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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

DANIEL TUROCY, et al.,

Plaintiffs,

vs.

**EL POLLO LOCO HOLDINGS, INC.,
et al.**

Defendants.

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

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

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

3 **I. BACKGROUND**

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

10 This case arises from allegations that between May and August 2015, El Pollo Loco—
11 and certain of its directors, officers, and shareholders—fraudulently misstated the cause of
12 declining sales trends in order to improve the market perception of El Pollo Loco's value. *Id.* ¶¶
13 4–15, 113. This case also arises from allegations that insiders sold about \$130 million in El
14 Pollo Loco stock at fraud-inflated prices on May 19, 2015, during that same time period, taking
15 advantage of non-public information to obtain millions of dollars in insider trading profits. *Id.*
16 ¶¶ 11, 12, 113, 131, 133.

17 Lead Plaintiffs Peter Kim, Dr. Richard J. Levy, Sammy Tanner, and Ron Huston¹
18 (collectively, "Plaintiffs") are purchasers of the securities of El Pollo Loco Holdings, Inc. ("El
19 Pollo Loco" or the "Company") between May 15, 2015 and August 13, 2015 ("Class Period").
20 *Id.* ¶¶ 18–22. Plaintiffs bring this putative securities class action against Defendants El Pollo
21 Loco Holdings, Inc. ("El Pollo Loco" or the "Company"), Trimaran Capital Partners, Trimaran
22 Pollo Partners, LLC ("Trimaran Pollo"), Freeman Spogli & Co., Stephen J. Sather (the
23 Company's CEO), Laurence Roberts (the Company's CFO), and Edward J. Valle (the
24 Company's Chief Marketing Officer ("CMO")) (collectively, "Defendants"). *Id.* ¶¶ 23–37.
25 Plaintiffs bring three claims under the Securities Exchange Act of 1934, pursuant to Section
26 10(b) (securities fraud), Section 20(a) (controlling person liability for securities fraud), and
27 Section 20A (insider trading). *Id.* ¶¶ 118–35. In support of these claims, Plaintiffs allege that

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

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

7 **A. Facts**

8 Plaintiffs allege the following facts regarding Defendants’ alleged fraud and insider
9 trading. *See* Mot at 1–2. In February 2015, during the first quarter of 2015, El Pollo Loco began
10 raising its menu prices. *Id.* (citing CTAC ¶¶ 55, 60). Removing \$5 combo meals from its menu
11 was one way that El Pollo Loco increased prices, despite the combo meals being a core
12 component of the Company’s quick service restaurant plus (“QSR+”) positioning. *Id.* (citing
13 CTAC ¶¶ 49–51). The higher priced menu resulted in lower customer traffic and lower same
14 store sales growth. *Id.* (citing CTAC ¶¶ 56–65). On May 12, 2015, two days before Defendants
15 announced the El Pollo Loco’s first quarter 2015 earnings results, El Pollo Loco’s senior
16 management made a presentation to El Pollo Loco’s board of directors. *Id.* (citing CTAC ¶¶
17 66–72). The presentation informed the board that, among other things: (a) menu prices
18 increased, (b) the increase in menu prices negatively impacted store traffic and sales, (c) the
19 Company’s value score had fallen and moved El Pollo Loco out of its QSR+ position, (d) the
20 second quarter of 2015 same store sales growth was projected to be 2.5%—below the original
21 forecast, and (e) the Company already planned to reinstitute \$5 menu items in the third quarter
22 of 2015 to bring back value and lower prices. *Id.* (citing CTAC ¶¶ 66–72). The information in
23 the May 12, 2015 board presentation was not revealed to the public. *Id.* (citing CTAC ¶ 73).

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

1 stated that the Company's value scores remained high and that it was on track to report full year
2 2015 system-wide same store sales growth between 3% and 5%, with the second quarter of
3 2015 falling in the lower end of that range. *Id.* (citing CTAC ¶¶ 81–82, 88–89). Defendants
4 failed to disclose that higher prices had an impact on the first or second quarter results up to
5 that date. *Id.* (citing CTAC ¶¶ 81–83). On May 19, 2015, seven days after the board
6 presentation, and five days after making allegedly false and misleading statements to investors,
7 a number of insiders, including the Shareholder Defendants and Defendants Sather and Valle,
8 sold over \$132 million of El Pollo Loco stock. *Id.* (citing CTAC ¶¶ 91–95).

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

25 **B. Proposed Class Representatives**

26 Named Plaintiffs Peter Kim, Richard J. Levy, Sammy Tanner, and Ron Huston
27 (collectively, the "Proposed Class Representatives") are individuals who purchased El Pollo
28

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

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

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

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

17 Ron Huston purchased 25,000 shares of El Pollo Loco common stock during the Class
18 Period at prices of up to \$25.00 per share, and 437 options contracts at prices of up to
19 \$3.90/contract, held those shares and options through the end of the Class Period, and suffered
20 losses of approximately \$337,084 after the Company’s announcement. *See* Plaintiffs Decl.;
21 Plaintiffs Loss Estimate; Declaration of Ron Houston (“Huston Decl”) (Dkt. 18-2).

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

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

1 **C. Procedural History**

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

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

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

27 17 C.F.R. § 240.10b-5. To prevail on a claim of securities fraud under Section 10(b) and Rule
 28 10b-5, a plaintiff must establish: (1) “a material misrepresentation or omission”; (2) “scienter”;

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

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

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

17 15 U.S.C. § 78t.

