**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**
**Judge William J. Martínez**

Civil Action No. 21-cv-2770-WJM-SBP

EL PASO FIREMEN & POLICEMEN'S PENSION FUND,
SAN ANTONIO FIRE & POLICE PENSION FUND, and
INDIANA PUBLIC RETIREMENT SYSTEM, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

INNOVAGE HOLDING CORP.,
MAUREEN HEWITT,
BARBARA GUTIERREZ,
J.P. MORGAN SECURITIES LLC,
BARCLAYS CAPITAL INC.,
GOLDMAN SACHS & CO. LLC,
CITIGROUP GLOBAL MARKETS INC.,
ROBERT W. BAIRD & CO. INCORPORATED,
WILLIAM BLAIR & COMPANY, L.L.C.,
PIPER SANDLER & CO.,
CAPITAL ONE SECURITIES, INC.,
LOOP CAPITAL MARKETS LLC,
SIEBERT WILLIAMS SHANK & CO., LLC, and
ROBERTS & RYAN INVESTMENTS, INC.,

Defendants.

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**ORDER GRANTING MOTION TO CERTIFY CLASS**

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This securities fraud action arises from alleged false and misleading statements made by Defendant InnovAge Holding Corp. ("InnovAge" or the "Company") and its former executives regarding InnovAge's business practices, the success of its growth strategy, and the potential impact of audits by government agencies in the highly regulated Program of All-Inclusive Care for the Elderly ("PACE") industry. Lead

Plaintiffs El Paso Fireman & Policemen's Pension Fund, San Antonio Fire & Police Pension Fund, and Indiana Public Retirement System (collectively, "Lead Plaintiffs") bring this action pursuant to (1) Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) and §78t(a), and Securities and Exchange Commission ("SEC") Rule 10b-5, promulgated thereunder by the SEC, 17 C.F.R. §240.10b-5 (the "Exchange Act"), and (2) Sections 11, 12(a)(2), and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 771(a)(2), and 77o (the "Securities Act"), on behalf of themselves and other purchasers of InnovAge securities. (ECF No. 54.)

Following the dismissal of several alleged misleading statements supporting their Exchange Act and Securities Act claims, Lead Plaintiffs moved to certify a class pursuant to Federal Rule of Civil Procedure 23 (ECF No. 140) ("Motion"). Defendants InnovAge; Maureen Hewitt and Barbara Gutierrez; John Ellis Bush, Andrew Cavanna, Caroline Dechert, Edward Kennedy, Jr., Pavithra Mahesh, Thomas Scully, Marilyn Tavenner, Sean Traynor, and Richard Zoretic; and Welsh, Carson, Anderson & Stowe and Apax Partners, L.P.'s (collectively, "Defendants") filed a response in opposition (ECF No. 160), to which Lead Plaintiffs filed a reply (ECF No. 172).

For the following reasons, the Motion is granted.

## I. BACKGROUND

The Court assumes the parties' familiarity with the facts underlying this action and incorporates by reference the Background section from its Order Granting in Part and Denying in Part Defendants' Joint Motion to Dismiss Amended Class Action Complaint. (ECF No. 102 at 2–31.)

Lead Plaintiffs seek to certify a class of persons and entities who: "(i) purchased

or otherwise acquired the publicly traded common stock of InnovAge between May 11, 2021, and December 22, 2021, inclusive; and/or (ii) purchased or otherwise acquired publicly traded InnovAge common stock either in or traceable to InnovAge's March 4, 2021, IPO and were damaged thereby." (ECF No. 140 at 8.) Lead Plaintiffs also ask the Court to appoint them as Class Representatives and Cohen Milstein Sellers & Toll PLLC as Class Counsel. (*Id.*)

Defendants oppose class certification as to the Exchange Act claim on the ground that Lead Plaintiffs "have failed to satisfy their burden under [Rule] 23(b) to establish that questions of law or fact common to class members predominate over individual issues with respect to their section 10(b) claims." (ECF No. 160 at 5.) Separately, they oppose class certification as to both the Exchange Act and Securities Act claims on the ground that the Lead Plaintiffs "have not satisfied Rule 23(a)'s adequacy requirement." (*Id.* at 14.)

