
IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DEBRA GARIETY, et al.,)
 Plaintiffs-Appellees,)
v.)
)
GRANT THORNTON LLP, et al.,)
 Defendants-Appellants,)
and)
)
THOMAS ALLEN,)
 Plaintiff-Appellee,)
v.)
)
GRANT THORNTON LLP, et al.,)
 Defendants-Appellants.)

Appeal from the
United States District Court for the
Southern District of West Virginia

Hon. David A. Faber,
Chief Judge, Presiding

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JURISDICTION

This is an interlocutory appeal from an order certifying a nationwide federal securities and a state common law class involving the laws of at least six states. The district court has jurisdiction over the underlying action pursuant to 15 U.S.C. § 78j(b) (federal claim under §10b of Securities Exchange Act of 1934) and 28 U.S.C. §§ 1331 and 1367 (federal question and supplemental jurisdiction). The class certification order was entered on March 28, 2003. Defendant–appellant Grant Thornton LLP (“Grant”) filed a petition for leave to appeal that order pursuant to Fed.R.Civ.P. 23(f) on April 11, 2003, the tenth day after March 28, excluding weekends. This Court granted leave to appeal on May 23, 2003. This Court has jurisdiction pursuant to Rule 23(f).

ISSUES

1. Whether the district court erred as a matter of law in certifying a class based solely on the presumption that Keystone’s stock traded in an efficient market, where the stock was unlisted for half of the four-month class period, the stock only traded over-the-counter for the remainder of the class period, and the alleged “market” consisted entirely of rigged sales by corrupt insiders and brokers.
2. Whether the court erred as a matter of law when it refused to look beyond the pleadings to determine if certification was warranted, and thus failed to consider evidence showing that the market for Keystone’s stock was not efficient.

3. Whether the court abused its discretion in concluding that common issues predominated over individual issues, where the class claims are based on oral representations and the state law claims require individual proof of reliance.

4. Whether the court abused its discretion in concluding that common issues of law predominated, where state law differs considerably on each of the five common-law claims alleged, which arise under the laws of at least six states.

5. Whether the court abused its discretion when it held that Bischoff and Gariety were adequate class representatives and ignored the PSLRA's requirement that the lead plaintiff and class representative must be the same person.

STATEMENT OF THE CASE

Plaintiffs are purchasers of stock in the First National Bank of Keystone. The Consolidated Amended Complaint ("complaint") pleads several claims against Grant: federal securities law violations under §10b, fraud, constructive fraud, negligent misrepresentation, aiding and abetting tortious conduct, and conspiracy. The complaint brings related claims against Keystone's former management and certain brokers. Plaintiffs allege that Grant issued an audit report on Keystone's financial statements either knowing or recklessly disregarding that the bank's assets were overstated. Grant contends that it was blameless, that Keystone's management and other third parties misled Grant and impeded the audit, and that it is unfair to blame Grant for failing to detect the fraud at Keystone in only eleven

months of audit work, when federal regulators for years overlooked the fraud, which was very well concealed by the bank’s senior management and employees.

Grant opposed class certification on the grounds that, among other reasons, none of the class representatives saw or relied on Grant’s audit report, and no presumption of reliance was available because Keystone was an unlisted or over-the-counter stock that traded for little more than two months and did not exhibit any characteristics of efficiency. The district court held that it must “presume” Keystone traded in an efficient market based entirely on the allegations of the complaint, and thus that common questions predominated—even as to plaintiffs’ numerous state law claims that arose under the laws of at least six different states and required individual proof of reliance. This appeal followed.

STATEMENT OF FACTS

A. Keystone’s Overstatement of Assets. As of 1990, Keystone was a small community bank in West Virginia with assets of approximately \$85 million. App. 91 (Cmplt. ¶62). Beginning in about 1992, Keystone embarked on a growth strategy that involved buying Federal Housing Authority loans from around the country and securitizing them. App. 92 (Cmplt. ¶63). To fund its securitization program, Keystone entered into financing relationships with other banks using “brokered deposits” and paying higher than normal rates of interest. *Id.*

According to the FDIC, Keystone’s securitizations generated huge losses, and by around the end of 1996 the bank was insolvent. App. 169 (Potter ¶¶7-8).

Keystone’s management solved this problem by committing criminal fraud. For years, senior bank executives—several of whom are now in prison for their misconduct—concealed the bank’s true financial condition. Their scheme in essence involved double-booking: Keystone continued to record loans on its books as assets even after they were sold to investors in a securitized pool. App. 169. Management concealed this fraud for years despite repeated investigation by federal regulators. From 1992-1999, the Office of the Comptroller of the Currency (“OCC”) conducted nine on-site examinations at Keystone. App. 35 (OIG Report at 9). The FDIC participated in three of these examinations. Yet the regulators repeatedly failed to discover any wrongdoing. By early 1999, the bank was overstating its assets by approximately \$500 million. App. 20.

B. Grant’s Audit Report. Keystone hired Grant in summer 1998 because of an agreement the bank made with its primary regulator, the OCC. App. 94 (Cmplt. ¶77). Grant was retained to audit the bank’s financial statements for the year ended 1998, and to re-audit the bank’s 1997 financials, which had been audited by another firm. Plaintiffs allege that Grant was also retained to review the loan servicing reconciliations in Keystone’s quarterly “Call Reports” to the FDIC. App. 95 (Cmplt. ¶79). Plaintiffs contend that Grant knowingly assisted Keystone

in falsifying the Call Reports and recklessly ignored “red flags” regarding overstatements of assets. App. 95-96 (Cmplt. ¶¶84-85). Grant contends that Keystone’s personnel, as well as regulators and other third parties, misled Grant and interfered with its audit, and that Grant had no inkling that bank managers recorded loans owned by others on its books or overstated assets by \$500 million.

Grant’s audit report on Keystone’s financial statements was dated April 19, 1999. The bank was an unlisted company at this time, and did not file registration statements or other filings with the SEC. App. 387 (Wagner ¶¶8-9). Accordingly, Grant’s audit report was not disseminated to the public in connection with any publicly-filed financial statement. Although Keystone’s quarterly Call Reports were available to the public, those reports did not include Grant’s year-end audit report, and federal regulators did not publish Grant’s report. In April 1999, the only parties to receive Grant’s report were federal regulators and Keystone.

C. The Scheme to Dump Keystone’s Stock. By June 1999, Keystone’s management became fearful that their \$500 million overstatement of the bank’s assets might be exposed. According to plaintiffs, bank insiders then began a fraudulent scheme to illegally dispose of their stock. App. 112 (Cmplt. ¶137). They teamed up with corrupt brokers—defendants E.E. Powell, Michael Patterson and Ferris Baker Watts—who arranged for the insiders’ stock to be sold at “artificially manipulated” and “fraudulently inflated prices.” App. 84-88, 115-177

(Cmplt. ¶¶38-51, 150, 155). The brokers contacted plaintiffs by telephone and touted Keystone as safe when they knew it was not. *Id.*; App. 450-454.

The brokers also used, as a selling tool, a one-page write-up on Keystone that appeared in the July 1999 edition of *Walker's Manual of Unlisted Stocks*. App. 116 (Cmplt. ¶152). Plaintiffs claim that *Walker's* published financial information on Keystone taken from Grant's audit report—but *Walker's* itself did not attribute its numbers to Grant's report, and there is no evidence that Grant authorized or had anything to do with this publication. App. 430. Similarly, in June 1999 Keystone was profiled in *American Banker* magazine's "annual ranking of the nation's most profitable community banks." App. 14-15. The brokers also used this notice to help insiders dump their stock. App. 452. It is undisputed that Grant provided no information to and had no contact with *American Banker*.

D. The Class Period—The Alleged Market for Keystone's Stock. The class period certified by the district court is about 4½ months long, running from April 19, 1999, the date of Grant's audit report, until September 1, 1999, the date federal regulators closed Keystone after uncovering its massive overstatement of assets. App. 459. According to plaintiffs, the class consists of approximately 150 persons who purchased Keystone stock during this time.

For about half of the class period—April 19, 1999 through June 25, 1999—Keystone's stock was unlisted. App. 387 (Wagner ¶¶8-9). Plaintiffs have not

identified any exchange, trading system or publication that reported the price of Keystone's stock during this time. After the bank's insiders and brokers began their dumping scheme, on June 25, 1999 the bank became listed for the first time on two "over-the-counter" trading systems: the Pink Sheets and the OTC Bulletin Board. Grant believes that the Pink Sheets are weekly reports of trades and prices distributed by the National Quotation Bureau, and the Bulletin Board is a screen-based trading system owned by NASDAQ. The complaint alleges only eight purchases of Keystone stock during the first 2½ months of the class period, before Keystone's listing on June 25, 1999. App. 136.

Plaintiffs' allegations regarding the second half of the class period support their claim that the "market" for Keystone's stock consisted of sales by insiders who colluded with brokers to dump the stock at "artificially manipulated" and "fraudulently inflated" prices. App. 115, 117. For example, plaintiffs allege that on July 7, 1999, they made three purchases of Keystone at prices of \$270, \$275 and \$290. Five days later, they allege three purchases at prices of \$250, \$250 and \$305. App. 136. According to public data, the spread between the bidding and asking prices for Keystone's stock at this time was between \$215 and \$300 a share, reflecting a trading range of almost 30 percent. App. 433. The record does not document any instances where the stock traded in honest, open-market transactions, as opposed to sales rigged by brokers who were in on the fraud.