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

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

27
28 ³ While Plaintiffs name Sather, Valle, and the Shareholder Defendants as the Defendants to the 20A claim, Plaintiffs only allege that Sather, Valle, and Trimaran Pollo traded El Pollo Loco shares. *See* CTAC ¶¶ 92, 133; *see also* Opp’n at 2 n.4.

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

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

6 On December 8, 2017, Plaintiffs filed the instant Motion to Certify Class. Defendants
7 filed their Opposition (“Opp’n”) (Dkt. 122) on March 8, 2018. Plaintiffs replied (“Reply”) (Dkt. 131)
8 on April 24, 2018. After the briefing on that Motion was complete, Defendants filed
9 on May 7, 2018, a Motion to Strike Sections of Plaintiffs’ Reply, or, in the alternative, for
10 Leave to File a Proposed Sur-Reply (“Strike Motion”) (Dkt. 141). On May 14, 2018, Plaintiffs
11 Opposed, and, in the alternative, Requested Leave to File a Proposed Sur-Sur Reply (“Strike
12 Opp’n”) (Dkt. 149). Defendants replied (“Strike Reply”) (Dkt. 152) on May 21, 2018. On June
13 14, 2018, Defendants filed a Notice of Supplemental Evidence (Dkt. 154), and on June 21,
14 2018, Defendants filed Exhibits to Notice of Supplemental Evidence (Dkt. 161).

15 **II. LEGAL STANDARD**

16 Courts may certify a class action only if it satisfies all four requirements identified in
17 Federal Rule of Civil Procedure 23(a). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614
18 (1997). Rule 23(a) requires Plaintiffs to show the following: (1) the class is so “numerous” that
19 joinder of all members individually is impracticable; (2) there are questions of law or fact
20 “common” to the class; (3) the claims or defenses of the class representatives are “typical” of
21 the claims or defenses of the class; and (4) the person representing the class is able to fairly and
22 “adequately” protect the interests of all class members. Fed. R. Civ. P. 23(a). These
23 requirements are commonly referred to as “numerosity,” “commonality,” “typicality,” and
24 “adequacy.” *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv.*
25 *Workers Int’l Union, AFL-CIO v. ConocoPhillips Co.*, 593 F.3d 802, 806 (9th Cir. 2010).

26 After satisfying these four prerequisites, a party must also demonstrate compliance with
27 one of the requirements under Rule 23(b). Here, because Plaintiffs seek certification under Rule
28 23(b)(3) they must demonstrate that common “questions of law or fact” predominate over

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

3 The decision to grant or deny a motion for class certification is committed to the trial
4 court’s broad discretion. *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir.
5 2010). However, “Rule 23 does not set forth a mere pleading standard.” *Wal-Mart Stores, Inc.*
6 *v. Dukes*, 564 U.S. 338, 351 (2011). “A party seeking class certification must affirmatively
7 demonstrate his compliance with the Rule—that is, [the party] must be prepared to prove that
8 there are in fact sufficiently numerous parties, common questions of law or fact[.]” *Id.*
9 “[B]efore certifying a class, the trial court must conduct a rigorous analysis to determine
10 whether the party seeking certification has met the prerequisites of Rule 23.” *Sali v. Corona*
11 *Reg’l Med. Ctr.*, 889 F.3d 623, 631 (9th Cir. 2018). The Ninth Circuit recently explained the
12 evidentiary standard at class certification:

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

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

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

1 (1982)). But, “Rule 23 grants courts no license to engage in free-ranging merits inquiries at the
2 certification stage.” *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194–95
3 (2013). Accordingly, any merits consideration must be limited to those issues necessary to
4 deciding class certification. *See id.* at 1195 (“Merits questions may be considered to the
5 extent—but only to the extent—that they are relevant to determining whether the Rule 23
6 prerequisites for class certification are satisfied.”). “[W]hether class members could actually
7 prevail on the merits of their claims is not a proper inquiry in determining the preliminary
8 question of whether common questions exist.” *Stockwell v. City & Cnty. of San Francisco*, 749
9 F.3d 1107, 1112 (9th Cir. 2014) (citing *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8
10 (9th Cir. 2011)).

11 **III. DISCUSSION**

12 Plaintiffs seek to certify the following class:

13 All persons and entities who purchased or otherwise acquired El Pollo Loco
14 Holdings, Inc. (“El Pollo Loco” or the “Company”) common stock or
15 exchange-traded call options, or who sold exchange-traded El Pollo Loco
16 put options (the “Securities”), between May 15, 2015 and August 13, 2015,
17 inclusive (the “Class Period”), and were damaged thereby. Excluded from
18 the Class are Defendants,⁴ present or former executive officers of El Pollo
19 Loco and their immediate family members (as defined in 17 C.F.R.
20 §229.404, Instructions (1)(a)(iii) and (1)(b)(ii)).

21 Mot. at 1.

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

25
26 _____
27 ⁴ “Defendants” are El Pollo Loco, Stephen J. Sather (“Sather”) the Company’s Chief Executive Officer, Laurance Roberts
28 (“Roberts”) the Company’s Chief Financial Officer, Edward J. Valle (“Valle”) the Company’s Chief Marketing Officer,
and the Company’s shareholders Trimaran Pollo Partners, L.L.C., Trimaran Capital Partners, and Freeman Spogli & Co. Mot.
at 1 n.2 (citing CTAC); Defendants’ Oral Argument (requesting that, for the purposes of defining the class, the Company’s
shareholders Trimaran Pollo Partners, L.L.C., Trimaran Capital Partners, and Freeman Spogli & Co. not be described as
“controlling,” because Defendants factually contest this description).