## II. CLASS ACTION STANDARD

"'The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc.*, 725 F.3d 1213, 1217 (10th Cir. 2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011)). Federal Rule of Civil Procedure 23 prescribes the requirements for class certification.

> Rule 23(a) requires the party seeking certification to demonstrate that: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there is a question of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy).

*Id.*

If the putative class satisfies Rule 23(a)'s requirements, it must still satisfy one of the three requirements listed in Rule 23(b). In this case, Lead Plaintiffs rely on Rule 23(b)(3), which requires the class to show that "questions of law or fact common to class members predominate over any questions affecting only individual members" and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

"A party seeking class certification must affirmatively demonstrate his compliance with [Rule 23]—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 564 U.S. at 350. The decision whether to grant or deny class certification "involves intensely practical considerations" and therefore "belongs within the discretion of the trial court." *Tabor v. Hilti, Inc.*, 703 F.3d. 1206, 1227 (10th Cir. 2013) (quotation marks omitted).

## III. APPLICATION

Lead Plaintiffs contend that they have satisfied Rule 23(a)'s requirements—namely, the numerosity, commonality, typicality, and adequacy elements of the Rule. (ECF No. 140.) Specifically, they argue that (1) the proposed "class members likely number in the thousands and are geographically dispersed" (numerosity); (2) the proposed class members' claims commonly allege that they were defrauded by the same misleading statements made by Defendants' (commonality); (3) the Lead Plaintiffs' and proposed class members' claims are founded on the same allegations and legal theories (typicality); and (4) the Lead Plaintiffs have reviewed "significant pleadings, participated in discovery, . . . stay[ed] apprised of litigation strategy," and

selected competent Lead Counsel (adequacy). (*Id.* at 5–14.)

Lead Plaintiffs likewise argue that they have satisfied Rule 23(b)(3)'s requirement, asserting, as pertinent here,[1] that "damages can be calculated on a class-wide basis" by applying the "out-of-hand" methodology. (*Id.* at 19.) According to Lead Plaintiffs, this methodology ascertains damages by employing the following "event study" formula: "(i) calculating the price impact of corrective disclosures; (ii) determining the impact of any 'confounding information' unrelated to the fraud; and (iii) subtracting (ii) from (i) to yield a calculation of fraud-related artificial inflation in InnovAge's stock price for each day during the Class Period." *See KBC Asset Mgmt. NV v. 3D Sys. Corp.*, 2017 WL 4297450, at *7 (D.S.C. Sept. 28, 2017) ("[T]he out-of-pocket method calculates the difference between the price at which the stock sold and the price at which the stock would have sold absent any artificial inflation cause by a defendant's alleged misrepresentations or omissions."). (ECF No. 172 at 7.)

At the outset, and after careful consideration, the Court is persuaded that Lead Plaintiffs have satisfied each of Rule 23(a)'s requirements. Apart from the adequacy element, which the Court addresses below, Defendants do not contest this conclusion.

Instead, Defendants primarily focus on Rule 23(b)(3)'s predominance element, which requires Lead Plaintiffs to show that "the questions of law or fact common to class members predominate over any questions affecting only individual class members" and that "a class actions is superior to other available methods for fairly and efficiently adjudicating the controversy." In particular, Lead Plaintiffs must "show that common

[1] Because Defendants only advance a Rule 23(b)(3) predominance challenge to Lead Plaintiffs' "out-of-pocket" damages methodology, the Court tailors its analysis accordingly.

question[s] subject to generalized, classwide proof predominate over individual questions." *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1087 (10th Cir. 2014). "'The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Id.* (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622–23 (1997)). "Put differently, the predominance prong 'asks whether the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Id.* (quoting 2 William B. Rubenstein *et al*., Newberg on Class Actions § 4:49, at 195–96 (5th ed. 2012)).