E. The Named Plaintiffs. The court appointed Horst Bischoff as lead plaintiff before he was deposed. App. 159. Bischoff's deposition revealed that he was an unsophisticated investor who followed the recommendations of his broker, Patterson. App. 205-206. In deciding to buy Keystone stock, Bischoff relied on Patterson's oral representations that "the bank was one of the best in the country and there is no way you can lose any money if you buy this," that the stock was "going up and up and up," and that Keystone was "a safe bank." App. 215-216. Patterson recommended that Bischoff put "as much money as [he] had into Keystone stock." App. 218. Bischoff saw the one-page summary from *Walker's*. App. 219. Patterson also told Bischoff that the bank was "going to go public" and that "in a few months you can probably make [a lot] of money." App. 230. Bischoff never saw the bank's financial statements or Grant's audit report. App. 237-240. He testified repeatedly that any knowledge he has about this case came solely from his attorneys, who make the decisions. App. 234-235, 251-254.

Debra Gariety, the other proposed class representative (but not lead plaintiff) was also an inexperienced investor. App. 272-273. She testified that she relied on the *Walker's* summary and her broker Lafferty's oral representations. App. 275, 278. Lafferty told her that Keystone "was going to go public within two weeks," which Gariety believed meant that the stock "would possibly go up." App. 276-277. Gariety never saw the bank's financial statements or Grant's audit report.

App. 287. The district court denied Gariety's motion to be appointed lead plaintiff under the PSLRA. App. 163.

Plaintiffs' interrogatory answers show that the other named plaintiffs claim reliance on a wide mix of statements about Keystone. Some bought the stock based on their brokers' oral statements, and reviewed nothing in writing. App. 450-453. Some, like Cline, Bischoff and Gariety, were told by their brokers that Keystone was "going to go public." App. 453. Some reviewed the one page write-up on Keystone in *Walker's* or the *American Banker* article, given to them by their broker. App. 452. One reviewed Keystone's quarterly Call Reports. App. 453. Only three allege that they reviewed Grant's audit report. App. 333, 453. Grant contends that it had no involvement in or control over the brokers' oral statements.

F. The Class Certification Decision. It is undisputed that neither proposed class representative ever saw Grant's audit report, Keystone's financial statements, or Keystone's Call Reports to the FDIC (which plaintiffs allege that Grant helped falsify). Grant objected to class certification because, among other things, the class representatives could not prove individual reliance on any statement by Grant, and no presumption of reliance was available. The district court agreed that plaintiffs were "exposed to differing combinations of omissions and misrepresentations, including some oral," but certified the class anyway, electing to "presume"—based solely on the complaint—that Keystone's stock traded in an efficient market.

App. 476-479. Thus, the court held that plaintiffs could presume reliance under the “fraud-on-the-market” theory and that common questions predominated. The court also held that common questions predominated on plaintiffs’ five state law claims, even though “the substantive laws of at least six states apply,” because variations between the states were “minimal.” App. 481-482. Finally, the court found that Bischoff and Gariety were adequate class representatives. App. 486.

SUMMARY OF ARGUMENT

The class certification decision must be overturned for several reasons. First, the district court erred as a matter of law in thinking that it could avoid individual reliance issues by presuming that Keystone traded in an efficient market. The class period here was only four months long. Keystone’s stock was *unlisted* for the first half of that period, and traded “over the counter” for the remainder. Plaintiffs have also conceded that the so-called “market” consisted entirely of sale prices rigged by bank insiders and corrupt brokers, who sought to dump stock on unsuspecting outsiders. These simple facts dictate a simple answer: the so-called “market” for Keystone’s stock was not efficient as a matter of law.

The court also erred by refusing to look beyond the pleadings to determine whether plaintiffs’ federal securities claims are amenable to class treatment. Instead, the court accepted plaintiffs’ bare allegations that the fraud-on-the-market presumption applied to those claims. This was contrary to longstanding Supreme

Court precedent, which requires the court to look beyond the pleadings and conduct a careful inquiry into the efficient market question. Based on this error, the court improperly ignored Grant's evidence that Keystone did not meet any of the factors used to test for market efficiency.

Even if there were an efficient market, questions of individual reliance still predominate over common questions. Plaintiffs bought Keystone stock based on varying oral representations, and their state law claims require individual proof of reliance, both of which make class certification improper. Likewise, it was error to certify five state law claims for class treatment when those claims involve the laws of at least six states, and there is considerable variance among those states' laws for each cause of action. Finally, reversal is warranted because the lead and class plaintiffs were unqualified, and because a class representative under Rule 23 must also be a lead plaintiff under the PSLRA.

ARGUMENT

I. The District Court Erred In Certifying Plaintiffs' Federal Claims For Class Treatment Because Keystone's Stock Did Not Trade In An Efficient Market.

The district court certified a class in this matter largely because it believed that for plaintiffs' federal securities claims, the "fraud-on-the-market" presumption obviated the need for plaintiffs to prove individual reliance. App. 477-480. From this, the court concluded that common questions "predominate over any questions

affecting only individual members,” and that the class satisfied Rule 23(b)(3). App. 474. A decision to certify a class is reviewed “for abuse of discretion,” but the court must exercise its discretion “within the confines of Federal Rule of Civil Procedure 23.” *Doe v. Chao*, 306 F.3d 170, 182 (4th Cir. 2002). “A district court abuses its discretion if its decision rests upon a clearly erroneous finding of fact, and errant conclusion of law or an improper application of law to fact. *Johnston v. HBO Film Mgmt.*, 265 F.3d 178, 183 (3d Cir. 2001). Underlying errors of law are reviewable *de novo*. *Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir. 2002).

A. Back to *Basic*: A Market Consisting Solely Of Rigged Insider Sales Of An Unlisted Or OTC Stock Cannot Be Efficient.

The starting point for efficient market analysis remains the landmark case of *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). There, the Supreme Court affirmed that “reliance is an element of a Rule 10b-5 cause of action,” and that plaintiffs must prove reliance in order to establish “the requisite causal connection between a defendant’s misrepresentation and a plaintiff’s injury.” *Id.* at 243. However, the Court determined that in some cases, it would recognize a rebuttable “presumption of reliance” based on the “fraud-on-the-market” theory. As the Court explained, “The fraud on the market theory 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,” and “[m]isleading statements will therefore defraud purchasers of stock even if the

purchasers do not directly rely on the misstatements.” *Id.* at 241-242.

The Court went on to describe an “open and developed” securities market that would support a presumption of reliance: “The modern securities markets, literally involving millions of shares changing hands daily, differ from face-to-face transactions contemplated by early fraud cases * * *. In face-to-face transactions, the inquiry into an investors’ reliance upon information is into the subjective pricing of that information by that investor. With the presence of a market, the market is interposed between seller and buyer and, ideally, transmits information to the investor in the processed form of a market price. Thus the market is performing a substantial part of the valuation process performed by the investor in a face-to-face transaction. The market is acting as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price.” *Id.* at 244. The Court concluded that “where materially misleading statements have been disseminated *into an impersonal, well-developed market for securities*, the reliance of individual plaintiffs on the integrity of the market price may be presumed.” *Id.* at 247 (emphasis added).

There are several reasons why Keystone did not trade in an efficient market, as a matter of law. First, an *unlisted* stock cannot be deemed to trade efficiently. When Grant issued its audit report on Keystone in April 1999, Keystone was not listed on any stock exchange or trading system, and it had no posted trading price.

It remained unlisted for over two months, until June 25, 1999. Plaintiffs alleged only *eight sales* of the bank's stock during this period, which accounts for half of the class period. Under *Basic*, isolated sales of stock in an unlisted company simply do not occur in "an impersonal, well-developed market for securities" where reliance "on the integrity of the market price may be presumed." *Id.* at 247.

Keystone was not magically transformed from an *unlisted* stock to an efficiently traded stock simply by virtue of becoming listed—for the first time—on two over-the-counter systems for the remaining two months of the class period. A stock trading over-the-counter for only two months has not had sufficient *time* to become efficient. It can take many months for even well-established stocks on major exchanges to reflect new public information. *Challenges to the Efficient Market Hypothesis: Limits to the Applicability of Fraud-On-The-Market Theory*, 73 Neb. L. Rev. 781, 787 (1994). The magnitude of this delayed response is even greater for stocks traded on smaller over-the-counter markets, such as the systems where Keystone was listed in July and August. *Id.*; accord *Theories, Assumptions and Securities Regulation: Market Efficiency Revisited*, 140 U. Pa. L. Rev. 851, 898 (1992) (misinformation distorts stock prices in small markets "more slowly and imprecisely" than those traded in large markets); *O'Neil v. Appel*, 165 F.R.D. 479, 501 (W.D. Mich. 1996) ("a period of only four months of substantial trading, followed by a crash," is not "evidence of a developed or efficient market").

