IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE WILLIS TOWERS WATSON PLC PROXY LITIGATION	)	Case No. 1:17-cv-1338 (AJT/JFA)

ORDER

Plaintiff Regents of the University of California ("Plaintiff") alleges violations of Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78a *et seq*. In particular, Plaintiff alleges that Defendants[1] made certain material misrepresentations and omissions in connection with proxy solicitations distributed to Towers Watson & Co. ("Towers") stockholders concerning the merger between Towers and Willis Group Holdings plc ("Willis") (the "Merger"), which resulted in the merged entity Willis Towers Watson plc ("WTW").

Currently pending before the Court is Plaintiff's Motion for Class Certification and Appointment of Class Representative and Class Counsel [Doc. 146] (the "Motion").[2] Defendants object to class certification on multiple grounds. Among other reasons, Defendants centrally contend that, in light of the Supreme Court's decision in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), certification should be denied because Plaintiff's damages model does not plausibly measure damages on a class-wide basis.

[1] The defendants in this action are: WTW; Towers; Willis; John Haley ("Haley"); Dominic Casserley ("Casserley"); ValueAct Capital Management, L.P. ("ValueAct"); and Jeffrey Ubben ("Ubben" and together with ValueAct, the "ValueAct Defendants") (collectively, the "Defendants").

[2] In its Motion, Plaintiff asks this Court, pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(3), and 23(g), to certify this action as a class action, certify the proposed Class (as defined below), and appoint Plaintiff as class representative and its counsel as class counsel and as liaison counsel for the Class.

Plaintiff's § 14(a) claim is based on the proxy materials jointly-issued by Towers and Willis in 2015 in order to obtain stockholder approval for the Merger. Those materials disclosed, *inter alia*, that Haley, Towers' Chairman and CEO, rather than Casserley, Willis' President and CEO, would become the CEO of WTW, an entity with a larger market capitalization than either Towers or Willis, DX 4 at 4, and that Haley had led the Merger negotiation on behalf of Towers, PX 4 at 113, 115-20.[3] It also specifically referenced Haley's conflict of interest between his role in the Merger negotiations and his interest in the outcome of those negotiations. *Id*. Nevertheless, Plaintiff claims that these disclosures insufficiently disclosed Haley's conflict because the proxy materials did not disclose a September 11, 2015 meeting between Haley and Ubben, then-CEO of ValueAct, a hedge fund that was a 10.3% Willis stockholder, during which Ubben explained ValueAct's performance-based executive compensation philosophy to Haley.[4] DX 27. During that meeting, Ubben outlined a three-year compensation package that linked Haley's prospective compensation as CEO of WTW to WTW's stock performance, with overall compensation reaching as much as approximately $55 million per year (as opposed to his then approximately $25 million per year) should WTW's stock price increase by certain milestones.

In support of class certification, Plaintiff has presented the expert report of Dr. David Tabak, who opines that class-wide damages are approximately $456 million. PX 14 ("Tabak Report") ¶ 3. That opinion is based on the assumption that had the proxies made the required disclosures, including, *inter alia*, the fact and substance of the September 11, 2015 meeting between Haley and Ubben, Towers stockholders would have rejected the Merger, and as a result,

[3] All references to "PX" and "DX" refer to the exhibits presented by Plaintiff and Defendants, respectively. *See* [Docs. 147, 149, 168, 170, 175, 176] (partially filed under seal).

[4] On August 30, 2019, the United States Court of Appeals for the Fourth Circuit reversed this Court's dismissal of this action on the ground that alleged omission and misrepresentations at issue were not material as a matter of law and remanded for further proceedings. *In re Willis Towers Watson PLC Proxy Litig*., 937 F.3d 297, 304-05 (4th Cir. 2019).

one of two things would have happened: either (1) Towers' stock price would have reverted (*i.e.*, increased) to a price higher than the price of Towers' stock immediately before the Merger closed on January 4, 2016, as determined by statistically-significant stock price movements that occurred between June 29, 2015, the day before the proposed Merger was announced, and the Merger's close on January 4, 2016,[5] or, alternatively, (2) Towers and Willis would have renegotiated the terms of the Merger, resulting in increased consideration for Towers stockholders. *Id*. ¶¶ 23-33. Plaintiff has not presented any evidence to support Dr. Tabak's central assumption that enough stockholders would have changed their votes to reject the Merger or his follow-on assumption that once Towers stockholders rejected the Merger, Towers and Willis would have renegotiated the Merger's terms.[6] Similarly challenged by the Defendants is Dr. Tabak's event-study methodology, which Dr. Tabak uses to calculate the amount of class-wide damages.[7]

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[5] These movements include the following:

(1) On June 29, 2015, the day before the Merger was announced, Towers stock closed at $137.98.

(2) On June 30, 2015, the day the Merger was announced, Towers stock closed at $125.80.

(3) On December 10, 2015, the trading day before Towers stockholders approved the Merger, Towers stock closed at $127.34 per share, $10.64 per share *below* the June 29, 2015 stock price and $1.54 per share *above* the June 30, 2015 stock price;

(4) On December 11, 2015, the trading day Towers stockholders approved the Merger, Towers stock closed at $132.96 per share, $5.02 per share *below* the June 29, 2015 stock price, $7.16 per share *above* the June 30, 2015 stock price, and $5.62 per share *above* the December 10, 2015 stock price; and

(5) On December 29, 2015, the last trading day before the Merger closed on January 4, 2016, Towers stock closed at $139.94 per share, $1.96 per share *above* the June 29, 2015 stock price, $14.14 per share *above* the June 30, 2015 stock price, and $6.98 per share *above* the December 11, 2015 stock price.

[6] Discovery closed on August 10, 2020. [Doc. 129].

[7] Based on his events-study methodology, Dr. Tabak calculates that following the assumed rejection of the Merger on December 11, 2015, Towers' stock price would have increased $12.19 per share *above* Towers' December 10, 2015 stock price or $6.57 per share *more* than the actual December 11, 2015 stock price increase of $5.62 per share. *See* Tabak Report ¶ 15, n.5, Ex. 4a & 4c; *cf*. Fischel Report ¶¶ 34-35, 51. Dr. Tabak obtains the $6.57 incremental increase by reversing the statistically-significant Towers stock price movements following the Merger's announcement on June 30, 2015 (expressed as Towers' increased market capitalization of $496.53 million), dividing that increased market capitalization by the number of Towers shares outstanding on October 1, 2015 (the Record Date), which effectively yields $7.15 per share, or the "difference between the market value of a Towers share that a

In *Comcast*, the Supreme Court held that in order to satisfy Federal Rule of Civil Procedure 23(b)(3)'s requirement that common questions of fact and law predominate, a plaintiff seeking class certification must present evidence sufficiently connecting its measure of damages to its theory of liability. *See id*. at 38. The *Comcast* Court further explained that, even if the proposed damages model could bridge liability and damages, "it still would not have established the requisite commonality of damages unless it plausibly showed that" the damages theory is uniform or shared across all class members. *Id*. at 38, n.6. Defendants oppose class certification primarily, but not exclusively, on the grounds that Plaintiff's damages model for economic loss fails to satisfy Rule 23(b)(3)'s predominance requirement, as explained in *Comcast*.