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

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

- 9 (1) whether Defendants violated the Exchange Act;
- 10 (2) whether Defendants omitted and/or misrepresented material facts;
- 11 (3) whether Defendants knowingly or recklessly disregarded that their statements and
12 omissions were false and misleading;
- 13 (4) whether the price of El Pollo Loco's common stock was artificially inflated as a
14 result of Defendants' misrepresentations and/or omissions; and
- 15 (5) whether and to what extent disclosure of the truth regarding Defendants' omissions
16 and misrepresentations of material facts caused Class members to suffer economic
17 loss and damages.

18 *Id.*

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

- 22 (1) Plaintiffs purchased El Pollo Loco Securities during the Class Period;
- 23 (2) Defendants made material misstatements and/or omissions to the public market'
- 24 (3) Defendants concealed the truth from investors throughout the Class Period;
- 25 (4) by hiding this information from investors, El Pollo Loco's stock price remained
26 artificially inflated throughout the Class Period; and
- 27 (5) Plaintiffs suffered the same type of injury as other Class members when the truth was
28 revealed.

1 *Id.*

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

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

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

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

- 18 (1) the proposed class consists of a large number of purchasers of El Pollo Loco
19 common stock or call options, or sellers of put options, who are geographically
20 dispersed and whose individual damages likely are small enough to keep individual
21 litigation from being economically worthwhile;
- 22 (2) Lead Counsel are not aware of other pending Section 10(b) litigation commenced by
23 any Class member in the United States regarding the alleged fraud;
- 24 (3) concentrating the litigation in this Court has many benefits, including eliminating the
25 risk of inconsistent adjudication and promoting the fair and efficient use of the
26 judicial system; and
- 27 (4) Plaintiffs do not foresee any management difficulties that will preclude this action
28 from being maintained as a class action.

1 *Id.*

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

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

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

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

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

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

5 Nonetheless, Defendants oppose Plaintiffs’ Motion with respect to Plaintiffs’ Section
6 20A claim, and oppose as Proposed Class Representatives Peter Kim, Richard J. Levy, and Ron
7 Huston. *See id.* Thus, the Court will address in turn: (1) the Section 20A claim; (2) the
8 typicality of Kim and Huston; and (3) the adequacy of Levy.

9 **A. Section 20A**

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

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

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

3 "Congress did not define the term 'contemporaneous' as used in § 20A, but instead
4 apparently intended to adopt the definition 'which has developed through the case law.'" *Neubronner v. Milken*, 6 F.3d 666, 670 (9th Cir. 1993) (citing H.R. Rep. No. 910, 100th Cong.,
5 2d Sess. 27 (1988)). "The House Report cited *Wilson v. Comtech Telecommunications Corp.*,
6 648 F.2d 88 (2d Cir. 1981); *Shapiro v. Merrill, Lynch, Pierce Fenner & Smith, Inc.*, 495 F.2d
7 228 (2d Cir. 1974) and *O'Connor & Associates v. Dean Witter Reynolds, Inc.*, 559 F. Supp. 800
8 (S.D.N.Y. 1983) as examples of three cases which have 'developed' the definition of
9 'contemporaneous.'" *In re Verifone Sec. Litig.*, 784 F. Supp. 1471, 1488–89 (N.D. Cal. 1992),
10 *aff'd sub nom. In re VeriFone Sec. Litig.*, 11 F.3d 865 (9th Cir. 1993) (quoting H.R. Rep. No.
11 910, 100th Cong., 2d Sess. 27 n.22 (1988)). "By reference to these cases, the drafters of
12 [Section 20A] meant to protect and compensate investors who trade at the same time as the
13 insider or for some short period thereafter, and [meant] that a reasonable period of liability
14 could be as short as a few days, but no longer than a month." *Id.* As the district court in *In re*
15 *Verifone Securities Litigation* explained:
16

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

27 *In re Verifone Sec. Litig.*, 784 F. Supp. at 1488–89 (internal citations omitted). "[The]
28 1988 House Report indicates that Congress specifically contemplated a case-by-case

1 approach to defining ‘contemporaneousness.’” *Buban v. O’Brien*, No. C 94–0331 FMS,
2 1994 WL 324093, at *4 (N.D. Cal. June 22, 1994) (quoting H.R.Rep. No. 910, 100th
3 Cong., 2d Sess. 27 (1988)). The contemporaneous trading requirement in Section 20A
4 was designed to “preserve the notion that only plaintiffs who were harmed by the insider
5 could bring suit, while nonetheless making it possible for such persons to bring suit.”
6 *Basile v. Valeant Pharm. Int’l, Inc.*, No. SA CV 14-2004-DOC (JCGx), 2015 WL
7 7352005, at *4 (C.D. Cal. Nov. 9, 2015) (“*Valeant* MTD Order”) (quoting *Buban*, 1994
8 WL 324093, at *1).

9 “There is no law binding on this Court as to what constitutes ‘contemporaneous’
10 trading.” *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1203–04 (C.D. Cal.
11 2008). “The Ninth Circuit has said that the timeframe required for an insider’s trade to be
12 ‘contemporaneous’ with a plaintiff’s trade is “not fixed.” *Id.* (quoting *Neubronner*, 6 F.3d at
13 670). The Ninth Circuit in *Brody* declined to elaborate on the period’s “exact contours,” but
14 stated that a period of two months is too long. *Brody v. Transitional Hosps. Corp.*, 280 F.3d
15 997, 1004 (9th Cir. 2002).

