010); Gunnells, 348 F.3d at 430–31. "A conflict is not fundamental when . . . class members share

common objectives and the same factual and legal positions and have the same interest in establishing the liability of defendants." Ward, 595 F.3d at 180 (quotation and alteration omitted); see Gunnells, 348 F.3d at 430–31. Moreover, courts consider "whether the potential class representative will be able to pursue the case vigorously." In re Comput. Sci. Corp., 288 F.R.D. at 118.

Lead plaintiff is an adequate representative of the settlement class for settlement purposes only. Lead plaintiff and putative class members are "all pursuing damages under the same statutes and the same theories of liability, and the differences among them will not . . . pit one group's interests against another." In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig., 795 F.3d 380, 394 (3d Cir. 2015). Moreover, lead plaintiff has "pursue[d] a resolution of the controversy in the interests of the class." Dura-Bilt Corp. v. Chase Manhattan Corp., 89 F.R.D. 87, 101 (S.D.N.Y. 1981); see Berry, 807 F.3d at 613–14. Accordingly, the court preliminarily finds that the proposed settlement classes, for the purposes of settlement only, meet the requirements of Rule 23(a). See, e.g., Munday v. Navy Fed. Credit Union, No. SACV 15-1629-JLS (KESx), 2016 WL 7655807, at *6 (C.D. Cal. Sept. 15, 2016) (unpublished); DeLeon, 2015 WL 821751, at *2–3; Singleton v. Domino's Pizza, LLC, No. DKC 11-1823, 2013 WL 12246357, at *3 (D. Md. May 13, 2013) (unpublished).

B.

Rule 23(b)(3) allows a class action to be maintained if the court finds "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In other words, Rule 23(b)(3) has two requirements: predominance and superiority. See Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d

311, 319 (4th Cir. 2006).

As for predominance, the predominance requirement is "far more demanding than Rule 23(a)'s commonality requirement and tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Gariety v. Grant Thornton, LLP, 368 F.3d 356, 362 (4th Cir. 2004) (quotation omitted); see Amchem, 521 U.S. at 623–24; Gray v. Hearst Commc'ns, 444 F. App'x 698, 700–01 (4th Cir. 2011) (unpublished); Thorn, 445 F.3d at 319. The predominance inquiry focuses on the balance between individual and common issues. See Brown v. Nucor Corp., 785 F.3d 895, 917–21 (4th Cir. 2015). Common issues of law and fact have been held to predominate "where the same evidence would resolve the question of liability for all class members." Beaulieu, 2009 WL 2208131, at *20; see Stillmock v. Weis Mkts., 385 F. App'x 267, 273 (4th Cir. 2010) (unpublished); Gunnells, 248 F.3d at 428; Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 40 (1st Cir. 2003).

To succeed on his securities fraud claim, plaintiff must prove "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." Haliburton Co v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407 (2014) (quotation omitted). Here, "at least five of the six elements . . . involve proof common to the class." In re NeuStar, Inc., 2015 WL 5674798, at *6; In re Red Hat, 261 F.R.D. at 90. Specifically, class members would use the same evidence to show that defendant made a material misrepresentation or omission, that defendant acted with scienter, that there was a connection between the misrepresentation and omission and the purchase and sale of a security, and loss causation. See In re NeuStar, Inc., 2015 WL 5674798, at *6; Menkes, 270 F.R.D. at 91. As for the element of reliance, plaintiff has invoked the "fraud-on-the-market" theory. The

fraud-on-the-market theory creates a rebuttable presumption of reliance where a plaintiff shows "(1) that the alleged misrepresentations were publicly known, (2) that they were material, (3) that the stock traded in an efficient market, and (4) that the plaintiff traded the stock between the time the misrepresentations were made and when the truth was revealed." Erica P. John Fund, 134 S. Ct. at 2408; see Basic Inc. v. Levinson, 485 U.S. 224, 248 & n.27 (1988). Plaintiff adequately demonstrated that the fraud-on-the-market theory applies. Thus, the element of reliance is also common to all class members.[2] As for economic loss, although economic loss must be proven individually, individualized damages do not alone defeat predominance. See, e.g., Brown v. Electrolux Home Prods., Inc., 817 F.3d 1225, 1232 (11th Cir. 2016); Gunnells, 348 F.3d at 427–28; Smilow, 323 F.3d at 40; Hart v. Louisiana-Pac. Corp., No. 2:08-CV-47-BO, 2013 WL 12143171, at *2 (E.D.N.C. Mar. 29, 2013) (unpublished). Moreover, each class member can show economic losses through evidence of the purchase and sale dates of the TranS1 security. Accordingly, the court finds that the predominance requirement is met.