Apart from its exceedingly short trading period, Keystone stock was not traded in an efficient market because of the nature of the “Pink Sheets” and Bulletin Board systems. In analyzing the fraud-on-the-market theory, *Basic* contrasted “modern” and “well developed” securities markets—which involved “millions of shares changing hands daily”—with traditional fraud cases based on “face-to-face transactions.” 485 U.S. at 244. The Court stated that a presumption of reliance would be appropriate if the market “perform[ed] a substantial part of the valuation process performed by the investor in a face-to-face transaction.” *Id.* However, most over-the-counter stocks are not as widely traded or followed as stocks on national exchanges like the New York Stock Exchange.¹ Given the speculative nature of and limited information about many over-the-counter stocks, purchasers of such stocks should be presumed to rely on their own investigation and judgment, not on the integrity of the purported “market price.” Securities fraud plaintiffs should not be permitted to invoke the “fraud on the market” presumption of reliance for over-the-counter systems like the Pink Sheets and Bulletin Board. *See Serfaty v. Int’l Automated Sys.*, 180 F.R.D. 418, 421 (D. Utah

¹ *See Challenges to the Efficient Market Hypothesis*, 73 Neb. L. Rev. at 783, 805 (widely traded OTC stock lacked efficient characteristics); *Fraud-On-The-Market Theory and Thinly-Traded Securities Under Rule 10b-5: How Does A Court Decide If A Stock Market Is Efficient?*, 25 Wake Forest L. Rev. 223, 251 (1990) (“the fraud on the market theory should not be available to a plaintiff alleging 10b-5 fraud” for “a regionally traded company with relatively few shareholders who trade infrequently on an over-the-counter market”).

1998) (citing expert's conclusion that there is "no evidence" that "the market for an average OTC Bulletin Board stock is efficient"); *In re Data Access Sys. Sec. Lit.*, 103 F.R.D. 130, 138 (D.N.J. 1984); *Epstein v. American Reserve*, 1988 WL 40500, *5 (N.D. Ill. Apr. 21, 1988); *Krogman v. Sterritt*, 202 F.R.D. 467, 474 (N.D. Tex. 2001); *Griffin v. GK Intelligent Sys.*, 196 F.R.D. 298, 303-304 (S.D. Tex.).

A further reason there can be no efficient market for Keystone's stock during the class period is that plaintiffs admitted they purchased the stock at prices that were *rigged* by corrupt brokers, who conspired with insiders to dump the stock at "artificially manipulated" prices. App. 117. This concession is directly at odds with *Basic*'s description of an efficient market, where "the price of a company's stock is determined by the available material information regarding the company and its business." 485 U.S. at 241. By their own admission, plaintiffs did not buy Keystone's stock based on a "market" price set by impersonal transactions—they bought in reliance on corrupt brokers, who told them (among other things) that Keystone was "going to go public." Plaintiffs *knew* Keystone was not a public company, and they bet on their brokers. Thus, this is (at best) a traditional fraud case based on "face-to-face transactions." It is also significant that there was no trading exchange or listing price for Keystone before the brokers' and insiders' dumping scheme, and hence no "market price" that could be distorted by defendants' alleged misstatements.

Finally, no presumption of an efficient market is possible here because the class representatives traded on what amounted to non-public information. Bischoff and Gariety bought Keystone's stock in reliance on their brokers' false tip that the bank was "going to go public" and the stock was "going to go up like crazy." App. 267-268, 277. The Seventh Circuit recently confronted a similar case involving a broker's false sales tip urging that a bank was "certain to be acquired, in the near future, at a big premium." *West v. Prudential Securities Inc.*, 282 F.3d 935, 936 (7th Cir. 2002). The Court explained, "[t]he theme of *Basic* and other fraud-on-the-market decisions is that public information reaches professional investors, whose evaluations of that information and trades quickly influence securities prices. But [the broker] did not release information to the public, and his clients thought that they were receiving and acting on non-public information * * *." *Id.* at 937. The Court therefore refused to "exten[d] the fraud-on-the-market doctrine to the [broker's] non-public statements." *Id.* at 940. The same result applies here.

For all these reasons, the court's presumption of an "efficient market" was untenable. A market consisting entirely of trades fixed by corrupt brokers for an unlisted or over-the-counter stock cannot be termed "efficient" as a matter of law.

B. The District Court Erred By Refusing To Look Beyond The Complaint In Certifying The Class.

Although the court suggested that class treatment would be inappropriate absent an efficient market, the court nonetheless "decline[d] to make a detailed

examination * * * of the efficiency of the market in which Keystone shares were traded,” and held that plaintiffs’ “assert[ion] that the Keystone market was efficient is enough at the certification stage to find the market efficient.” App. 479-480. In refusing to look beyond the pleadings, the court relied on *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-178 (1974), which held that a court should not consider the merits in ruling on class certification. App. 480.

This analysis was wrong as a matter of law. Supreme Court decisions after *Eisen* make clear that considering matters beyond the pleadings is often required to determine whether class certification is warranted. The Court has stated explicitly that “sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,” and a class “may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.” *General Telephone v. Falcon*, 457 U.S. 147, 160-161 (1982). *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (“the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action”).

This Court has been even more blunt in requiring district courts to look beyond the pleadings in assessing class certification: “Without a hearing and acting entirely on the allegations of the complaint, the district court certified the action as a class action. * * * [W]e have said in a number of recent cases that

normally certification should not be granted perfunctorily on the basis of boilerplate allegations such as we have here. * * * [T]here should be some inquiry, often involving discovery * * * for the purpose of determining whether the case qualifies for certification[.]” *Belcher v. Bassett Furniture*, 588 F.2d 904, 906 (4th Cir. 1978); *see Szabo v. Bridgeport Machines*, 249 F.3d 672, 675 (7th Cir. 2001).

Based on the foregoing principles, “courts have recognized a special need for factual scrutiny when class representatives seek to proceed on a fraud-on-the-market theory.” *O’Neil*, 165 F.R.D. at 497. Indeed, a significant number of courts have considered *expert testimony* on the efficient market question before deciding whether class certification was appropriate. *Id.* at 501-502; *Krogman*, 202 F.R.D. at 470-78; *Serfaty*, 180 F.R.D. at 421; *Griffin*, 196 F.R.D. at 303-304; *Cheney v. Cyberguard*, 213 F.R.D. 484, 498-500 (S.D. Fla. 2003); *Levine v. Skymall, Inc.*, 2002 WL 31056919, *4 (D. Ariz. May 24, 2002). In short, the court “can and must conduct a preliminary inquiry into the likely availability of the fraud on the market theory” when considering class certification. *O’Neil*, 165 F.R.D. at 502. The court here erred as a matter of law in presuming that Keystone traded in an efficient market based solely on the allegations in the complaint.

C. Analysis Of The Relevant Factors Demonstrates That The Market For Keystone Was Not Efficient.

As shown in Part I(A), there are several reasons why Keystone’s stock did not trade efficiently as a matter of law. But Grant provided the district court with

much more, in the form of a detailed analysis of five well-established factors for reviewing market efficiency: (1) volume of stock trades, (2) number of securities analysts that follow the stock, (3) presence of market makers, (4) eligibility to file form S-3 with the SEC, and (5) whether the stock price responds to unexpected events or news releases. *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990). Although the court ignored these points because of its erroneous refusal to look beyond the pleadings, these factors confirm that the market for Keystone stock was inefficient.

Trading Volume. Keystone’s trading volume was very low. High volumes indicate “significant investor interest in the company” and suggest many investors are trading based on newly available information, whereas low volumes suggest the contrary. *O’Neil*, 165 F.R.D. at 501. Here, plaintiffs estimate that only 150 people traded Keystone stock during the 4½-month class period—a striking indication of low volume. In the first half of that period, the complaint reflects only eight trades. App. 136. For the second half of the class period, from June 25, 1999 until September 1, 1999, no shares were traded on 16 days, fewer than 1000 shares were traded on 35 days, and more than 7,500 shares were traded on only one day. App. 424-425. Such low volumes are insufficient to support an efficient market. *O’Neil*, 165 F.R.D. at 501 (stock that “had thirty days in the class period when the stock did not trade at all” and “numerous days in which trading amounted

to no more than 1000 to 3000 shares” was not efficient); *Griffin*, 196 F.R.D. at 303 (17,000 transactions involving 31 million shares over seven-month class period not efficient); *Serfaty*, 180 F.R.D. at 421 (2,730 trades and total volume of 882,421 shares did not support efficient market); *Krogman*, 202 F.R.D. at 475 (no trades for two months indicated lack of efficiency).

Securities Analysts. No securities analysts followed Keystone’s stock. The more analysts that follow a security, “the greater the likelihood that all information disseminated by a corporation is being relied upon.” *O’Neil*, 165 F.R.D. at 501. Conversely, a lack of analysts means the market is unlikely to quickly incorporate new information about the company into its stock price. Plaintiffs tried to obscure this point below by citing limited media coverage of Keystone, including an article in *American Banker* and a one-page write-up in *Walker’s Manual*. App. 430. But “commentary by news reporters,” even in serious publications like the *Wall Street Journal*, “cannot substitute for serious attention to stock by professional securities analysts.” *O’Neil*, 165 F.R.D. at 501; accord *Krogman*, 202 F.R.D. at 474 (coverage by two analysts and “Market Guide, Moody’s Investors Service and Securities Data Company” was insufficient to weigh in favor of market efficiency).

Market Makers. Plaintiffs’ complaint alleges just one “market maker” for Keystone, defendant E.E. Powell, as well as three other defendant brokerage firms that sold Keystone shares—Michael Patterson, Ferris Baker Watts and Scott &

Stringfellow. App. 84-88.² Even if all four firms acted as market makers, this would be far short of a number sufficient to suggest efficiency. *Serfaty*, 180 F.R.D. at 422 (1998) (4 to 6 market makers insufficient); *Griffin*, 196 F.R.D. at 304 (21 small brokerage firms insufficient). Here, moreover, plaintiffs provided the district court with nothing to suggest *why* the named firms functioned as market makers. Information that simply identifies an alleged market maker is “virtually meaningless * * * until one knows the volume of shares they committed to trade, the volume of shares they actually traded, and the prices at which they did so.” *O’Neil*, 165 F.R.D. at 501-502; *accord Krogman*, 202 F.R.D. at 475 (“the mere presence of market makers does not indicate efficiency”). Further, plaintiffs’ complaint refutes any suggestion that the defendants acted as market makers because they all allegedly participated in the scheme to dump Keystone’s stock. Market makers are indicative of an efficient market only if they “react swiftly to company news and reported financial results by buying or selling stock and driving it to a changed price level.” *Cammer v. Bloom*, 711 F.Supp. 1264, 1287 (D.N.J. 1989). Brokers who sell at rigged prices are not performing this function.