16 Defendants raise the contemporaneous trading issue as a standing argument, but the
17 contemporaneous trading requirement of Section 20A is a statutory standing requirement that
18 “delineate[s] the scope” of the cause of action—and it is not a prerequisite for Article III
19 standing. *In re Connetics Corp. Sec. Litig.*, No. C 07-02940 SI, 2008 WL 3842938, at *13
20 (N.D. Cal. Aug. 14, 2008) (quoting *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1001 n.
21 3 (9th Cir. 2002)); *see also* *Valeant* MTD Order at *4 (addressing a motion to dismiss for
22 failure to allege contemporaneous trading under the failure to state a claim standard rather than
23 the lack of subject matter jurisdiction standard). A question of statutory standing, like
24 contemporaneous trading, “does not implicate subject-matter jurisdiction, i.e., the court’s
25 statutory or constitutional power to adjudicate the case.” *See Lexmark Int’l, Inc. v. Static*
26 *Control Components, Inc.*, 134 S. Ct. 1377, 1388 n.4 (2014). Rather, a question of statutory
27 standing goes to the merits, and concerns “whether a legislatively conferred cause of action
28 encompasses a particular plaintiff’s claim.” *Id.* at 1382; *see also* *Innovative Sports Mgmt., Inc.*

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

3 At class certification, Courts do not have “license to engage in free-ranging merits
4 inquiries.” *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013).
5 “Merits questions may be considered to the extent—but only to the extent—that they are
6 relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.”
7 *Id.* (“[A] district court has no authority to conduct a preliminary inquiry into the merits of a suit
8 at class certification unless it is necessary to determine the propriety of certification[.]” (internal
9 marks and citation omitted)). Thus, the Court will consider Defendants’ contemporaneous
10 trading challenges to the certification of Plaintiffs’ 20A claim only to the extent that such
11 arguments are “relevant to the Court’s assessment of whether a class should be certified.” *Cf. In*
12 *re Merck & Co., Inc. Sec., Derivative & ERISA Litig.*, No. CIV.A. 05-1151 SRC, 2013 WL
13 396117, at *8 (D.N.J. Jan. 30, 2013) (declining to address, at the motion for class certification
14 stage, the defendant’s argument that a lack of privity between the insider and the Lead Plaintiff
15 established a lack of contemporaneous trading and a lack of standing for a 20A claim).

16 Thus, a free-standing contemporaneous trading standing inquiry is not warranted, but
17 only an analysis of whether the Rule 23 requirements are met. *See* Reply at 14.⁶ *In re Merck* is
18 instructive. In that case, the defendant argued—in opposition to the class certification motion—
19 that the lead plaintiff lacked standing to certify a class on a 20A claim because the plaintiff and
20 defendant had traded in Merck stock at difference prices and in different quantities, and
21 therefore, according to the defendant, the plaintiff could not prove contemporaneous trading
22 with the defendant. *In re Merck*, 2013 WL 396117, at *8. The district court, having previously
23 held that the plaintiff had stated a plausible 20A claim, rejected the defendant’s argument,
24 finding that it raised an issue going solely to the merits:

25
26 ⁶ While Defendants cite cases such as *Middlesex Ret. Sys. v. Quest Software, Inc.*, No. CV066863DOCRNBX, 2008 WL
27 7084629, at *15 (C.D. Cal. July 10, 2008); *In re Verifone Sec. Litig.*, 784 F. Supp. 1471, 1489 (N.D. Cal. 1992); and *In re*
28 *Cypress Semiconductors Sec. Litig.*, 1994 WL 669856, at *2 (N.D. Cal. Nov. 29, 1994), for the proposition that Lead
Plaintiffs must demonstrate contemporaneous trading to establish standing for the purposes of class certification, those cases
were decided before Ninth Circuit in *Vaughn v. Bay Envtl. Mgmt., Inc.*, 567 F.3d 1021 (9th Cir. 2009) and the Supreme Court
in *Lexmark*, 134 S. Ct. at 1388 n.4 made clear that statutory standing is a merits rather than jurisdictional issue. *See* Sur-Sur-
Reply at 4–5.

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

11 *Id.* (internal citations omitted). But unlike *In re Merck*, here the Court has yet to address
12 whether Plaintiffs' 20A claim is plausible. Thus, the decision in *In re Merck* is not exactly on
13 point, and the Court must undertake at least some analysis of contemporaneous trading to
14 determine whether Plaintiffs can satisfy the requirements of Rule 23. *Cf. Dukes*, 564 U.S. at
15 351 ("A party seeking class certification must . . . be prepared to prove that there are in fact
16 sufficiently numerous parties . . ."). Specifically, the Court will address Defendants'
17 contention that Plaintiffs cannot meet the numerosity requirement of Rule 23 for the 20A claim
18 because no Plaintiffs or putative class members can possibly demonstrate contemporaneous
19 trading with the 20A Defendants. *See, e.g.,* Opp'n at 14 (discussing Fed. R. Civ. P. 23(a)(1)
20 ("[T]he class is so numerous that joinder of all members is impracticable[.]")). In addition
21 (even though Defendants did not argue this) it logically follows that if no Proposed Class
22 Representatives can demonstrate contemporaneous trading, they would not be adequate class
23 representatives for the 20A claim. *See* Fed. R. Civ. P. 23(a)(4) ("[T]he representative parties
24 will fairly and adequately protect the interests of the class."). Accordingly, the Court will turn
25 to Section 20A's contemporaneous trading requirement as it pertains to whether Plaintiffs have
26 met Rule 23's numerosity and adequacy requirements.