Plaintiff, in response, contends that under applicable case law, its proof of class-wide damages does not depend on actually proving the assumptions built into Dr. Tabak's damages model since economic loss is established by showing that Towers' shareholders received less than fair value from the Merger that was achieved through material misrepresentations or omissions in a proxy solicitation that served as an essential link to the Merger. For this reason, loss causation is not determined by reference to whether or not the Merger would have been approved had the alleged non-disclosures been made, but rather by comparing the value of Towers stock with and without the Merger. [Doc. 205] (July 29, 2020 Transcript) at 11:4-11:20. In any event, according to Plaintiff, whether it can establish damages is not to be resolved at the class certification stage and its damages model sufficiently links its damages theory to its liability theory to satisfy *Comcast*.

Towers merger participant originally had and the market value of the new share that they would get as a result of the [M]erger." Tabak Report ¶ 16. To yield $6.57 per share, Dr. Tabak then reduces that figure ($7.15 per share) by the "after-tax stock-price effect of $0.58 per share" to reflect the break-up fee Towers would have had to pay Willis in the event Towers stockholders rejected the Merger. *See id.* ¶¶ 15-17; *see also infra* n.17.

As discussed below, for the purpose of class certification, Plaintiff's damages model, whatever its merits or deficiencies may ultimately prove to be, presents common class-wide questions, resolvable through common evidence, that predominate over individual issues and is sufficiently consistent with its liability theory to satisfy *Comcast*. And because Plaintiff has otherwise satisfied the remaining requisites for class certification, Plaintiff's Motion is **GRANTED**.[8]

I. LEGAL STANDARD

"The class-action device, which allows a representative party to prosecute his own claims and the claims of those who present similar issues, is an exception to the general rule that a party in federal court may vindicate only his own interests." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 318 (4th Cir. 2006) (citation omitted). Thus, to proceed under this exception, a court must determine that the class action mechanism protects both the rights of the absent plaintiffs and the right of the defendants to present facts or raise defenses that are particular and unique to individual class members. *Id*.

Class certification is governed by Federal Rule of Civil Procedure 23. Specifically, pursuant to Rule 23(c)(1)(A), "[a]t an early practicable time after a person sues . . . as a class representative, the [district] court must determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A). A district court "has broad discretion in deciding whether

[8] At oral argument on July 29, 2020, the Court granted Plaintiff leave to submit Dr. Tabak's rebuttal report. *See* [Doc. 205] at 53, 55. On August 5, 2020, Plaintiff submitted the rebuttal report, [Doc. 206-1] ("Tabak Rebuttal Report"), together with a brief supplemental memorandum and two expert reports regarding materiality [Doc. 206]. On August 7, 2020, Defendants WTW, Towers, Haley, and Casserley (the "TW/Willis Defendants") submitted a Motion to Strike in Opposition to Lead Plaintiff's Supplemental Submission in Support of Class Certification [Doc. 112] ("Motion to Strike"). In the Motion to Strike, the TW/Willis Defendants request the Court strike Plaintiff's submission (not including the rebuttal report) or, in the alternative, accept its responses as part of the record. Given that the scope of Plaintiff's request and the Court's leave may have been unclear and after reviewing the supplemental submissions, the Court accepts the parties' supplemental filings [Docs. 206, 206-1, 206-2, 206-3, 211, 212, 216, and 217] as part of the record.

to certify a class, but that discretion must be exercised within the framework of Rule 23." *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996). To obtain certification, a movant must satisfy the threshold requirements contained in Rule 23(a), which include: (1) "numerosity"—that the class is so numerous that joinder of all members would be impracticable; (2) "commonality"—that questions of law or fact are common to the class; (3) "typicality"—that the claims or defenses of the representative party are typical of those of the class; and (4) "adequacy"—that the representative party fairly and adequately protect the interests of the class. *See* Fed. R. Civ. P. 23(a); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014). Notably, the final three requirements of Rule 23(a) "tend to merge, with commonality and typicality 'serving as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 337 (4th Cir. 1998) (quoting *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982)).

In addition to Rule 23(a)'s requirements, the movant must also demonstrate that the proposed class fits into one of the three categories of actions identified in Rule 23(b). *Adair*, 764 F.3d at 357. As in most securities class actions, Plaintiff moves for certification under Rule 23(b)(3). To certify a class pursuant to Rule 23(b)(3), a movant must establish: (1) predominance—"that the questions of law or fact common to class members predominate over any questions affecting only individual members;" and (2) superiority—"that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Rule 23 "does not set forth a mere pleading standard[,]" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); and the movant must affirmatively present "substantial evidence" that the putative class complies with Rule 23. *Brown v. Nucor Corp.*, 785 F.3d 895, 931 (4th Cir. 2015). Further, district courts have "an independent obligation to perform a 'rigorous analysis' to ensure that all of the prerequisites have been satisfied." *Wal-Mart*, 564 U.S. at 350 (citing *Falcon*, 457 U.S. at 161). In doing so, the district court may need to "probe behind the pleadings before coming to rest on the certification question," *id.*, and to that end, may conduct, "to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied, an inquiry into the merits of the movant's claims and evidence," *Amgen Inc v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455 (2013); *accord Nucor*, 785 F.3d at 903. Ultimately, it is the movant's burden to demonstrate compliance with Rule 23 by a preponderance of the evidence. *See Adair*, 764 F.3d at 368; *see also Nucor*, 785 F.3d at 931 (citing *Catholic Health Care West v. US Foodserv. (In re US FoodServ. Pricing Litig.)*, 729 F.3d 108, 117 (2d Cir. 2013) and *Carrera v. Bayer Corp.*, 727 F.3d 300, 306 (3d Cir. 2013)); McLaughlin on Class Actions, § 5:25 (2008).