As for the superiority requirement, plaintiff must be able to demonstrate that proceeding as a class "is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); see Thorn, 445 F.3d at 319. In assessing superiority, courts should consider the following factors:

> (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.

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[2] Even if plaintiff failed to show the fraud-on-the-market presumption applies, this would not alone defeat predominance. When a class is certified for settlement purposes only, the plaintiff is not required to "satisfy the fraud-on-the-market presumption in order to demonstrate predominance." In re Am. Int'l Group Inc. Sec. Litig., 689 F.3d 229, 241 (2d Cir. 2012).

Fed. R. Civ. P. 23(b)(3); see Thorn, 445 F.3d at 319. Courts should consider "whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court." Stillmock, 385 F. App'x at 274 (quotation omitted). However, on a request for a settlement-only class certification, the court need not consider the likely difficulties in managing a class action. See Amchem, 521 U.S. at 620; Carter v. Forjas Taurus, S.A., 701 F. App'x 759, 765 (11th Cir. 2017) (per curiam) (unpublished); Decohen, 299 F.R.D. at 476.

The superiority requirement is met. As for the first factor, the burden and expense of individual litigation, and the legal and practical difficulty of proving individual claims concerning these events, make it highly unlikely that individual class members could obtain the relief achieved in this settlement if they were forced to proceed on their own. As for the second factor, no individual claims are pending. As for the third factor, this court presents a desirable forum for litigating these claims. The claims arose in the Eastern District of North Carolina and many of the relevant records are in the Eastern District of North Carolina. Accordingly, the court preliminarily finds that the requirements of Rule 23(b)(3) are met. See, e.g., Munday, 2016 WL 7655807, at *6 ; DeLeon, 2015 WL 821751, at *2–3; Singleton, 2013 WL 12246357, at *3.

IV.

The parties seek approval of the proposed notice plan. Rule 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Rule 23(e)(1) does not specify "the required contents of the settlement notice." McLaurin v. Prestage Foods, Inc., No. 7:09-CV-100-BR, 2011 WL 13146422, at *5 (E.D.N.C. Nov. 9, 2011) (unpublished) (quotation omitted). Due process, however, requires that notice be "the best practicable, reasonably calculated, under all the circumstances, to apprise

interested parties of the pendency of the action and afford them an opportunity to present their objections." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (quotation omitted). When a class is certified at the same time as settlement, the notice must also comport with the requirements of Rule 23(c)(2)(B). See, e.g., Fidel v. Farley, 534 F.3d 508, 513 (6th Cir. 2008). Rule 23(c)(2)(B) requires that all class members be provided with "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); see Low v. Trump Univ., LLC, 881 F.3d 1111, 1117 (9th Cir. 2018). The notice must include the following information, written in plain language:

> (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). Under Rule 23(c)(2)(B), "[t]he yardstick against which we measure the sufficiency of notices in class action proceedings is one of reasonableness." Low, 881 F.3d at 1117 (quotation omitted); see In re Bank of Am. Corp. Sec. Derivative, & ERISA Litig., 772 F.3d 125, 132 (2d Cir. 2014).

The Private Securities Litigation Reform Act ("PSLRA") also requires that the notice contain certain information concerning the proposed settlement agreement including the amount of the settlement proposed to be distributed to the parties, a statement about the potential outcome of the case, contact information for lead counsel, and the reasons for settlement. See 15 U.S.C. § 78u-4; see In re Molycorp., Inc. Sec. Litig., No. 12–cv–00292–RM–KMT, 2017 WL 4333997, at *8 (D. Colo. Feb. 15, 2017) (unpublished), report and recommendation adopted by 2017 WL 4333998 (D. Colo. Mar. 6, 2017) (unpublished).

The proposed notice will be sent by first class mail to every settlement class member who can be identified through reasonable effort. See [D.E. 114] 17. The claims administrator will make copies of the notice available to nominee holders such as brokerage firms who held TranS1 stock. The nominee holders will be requested to forward copies of the notice to all beneficial owners of the stock or to provide the claims administrator with the beneficial owners' names and addresses so the claims administrator can directly mail the notice. See id. Moreover, a publication notice will be published on *BusinessWire*, a global leader in press release distribution and regulatory disclosure. The notice will also be posted on the case website at www.trans1securititessettlement.com. [D.E. 115-2] 5.