1. Contemporaneous Trading

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

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

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

Plaintiff⁷	Date of Purchase	Amount	Price
Peter Kim	5/19/2015	1,000	\$22.90
Ron Huston	5/19/2015	2,000	\$23.21
Ron Huston	5/29/2015	3,000	\$20.88

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

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

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

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

3 Plaintiffs Decl.; Huston Decl. Huston also purchased, on May 20, 2015, 100 options contracts
4 (“January 20, 2017 Call, \$25.00 Strike Price”) on El Pollo Loco common stock, at a price of
5 \$3.90 per contract. *See* Huston Decl.

6 In their Opposition, Defendants contend that a plaintiff does not have standing to sue for
7 insider trading under Section 20A when that plaintiff could not have traded with the defendant.
8 Opp’n at 7. Defendants put forward the expert report of Daniel R. Fischel, which states that on
9 May 19, 2015, the 20A Defendants sold all of their shares to Jefferies through a block trade—
10 which is a private transaction conducted off-market pursuant to SEC Rule 144, 17 C.F.R.
11 § 230.144. *See* Declaration of Jason D. Russell (Dkt. 122-1) (“Russel Decl.”) Ex. 5 (“Fischel
12 Report”) ¶¶ 8–9. Fischel opines that because Lead Plaintiffs were not parties to the private
13 transaction, they did not suffer any economic injury. *Id.* ¶ 10. In other words, Defendants assert
14 that they have shown that only Jefferies could possibly have traded with the 20A Defendants,
15 and therefore, Defendants argue, no other parties could have traded “contemporaneously” with
16 the 20A Defendants under the meaning of Section 20A. Opp’n at 7. More specifically,
17 Defendants suggest that because the contemporaneous trading requirement originally
18 “developed as a proxy for the traditional requirement of contractual privity between plaintiffs
19 and defendants” in insider trading cases, if Defendants can prove the absence of privity, the
20 contemporaneous trading requirement cannot be satisfied, and the 20A Defendants could not
21 have harmed any putative class members.⁸ *Id.* at 7–10. In addition, Defendants seek to
22 distinguish this Court’s decision in *Valeant*, where the Court held that Section 20A plaintiffs
23 had plausibly alleged contemporaneous trading, even though the 20A defendants in that case
24 had only traded with a private party. *Id.* at 13 (discussing *Valeant* MTD Order). In *Valeant*, this
25 Court held that the plaintiffs had plausibly pled contemporaneous trading by alleging that the
26 defendants had caused the private party to buy shares in the open market, and then caused the
27 private party to sell those shares to the defendants. *Id.*; *Valeant* MTD Order at *6–*8. Here,

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

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

4 In their Reply, Plaintiffs argue that Lead Plaintiffs Huston and Kim (as well as numerous
5 putative class members⁹) traded contemporaneously with the 20A Defendants because the
6 contemporaneous trading requirement is temporal and is not restricted based on the manner in
7 which a defendant decides to structure its insider trading. Reply at 3–4. In other words,
8 Plaintiffs argue that Section 20A does not require that Plaintiffs traded directly with inside
9 traders, and Section 20A is applicable even if an insiders’ sale is a private transaction, and not
10 on the public market. *Id.* at 8–11. It follows, Plaintiffs contend, that when investors trade in a
11 class of securities at or about the same time as an insider trader, regardless of whether they
12 could have traded directly with the insider, such investors are damaged when they pay more for
13 the security than they otherwise would have had the inside information been made public. *Id.* at
14 12. Regardless, Plaintiffs also argue that the 20A Defendants’ trading was directly linked to
15 trading on the public market, because Jefferies’ involvement in the 20A Defendants’ sales was
16 merely as a broker (and agent) through whom the securities were intended to be sold onto the
17 public market. *Id.* at 5–7. Therefore, Plaintiffs assert that they have established the
18 requirements of Rule 23 to certify the class, including numerosity. *Id.*

19 Next, Defendants move to strike portions of Plaintiffs’ Reply, arguing that Plaintiffs
20 failed to provide any evidence in their opening brief that they have standing as
21 “contemporaneous traders” under Section 20A, failed to submit an expert report on the Section
22 20A claim, and failed to put forth evidence of numerosity. *See generally* Strike Motion.
23 Defendants argue that because Plaintiffs bear the burden of establishing the elements of class
24 certification and standing in their opening brief, Plaintiffs cannot make arguments and submit
25 additional evidence on these issues for the first time in their Reply.¹⁰ In the alternative to

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

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

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

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

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

24 Accordingly, because Plaintiffs were not required to anticipate and rebut the “private
25 transaction” argument in their opening brief, the Court DENIES Defendants’ Motion to Strike
26 portions of the Reply. Nonetheless, because of this Court and the Ninth’s Circuit’s strong
27 preference for deciding issues on the merits—especially given the limited case law addressing
28