Once a court has certified a class, the court "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The court must also ensure that the notice, in clear and concise language, plainly explain, *inter alia*, the background of the case, the nature of the relief sought, the definition of the class certified, and the opportunity and manner for a proposed class member to opt-out of any certified class. *Id.*

II. BACKGROUND

A. Factual Background[9]

Towers, a Delaware corporation, was a publicly-traded professional services firm headquartered in Arlington, Virginia focused on helping organizations improve performance through risk management, human resources, and actuarial and investment consulting. [Doc. 49] ("Amended Complaint" or "Am. Compl.") ¶ 27. Prior to the Merger, Towers was publicly traded, and John J. Haley served as the Chairman and CEO of Towers. *Id*. ¶ 30.

Willis was a global advisory, brokering, and solutions business headquartered in London, United Kingdom. *Id*. ¶ 28. Prior to the Merger, Willis was publicly traded, and Dominic Casserley served as CEO of Willis. *Id*. ¶ 31.

ValueAct, a Delaware limited partnership headquartered in San Francisco, California, managed over $15 billion on behalf of large institutional investors. *Id*. ¶ 29. Immediately preceding the Merger, ValueAct, Willis' second largest stockholder, owned approximately 10.3 percent of Willis' outstanding shares. *Id*. Ubben was the co-founder, Chief Executive and Investment Officer of ValueAct, and a member of its Management Committee. *Id*. ¶ 32. Ubben served on Willis' Board from 2013 until the Merger closed, and then subsequently served on the WTW Board until November 17, 2017, during which time he served on the Compensation Committee of the WTW Board. *Id*.

Beginning in 2013 and continuing into 2015, Willis, motivated by pressures produced by its declining economic performance, began a review of strategic alternatives, including potential mergers. PX 4 ("Proxy") at 70. To that end, on January 26, 2015, Casserley met with Haley in

[9] This factual recitation is taken from the parties' Stipulation of Undisputed Facts [Doc. 225], submitted in compliance with the Court's Scheduling Order [Doc. 129], the Amended Complaint, the Proxy materials, and to the extent undisputed, the submissions submitted in support of and in opposition to the Motion.

London, at which time the parties discussed the possibility of a merger between Willis and Towers. Proxy at 71. At that time, the two agreed to discuss the possibility further, including with the members of their respective management teams, which ultimately led to the engagement of financial advisors by each of the respective companies. *Id*.

In May 2015, Haley convened the Towers Board to discuss the potential merger with Willis, resulting in the formation of a special committee. *Id*. After further, extensive discussions between Haley, Casserley, Ubben, and others pertaining to the Merger's structure, the Towers Board once again convened on June 20, 2015 to evaluate its financial advisors' presentation and again on June 29, 2015 to review and vote on the proposed merger transaction. *Id*. at 72-74.

Under the terms of the proposed merger, each share of Towers stock was valued at $125.13, approximately a nine percent discount to Towers' then-market trading price. Nevertheless, Towers' financial advisor concluded that the transaction was fair and the Towers Board, with Haley participating, approved the merger agreement, provided both Towers and Willis could obtain the requisite stockholder approval. Tabak Report, Ex. 4a. The final merger agreement provided that Haley would serve as the CEO of the merged entity, WTW, and Towers and Willis would each designate six directors to the twelve-member board. Proxy at 113. On June 30, 2015, the parties jointly-announced the Merger. Following the Merger's announcement, Towers stock price dropped nearly nine percent to $125.80. Am. Compl. ¶ 3; Tabak Report, Ex. 5. At that time, Plaintiff owned 17,775 Towers shares. DX 5 at 10.

On September 11, 2015, Haley met with Ubben of ValueAct, who had reached out to Haley. At that meeting, Ubben presented Haley with a three-page slide deck outlining ValueAct's performance-based compensation philosophy and illustrating a long-term equity incentive compensation package for Haley over a three-year period under three different

scenarios: (1) Haley's then-current compensation package over his last three years at Towers, worth approximately $25 million per year; (2) Haley's then-current compensation package approximately doubled (pro forma) as President and CEO at WTW based on WTW's increased market capitalization; and (3) Haley's compensation package as President and CEO of WTW under ValueAct's compensation philosophy. PX 3. Under the final scenario, Haley had the opportunity to earn more than $140 million (including upwards of $165 million) over three years provided WTW meet certain stock performance milestones under Haley's leadership.[10] *Id*. at 2. ValueAct's proposal also provided that should Haley fail to achieve the specified milestones, his stock compensation would be slightly below market and potentially below his then-current earnings as Towers' CEO. *Id*. at 3.

On October 13, 2015, Towers and Willis jointly issued the Proxy in support of the Merger. The Proxy did not disclose the fact or substance of the September 11, 2015 meeting between Haley and Ubben or ValueAct's role in the Merger's negotiations. *See generally* Proxy; [Doc. 225] ¶ 11.

Once the Merger was announced, there appeared to be strong stockholder support for the long-term strategic benefits of the transaction. However, certain Towers stockholders, including certain large hedge funds and institutional investors, expressed dissatisfaction with the relative

[10] For example, if during his tenure as WTW CEO, WTW stock achieved a 15% internal rate of return ("IRR"), Haley could earn 1.30% of the equity value of WTW; a 20% IRR, 1.40%; a 25% IRR, 1.60%; a 30% IRR, 1.70%. *See* PX 3 at 3. Based on the current record, there is no evidence that Ubben was authorized to enter into this or any other any compensation agreements with Haley prior to the Merger's consummation or that Haley and Ubben in fact reached any agreements; rather, Haley's post-Merger compensation was to be decided, and in fact was decided, by the post-Merger WTW Board, which ultimately awarded Haley a compensation package with arguably even higher up-side than what Ubben had proposed. *See In re Towers Watson & Co. S'holders Litig.*, 2019 WL 3334521, at *6 n. 26 (Del. Ch. July 25, 2019) (comparing ValueAct proposal, which offered a 300% maximum payment if Haley achieved certain shareholder milestones, with WTW's March 2016 proxy statement, which indicated a 350% maximum payout if Haley achieved certain shareholder milestones), *reversed on other grounds*, *City of Fort Meyers General Employees' Pension Fund et al. v. Haley et al*., 2020 Del. Lexis 2255 (Del. June 30, 2020).

valuations of the companies on which the stock exchange ratio for each company was based and proposed that the exchange ratio and/or the Towers Watson pre-merger special dividend be adjusted. DX 6 ("Proxy Update") at 3; *see also* PX 30 (Driehaus Capital Management, Analysis of Proposed Combination with Willis Group Holdings plc & Standalone Alternative, dated September 14, 2015). In light of this stockholder dissatisfaction, the Towers' Board became concerned that the Merger would not obtain the required approval at the special stockholders meeting scheduled for November 18, 2015. *Id*.; *see also* Am. Compl. ¶¶ 102-115, 123, 141.