Registration Statements. It is undisputed that Keystone was not eligible to

² Although the complaint names several more defendant firms, most appear to be alter-egos of defendant Michael Patterson, Inc. In the district court, plaintiffs cited one broker’s “belief” that there were “4 to 10” other market makers besides E.E. Powell, but this is unsupported speculation. No firms apart from those named in the complaint were ever identified as market makers.

file an S-3 registration statement with the SEC. This factor “weighs heavily against a finding of efficiency” because “[o]nly corporations whose stocks are actively traded and widely followed are allowed to use the S-3 form.” *O’Neil*, 165 F.R.D. at 502; *accord Griffin*, 196 F.R.D. at 304.

Stock Price Movement In Response To News. There is little evidence that Keystone’s stock price moved in response to new information. For example, the complaint alleges that on July 7, 1999, three plaintiffs purchased Keystone at prices of \$270, \$275 and \$290, and five days later, plaintiffs purchased at prices of \$250, \$250 and \$305. App. 136. Nothing in the record suggests legitimate reasons for these widely disparate prices. The bid/ask spread for Keystone’s stock in early July was between \$215 and \$300 a share, a trading range of almost 30 percent. App. 424. This kind of random volatility, not attributable to publicly disclosed information about Keystone, shows the bank did not trade efficiently. *O’Neil*, 165 F.R.D. at 503 (no efficient market where plaintiffs had “not shown any reliable relationship between changes in price and public announcement of information”); *Krogman*, 202 F.R.D. at 477 (unexplained volatility weighs against efficiency).³

³ The district court’s observation that Keystone stock became worthless within days after the “scandal about illegal activity” broke (Op. 23 n. 4) is not to the contrary. A market need not be efficient to reflect the fact that regulators shut down a bank, making its stock worthless. *O’Neil*, 165 F.R.D. at 501 (“a period of only four months of substantial trading, *followed by a crash*, cannot be viewed as evidence of a developed or efficient market”) (emphasis added).

Since *all* of the pertinent factors indicate the absence of an efficient market, the fraud-on-the-market presumption of reliance is not applicable. As explained in Part II, this means that plaintiffs are required to prove individual reliance as to their federal *and* state claims, that individual issues predominate over common ones, and that class certification was an abuse of discretion.

D. The District Court Erred In Holding That Grant Made A “Public Misrepresentation.”

The court also erred in concluding that plaintiffs satisfied the fraud-on-the-market requirement that Grant make a “public misrepresentation.” At the time Grant issued its audit report, Keystone was not a public company, and there is no evidence that Grant released its audit report to anyone other than Keystone or federal regulators. The proposed class representatives admitted they never saw Grant’s audit report. App. 237-240 (Bischoff); App. 287 (Gariety). Despite this, the court held that an alleged summary of Grant’s audit report in *Walker’s*, coupled with allegations that Grant “actively falsified Call Reports sent to the FDIC,” satisfied the “public misrepresentation” requirement of the case law. Op. at 21.

Grant cannot be held liable for *Walker’s* or the Call Reports. Grant was not identified as the author of either one, and “a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b).” *Wright v. Ernst & Young*, 152 F.3d 169, 175 (2d Cir. 1998); *accord Ziemba v. Cascade Int’l*, 256 F.3d 1194, 1205 (11th Cir. 2001) (“alleged misstatement or omission upon

which a plaintiff relied must have been publicly attributable to the defendant”); *Anixter v. Home-Stake Products*, 77 F.3d 1215, 1226 (10th Cir. 1996) (accountants “must themselves make a false or misleading statement”). The district court erred in holding that Grant made a “public misrepresentation.”

II. The Court Abused Its Discretion By Certifying A Class Under Rule 23(b)(3) Because Individual Issues Predominate Over Common Ones.

Basic made clear that, absent a presumption of reliance in securities fraud cases, plaintiffs must submit “proof of individualized reliance from each member of the proposed plaintiff class.” 485 U.S. at 242. This in turn forecloses plaintiffs “from proceeding with a class action” because individual issues will necessarily “overwhelm” common ones. *Id.* Following *Basic*, numerous courts have refused to certify securities fraud class actions absent an efficient market because questions of individual reliance predominated. *Serfaty*, 180 F.R.D. at 423; *O’Neil*, 165 F.R.D. at 499; *Krogman*, 202 F.R.D. at 479; *Griffin*, 196 F.R.D. at 305; *Bear v. Oglebay*, 142 F.R.D. 129, 132-34 (N.D. W. Va. 1992) *Yadlosky v. Grant Thornton, LLP*, 197 F.R.D. 292, 298-299 (E.D. Mich. 2000); *Ganesh, LLC v. Computer Learning Ctrs.*, 183 F.R.D. 487, 491 (E.D. Va. 1998). Without the presumption of reliance afforded by the “fraud-on-the-market” theory, plaintiffs here must prove individual reliance to recover under their federal securities law claims, and class certification is inappropriate under Rule 23(b)(3). *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 341 (4th Cir. 1998).

Individual questions predominate over common questions for other reasons as well. First, this case primarily involves *oral representations* and therefore is not properly adjudicated as a class action. Second, regardless of whether there is an efficient market, plaintiffs' state law claims require proof of individual reliance because the relevant states have *not* adopted the fraud-on-the-market theory for common law claims. Third, plaintiffs' state law claims raise individual issues of law that vary widely from state to state and predominate over common legal issues. Any one of these factors means that class certification was unwarranted. Plaintiffs failed to satisfy their burden of demonstrating that common issues predominate.

A. This Case Involves Primarily Oral Representations, Making Class Certification Wrong As A Matter Of Law.

The district court acknowledged that “[i]n this case, plaintiffs were in fact exposed to differing combinations of omissions and misrepresentations, including some oral, making individual reliance a live issue.” App. 476. Plaintiffs’ answers to interrogatories illustrate this as well. Some plaintiffs received *no* written materials and different oral sales pitches from different brokers: Hanyzewski was told that Keystone was a “good investment;” Shannon was told that the bank had “guaranteed earnings;” and Overholser was told the bank “would soon be bought out.” App. 450-453. Millner, Teen Response, and the Hydes received sales calls from different brokers, and the one-page write-up on Keystone from *Walker’s* or the *American Bankers* article. *Id.* Allen received a sales call from a broker at E.E.

Powell; unlike other plaintiffs, he reviewed Keystone's filings on the FDIC's website and obtained a copy of Grant's audit report. App. 450. As noted above, Bischoff and Gariety (the proposed class representatives) received a copy of the *Walker's* write-up, and were both told that Keystone was "going to go public."

Circuit courts across the country have held that securities fraud cases based primarily on oral misrepresentations cannot be as class actions. "[I]t has become well-settled that, as a general rule, an action based substantially on oral rather than written communications is inappropriate for treatment as a class action." *Johnston*, 265 F.3d at 190. Plaintiffs in *Johnston* were investors who purchased units in a partnership formed to produce films. Their complaint alleged that brokers induced them to buy based on "uniform marketing materials" that falsely represented the famous actor Michael Douglas would have a major role in producing the films. But discovery revealed that plaintiffs in fact relied on a mix of differing oral and written statements. *Id.* at 189-190. Some remembered seeing written materials, while others did not, and the brokers admitted they did not use any "standardized script" or "uniform presentation" in promoting the investment. *Id.* at 190. The Third Circuit affirmed refusal to certify a class, agreeing that "individual issues overwhelmed issues common to the class." *Id.*

This Court has likewise held that "the oral nature" of statements like those here are "a particularly shaky basis for a class claim." *Broussard*, 155 F.3d at 341.

Broussard reviewed a class action filed by franchisees of Meineke Discount Muffler Shops. Plaintiffs claimed breach of fiduciary duty, fraud and negligent misrepresentation, allegedly based on “standardized documents” used by Meineke. *Id.* At trial, however, plaintiffs relied on testimony concerning oral “final review sessions” to prove the company’s alleged misstatements. *Id.* This Court reversed class certification and held that “claims based substantially on oral rather than written communications are inappropriate for treatment as class actions unless the communications are shown to be standardized.” *Id.*; accord *Simon v. Merrill Lynch, Pierce, Fenner & Smith*, 482 F.2d 880, 882 (5th Cir. 1973); *Retired Chicago Police Ass’n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993).

Given the district court’s acknowledgment that “plaintiffs were in fact exposed to differing combinations of omissions and misrepresentations, including some oral,” *Broussard* requires reversal of class certification. Plaintiffs purchased Keystone’s stock based on a broad range of oral statements. There was no uniform sales pitch, and no common written materials—indeed, some plaintiffs received *no* written materials. Class certification was therefore an abuse of discretion.

B. Individual Reliance Must Be Proven On Plaintiffs’ State Law Claims, And Thus Common Fact Questions Do Not Predominate.