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

3 In Defendants’ Sur-Reply, Defendants challenge Plaintiffs’ contention that
4 contemporaneous trading is a temporal requirement. Sur-Reply at 20. Specifically, Defendants
5 suggest that this Court’s *Valeant* decision illustrates that contemporaneous trading is not just
6 about timing, but also the specific nature of the insiders’ transaction, because otherwise,
7 Defendants suggest, this Court would not have needed to analyze whether the defendants’
8 private trade in *Valeant* should be “exempt from the contemporaneous trading analysis.” *Id.*
9 (citing *Valeant* MTD Order at *5). But Defendants’ reliance on *Valeant* is misplaced. In that
10 case, the plaintiffs had brought a Section 20A claim based on a predicate violation of Rule 14e-
11 3, 17 C.F.R. § 240.14e-3, which addresses inside trading on information about a tender offer (a
12 public offer to acquire a company). *See Valeant* MTD Order at *6. Rule 14e-3, in conjunction
13 with Section 20A, provides a cause of action for those who not only traded contemporaneous
14 with an insider trade, but also for a trade “cause[d]” by the insider. 17 C.F.R. § 240.14e-3.
15 Thus, when the Court determined that a private trade in *Valeant* plausibly caused a trade on the
16 open market, the Court included the open market trade in the contemporaneous trading analysis
17 because it was “cause[d]” by the insider for the purposes of a Section 20A claim predicated on
18 a Rule 14e-3 violation. *See Valeant* MTD Order at *6. In addition, the Court in *Valeant* was
19 analyzing which trades were “caused” by the defendants because Section 20A only includes
20 contemporaneous trading in the securities that are the subject of the predicate violation, which
21 in that case was Rule 14e-3. *See id.* And because the *Valeant* defendants had only at first
22 purchased options on the common stock, only if the defendants “caused” the purchase of the
23 common stock within the meaning of Rule 14e-3, could common stock be a security that was
24 the subject of the underlying violation for the purposes of Section 20A (and for the
25 contemporaneous trading analysis). *See id.* Thus, *Valeant* did not precisely address whether a
26 private trade (even assuming here that the Jefferies transaction was purely private, which
27 Plaintiffs hotly dispute) can be excluded from the contemporaneous trading analysis
28 requirement for the purposes of a Section 20A claim predicated on a Section 10(b) violation.

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

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

28

1 However, the plain language of the 20A statute only requires trading
2 “contemporaneously,” and contemporaneous is a temporal word meaning “existing, occurring,
3 or originating during the same time.” *See Contemporaneous*, Merriam-Webster (June 21, 2018,
4 6:53 PM), <https://www.merriam-webster.com/dictionary/contemporaneous>; *see also Valeant*
5 MTD Order at *6 (“While the Ninth Circuit has not defined a specific time period, it has
6 advised that trades must occur at ‘about the same time’ to be considered contemporaneous.”
7 (quoting *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1001 (9th Cir. 2002))). Further,
8 many courts have held that investors’ trade in a security several days apart from the insider
9 trade, are “contemporaneous,” despite the fact that it would be impossible (or at least very
10 unlikely) for such investors to have traded directly with the inside trader. *See, e.g., Middlesex*
11 *Ret. Sys. v. Quest Software Inc.*, 527 F. Supp. 2d 1164, 1196 (C.D. Cal. 2007) (finding that
12 eight days is contemporaneous); *City of Westland Police & Fire Ret. Sys. v. Sonic Solutions*,
13 No. C 07–0511 CW, 2009 WL 942182, at *12 (N.D. Cal. Apr. 6, 2009) (finding purchase of
14 stock nine days after a sale was contemporaneous).

15 In support of Defendants’ position that contemporaneous trading does require that a
16 plaintiff could have traded directly with an insider trader, Defendants cite two Ninth Circuit
17 cases—*Neubronner* and *Brody*—which adopted the contemporaneous trading requirement for
18 implied causes of action for inside trading, and endorsed a proxy for privity understanding of
19 the contemporaneous trading requirement. *See* Opp’n at 7–10 (quoting *Neubronner v. Milken*, 6
20 F.3d 666, 670 (9th Cir. 1993) (“the contemporaneous trading rule ensures that only private
21 parties who have traded with someone who had an unfair advantage will be able to maintain
22 insider trading claims.”); *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1002, (9th Cir.
23 2002) (“[T]he contemporaneous trading rule’s premise [is] that there is a need to filter out
24 plaintiffs who could not possibly have traded with the insider[.]”).

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

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

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

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

18 *Id.* at 670. Then, in *Brody*, the Ninth Circuit extended the contemporaneous trading requirement
19 adopted in *Neubronner* to insider trading causes of actions brought under Section 14(e) and
20 Rule 14e-3. *Brody*, 280 F.3d at 1005 (“The contemporaneous trading requirement, designed to
21 limit the class of potential plaintiffs to only those who could have possibly traded with the
22 insider, is [] precisely congruent with the SEC’s expressed purpose in promulgating Rule 14e-
23 3.”). Thus, *Neubronner* and *Brody*—in interpreting implied causes of action under Section
24 10(b) and Rule 10b-5, and under Section 14(e) and Rule 14e-3 (but not claims brought under
25 Section 20A)—adopted the “proxy for privity” understanding of contemporaneous trading, as
26 reasoned in *Wilson*. See *Brody*, 280 F.3d at 1005; *Neubronner*, 6 F.3d at 671. Relying on *Brody*
27 and *Neubronner*, Defendants argue that the Court should adopt the “proxy for privity”
28 understanding of contemporaneous trading for the Section 20A context. Opp’n at 9–10.