In an effort to present merger terms acceptable to a majority of Towers stockholders, Haley, after discussions with members of Towers' Board, approached Casserley and James McCann, Chairman of Willis' Board, on November 10, 2015 and proposed that the parties amend the Merger terms to increase the Towers' special dividend and change the exchange ratio to effectively increase Towers stockholders' ownership of the combined company upon the Merger's consummation. Proxy Update at 3-5. Over the course of the next few days, and against the background of Towers' push to solicit a majority of votes "FOR" the Merger, Haley continued to engage Casserley and McCann in efforts to renegotiate the Merger's terms. *Id*. Eventually, after an initial reluctance by Willis' Board to accept any modified merger terms and after Towers, continuing to face shareholder dissatisfaction, postponed its vote from November 18, 2015 to November 20, 2015, Casserley, on behalf of Willis' Board, proposed on November 18, 2015 an increase in the special dividend to $9.74 per Towers share along with an increase in the expense reimbursement amount Willis would receive should Towers' stockholders fail to approve the Merger. *Id*. At that time, Casserley communicated that the Willis Board was unlikely to support any further increase in the special dividend, to which Haley responded that a dividend of at least $10.00 per share would be necessary. *Id*.

After further consultation, the Towers' Board authorized Haley to inform Willis that it would agree to changes in the reimbursement amount if Willis agreed to increase the special dividend to $10.00 per share, which Haley formally communicated to Casserley on November 18, 2015. *Id*. at 5. On the same date, Willis' Board agreed to that proposal, accepting an increase in the special dividend to $10.00 per Towers share provided Towers agree to an accompanying increase in the expense reimbursement. *Id.* On November 19, 2015, the Towers Board reviewed the final proposed amendment with input from counsel and its financial advisor, and on the same day, approved the amended terms. *Id*.; *see also* [Doc. 225] ¶ 12. The following day, Towers convened its stockholders meeting, at which time it voted to adjourn the meeting to December 11, 2015. *Id*.

Based on the final, revised terms, the merger consideration was now valued at $128.30 per Towers share, an increase of over $5.00 from the prior special dividend. Tabak Report ¶ 27. On November 20, 2015, Towers filed an amendment to the Merger plan, noting that it would be required to pay Willis $60 million in cash if, *inter alia*, Towers stockholders voted against the Merger. Proxy Update at 5; DX 17 ("Fischel Report") ¶ 47 (citing Willis Towers Watson plc, 8-K, dated March 1, 2016).

On November 27, 2015, Towers and Willis jointly filed the Proxy Update, disclosing that Towers and Willis agreed to revised Merger terms. [Doc. 225] ¶ 13. The Proxy Update contained a five-page summary outlining the additional negotiations between the companies pertaining to the amended terms. The Proxy Update, however, did not disclose the fact or substance of the September 11, 2015 meeting between Haley and Ubben[11] or ValueAct's role in

[11] There is no evidence in the current record of any further discussions between Haley and Ubben or anyone else concerning Haley's possible compensation as WTW President and CEO *after* the September 11, 2015 meeting before the merger was approved on December 11, 2015 or closed on January 4, 2016. *See* [Doc. 205] (July 29, 2020 Transcript) at 29:16-30:25.

the merger negotiations and allegedly misrepresented certain terms of the renegotiations, particularly pertaining to the exchange ratio. *See generally* Proxy Update.

On December 11, 2015, Towers convened a special stockholders meeting to vote on the Merger, at which time 62 percent of the Towers stockholders (casting 43,214,223 votes) voted "FOR" the Merger. Proxy Update at 5-6; Fischel Report ¶ 30 (citing Towers Watson & Co., 8-K, Dec. 11, 2015). Plaintiff's Towers shares were voted "AGAINST" the Merger.[12] DX 14; Fischel Report ¶ 31. On December 22, 2015, Willis filed a Form 8-K, in which it announced the composition of the post-Merger WTW Board and the officers. [Doc. 225] ¶ 15. The Merger closed on January 4, 2016, forming WTW. *Id*. On that same day, the former Towers stockholders received their $10.00 special dividend and exchanged their shares for WTW shares at the designated exchange ratio. *Id*.

On December 11, 2015, upon the Merger's approval, Tower's stock price increased 4.41%, closing at $132.96 per share. Tabak Report, Ex. 4a.; Fischel Report ¶ 33. On December 29, 2015, the last day of trading in the Towers stock before the Merger's close on January 4, 2016 and the Towers stockholders' receipt of a $10.00 special dividend, Towers stock price closed at $139.94 per share. Fischel Report, Ex. 1. That final share price for Towers stock represents $1.96 per share *above* the Towers stock price on June 29, 2015, the day immediately before the Merger was announced, and a $6.98 (or 4.98%) per share increase from December 11, 2015, the date Towers stockholders approved the Merger. *Id.*

Against that background, Plaintiff alleges that the Proxy, jointly-issued by Towers and Willis on October 13, 2015, and the Proxy Update, jointly-issued by Towers and Willis on

[12] Plaintiff's Towers shares were voted "AGAINST" the Merger by Plaintiff's proxy advisory firm ISS, who had been delegated all voting decisions, although Plaintiff's financial advisor had endorsed the Merger. *See* DX 14; Fischel Report ¶ 31.

November 27, 2015 after the Merger's terms were renegotiated, omitted certain material information, including, *inter alia*, Haley's potential compensation incentives as a result of the September 11 meeting with Ubben and that, by implication, Haley had not attempted to obtain the largest increase in the dividend to Towers shareholders but only what he considered to be the minimum additional consideration necessary to secure approval of the Merger by Towers stockholders. Plaintiff also alleges that the Proxy Update falsely described the parties' renegotiations as an arm's length negotiations between Haley and Casserley, omitting ValueAct's role. Am. Compl. ¶¶ 18, 68, 123-26, 149, 195-98. As for damages, Plaintiff alleges that due to these materially untrue statements and omissions, Towers stockholders received less than the true, fair value from the Merger for their shares. Am. Compl. ¶¶ 21, 123 & at 75; Tabak Report ¶ 3.