A second reason why individual questions predominate over common ones in this case is that the complaint pleads state common-law claims against Grant for fraud, constructive fraud, negligent misrepresentation, aiding and abetting tortious

conduct and conspiracy. Case law from the states in which plaintiffs suffered their alleged injuries makes clear that plaintiffs must prove individual reliance as an element of *each* of these state law claims.⁴

Although the district court held that the fraud-on-the-market presumption of reliance applied to plaintiffs' federal claims, the court made no such finding as to plaintiffs' state common law claims—and understandably so: *none* of the states involved have adopted a fraud-on-the-market presumption that would allow

⁴ Fraud, constructive fraud and negligent misrepresentation require proof of reliance as follows: *Federated Management v. Coopers & Lybrand*, 738 N.E.2d 842, 854-855 (Ohio Ct. App. 2000); *TBLD Corp. v. Ravenna Investment Co., Inc.*, 2002 WL 31175478, *3 (Ohio Ct. App. Oct. 2, 2002); *Alleco Inc. v. Harry & Jeanette Weinberg Foundation*, 665 A.2d 1038, 1047 (Md. 1995); *Walpert, Smullian & Blumenthal v. Katz*, 762 A.2d 582, 608 (Md. 2000); *Spincycle, Inc. v. Kalender*, 186 F. Supp.2d 585, 590-591 (D. Md. 2002); *Kaufman v. I-Stat Corp.*, 754 A.2d 1188, 1195 (N.J. 2000); *Daibo v. Kirsch*, 720 A.2d 994, 999-1000 (N.J. App. Div. 1998); *Kaufman v. Cohen*, 760 N.Y.S.2d 157, 165 (App. Div. 2003); *Klembczyk v. DiNardo*, 705 N.Y.S.2d 743, 744 (App. Div. 1999); *Credit Alliance Corp. v. Arthur Andersen & Co.*, 483 N.E.2d 110, 118 (N.Y. 1985); *Wilt v. State Automobile Mut. Ins.*, 506 S.E.2d 608, 611-612 n.9 (W.Va. 1998); *First Nat'l Bank v. Crawford*, 386 S.E.2d 310, 313 (W.Va. 1989); *Mosley v. American Medical Int'l*, 712 So.2d 1149, 1151 (Fla. Dist. Ct. App. 1998); *Robson Link & Co. v. Leedy Wheeler & Co.*, 18 So. 2d 523, 533 (Fla. 1944); *First Florida Bank v. Max Mitchell & Co.*, 558 So.2d 9, 15 (Fla. 1990). Aiding and abetting and conspiracy require proof of reliance because they require proof of underlying torts. *See Small v. Lorillard Tobacco*, 720 N.E.2d 892, 898 (N.Y. 1999); *Alleco*, 665 A.2d at 1050 (Maryland); *Banco Popular v. Gandi*, 823 A.2d 809, 816 (N.J. App. Div. 2003); *Gardenhire v. New Jersey Mfgs. Ins.*, 754 A.2d 1244, 1249 (N.J. Sup. Ct. 2000); *Gosden v. Louis*, 687 N.E.2d 481, 497-498 (Ohio Ct. App. 1996); *Dixon v. American Industrial Leasing*, 252 S.E.2d 150, 152 (W. Va. 1979); *Price v. Halstead*, 355 S.E.2d 380, 386-387 (W.Va. 1987); *Margolin v. Morton F. Plant Hosp. Ass'n*, 342 S.2d 1090, 1092 (Fla. Dist. Ct. App. 1977); *Acadia Partners v. Tompkins*, 759 So.2d 732, 736 (Fla. Dist. Ct. App. 2000).

plaintiffs to avoid submitting proof of individual reliance. *I-Stat.*, 754 A.2d at 1200-1201 (declining to adopt fraud-on-the-market presumption for common law fraud in New Jersey); *Ackerman v. Price Waterhouse*, 683 N.Y.S.2d 179, 192 (App. Div. 1998) (no fraud-on-the-market presumption for common law claims); *Kahler v. E.F. Hutton*, 558 So.2d 144, 145 (Dist. Ct. App. Fla. 1990) (same); *In re Medimmune, Inc. Secs. Litig.*, 873 F. Supp. 953 (D. Md. 1995) (same); *see also Freedman v. Value Health*, 2000 WL 630916 *9 (D. Conn.); *Mirkin v. Wasserman*, 858 P.2d 568, 571 (Cal. Sup. Ct. 1993).

As discussed above, it is settled law in this Circuit that when individual reliance must be proven for each class member, individual issues predominate. *Broussard*, 155 F.3d at 341-342 (class treatment “impossible” where individual issues of reliance involved); *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986) (same). The court abused its discretion in ignoring this longstanding rule. Because individual issues predominate, certification was inappropriate under Rule 23(b)(3).

C. Plaintiffs’ Numerous State Law Claims Raise Multiple Issues Of Law, And Thus Common Legal Questions Do Not Predominate.

It is well settled that the “party seeking class certification bears the burden” of demonstrating that every requirement of Rule 23 has been met. *Lienhart v. Dryvit Systems*, 255 F.3d 138, 146 (4th Cir. 2001). This includes “establishing that state law variations in th[e] lawsuit do not predominate over common issues.” *Yadlosky*, 197 F.R.D. at 301. Accordingly, plaintiffs must satisfy the requirement

that “questions of law or fact common to the class,” Fed. R. Civ. P. 23(a)(2), will “predominate over any questions affecting only individual members,” and that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy,” Fed. R. Civ. P. 23(b)(3). And “[a] district court’s duty to determine whether the plaintiff has borne its burden on class certification requires that a court consider variations in state law when a class action involves multiple jurisdictions.” *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996). The plaintiffs here did not come close to meeting their burden with respect to the five state law claims alleged against Grant.

For starters, the plaintiffs did not even identify all of the states’ laws that apply to their claims. This was necessary because, as the district court held, the forum state of West Virginia “appl[ies] the *lex loci delicti* choice-of-law rule—that is, the substantive rights between the parties are determined by the law of the place of injury,” which necessarily means where the plaintiffs live. App. 24. As a result, the court ruled that “the substantive law of *at least six states* apply because of the residences of the plaintiffs and the locations of their stock purchases.” *Id.* (emphasis added). Thus, the laws of New York, Ohio, New Jersey, Maryland, West Virginia, and Florida apply to the claims of the 16 named plaintiffs, who live in one of those states. App. 80-82 (Cmplt. ¶¶9-24). But the class here consists of “150 people or more” (App. 5), and the plaintiffs did not provide the district court

with *any* information about the other 135 or so other class members. Plaintiffs have vaguely told this Court that a “majority” of the class lives in “Ohio and neighboring states” (Opp. to 23(f) Pet. at 1 n.1), but they have never even identified those states, much less indicated where every class member lives.

Plaintiffs’ failure to identify the states where the other 135 class members lived when the pertinent events occurred mandates, by itself, overturning class certification. Courts “must apply an individualized choice of law analysis to each plaintiff’s claim,” *Castano*, 84 F.3d at 743, and that cannot be done when, as here, most plaintiffs’ states of residence is a mystery. *See also Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C. Cir. 1986) (plaintiffs, “as class action proponents, must show that it is accurate” that there are “no variations in state warranty laws relevant to this case”). And “[g]iven the plaintiffs’ burden, a court cannot rely on assurances of counsel that any problems with predominance or superiority can be overcome.” *Castano*, 84 F.3d at 742. The “court cannot accept such an assertion ‘on faith.’” *Walsh*, 807 F.2d at 1016. Plaintiffs are obligated to “‘first specifically identify[] the applicable state law variations,’” and then do “an ‘extensive analysis’ of state law variances.” *Id.* at 1017. *See Castano*, 84 F.3d at 743 (reversing class certification where “[n]othing in the record demonstrates that the court critically analyzed how variations in state law would affect predominance”). The plaintiffs

did not do that here. They did not even identify all of the relevant states, let alone critically variations analyze in state law.

The “requirement that a court know which law will apply before making a predominance determination is especially important when there may be differences in state law.” *Castano*, 84 F.3d at 741. That is the situation here. Even if the state claims involve the laws of “only” six states—and it is likely that more states’ laws apply given the large number of class members whose residence is unknown—common issues of law do not predominate. We will consider each of plaintiff’s five state law claims for each of the six states whose laws, at a minimum, apply.

Fraud. In *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), where the Seventh Circuit granted a writ of mandamus to overturn a class certification order, Chief Judge Posner stated that although “[i]t is no doubt true that at some level of generality the law of negligence is one,” the law of negligence and its subsidiary concepts in fact “differ” from state to state. *Id.* at 1300. And even if the differences were only in nuance—which the Seventh Circuit held they were not—“nuance can be important,” since it spawns “differing judicial formulations of the meaning of negligence and the subordinate concepts.” *Id.* This observation applies equally well to the law of fraud in the (at least) six states whose laws govern in this case.

This is true at even the most basic level. In West Virginia, a fraud claim has three elements, *Wilt*, 506 S.E.2d at 611; in Ohio, there are six, *Geo-Pro Services v. Solar Testing Labs.*, 763 N.E.2d 664, 673 (Ohio Ct. App. 2001); and in the other states there are five elements. See *Cohen*, 760 N.Y.S.2d at 165; *I-Stat*, 754 A.2d at 1195 (New Jersey); *Mosley v. American Medical Int'l*, 712 So.2d 1149, 1151 (Fla. Dist. Ct. App. 1998); *Alleco*, 665 A.2d at 1047 (Maryland). The differences deepen as specific elements are considered.