1 But there is no binding authority suggesting that Congress, in enacting Section 20A,
2 restricted the availability of Section 20A to those investors who could have possibly traded with
3 an insider. *See* H.R. Rep. No. 910, 100th Cong., 2d Sess. 27 n.22 (1988); *In re Merck*, 2015 WL
4 2250472 (rejecting the defendant’s argument that Section 20A only affords a cause to action to
5 investors who could have traded directly with an inside trader). The House Report suggests that
6 in enacting Section 20A, Congress intended to adopt the definition of the term
7 “contemporaneous” as it had “developed through the case law.” *See Neubronner*, 6 F.3d at 671
8 (citing H.R. Rep. No. 910, 100th Cong., 2d Sess. 27 n.22 (1988)). As examples of such case
9 law, the House Report cited not only *Wilson*—which *Brody* and *Neubronner* found persuasive
10 for implied causes of action—but also two other cases: *Shapiro v. Merrill Lynch, Pierce,*
11 *Fenner & Smith, Inc.*, 495 F.2d 228 (2d Cir. 1974) and *O’Connor & Associates v. Dean Witter*
12 *Reynolds, Inc.*, 559 F. Supp. 800 (S.D.N.Y. 1983), two cases that understood contemporaneous
13 trading to be a temporal test, rather than one based on the possibility of privity. *See id.* (citing
14 H.R. Rep. No. 910, 100th Cong., 2d Sess. 27 n.22 (1988) (citing *Wilson*, 648 F.2d at 88 (2d Cir.
15 1981); *Shapiro*, 495 F.2d at 237; *O’Connor*, 559 F. Supp. at 805)).¹¹

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

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

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

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

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

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

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

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

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

- 12 • that there were “purchases”—Kim and Huston (and putative class members)
13 purchased El Pollo Loco common stock (and options) on and around May 19, 2015¹²;
- 14 • of “a security that is actively traded in an efficient market”—El Pollo Loco common
15 stock (and options on it)¹³ is actively traded in an efficient market¹⁴;
- 16 • “made contemporaneous with a sale by an insider”— the 20A Defendants sold El
17 Pollo Loco common stock on May 19, 2015¹⁵; and
- 18 • “in possession of material, non-public information”—Plaintiffs plausibly allege that
19 the 20A Defendant possessed and failed to disclose information about the cause of El
20 Pollo Loco’s declining sales trends.¹⁶

21 *See Johnson*, 257 F.R.D. at 593. Accordingly, the Court is satisfied that Plaintiffs have
22 established the Rule 23 elements as to their 20A claim, including adequacy and numerosity.¹⁷
23 Because the Class Period runs from May 15, 2015 to August 13, 2015, and thus covers all
24

25 ¹² *See* Reply at 4–5, 15 (citing Feinstein Decl. at 67); Plaintiffs Decl.; Houston Decl.

26 ¹³ *See, e.g.*, CTAC ¶¶ 133–34; *see also Valeant* MTD Order at *8–*9 (concluding that the plaintiff had sufficiently alleged
27 that common stock and options on common stock were “securities of the same class” for the purposes of Section 20A).

28 ¹⁴ *See* Mot. at 15–20 (citing Feinstein Decl.) (providing extensive evidence that the market for El Pollo Loco common stock
was efficient during the Class Period).

¹⁵ This fact is undisputed. *See e.g.*, CTAC ¶¶ 4–15, 113; Opp’n at 3.

¹⁶ *See* Order Denying Motion to Dismiss (Dkt. 96).

¹⁷ That is, assuming Plaintiffs have established that Kim and/or Houston satisfy the typically requirement (which Defendants
dispute), which is discussed further below.

1 possible trading days that could be considered contemporaneous with the 20A Defendants' May
2 19, 2015 sale, and includes all potential class members for the 20A claim, the Court need not
3 certify a 20A sub-class or determine at this time how many trading days were contemporaneous
4 with the May 19, 2015 sale, which is ultimately a merits question. *See, e.g., Middlesex Ret. Sys.*
5 *v. Quest Software, Inc.*, No. CV 06-6863-DOC (RNBx), 2009 WL 10669638, at *1 (C.D. Cal.
6 Sept. 8, 2009) (certifying one class for Section 10(b), 20(a), and 20A claims).

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

15 **2. Common Questions on Section 20A Damages**

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

23 Plaintiffs respond that Section 20A claims “are ideally suited for class treatment because
24 they are simple and mechanical.” Reply at 12 (quoting *Kaplan v. S.A.C. Capital Advisors, L.P.*,
25 311 F.R.D. 373, 382 (S.D.N.Y. 2015) (The plaintiff's damages can be “calculated based on the
26 overall price change from the time of the contemporaneous trade up to the time [the plaintiff]
27 learned the tipped information or at a reasonable time after it became public.” (internal
28 quotation marks omitted))). Plaintiffs also argue that Section 20A damages can be calculated

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

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

1 **B. Typicality of Kim and Huston**

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

4 A class representative’s claims or defenses must be “typical of the claims or defenses of
5 the class.” Fed. R. Civ. P. 23(a)(3). Courts assess typicality by determining whether the class
6 representatives and the rest of the putative class have similar injuries and conduct. *Hanlon v.*
7 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). The Ninth Circuit has stated, “[t]he
8 purpose of the typicality requirement is to assure that the interest of the named representative
9 aligns with the interests of the class.” *Hanon*, 976 F.2d at 508. The “test of typicality is
10 ‘whether other members have the same or similar injury, whether the action is based on conduct
11 which is not unique to the named plaintiffs, and whether other class members have been injured
12 by the same course of conduct. *Id.* (citing *Schwartz v. Harp*, 105 F.R.D. 279, 282 (C.D. Cal.
13 1985)). Representative claims “are ‘typical’ if they are reasonably co-extensive with those of
14 absent class members; they need not be substantially identical.” *Hanlon* 150 F.3d at 1020.
15 “[C]lass certification is inappropriate where a putative class representative is subject to unique
16 defenses which threaten to become the focus of the litigation.” *Hanon*, 976 F.2d at 508. Unique
17 defenses can go to either the typicality or adequacy of class representatives. *Petrie v. Elec.*
18 *Game Card, Inc.*, No. SACV100252DOCRNBX, 2015 WL 4608227, at *4 (C.D. Cal. July 31,
19 2015) (citing *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
20 903 F.2d 176, 180 (2d Cir. 1990)).