III. ANALYSIS

In its Motion, Plaintiff requests certification of the following class (the "Class"):

> All persons and entities that were Towers Watson & Co. ("Towers") shareholders of record as of October 1, 2015, the record date for Towers shareholders to be eligible to vote on the merger of Towers and Willis Group Holdings plc ("Willis"), and who were damaged thereby. Excluded from the Class are Defendants Willis Towers Watson plc, Willis, Towers, John Haley, Dominic Casserley, ValueAct Capital Management, L.P. ("ValueAct"), and Jeffrey Ubben; members of the immediate family of any Defendant who is an individual; any person who was an officer or director of Willis Towers Watson, Willis, Towers, or ValueAct as of October 1, 2015; any firm, trust, corporation, or other entity in which any Defendant has or had a controlling interest; any employee retirement and benefit plans of Willis Towers Watson, Willis, Towers, or ValueAct; Defendants' directors' and officers' liability insurance carriers and any affiliates or subsidiaries of those carriers; any Towers shareholders that completed the exercise of their right to appraisal of their shares under Delaware law; and the legal representatives, agents, affiliates, heirs, successors-in-interest, or assigns of any of the foregoing excluded parties.

[Doc. 147] at 2-3. Because the central (but not only) issue with respect to class certification is whether Plaintiff's claim under § 14(a) and its damages model, in particular, satisfies Rule 23(b)(3)'s predominance requirement, the Court will first consider whether the Plaintiff has satisfied Rule 23(b)(3).

A. Rule 23(b)(3)

Under Rule 23(b)(3), a movant must establish: (1) predominance—"that the questions of law or fact common to class members predominate over any questions affecting only individual members;" and (2) superiority—"that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

i. Predominance

Under Rule 23(b)(3), "the questions of law or fact common to class members" must "predominate over any questions affecting only individual members." This "predominance requirement is similar to but 'more stringent' than the commonality requirement of Rule 23(a)." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006).

Determining whether "questions of law or fact common to class members predominate" begins with the elements of the underlying cause of action. To summarize, § 14(a) prohibits the solicitation of proxies "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78n(a).[13] Rule 14a-9(a) prohibits solicitations "containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with

[13] To prevail under § 20(a) of the Exchange Act, Plaintiff's companion claim, Plaintiff "must allege (a) a primary violation by the controlled person, and (b) control by the defendant of the primary violator . . . ." and also culpable participation in the fraud in some meaningful sense by the controlling person. *See In re Global Crossing, Ltd. Sec. Litig*., 2005 U.S. Dist. LEXIS 26942, 2005 WL 2990646, at *7 (S.D.N.Y. Nov. 7, 2005) (internal quotation marks and citations omitted). Because liability under § 20(a) depends on whether Plaintiff can prove its § 14(a) claim, the Court does not separately discuss class certification as to Plaintiff's § 20(a) claim.

respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein non false or misleading." 17 C.F.R. § 240.14a-9(a). Thus, to prevail under § 14(a), a plaintiff must prove that (1) a proxy statement contained a material misrepresentation or omission, which (2) caused plaintiff's injury, and (3) that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction. *In re Willis Towers Watson Plc Proxy Litig.*, 439 F. Supp. 3d 704, 712 (E.D. Va. 2020) (quoting *Hayes v. Crown Centr. Petrol. Corp.*, 78 F. App'x 857, 861 (4th Cir. 2003) (per curiam)).

At issue here is whether Plaintiff's damages model satisfies the predominance requirement with respect to the element of economic loss. Plaintiff contends that its damages model satisfies that predominance requirement because it measures a *common* question of damages (*i.e.*, qualifying Towers stockholders' out-of-pocket loss measured by the difference between the Merger consideration and the true value of Towers stock on the Merger close date) through *common* evidence using a *common* measure of damages acceptable under § 14(a). *See Goldkrantz v. Griffin*, 1999 U.S. Dist. LEXIS 4445, at *20 (S.D.N.Y. Apr. 5, 1999) ("The normal measure of recovery is damages, defined as the difference between the price paid for the security and its true value absent the fraud on the date of the transaction") (citations omitted).[14]

Defendants, in opposition, argue that Plaintiff has failed to satisfy that predominance requirement because Plaintiff's damages theory rests on two problematic assumptions: first, that the disclosure of the information omitted would have resulted in Towers stockholders rejecting the Merger; and second, that any rejection of the Merger would have "reversed" or "reverted" the statistically-significant price movements that followed the Merger's announcement. [Doc. 169]

[14] Plaintiff also contends, without any apparent challenge from the Defendants, that the elements of materiality and falsity "all present paradigmatic common questions" and thus predominate in this action. *See* [Doc. 147] at 10.

at 18-19; *cf.* Tabak Report ¶¶ 9, 19, 23-25. Defendants add that neither Dr. Tabak nor Plaintiff has offered any evidence, other than the non-disclosures themselves, from which to infer that had the material misrepresentations and omissions been disclosed, the Merger would not have been approved on December 11, 2015. [Doc. 169] at 19; *cf.* Tabak Report ¶¶ 16, 24 ("Only approximately 62% of Towers stockholders voted for the merger even without knowledge of the 'undisclosed conflict' discussed by the Fourth Circuit. *Given the materiality of the relevant undisclosed information, there is a reasonable likelihood that the merger would not have been approved by Towers stockholders had proper disclosures been made*.") (emphasis added); *but see In re GTx, Inc. S'holders Litig.*, 2020 U.S. Dist. LEXIS 109680, at *12, 2020 WL 3439356 (S.D.N.Y. June 23, 2020) ("The existence of a material misstatement or omission cannot by itself establish loss causation."). Defendants also dispute whether the same "out-of-pocket" measure of damages is common to all class members in light of the facts that some Towers stockholders also owned Willis stock during the proposed class period and that some Towers stockholders purchased additional Towers stock during the class period at various prices.[15] Defendants also contend, with respect to Dr. Tabak's renegotiation scenario, that such a damages theory presents an overly-speculative and thus implausible "lost opportunity" measure of damages—a theory of damages not recognized to date by the Fourth Circuit. *See* [Doc. 169] at 16-19.[16]

[15] For example, Plaintiff investment managers purchased on behalf of Plaintiff more than 310,000 shares of Towers stock (approximately 95% of its Towers stock holdings) *after* June 30, 2015 based on the assessment that the proposed Merger made "a lot of strategic sense," DX 8, the Towers' stock had been overvalued before the Merger's announcement, *id.*, and that Haley had a positive track record as an executive, DX 5 at 10-11.