New York, Ohio, and West Virginia require “justifiable reliance” by the plaintiff, *Cohen*, 760 N.Y.S.2d at 165; *Geo-Pro*, 763 N.E.2d at 673; *Wilt*, 506 S.E.2d at 611; New Jersey requires “reasonable reliance,” *I-Stat*, 754 A.2d at 1195; a Maryland plaintiff must establish a “right to rely” on the purported misrepresentation, *Alleco*, 665 A.2d at 1047; and Florida requires simply “action by the plaintiff in reliance on the correctness of the representation,” *Mosley*, 712 So.2d at 1151. These variations are significant. See *Castano*, 84 F.3d at 743 (holding that the “uncommon issues” include the fact that “some states require justifiable reliance on a misrepresentation, while others require reasonable reliance”) (citations omitted).

Other differences abound. Unlike the other states, Maryland and Florida do not list as an element that the misrepresentation must be “material.” See *Alleco*, 665 A.2d at 1047 (the plaintiff must prove “a false representation” by the

defendant); *Mosley*, 712 So.2d at 1151 (plaintiff must prove “a false statement of fact”). In New York and Florida, the defendant must “know[]” that the statement was false when made, *Cohen*, 760 N.Y.S.2d at 165; *Mosley*, 712 So.2d at 1151; a New Jersey plaintiff must show the “knowledge *or belief* by the defendant of its falsity,” *I-Stat*, 754 A.2d at 1195 (emphasis added); in Maryland and Ohio, the defendant must have either “known” that the statement was false or made the statement with “reckless[]” disregard for its truth, *Alleco*, 665 A.2d at 1047; *Geo-Pro*, 763 N.E.2d at 673; and West Virginia requires only that the alleged “fraudulent” act be “false,” *Wilt*, 506 S.E.2d at 611. The requisite intent by the defendant also differs from one state to another. The defendant must have: “an intention that the other person rely on” the statement, *I-Stat*, 754 A.2d at 1195 (New Jersey); “the intent of misleading another into relying upon it,” *Geo-Pro*, 763 N.E.2d at 673 (Ohio); “the purpose of inducing the plaintiff to act in reliance thereon,” *Mosley*, 712 So.2d at 1151 (Florida); “the purpose of defrauding the plaintiff,” *Alleco*, 665 A.2d at 1047 (Maryland); or no such intention or purpose at all, *Cohen*, 760 N.Y.S.2d at 165 (New York); *Wilt*, 506 S.E.2d at 611 (West Virginia). And in West Virginia, the alleged fraudulent act can be either “the act of the defendant *or* induced by him.” *Wilt*, 506 S.E.2d at 611 (emphasis added). But in Maryland, “the defendant” must have made the false representation at issue. *Alleco*, 665 A.2d at 1047.

Constructive fraud. Similarly, the six states follow divergent paths with respect to constructive fraud. In New York, constructive fraud applies only when there is a “fiduciary or confidential relationship,” *Klembczyk*, 705 N.Y.S.2d at 744, while Ohio requires a “special confidential or fiduciary relation,” *Ohio University Bd. of Trustees v. Smith*, 724 N.E.2d 1155, 1160 (Ohio Ct. App. 1999).

Florida law is somewhat different:

Constructive fraud is the term typically applied where a duty under a confidential or fiduciary relationship has been abused, or where an unconscionable advantage has been taken. Constructive fraud may be based on misrepresentation or concealment, or the fraud may consist of taking an improper advantage of the fiduciary relationship at the expense of the confiding party.

Beers v. Beers, 724 So.2d 109, 116-117 (Fla. Dist. Ct. App. 1998) (citations omitted). West Virginia takes still another approach; there, “constructive fraud is generally reserved for those cases where a fiduciary relationship exists between the parties *or the fraud violates an important public policy concern.*” *White v. National Steel Corp.*, 938 F.2d 474, 489 (4th Cir. 1991) (emphasis added). Thus, in West Virginia, “[c]onstructive fraud is defined as a ‘breach of a legal or equitable duty, which, irrespective of moral guilt of the fraud feisor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.’” *Wilt*, 506 S.E.2d at 612 n.9. Maryland follows the same standard. *Maryland Environmental Trust v. Gaynor*, 803 A.2d 512, 516-517 (Md. 2002).

Because constructive fraud in some states implicates (in whole or in part, depending on the state) the concept of a fiduciary relationship, the differences between the states with respect to constructive fraud are compounded by the states' different standards for establishing a fiduciary duty. See *Taylor Woodrow Homes v. 4/46-A Corp.*, 2003 WL 158888, *3-4 (Fla. Dist. Ct. App. Jan. 24, 2003); *Slovak v. Adams*, 753 N.E.2d 910, 917 (Ohio Ct. App. 2001); *L. Magarian & Co. v. Timberland Co.*, 665 N.Y.S.2d 413, 414 (App. Div. 1997); *F.G. v. MacDonell*, 696 A.2d 697, 703-04 (N.J. 1997); *Koontz v. Long*, 384 S.E.2d 837, 839-840 (W. Va. 1989). In addition, the differences already discussed for fraud affect constructive fraud in Ohio, where the elements of constructive fraud and fraud are the same except for the defendant's intent. See *TBLD*, 2002 WL 31175478, *3. And in New Jersey, "constructive fraud" appears to be synonymous with "equitable fraud," which requires proof of all of the elements of fraud except the defendant's knowledge of the statement's falsity, but for which the "only relief * * * is equitable relief, such as rescission or reformation of an agreement, and not monetary damages only." *Foont-Freedenfeld Corp. v. Electro-Protective Corp.*, 314 A.2d 69, 71 (N.J. App. Div. 1973). See also *Daibo v. Kirsch*, 720 A.2d 994, 1000 (N.J. App. Div. 1998). The other five states do not bar monetary damages for constructive fraud.

Negligent misrepresentation. The states also follow different approaches to negligent misrepresentation. Unlike the other states, New Jersey sets forth the applicable standard in a statute (enacted in 1995). A plaintiff who was not the accountant's client can prevail on a negligence theory only by proving that:

- the accountant “knew” at the time of the engagement, or agreed with the client after the engagement, that the accountant’s “service rendered to the client” would be made available to a “specifically identified” person in connection “with a specified transaction”;
- the accountant “knew that the claimant intended to rely” upon the accountant’s service “in connection with that specified transaction”; and
- the accountant “directly expressed to the claimant” the accountant’s “understanding of the claimant’s intended reliance” on the accountant’s service.

N.J. Stat. Ann. 2A:53A-25.b(2)(a)-(c).

The standard in New York is similar, but certainly not identical. The first New York requirement for holding accountants “liable in negligence to noncontractual parties” is that the accountants “must have been aware” (not “knew,” as in New Jersey) that audited financial reports “were to be used for a particular purpose or purposes” (as opposed to a “specified transaction” in New Jersey). *Credit Alliance*, 483 N.E.2d at 118. Second, the accountant also “must have been aware” that the plaintiff was “a known party or parties * * * intended to rely” on the financial reports, *id.*, rather than the accountant “knew” that a

“specifically identified” person “intended to rely,” as in New Jersey. Third, in New York, “there must have been some conduct” by the accountants “linking them” to the “known party or parties,” which “evinces the accountants’ understanding of that party or parties’ reliance.” *Id.* In New Jersey, in contrast, the plaintiff must establish that the accountant “directly expressed to the claimant” the accountant’s “understanding of the claimant’s intended reliance” on the accountant’s service. N.J. Stat. Ann. 2A:53A-25.b(2)(c). And New Jersey will impose liability when the accountant “agreed with the client *after* the time of the engagement” that the accountant’s services would be made available to specified persons for specified transactions. N.J. Stat. Ann. 2A:53A-25.b(2)(a) (emphasis added). There is no analogous post-engagement feature in New York law. Maryland has adopted the New York standard. *Walpert, Smullian & Blumenthal*, 762 A.2d at 602-608.

The standard in the RESTATEMENT (SECOND) OF TORTS § 552 (1977), is considerably different from the approach taken by New York and Maryland on the one hand, and New Jersey on the other. New York specifically “decline[d] to adopt” RESTATEMENT § 552, *Credit Alliance*, 483 N.E.2d at 119 n.11, as did Maryland, *Walpert, Smullian & Blumenthal*, 762 A.2d at 599-600. See also *Bily v. Arthur Young & Co.*, 834 P.2d 745, 752-759 (Cal. 1992) (surveying three approaches to auditor liability to third parties, including the New York and

RESTATEMENT positions as well as the “variations within each school”). Under the RESTATEMENT test, liability is imposed when, *inter alia*, the defendant negligently “supplies false information for the guidance of others in their business transactions,” and the plaintiff “justifiabl[y] reli[es]” upon the information. § 552(1). Moreover, the plaintiff must be “one of a limited group” for whose “benefit and guidance” the defendant “intends to supply the information or knows that the recipient intends to supply it.” § 552(2)(a). The plaintiff must also rely upon the information in a transaction that the defendant “intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.” § 552(2)(b). Florida and West Virginia have adopted RESTATEMENT § 552 for accountants’ liability cases instead of the New York rule. See *First Florida*, 558 So.2d at 12-15; *Crawford*, 386 S.E.2d at 311-313.

Nonetheless, Florida and West Virginia do not follow identical standards. For example, in West Virginia, “[t]he standard of care depends upon generally accepted accounting practices,” which specifically includes “rules governing the professional conduct of accountants” promulgated by “the West Virginia Board of Accountancy.” *Crawford*, 386 S.E.2d at 313 & n.7. And West Virginia “imposes a standard of care only to *known* users who will actually be relying on the information provided by the accountant. *Id.* at 313 (emphasis added). In Florida, in contrast, “it is *not* required that the person who is to become the plaintiff be

identified or known to the defendant as an individual when the information is supplied.” *First Florida*, 558 So.2d at 15 (emphasis added).