Defendants contend that Lead Plaintiffs' Exchange Act claim is not suitable for class certification because Lead Plaintiffs "have not presented any reliable methodology for calculating the damages (if any) to the class members on a class-wide basis that is consistent with their theory of liability and that can be feasibly calculated once any common liability questions are decided." (ECF No. 160 at 5.) To get there, Defendants principally rely on *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), an antitrust case in which the Supreme Court held that, in order for a proposed damages methodology to meet the Rule 23(b)(3) standard—that it be capable of class-wide measurement—the model must attribute the damages to the plaintiff's theory of liability. (*Id.*) Defendants posit that Lead Plaintiffs' "out-of-pocket" methodology is incapable of isolating the price impact of actionable misrepresentations from the price impact of "confounding information"—*i.e.*, events or factors that may have impacted stock price but did not cause the class's alleged damages—and that there is therefore no nexus between their proposed damages methodology and their "materialization of concealed risk" theory of

harm. (*Id.*) Specifically, Defendants claim the "out-of-pocket" methodology cannot disentangle confounding information pertaining to their sanctions, non-actionable statements that accompanied actionable statements, and artificial inflation over time. (*Id.* at 10–14.)

Like numerous courts around the country, however, the Court is unmoved by Defendants' *Comcast*-based argument. For one, the Court does not see how the alleged defects in Lead Plaintiffs' "out-of-pocket" damages methodology refutes the notion that questions of law or fact common to class members as a whole predominate over any questions affecting only individual class members. The Court does not understand Defendants to argue that the "out-of-pocket" methodology can accurately calculate damages for some class members but not others. On the contrary, to the Court's mind, if the methodology cannot isolate actionable misrepresentations from confounding information for one class member, it would presumably be unable to do so for all other class members as well.

Thus, taking as true Defendants' claim that Lead Plaintiffs' "out-of-pocket" damages methodology cannot reliably "disentangle the effects of actionable statements from non-actionable statements," this fact does not defeat a finding of predominance here. *See In re SandRidge Energy, Inc. Sec. Litig.,* 2019 WL 4752268, at *6 (W.D. Okla. Sept. 30, 2019) ("If Mr. Steinholt's model improperly fails to consider certain other losses or to account for inflation changes during the class period, it would seemingly be flawed in this manner as to every member of the class."); *see also City of Cape Coral Mun. Firefighters' Ret. Plan v. Emergent Biosolutions, Inc., HQ*, 322 F. Supp. 3d 676, 692 (D. Md. 2018) (considering predominance challenge to plaintiffs' out-of-pocket

damages methodology and concluding that "[t]he amount of inflation resulting from the misrepresentations, therefore, would be the same for each investor, regardless of their individual threshold for risk."); *In re BP P.L.C. Sec. Litig.*, 2014 WL 2112823, at *7 (S.D. Tex. May 20, 2014) ("[T]he focus of the 23(b)(3) class certification inquiry—predominance—is not whether the plaintiffs will fail or succeed, but whether they will fail or succeed *together*.").

Second, it appears to be settled among courts that the "out-of-pocket" methodology *is* able to separate the effects of actionable misrepresentations from non-actionable confounding factors. As one court put it, "Use of the out-of-pocket damages model in securities case is hardly new or novel—it 'is the standard measurement of damages in Section 10(b) securities cases.'" *Weiner v. Tivity Health, Inc.*, 334 F.R.D. 123, 137 (M.D. Tenn. 2020) (quoting *City of Miami Gen. Emp. & Sanitation Emp. Ret. Tr. v. RH, Inc.*, 2018 WL 4931543, at *3 (N.D. Cal. Oct. 11, 2018)). Other courts have echoed this sentiment. *See, e.g., In re Allergan PLC Sec. Litig.*, 2021 WL 4077942, at *15 (S.D.N.Y. Sept. 8, 2021) ("And insofar as Allergan is insisting that an event study damages model is unable to isolate the price drop attributable to any specific misrepresentation or corrective disclosure, this Court has in the past reject[ed] the suggestion that an event study is incapable of disaggregating the effects of confounding information. Were it otherwise, nearly every securities fraud class action would fail.") (citation omitted); *In re Myriad Genetics, Inc. Sec. Litig.*, 2021 WL 5882259, at *7 (D. Utah Dec. 13, 2021) ("LAFPP offers a routinely accepted 'out of pocket' damages model that could be used to calculate damages on a class wide basis."); *In re Teva Sec. Litig.*, 2021 WL 872156, at *40 (D. Conn. Mar. 9, 2021) ("Numerous courts have certified

classes asserting Section 10(b) and Rule 10b-5 claims based on an expert's proposed use of that three-step analysis."); *Indiana Pub. Ret. Sys. v. Pluralsight, Inc.*, 2023 WL 8936277, at *11 (D. Utah Dec. 27, 2023) ("Parties do not need to calculate class-wide damages at the class certification stage. They need only show a common, classwide *method* for determining individual damages. To that end, courts have recognized the 'out-of-pocket' method for calculating class-wide damages.") (emphasis in original) (citation omitted); *Int'l Bhd. of Elec. Workers Loc. 98 Pension Fund v. Deloitte & Touche LLP*, 2024 WL 4750812, at *6 (D.S.C. Nov. 12, 2024) (same).