[16] Defendants contend that Dr. Tabak's uses a "lost opportunity" measure of damages in connection with "[the] hypothetical renegotiation of the terms of the merger agreement . . . [,]" under which he calculates the expected value "that Towers shareholders could have bargained for in such a negotiation." It appears, however, that the amount of damages claimed under this approach is equivalent to the amount of damages Towers' shareholders suffered based on the "price reversion" theory, *i.e.*, an additional $6.57 per Towers share above its share price on December 11, 2015. Tabak Report ¶ 31. Under this approach, Dr. Tabak does not actually calculate damages; rather, he submits that, given full market information, the "Towers shareholders would not have been expected to

In *Comcast*, the Supreme Court addressed a plaintiff's burden under Rule 23(b)(3)'s predominance requirement with respect to the economic loss element of a claim—in *Comcast*, an antitrust claim. There, the plaintiffs advanced four theories of antitrust liability and injury, only one of which the trial court accepted as capable of class-wide proof. The Supreme Court held, however, that plaintiff's damages model, though capable of measuring class-wide damages, did not sufficiently isolate damages attributable to that one accepted theory of injury. And because the plaintiff had the obligation at the class certification stage to proffer a viable damages model that "measure[s] only those damages attributable" to its asserted theory of injury, *Comcast*, 569 U.S. at 35, the lower courts had erred when both failed to consider whether the damages model was "consistent" with the sole remaining liability theory accepted by the trial court, *id*. at 35 ("any model supporting a plaintiff's damages case *must be consistent* with its liability case") (internal quotations omitted) (emphasis added). Thus, after *Comcast*, trial courts reviewing a motion for class certification are obliged to "take a 'close look'" at the connection between a plaintiff's theory of damages and theory of liability and, in that respect, must ask "whether common questions [will] predominate over individual ones." *Id*. at 34 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997)); *Foodserv*, 729 F.3d at 123 n.8 ("courts should examine the proposed damages methodology at the certification stage to ensure that it is consistent with the classwide theory of liability and capable of measurement on a classwide basis.") (citing *Comcast*, 569 U.S. at 38). That "close look" will, in turn, necessarily involve, to some extent, a substantive consideration of the damages model, but one without any adjudication of the model's merits. *See Comcast*, 569 U.S. at 46 (Ginsburg and Breyer, JJ., dissenting). This

support any deal that would have given them less than what they would have received in the absence of a merger." *Id*. ¶ 32 (emphasis added). In other words, $6.57 per share represents the *minimum* additional consideration Towers shareholders would have agreed to accept, in a hypothetical full-disclosure world, to consummate the Merger. *Id*.

limited inquiry is further reflected in the Supreme Court's holdings in *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 807 (2011) (*Halliburton I*); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 475 (2013); and *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) (*Halliburton II*).

In *Halliburton I*, the Supreme Court held that under Rule 23(b)(3) evidence of loss causation at the class-certification stage is not necessary. 563 U.S. 804, 807. In *Halliburton II*, the Supreme Court allowed for a merits analysis but only to rebut the presumption of reliance under the fraud-on-the-market theory, *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), a presumption not applicable to § 14(a) claims. 573 U.S. at 280. And in *Amgen*, the Supreme Court held that under Rule 23(b)(3) proof of materiality is not necessary to ensure that the questions of law or fact common to the class will predominate over any questions affecting only individual members as the litigation progresses. 568 U.S. at 467 (internal quotations omitted). In reaching that conclusion, the Supreme Court emphasized that the question of materiality is an objective one—asking what the significance of an omitted or misrepresented fact is—and, as a result, can be proven through evidence common to the entire class. *Id*. at 467-68.

Dr. Tabak's model purports to measure the loss in value *all* Towers stockholders experienced as a result of the Merger's announcement and approval as compared to what Towers stockholders would have retained (or obtained) had the Merger not been approved. It is based on common class-wide assumptions and purports to measure class-wide damages with reference to common statistically-significant events "that may be relevant to the calculation of damages" following the Merger's announcement. Tabak Report ¶ 3.[17] As in *Haliburton I* (with respect to

[17] These events include the following:

(1) June 30, 2015: Towers and Willis announce the proposed merger.

(2) July 28, 2015 (after-market hours): Willis reports 2Q15 earnings.

loss causation) and *Amgen* (with respect to materiality), the element of economic loss in this case, based on Plaintiff's damages model, pertains to an objective question common to the class and resolvable by common evidence. Therefore, "there is no risk whatsoever that a failure of proof on the common questions of [economic loss] will result in individual questions predominating." *Amgen*, 568 U.S. at 467-68.

Defendants' challenge to Plaintiff's damages model is based on what they claim are speculative assumptions, a flawed events-study methodology, and the particular stock holdings of certain class members, all of which is anchored in Plaintiff's ability to prove loss causation and the amount of damages. But those issues are not to be decided for the purposes of determining class certification. *See Halliburton I*, 563 U.S. at 807 (loss causation not to be adjudicated in connection with class certification); *Amgen*, 568 U.S. at 475 ("Yet this Court has held that loss causation and the falsity or misleading nature of the defendant's alleged statements or omissions are common questions that need not be adjudicated before a class is certified."); *cf. Carpenters Pension Trust Fund for N. Cal. v. Allstate Corp. (In re Allstate Corp. Secs. Litig.)*, 2020 U.S. App. LEXIS 22121, at *25, 966 F.3d 595 (7th Cir. July 16, 2020) ("The crucial challenge for the district court is to decide only the issues the Supreme Court has said should be

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(3) August 11, 2015: Towers reports 4Q15 earnings.
(4) October 27, 2015 (after-market hours): Willis reports 3Q15 earnings.
(5) November 2, 2015: Towers reports 1Q16 earnings.
(6) November 5, 2015 (after-market hours): Glass Lewis and Institutional Shareholder Services ("ISS") issue reports advising that Towers shareholders should vote against the merger and that Willis shareholders should vote in favor of the merger.
(7) November 18, 2015: News reports state that Towers and Willis were adjourning their shareholder meetings and that Willis was considering increasing the special dividend to Towers shareholders.
(8) November 19, 2015: Towers announces revised terms of the merger.
(9) December 9, 2015: ISS issues a report on the revised merger terms.
(10) December 11, 2015: Towers shareholders vote on the merger.