The Ohio Supreme Court has straddled the fence on the standard for accountants’ liability, approving of both New York’s pre-*Credit Alliance* rule and RESTATEMENT § 552. See *Haddon View Investment Co. v. Coopers & Lybrand*, 436 N.E.2d 212, 214 (Ohio 1982) (“We find the interpretation of *Ultramares* [*Corp. v. Touche, Niven & Co.*, 174 N.E. 441 (1931)] set forth in *White v. Guarente* [372 N.E.2d 315 (N.Y. 1977)] to accord with reason and justice. Moreover, the Restatement of Torts 2d [§ 552] and various commentators have come to the same conclusion”). The *Haddon* court adopted a rule for Ohio as follows: “we hold that an accountant may be held liable by a third party for professional negligence when that third party is a member of a limited class whose reliance on the accountant’s representation is specifically foreseen.” 436 N.E.2d at 215. “[T]he accountant’s duty * * * extends to any third person to whom they *understand* the reports will be *shown* for *business purposes*.” *Id.* at 214-215 (emphasis added). The RESTATEMENT and New York *Credit Alliance* standards are both different. See § 552(2)(b) (the defendant must “intend[] the information to influence” a “transaction,” or know that the recipient so intends, or the plaintiff must rely on it “in a substantially similar transaction”); *Credit Alliance*, 483 N.E.2d at 118 (the accountant “must have been aware” that the information would

be “used for a particular purpose or purposes” for which “a known party or parties was intended to rely,” and the accountant’s conduct must “evinced[] the accountant’s understanding of that party or parties’ reliance”).

Even apart from Ohio’s hybrid approach and the variations between the states that have adopted § 552, the RESTATEMENT is “broader” than both the New York rule, *First Florida*, 558 So.2d at 14, and the New Jersey statute. The RESTATEMENT imposes liability for information supplied to guide others in “business transactions” that the accountant intends to influence or “a substantially similar transaction,” § 552(1), (2)(b), as opposed to financial reports used “for a particular purpose or purposes,” *Credit Alliance*, 483 N.E.2d at 118, or for a “specified transaction” only, N.J. Stat. Ann. 2A:53A-25.b(2)(a) & (b). The RESTATEMENT extends liability to “a limited group” for whose “benefit and guidance” the defendant, at the time of the engagement, “intends to supply the information or knows that the recipient intends to supply it,” § 552(2)(a), while New York limits liability to “a known party or parties,” *Credit Alliance*, 483 N.E.2d at 118, and New Jersey restricts liability to claimants “specifically identified to the accountant,” including—unlike the RESTATEMENT and New York—claimants identified “after the time of the engagement” if the accountant and client so agree, N.J. Stat. Ann. 2A:53A-25.b(2)(a). Moreover, what is required to prove the defendant’s understanding is different under the three standards: the

RESTATEMENT requires that the defendant “intends to supply the information or knows that the recipient intends to supply it,” § 552(2)(a); New York requires “some conduct” by the accountants “linking” them to “a known party or parties” that “evinces the accountants’ understanding of that party or parties’ reliance,” *Credit Alliance*, 483 N.E.2d at 118; and in New Jersey, the accountant must have “directly expressed to the claimant” the accountant’s “understanding of the claimant’s intended reliance” on the accountant’s service, N.J. Stat. Ann. 2A:53A-25.b(2)(c).

These are very different standards, as the states that have considered adopting the New York or RESTATEMENT standards have consistently recognized. The district court’s view that “there is a high degree of overlap” between the various standards for negligent misrepresentation (App. 26) is simply wrong. If the standards were really “substantially similar” (*id.*), state courts across the country would not have carefully considered the pros and cons of the New York, RESTATEMENT, and other standards before adopting one accountants’ liability test and rejecting the rest.

Conspiracy. Four of the six states do not permit stand-alone claims for civil conspiracy; in those states, one who conspires with another to commit a tort may be liable for the underlying tort, but not for conspiracy. *Burdick v. Verizon Communications*, 758 N.Y.S. 2d 877 (App. Div. 2003); *Banco Popular*, 823 A.2d

at 816 (New Jersey); *Alexander & Alexander Inc. v. B. Dixon Evander & Assocs.*, 650 A.2d 260, 265 n.8 (Md. 1994); *Gosden*, 687 N.E.2d at 497-498. However, West Virginia permits a cause of action for civil conspiracy. *Dixon*, 253 S.E.2d at 152. And Florida “recognize[s] an independent tort involving a type of civil conspiracy which is based on some ‘peculiar power of coercion of the plaintiff possessed by the defendants in combination which any individual standing in like relation to the plaintiff would not have had,’” *Lane v. Hemophilia of the Sunshine State, Inc.*, 793 So.2d 992, 995 (Fla. Dist. Ct. App. 2001), although the “general rule” there is that “an act which did not constitute a cause of action against one person could not be made the basis of a civil action for conspiracy,” *Margolin*, 342 So.2d at 1092.

Regardless of whether conspiracy may be a separate cause of action, what is required to hold a conspirator liable for a tort varies from state to state. In West Virginia and New Jersey, the plaintiff must establish that there is “a combination” of at least two people, *Dixon*, 253 S.E.2d at 152; *Weil v. Express Container*, 824 A.2d 174, 183 (N.J. App. Div. 2003); Ohio requires “a malicious combination” of at least two people, *Geo-Pro*, 763 N.E.2d at 674; and Florida and New York require “an agreement” between two or more parties, *Lipsig v. Ramlawi*, 760 So.2d 170, 180 (Fla. Dist. Ct. App. 2000); *Portnot v. American Tobacco*, 1997 WL 638800, *7 (N.Y. Sup. Ct. Sept. 26, 1997). In New Jersey, “the plaintiff must

demonstrate that there was one plan and that its essential scope and nature was known to each person who is charged with responsibility for its consequences,” *Weil*, 824 A.2d at 183, while in Ohio “it is sufficient that the parties in any manner come to a mutual understanding that they will accomplish the unlawful design,” *Godsen*, 687 N.E.2d at 496.

In West Virginia, the defendants must engage in “concerted action”—“wrongful acts done by the defendants,” *Dixon*, 253 S.E.2d at 152, and in New Jersey, the conspirators must “act[] in concert,” *Weil*, 824 A.2d at 183. New York requires “intentional participation” in the conspiracy by the defendant. *Portnot*, 1997 WL 638800, *7. Florida, on the other hand, will assess liability when either co-conspirator performs “some overt act in furtherance of the conspiracy.” *Lipsig*, 760 So.2d at 180. In Maryland, a defendant “who conspired to accomplish” the injury “committ[ed]” may be liable for the underlying tort, *Alexander*, 650 A.2d at 265 n.8, and the plaintiff must establish that the “acts actually done, if done by one person, would constitute a tort,” *Alleco*, 665 A.2d at 1045. In Ohio, the conspirators must have combined to injure the plaintiff “in a way not competent for one alone.” *Geo-Pro*, 763 N.E.2d at 674.

Moreover, New York requires proof that the defendant acted in “furtherance” of “an unlawful purpose,” *Portnot*, 1997 WL 638800, *7, while West Virginia expands that to provide that the defendants’ conduct must either

“accomplish an unlawful purpose” or “accomplish some purpose, not in itself unlawful, by unlawful means,” *Dixon*, 253 S.E.2d at 152. Unlike New York and West Virginia, Florida does not focus on “purpose,” but requires “an unlawful *act*” or a “lawful *act* by unlawful means.” *Lipsig*, 760 So.2d at 180 (emphasis added). New Jersey also requires “an unlawful act” or a “lawful act by unlawful means,” but adds that the “principal element” of that act must be “to inflict a wrong against or injury upon another.” *Weil*, 824 A.2d at 183. Florida, in contrast, will apparently impose liability when the plaintiff is injured by “some overt act,” even if the overt act is not “an unlawful act” or a lawful act employing “unlawful means.” *Lipsig*, 760 So.2d at 180. And Ohio, unlike the other states, not only requires “an unlawful act *independent from the actual conspiracy*,” but the act must be a “*criminal offense*[].” *Charles Gruenspan Co. v. Thompson*, 2003 WL 21545134, *7 (Ohio Ct. App. July 10, 2003) (emphasis added).

In at least some contexts in West Virginia, the plaintiff must demonstrate that “the purpose of the combination” is “malicious.” *Politino v. Azzon, Inc.*, 569 S.E.2d 447, 451 (W. Va. 2002). Ohio, in contrast, *always* requires “a malicious combination” as an essential element of a civil conspiracy claim. *Geo-Pro*, 763 N.E.2d at 674. The other four states do not require malice in order to establish a civil conspiracy.

Aiding and abetting tortious conduct. Plaintiffs allege that Grant Thornton aided and abetted the “[t]ortious [c]onduct” of other defendants. App. 132. The six states’ laws governing this claim are not uniform either.

One of the torts Grant supposedly aided and abetted was fraud (*id.* ¶ 231), but “Ohio does not recognize a claim for aiding and abetting common-law fraud.” *Federated Management*, 738 N.E.2d at 853. On the other hand, that is a basis for liability in Maryland and New York. *Alleco*, 665 A.2d at 1049; *Agostini v. Sobol*, 757 N.Y.S.2d 555, 556 (App. Div. 2003). Another tort that Grant is charged with aiding and abetting is negligent misrepresentation, but in New York there is no claim for aiding and abetting negligent conduct. *Portnot*, 1997 WL 638800, at *7. In West Virginia, there is. *Price*, 355 S.E.2d at 386-387.