The court has reviewed the proposed notice plan and finds that the notice plan provides the best practicable notice under the circumstances, and, when completed, shall constitute fair, reasonable, and adequate notice of the settlement to all persons and entities affected by or entitled to participate in the settlement, in full compliance with the notice requirements of Fed. R. Civ. P. 23(c)(2)(B), due process, and the PSLRA. Thus, the court approves the proposed notice plan. See In re Molycorp., 2017 WL 4333997, at *8; In re NeuStar, Inc., 2015 WL 5674798, at *12; In re Northfield Labs., Inc. Secs. Litig., No.06-C-1493, 2012 WL 366852, at *8–9 (N.D. Ill. Jan. 31, 2012) (unpublished); Menkes, 270 F.R.D. at 106.[3]

[3] On June 11, 2018, the court directed plaintiff to specify whether the compensatory award plaintiff may request, see [D.E. 115-3] 3; [D.E. 115-2] 4, is to reimburse plaintiff for reasonable costs and expenses or whether the award is an incentive award. The Private Securities Litigation Reform Act prohibits incentive awards. See [D.E. 116]. On June 15, 2018, plaintiff responded and stated that "[p]laintiff's request shall be limited to 'reasonable costs and expenses (including lost wages) directly relating to the representation of the class.'" [D.E. 117] 2. Plaintiff also stated that the award request will not exceed $7,500. See id. The court presumes that the $7,500 is a typographical error. The court doubts that plaintiff's reasonable costs and expenses amount to $7,500. In any event, plaintiff's proposed notice states that plaintiff will not request an award in excess of $3,000. See [D.E. 115-3] 3. Plaintiff's notice must be complete and accurate.

V.

The court adopts the following settlement procedure and schedule:

Notice Plan

1. The court approves the appointment of Epiq Class Action & Claims Solutions, Inc. as the claims administrator to supervise and administer the notice procedure as well as the processing of claims as more fully set forth below:

a. The defendants shall assist the claims administrator in obtaining, from TranS1's transfer agent, records of ownership sufficient to identify Settlement Class Members by July 16, 2018.

b. The claims administrator, shall cause a copy of the notice and proof of claim, to be mailed by first-class mail to all settlement class members who can be identified with reasonable effort and to be posted on its website at www.trans1securitiessettlement.com by July 23, 2018.

c. The claims administrator, shall cause the publication notice to be published once over *BusinessWire* by July 23, 2018.

d. No later than November 5, 2018, lead counsel shall file with the court a post-notice declaration attesting to compliance with the notice plan filed with the court.

2. Nominees who purchased or acquired TranS1 securities for the benefit of another person during the class period shall be requested to send the notice and proof of claim and release form to such beneficial owners of TranS1 securities within 10 calendar days after receipt thereof, or send a list of the names and addresses of such beneficial owners to the claims administrator within 10 calendar days of receipt thereof, in which event the claims administrator shall promptly mail the notice and proof of claim to such beneficial owners.

Objections to Settlement and Exclusions from Settlement

3. Any settlement class member may enter an appearance in the action, at his, her, or its own

expense, individually or through counsel of their own choice. If they do not enter an appearance, they will be represented by lead counsel.

4. Any settlement class member may, upon request, be excluded or "opt out" from the settlement class. Any such person must submit to the claims administrator a request for exclusion ("Request for Exclusion"), which complies with the requirements set forth in the notice and is postmarked no later than 21 days before the settlement fairness hearing. All persons who submit valid and timely requests for exclusion in the manner set forth in this paragraph shall have no rights under the stipulation, shall not share in the distribution of the net settlement fund, and shall not be bound by the stipulation or any judgment. However, a settlement class member may submit a written revocation of a request for exclusion up until 5 days before the date of the settlement fairness hearing and still be eligible to receive payments pursuant to the stipulation provided the settlement class member also submits a valid proof of claim and release form before the settlement fairness hearing.

5. Any settlement class member and any other interested person may appear at the settlement fairness hearing in person or by counsel and be heard, to the extent allowed by the court, either in support of or in opposition to the matters to be considered at the hearing, provided, however, that no person shall be heard, and no papers, briefs, or other submissions shall be considered by the court in connection to such matters, unless no later than 21 days before the settlement fairness hearing, such person files with the court a statement of objection setting forth: (i) whether the person is a settlement class member; (ii) to which part of the stipulation the settlement class member or interested person objects; and (iii) the specific reason(s), if any, for such objection including any legal support the settlement class member or interested person wishes to bring to the court's attention and any evidence the settlement class member or interested person wishes to introduce in support

of such objection. Such settlement class member shall also provide documentation sufficient to establish the amount TranS1 securities purchased and sold during the class period, and the prices and dates of such transactions. Objection materials must be sent to the following:

LEAD COUNSEL:
Jeremy A. Lieberman
POMERANTZ LLP
600 Third Avenue, 20th Floor
New York, NY 10016

DEFENDANTS' COUNSEL
John F. Cannon
STRADLING YOCCA CARLSON &
RAUTH, P.C.
660 Newport Center Drive, Suite 1600
Newport Beach, CA 92660
Telephone: (949) 725-4000
Facsimile: (949) 725-4100

COURT
Office of the Clerk
United States District Court
310 New Bern Avenue
Raleigh, NC 27611

6. Attendance at the settlement fairness hearing is not necessary. However, persons wishing to be heard orally in opposition to approval of the settlement, the plan of allocation, or fee and expense application are required to indicate in their written objection their intention to appear at the settlement fairness hearing. Settlement class members do not need to appear at the settlement fairness hearing or take any action if they do not oppose any aspect of the settlement.

Settlement, Plan of Allocation, and Fee and Expense Application

7. All papers in support of the settlement, plan of allocation, and any fee and expense application shall be filed and served no later than 28 days before the settlement fairness hearing, and any reply papers shall be filed and served no later than 7 days before the settlement fairness hearing.

8. All funds held by the escrow agent shall be deemed and considered to be in custodia legis of the court, and shall remain subject to the jurisdiction of the court, until such time as such funds shall be distributed pursuant to the stipulation and/or further order(s) of the court. There shall be no distribution of any part of the net settlement fund to the settlement class until the plan of allocation is finally approved and the court issues the settlement fund distribution order and until the order and final judgment becomes final.

Filing and Administration of Claim Forms

9. Settlement class members who wish to participate in the settlement shall complete and submit a proof of claim and release form in accordance with the instructions contained therein. Unless the court orders otherwise, all proofs of claim must be postmarked or submitted electronically no later than January 2, 2019. Any settlement class member who does not submit a proof of claim within the time provided shall be barred from sharing in the distribution of the proceeds of the net settlement fund, unless otherwise ordered by the court, but shall nevertheless be bound by any final judgment entered by the court. Notwithstanding the foregoing, lead counsel shall have the discretion to accept late-submitted claims for processing by the claims administrator but shall not incur any liability for declining to do so.

10. The proof of claim and release form submitted by each settlement class member must satisfy the following conditions, unless otherwise ordered by the court: (i) it must be properly completed, signed and submitted in a timely manner in accordance with the provisions of the preceding paragraph; (ii) it must be accompanied by adequate supporting documentation for the transactions reported therein, in the form of broker confirmation slips, broker account statements, an authorized statement from the broker containing the transactional information found in a broker confirmation slip, or such other documentation as is deemed adequate by lead counsel or the claims

administrator; (iii) if the person executing the proof of claim and release form is acting in a representative capacity, a certification of her current authority to act on behalf of the settlement class member must be included therein; (iv) it must be complete and contain no material deletions or modifications of any of the printed matter contained therein; and (v) it must be signed under penalty of perjury.

Final Approval Hearing

11. A hearing on final settlement approval (the "Final Approval Hearing") will be held on November 19, 2018, in courtroom one of the Terry Sanford Federal Building, 310 New Bern Avenue, Raleigh, North Carolina, at 2:00 p.m., to consider matters relating to the settlement, including the following: (a) whether the settlement classes should be certified, for settlement purposes only; (b) the fairness, reasonableness and adequacy of the settlement, the terms of the settlement agreement, the dismissal with prejudice of the litigation as to defendants, and the entry of final judgment; and (c) whether class counsel's application for attorneys' fees, expenses, and service awards for the settlement class representatives, and their other costs should be granted.

12. The court orders class counsel to file with the court any memoranda or other materials in support of final approval of the settlement and any fee petition by October 29, 2018. Any response is due by November 5, 2018. Any reply is due by November 12, 2018.

13. Any settlement class member may retain an attorney at his or her own expense to appear in the action. Such attorney shall file with the court and serve a notice of appearance on class counsel and defendants' counsel by November 5, 2018.

VI.

In sum, the court GRANTS plaintiff's motion for preliminary approval of class action settlement [D.E. 113]. The court sets the final fairness hearing for November 19, 2018, at 2:00 p.m.,

in courtroom one of the Terry Sanford Federal Building, 310 New Bern Avenue, Raleigh, North Carolina.

SO ORDERED. This 2 day of July 2018.

JAMES C. DEVER III
Chief United States District Judge