Tabak Report ¶¶ 10-11 ("Of the ten events, eight (all but August 11 and November 2, both shown in *italics*) represent effects of the merger that would be reversed if the merger had not been completed."); *see also id.*, Ex. 4c.

decided for class certification while resisting the temptation to draw what may be obvious inferences for the closely related issues that must be left for the merits, including materiality and loss causation, as required by *Halliburton I* and *Amgen*.").[18] Likewise, whether Plaintiff needs to establish any of the assumptions upon which Dr. Tabak's damages model is based is a merits question; and whether Plaintiff can adequately establish those assumptions, should proof be necessary, will be determined by the same evidence (or lack of evidence) applicable to all Towers stockholders. Neither issue is affected by questions of fact or law particular to any individual stockholder; and whatever the merits of Plaintiff's damages model, its merits will be determined by evidence shared across all relevant Towers stockholders. To engage in any substantive evaluation of these issues at this time, as Defendants urge, would send this Court on a potentially wide-ranging merits inquiry, beyond that sanctioned under *Comcast.* At this point, the Court need only determine whether Plaintiff's damages model sufficiently purports to measure damages on a class-wide basis in a manner "consistent" with its theory of liability such

[18] Defendants cite a number of cases in support of its position, none of which the Court finds apposite or persuasive. The cited § 10(b) cases that rejected a damages models under *Comcast*, *see* [Doc. 169] at n.5, involved much less defined damages. *Cf. In re BP P.L.C. Secs. Litig.*, 2013 U.S. Dist. LEXIS 173303, at *75, 2013 WL 6388408, at *17 (S.D. Tex. Dec. 6, 2018) ("Plaintiffs cannot avoid this hard look by refusing to provide the specifics of their proposed methodology."); *Fort Worth Employees' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 141 (S.D.N.Y. 2010) (proposed class-wide damages rejected because the expert mentioned three methods, unsupported by evidence, and conclusorily stated that "it is his opinion 'that class-wide damages can be calculated in a formulaic manner'"); *Sicav v. Jun Wang*, 2015 U.S. Dist. LEXIS 6815, at *15, 2015 WL 268855, at *6 (S.D.N.Y. Jan. 21, 2015) (possible long-term price impact, measurable across the lengthy class period, could not be supported with "common proof" applicable to all securities purchasers). Other cases cited by Defendants for the proposition that speculative damages theories are unacceptable, *see* [Doc. 169] at 15-18, were decided based on the adequacy of the complaint's allegations or at summary judgement, not on motions for class certification. *Cf. Mack v. Resolute Energy Corp.*, 2020 U.S. Dist. LEXIS 46776, 2020 WL 1286175 (D. Del. Mar. 18, 2020) (granting motion to dismiss with leave to amend); *In re GTx, Inc. S'holders Litig.*, 2020 U.S. Dist. LEXIS 109680, at *15 (granting motion to dismiss); *In re DaimlerChrysler AG Sec. Litig.*, 294 F. Supp. 2d 616, 627-28 (D. Del. 2003) (denying summary judgment); *Tse v. Ventana Medical Systems, Inc.*, 297 F.3d 210 (3d Cir. 2002) (affirming grant of summary judgment).

that common questions of damages will predominate over any individual issues. The Court concludes that it does.

ii. Superiority

In addition to common questions of law and fact, Rule 23(b)(3) requires the class action to be superior to other available methods for litigating the claims. In making this assessment, the Court should consider:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3).

Based on these factors, the Court finds that proceeding as a class action in this action, as in public traded securities claims generally, is the superior mechanism to adjudicate the Class's claims. *See In re BearingPoint, Inc. Sec. Litig.*, 232 F.R.D. 534, 542 (E.D. Va. 2006) (Ellis, J.) ("Securities fraud cases are particularly appropriate candidates for [certification] treatment under Rule 23(b)(3) . . . .") (citing *Amchem*, 521 U.S. at 625); *see also Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 187 (S.D.N.Y. 2008) ("In general, securities suits . . . easily satisfy the superiority requirement of Rule 23.").

B. Rule 23(a)

i. Readily Ascertainable

Although not expressly included in Rule 23, "Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'" *EQT*, 764 F.3d at 357 (citing *Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972)); *see also In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir. 1989) ("Though not specified in [Rule 23],

establishment of a class action implicitly requires . . . that there be an identifiable class . . . ."), *abrogated on other grounds*, *Amchem*, 521 U.S. 591. To satisfy this standard, a plaintiff does not need to identify every class member at the time of certification. However, "[i]f class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012); *see also* 7A Charles Alan Wright et al., Federal Practice & Procedure § 1760 (3d ed. 2005) ("[T]he requirement that there be a class will not be deemed satisfied unless . . . it is administratively feasible for the court to determine whether a particular individual is a member.").

The record date for voting on the Merger was October 1, 2015 (the "Record Date"); and Plaintiff proposes that the class consist of all Towers shareholder "eligible to vote on the merger . . . [and] who were damaged thereby." [Doc. 147] at 2-3. Defendants do not contend that the membership of the proposed class is not readily identifiable. Rather, they contend that the proposed Class is "overly broad" and request that the Class definition *exclude* any Towers stockholders on the Record Date who (1) sold their shares prior to the Merger's close on January 4, 2016; (2) were also Willis stockholders (since any alleged gains received by Willis were offset by alleged losses suffered by Towers); or (3) may recover in connection with the pending Delaware state court action. [Doc. 169] at 23.

"It is generally accepted that only stockholders who were entitled to vote on a transaction have standing under § 14(a) to challenge the proxy materials issued by a corporation regarding that transaction." *DCML LLC v. Danka Bus. Sys. PLC*, 2008 U.S. Dist. LEXIS 97210, 2008 WL 5069528, at *2 (S.D.N.Y. Nov. 26, 2008); *see also United Paperworkers Int'l Union v. Int'l Paper Co.*, 985 F.2d 1190, 1197-98 (2d Cir. 1993) (Section 14(a) was passed "with the goal

of preserving for all stockholders who are entitled to vote . . . the right to make decisions based on information that is not false or misleading.") But to properly raise any claim, a party must also have standing under Article III and to meet this requirement, that party must allege a personal injury. *See Allen v. Wright*, 468 U.S. 737, 751 (1984). In *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342 (2005), the Supreme Court recognized, in the context of a Rule 10b-5 claim, that "if . . . the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss" and under such circumstances, a plaintiff cannot plead injury.

As in *Dura* with respect to the sale of securities before "the relevant truth" was known, any proposed Class member who sold the entirety of their Towers stock before the closing of the Merger, the relevant transaction, did not suffer any cognizable loss as a result of the Merger allegedly obtained through the Proxy's misrepresentations or omissions. The Proxy solicitations, the essential link in the Merger's approval, would not have caused them some economic loss because they did not own shares as of the Merger's consummation. These stockholders cannot therefore state an injury-in-fact.[19] Significant in this regard is that Plaintiff's damages, as calculated through Dr. Tabak's damages model, are based on the additional value a Towers stockholder should have retained (or obtained) had the Merger been disapproved, *i.e.*, the additional $6.57 Towers stockholders should have received in addition to the $5.62 stock price increase experienced on December 11, 2015. In other words, the class for whom damages have

[19] *See Bricklayers & Masons Local Union No. 5 Ohio Pension Fund v. Transocean Ltd.*, 866 F. Supp. 2d 223, 237 (S.D.N.Y. 2012) (finding that because "Bricklayers has failed to proffer any facts showing that it was eligible to vote or that it retained its Transocean shares after the corrective disclosures began," it could not satisfy the Exchange Act's statutory requirement that they suffered a personal injury); *see also Hurtado v. Gramercy Prop. Tr.*, 425 F. Supp. 3d 496, 515 (D. Md. 2019) (Section 14(a) claim requires proving that "the proxy solicitation . . . was an essential link in the *accomplishment of the transaction* that resulted in the economic loss") (internal quotation and citation omitted) (emphasis added).

been calculated are those who retained their share of Towers stock through the Merger's close and therefore received for their Towers stock less than they should have as a result of the materially deficient proxy solicitations. For these reasons, the class will exclude any stockholder who sold all its shares before January 4, 2016.