To the extent that Grant allegedly aided and abetted a breach of fiduciary duty committed by other defendants, the claim necessarily implicates the various states’ fiduciary duty standards, which as noted earlier, vary from state to state. Moreover, “although the breach of a fiduciary duty may give rise to one or more causes of action, in tort or in contract, *Maryland does not recognize a separate tort action for breach of fiduciary duty.*” *International Brotherhood of Teamsters v. Willis Corroon Corp.*, 802 A.2d 1050, 1052 n.1 (Md. 2002) (emphasis added).

Four of the six states follow the RESTATEMENT (SECOND) OF TORTS §876 as the general standard for aiding and abetting claims. *See Acadia Partners*, 759

So.2d at 736 (Florida); *Price*, 355 S.E.2d at 386 (West Virginia); *Judson v. People's Bank*, 134 A.2d 761, 767 (N.J. 1957); *Small*, 720 N.E.2d at 898 (New York). But “Ohio has not definitively adopted this section.” *Andonian v. A.C. & S., Inc.*, 647 N.E.2d 190, 191 (Ohio Ct. App. 1994) (concluding that “[w]e need not determine whether Ohio recognizes Section 876” because the plaintiffs could not prevail under that section anyway). And it is “improper” in Maryland to “allege aiding and abetting * * * in [a] separate count[]” of the complaint. *Manikhi v. Mass Transit Admin.*, 758 A.2d 95, 110 n.6 (Md. 2000). Furthermore, although Maryland courts have occasionally cited §876, Maryland’s test is its own. It imposes “aider and abettor tort liability” on one who ““by any means (words, signs, or motions) encouraged, incited, aided or abetted the act of the direct perpetrator of the tort.”” *Alleco*, 665 A.2d at 1049. *Accord Rice v. Paladin Enterprises*, 128 F.3d 233, 251 (4th Cir. 1997) (Maryland); *Zachair, Ltd. v. Driggs*, 762 A.2d 991, 1006 (Md. Ct. App. 2000). In contrast, the RESTATEMENT requires that the defendant “know[] that the other’s conduct constitutes a breach of duty and give[] substantial assistance or encouragement to the other so to conduct himself.” §876(b).

Even those states that have adopted § 876(b) are not in lockstep. New York follows § 876 in some contexts, but has its own, different test for “aiding and abetting a breach of fiduciary duty”: “(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach,

and (3) that plaintiff suffered damage as a result of the breach.” *Cohen*, 760 N.Y.S.2d at 169. And although West Virginia requires that the defendant’s “conduct” substantially encourage the breach of another’s duty, *Price*, 355 S.E.2d at 386, in New York “mere inaction” by the alleged aider and abettor *can* “constitute[] substantial assistance” to a breach of fiduciary duty “if the defendant owes a fiduciary duty directly to the plaintiff,” *Cohen*, 760 N.Y.S.2d at 170, although in other contexts, aiding and abetting “cannot be predicated upon mere silence,” *Liquidation of Union Indemnity Ins.*, 736 N.Y.S.2d 1, 2 (App. Div. 2001). Unlike both West Virginia and New York, “inaction can form the basis of aiding and abetting liability” in New Jersey “if it rises to the level of providing substantial assistance or encouragement.” *Failla v. City of Passaic*, 146 F.3d 149, 158 n.11 (3d Cir. 1998). New York also requires that the defendant commit an “overt act” before aiding and abetting liability will be imposed, *Offenhartz v. Cohen*, 562 N.Y.S.2d 500, 501 (App. Div. 1990), and for aiding and abetting fraud, plaintiff must demonstrate that the defendant “intended to aid in the commission of the fraud,” *Agostini*, 757 N.Y.S.2d at 556. New Jersey has also deviated from strict adherence to § 876: it considers “the duration of the assistance provided” as one of the factors used in determining whether a defendant provided “substantial assistance”—a factor not listed in either the text of or the comments to § 876. *Gardenhire*, 754 A.2d at 1250.

* * *

As the foregoing discussion has shown, about the only thing that is “common” about the state law claims here is the name of the cause of action. The elements and standards vary from one state to the next. Not only do individual legal issues unquestionably predominate, but a trial involving the state law claims would be completely unmanageable. No jury could reasonably be expected to even keep track of each state’s variations of each state law claims, much less take those differences into account in deciding a particular plaintiff’s claims under a particular state’s law. And the already nightmarish problems of trial would be exacerbated if the remaining 135 class members—whose residences are presently unknown—live outside of the six states whose laws we have just surveyed.

As we have demonstrated, common questions predominate for any of the state law claims. The class must be decertified with respect to the state law claims.

III. The District Court Abused Its Discretion In Holding That Bischoff And Gariety Were Adequate Class Representatives.

One of the “prerequisites” to class certification is that “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). “[T]he party seeking certification bears the burden of establishing that *all* requirements” of Rule 23(a) have been met, including “the adequacy requirement.” *Berger v. Compaq Computer*, 257 F.3d 475, 481 (5th Cir. 2001). The district court erred in holding that Bischoff and Gariety were adequate class representatives.

A. Bischoff Is Not Adequate Because He Is Incapable Of Directing The Litigation.

Bischoff's deposition demonstrated that he was incapable of directing this litigation. He testified repeatedly that any knowledge he had about this case was acquired solely from his attorneys, and that his lawyers make the decisions in this case. Indeed, Bischoff found it appropriate to abdicate all control to his lawyers. When asked if he had any input on who was selected to be class representative, for example, he mistook the question as asking who was allowed to be in the class: "my feeling is that the lawyer knows what needs to be done, and the right thing to do is whatever the lawyer thinks is the right thing to do. I mean, if he decides somebody is in or is not in, that's up to him. It is certainly not up to me." App. 248. When asked, "have you been involved in making any decisions in carrying out this lawsuit," he answered, "I guess I would have to say no." App. 256.

Courts have been nearly unanimous in disapproving the selection of such persons as class representatives. A proper class representative must "possess a sufficient level of knowledge and understanding to be capable of 'controlling' or 'prosecuting' the litigation." *Berger*, 257 F.3d at 482-483. Conversely, "an individual is *not* an adequate representative if he has so little knowledge of and involvement in the class action that he would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys." *Griffin*, 196 F.R.D. at 301 (emphasis added). It seems obvious that a proposed

class representative who point-blank refused to take any responsibility for whether others would be allowed to join the class (“if [my attorney] decides somebody is in or is not in, that’s up to him”) is not disposed to represent that class against the possibly adverse interests of his attorneys—quite the contrary.

Bischoff fails other tests of an adequate representative as well. “In order to be a class representative who will vigorously prosecute a class action, the representative must have more knowledge than a lay person about the class action.” *In re Telectronics Pacing Sys.*, 168 F.R.D. 203, 218 (S.D. Ohio 1996). Likewise, courts have disapproved of proposed class representatives where “what the plaintiffs know appears to come entirely from their attorneys.” *Kelley v. Mid-American Racing Stables, Inc.*, 139 F.R.D. 405, 409 (W.D. Okla. 1990). Bischoff candidly admitted that, apart from his own stock purchases, he had no knowledge of the case “other than what [he] learned through counsel.” App. 252-253. In his own words, this man is not qualified to be a class representative. It was an abuse of discretion for the district court to hold to the contrary.

B. Gariety Is Inadequate Because The Class Representative Must Satisfy The PSLRA’s “Lead Plaintiff” Requirements.

In an earlier opinion in this matter, the district court denied Gariety’s motion to be the lead plaintiff in this matter pursuant to the Private Securities Litigation Reform Act (PSLRA). App. 163. As explained below, if Gariety cannot be lead plaintiff she is barred from being the class representative.

The PSLRA requires, among other things, that the court “shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of *adequately representing the interest of class members.*” 15 U.S.C. § 77z-1(a)(3)(B)(i). The statute further provides that the court shall consider whether a plaintiff “satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. Thus, the PSLRA clearly contemplates that the “lead plaintiff” in a securities class action shall also be the class representative under Rule 23(a)(4).

Yet the district court ignored the plain language of the PSLRA and appointed Gariety as a class representative, despite having previously *denied* her motion to be lead plaintiff. As the court recognized in its order rejecting Gariety and others as lead plaintiff, the PSLRA’s provisions dealing with the selection of lead plaintiff were meant to “limit the control of the plaintiffs’ bar over this type of litigation.” App. 143; *accord Berger v. Compaq Computer Corp.*, 279 F.3d 313, 313 (5th Cir. 2002) (“Congress enacted the ‘lead plaintiff’ provisions of the PSLRA to direct courts to appoint, as lead plaintiff, the most sophisticated investor available and willing to serve in a putative securities class action”). Since Gariety was rejected as lead plaintiff in part because her motion suggested she was captive to her attorneys, she also should be rejected as a class representative. Her failure to meet the requirements of the PSLRA is dispositive.

CONCLUSION

The class certification order should be reversed.

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Respectfully submitted,

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STATEMENT CONCERNING ORAL ARGUMENT

Defendant-Appellant Grant Thornton LLP respectfully requests oral argument. The issues raised by this appeal have not been authoritatively decided and Grant Thornton believes that oral argument would aid the Court's decision in this case.