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

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

1 Defendants point out that Kim testified that he thought the El Pollo Loco stock was still inflated
2 on August 14, 2015.¹⁹ *Id.* This testimony, Defendants assert, puts Kim (and Huston) at odds
3 with the other class member for purposes of loss causation, because the class is asserting that
4 the inflation in the stock dissipated after August 13, 2015. *Id.*

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

19 Reply at 18 n.11.

20 “A representative plaintiff’s lack of detailed, comprehensive knowledge about the legal
21 technicalities of the claims asserted in class litigation . . . provides no basis on which to deny a
22 motion for class certification.” *In re Silver Wheaton Corp. Sec. Litig.*, No.
23 215CV05146CASJEMX, 2017 WL 2039171, at *8 (C.D. Cal. May 11, 2017) (citing *Gunnells*
24 *v. Healthplan Services, Inc.*, 348 F.3d 417, 430 (4th Cir. 2003) (“It is hornbook law . . . that in a
25 complex lawsuit, such as one in which the defendant’s liability can be established only after a
26 great deal of investigation and discovery by counsel against a background of legal knowledge,

27
28 ¹⁹ Defendants also assert that Huston testified that he believed the stock price was inflated until at least August 20, 2015, but Defendants do not appear to have filed any unredacted version of the deposition transcript that they cite to—page 110. See Opp’n at 16 (citing Russell Decl. Ex. 2 at 110:2–19).

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

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

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

17 Defendants point out that Kim continued to purchase shares beginning in November
18 2015 (even after he moved for appointment as Lead Plaintiff) until November 2017; and
19 Huston purchased a significant amount of shares just ten days after August 13, 2015, increasing
20 his holdings in the stock by 35%. *See Opp’n* at 15–17. These purchases, Defendants argue, are
21 unusual and make Kim and Huston atypical. *Id.* However, Defendants do not offer any
22 explanation as to what makes these purchases “unusual,” *see Opp’n* at 17, which is fatal to their
23 argument, particularly in light of the fact that the price of El Pollo Loco shares dropped by 20%
24 from a closing price of \$18.36 per share on August 13, 2015 to a closing price of \$14.56 per
25 share on August 14, 2015, following the alleged disclosure, which presumably would not
26 render post-disclosure purchases unusual. *See CTAC* ¶ 103; *Petrie*, 308 F.R.D. at 347
27 (“[R]eliance on the integrity of the market price during the class period is unlikely to be
28 defeated by post-disclosure reliance on the integrity of the market, especially when the market’s

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

3 Plaintiffs argue that post-Class Period purchases do not render Kim and Huston atypical
4 because the purchases are not unusual. Reply at 18–20. Huston, Plaintiffs point out, testified
5 that he purchased additional shares after the Class Period, when prices had fallen, to lower his
6 average cost, and Kim purchased shares after November 2015, when the price declined from
7 \$14.56 to \$11.47, hoping that the stock would perform better after it declined in price. *Id.*
8 (quoting Russell Decl. Exs. 2, 4). There is nothing to suggest that Huston or Kim’s post-Class
9 Period transactions were unusual or did not rely on the integrity of the market. *See id.*; *In re*
10 *Frontier Ins. Grp., Inc. Sec. Litig.*, 172 F.R.D. 31, 42 (E.D.N.Y. 1997) (“The fact that [the
11 plaintiff] attempted to recoup her losses by continuing to purchase [defendant’s] stock after the
12 disclosure of the alleged misrepresentations has no bearing on whether or not she relied on the
13 integrity of the market during the class period.”).

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

15 **C. Adequacy of Levy**

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

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

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

15 **IV. DISPOSITION**

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

19 All persons and entities who purchased or otherwise acquired El Pollo Loco
20 Holdings, Inc. ("El Pollo Loco" or the "Company") common stock or
21 exchange-traded call options, or who sold exchange-traded El Pollo Loco
22 put options (the "Securities"), between May 15, 2015 and August 13, 2015,
23 inclusive (the "Class Period"), and were damaged thereby. Excluded from
24 the Class are Defendants,²⁰ present or former executive officers of El Pollo
25 Loco and their immediate family members (as defined in 17 C.F.R.
26 §229.404, Instructions (1)(a)(iii) and (1)(b)(ii)).

27
28 ²⁰ "Defendants" are El Pollo Loco, Stephen J. Sather ("Sather") the Company's Chief Executive Officer, Laurance Roberts ("Roberts") the Company's Chief Financial Officer, Edward J. Valle ("Valle") the Company's Chief Marketing Officer, and the Company's shareholders Trimaran Pollo Partners, L.L.C., Trimaran Capital Partners, and Freeman Spogli & Co.

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

5
6 DATED: July 3, 2018

David O. Carter

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8 DAVID O. CARTER
9 UNITED STATES DISTRICT JUDGE
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