Given all this on-point caselaw, the Court easily rejects Defendants' predominance challenge.

Lastly, the Court addresses Defendants' Rule 23(a)(4) challenge to the Exchange Act and Security Act claims based on Lead Plaintiffs' alleged inability to "fairly and adequately protect the interests of the class." (ECF No. 160 at 14.) In support, Defendants aver that Lead Plaintiffs indicate in their Declarations that they "rely on" and "defer entirely to" their counsel with respect to important, basic components of this lawsuit. (*See* ECF No. 160 at 19.)

"In a complex lawsuit . . . the representative need not have extensive knowledge of the facts of the case in order to be an adequate representative." *In re Nature's Sunshine Product's Inc. Sec. Litig.*, 251 F.R.D. 656, 657 (D. Utah 2008) (quoting *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430 (4th Cir. 2003)). "Only if the class representatives' 'participation is so minimal that they virtually have abdicated to their attorneys the conduct of the case' should they fail to meet the adequacy of representation requirement." *In re Nature's Sunshine Product's Inc. Sec. Litig.*, 251

F.R.D. at 657; *see also Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187–88 (10th Cir. 2002) (requiring class representatives to be able to "prosecute the action vigorously on behalf of the class").

Notwithstanding Defendants' cherry-picked examples to the contrary, the record does not support their contention that the Lead Plaintiffs lack sufficient knowledge of the facts of this case to adequately represent the class. As Lead Plaintiffs aptly point out, the class representatives "are sophisticated institutional investors who manage billions in assets." (ECF No. 172 at 14.) Moreover, each Lead Plaintiff has thus far capably demonstrated their understanding of this action by testifying as to the occurrence of key events ("InnovAge is a healthcare company [that] initiated a[n] IPO in March of 2021"); the cause of their alleged losses ("During the class period . . . information about the audits that occurred in Sacramento and Colorado was made public, which was not provided . . . at the IPO in March, and therefore it led to a 78% drop in the value of the stock"); and the causes and effects of Defendants' alleged conduct ("[B]ecause of the inadequacies . . . those audits then stopping InnovAge from accepting any new members, which obviously affects their ability to grow, which then affects their stock price."). (*Id.* at 15.)

Given all this, the Court also rejects Defendants' adequacy challenge. *See In re Oppenheimer Rochester Funds Grp. Sec. Litig.*, 318 F.R.D. 435, 445 (D. Colo. 2015) ("In the context of complex securities litigation, attacks on the adequacy of the class representative based on the representative's ignorance or credibility are rarely appropriate."); *Brokop v. Farmland Partners Inc.*, 2021 WL 4913970, at *2 (D. Colo. Sept. 30, 2021) (resolving doubt against adequacy in favor of class certification).

## IV. CONCLUSION

For the foregoing reasons, the Court ORDERS as follows:

1. Lead Plaintiffs' Motion for Class Certification (ECF No. 140) is GRANTED;

2. The Court CERTIFIES the following class under Federal Rule of Civil Procedure 23(b)(2), defined as: persons and entities who "(i) purchased or otherwise acquired the publicly traded common stock of InnovAge between May 11, 2021, and December 22, 2021, inclusive; and/or (ii) purchased or otherwise acquired publicly traded InnovAge common stock either in or traceable to InnovAge's March 4, 2021, IPO and were damaged thereby.";

3. El Paso Fireman & Policemen's Pension Fund, San Antonio Fire & Police Pension Fund, and Indiana Public Retirement System are APPOINTED as Class Representatives; and

4. The law firm of Cohen Milstein Sellers & Toll PLLC is APPOINTED as Class Counsel.

Dated this 8th day of January, 2025.

BY THE COURT:

William J. Martínez
Senior United States District Judge