The Court will not exclude, however, those stockholders who also owned Willis shares during the class period or who may recover in the pending Delaware state court action. Neither the dual ownership of Towers and Willis stock nor participation in the pending Delaware action excludes the common class wide questions of fact or law pertaining to liability; and whether certain class members' damages should be offset by its Willis holdings or recoveries elsewhere can, if necessary, be adequately addressed within the context of a certified class. *See In re Visa Check/Mastermoney Antitrust Litig. v. Visa, United States*, 280 F.3d 124, 141 (2d Cir. 2001) (identifying tools to address specific damages issues); *see also In re Bank of Am. Corp. Secs*, 281 F.R.D. 134, 144 (S.D.N.Y. 2012) ("the possibility that certain proposed class members may have held [the acquired company's] shares and therefore benefited from [the other company's] acquisition of [the acquired company] does not require a narrowing of the proposed Section 14(a) class definition.").

ii. Numerosity

Under Rule 23, a class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). That said, "[n]o specified number is needed to maintain a class action." *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984). Instead, "the determination rests on the court's practical judgment in light of the particular facts of the case." *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 550 (D.S.C. 2000); *accord Gen. Tel. Co. of the Nw. v. Equal Emp't Opportunity Comm'n*, 446 U.S. 318, 330 (1980)

("The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations.").

Here, it is uncontested that the proposed Class has satisfied the numerosity requirement.

iii. Commonality

To maintain a class action, there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). In a class action brought under Rule 23(b)(3), as here, "the 'commonality' requirement of Rule 23(a)(2) is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class predominate over other questions." *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 n.4 (4th Cir. 2001) (internal quotes omitted). Because the Court has determined that Plaintiff has satisfied Rule 23(b)(3)'s predominance requirement, discussed *supra*, Plaintiff has also satisfied the commonality requirement.

iv. Typicality

Typicality requires that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Lienhart*, 255 F.3d at 146 (4th Cir. 2001) (quoting *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982)); *see also* Fed. R. Civ. P. 23(a)(3). "The typicality requirement is met if a plaintiff's claim arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory." *Parker v. Asbestos Processing, LLC*, 2015 U.S. Dist. LEXIS 1765, 2015 WL 127930, at *7 (D.S.C. Jan. 8, 2015). It is not necessary to show that the movant be identically situated to other Class members to meet the typicality standard. *See In re Mills Corp.*, 257 F.R.D. at 105; *see also Broussard*, 155 F.3d at 344 (typicality requirements do not "require that members of the class have identical factual and legal claims in all respects"). Rather, the

movant need only show that the disputed issues in this litigation are as central to its claims as to those of the other proposed Class members. *See In re BearingPoint, Inc. Sec. Litig.*, 232 F.R.D. at 538 (citing *Broussard*, 155 F.3d at 338).

Here, there is little doubt that Plaintiff's claim arises from the same events and course of conduct as the other Class members and that the theory of liability is the same. *See BearingPoint*, 232 F.R.D. at 538. Nevertheless, Defendants oppose class certification on the grounds that Plaintiff is not an appropriate class representative for three reasons: (1) its claim is subject to a statute of limitations defense unique to it and therefore its claims are not "typical" of the class;[20] (2) Plaintiff purchased shares of Towers stock *after* the initial June 30, 2015 drop in Towers' stock price, ultimately profiting on its investment; and (3) Plaintiff's own investment advisors supported the Merger.

Defendant's statute of limitations defense against Plaintiff's claim is based on imputing to Plaintiff and thus the Class the knowledge of its lawyers who previously worked on the Delaware appraisal action. The Fourth Circuit has observed in this case that counsel's knowledge in class actions is not generally attributed to class members.[21] *See In re Willis Towers Watson*, 937 F.3d 297, 309 (4th Cir. 2019) ("district courts have generally declined to impute knowledge from class counsel to class members unless that counsel had previously

[20] *See, e.g., Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990) (A defense that is unique to the class representative and has the potential to become "the focus of the litigation" may destroy typicality); *see also* 5 Moore's Federal Practice § 23.24[5] ("Typicality will not be present if the class representative's claim is subject to one or more unique defenses that likely will be central to the litigation.").

[21] By Order dated July 11, 2018 [Doc. 65], this Court dismissed this action based on the running of the statute of limitations. On August 30, 2020, the Fourth Circuit reversed that ruling, finding that it was error to dismiss the action on an "inquiry notice" standard (as opposed to "discovery notice") and that, in any event, the defense was not established as a matter of law based on the allegations of the Complaint since "[t]here is no allegation in the amended class action complaint that class counsel knew the material facts more than a year before November 2017." *In re Willis Towers Watson*, 937 F.3d at 302-03, 308-09.

represented those class members in related individual suits."); *id*. ("even if we adopted the defendants' view of the facts, it's not clear that the right course would be imputing that knowledge to the plaintiff class."). Moreover "courts have held that a statute of limitations defense as to the named plaintiff will not ordinarily defeat typicality because the issue of whether or not a statute of limitations applies is a merits determination that cannot be assessed at the class certification stage." *Morris v. Wachovia Sec., Inc.*, 223 F.R.D. 284, 296 (E.D. Va. 2004) (citing Alba Conte & Herbert Newberg, Newberg on Class Actions § 22:28 (4th ed. 2002)). At this stage, based on the current record, the Court cannot conclude based on the prospects of a statute of limitations defense that this issue will become (distractingly) the "focus of this litigation" and make Plaintiff's designation as Class Representative is inappropriate.

Similarly, neither Plaintiff's stock purchases nor the views of its investment advisors sufficiently undercut the "typicality" of Plaintiff's claim to disqualify Plaintiff from acting as a class representative. When and on what advice Plaintiff purchased Towers shares after the initial Merger announcement, or the views of its investment advisors concerning the Merger, bears little on the materiality of the alleged misrepresentations or omissions, loss causation, or how to measure damages—the common class-wide issues.

v. <u>Adequacy</u>

Finally, under Rule 23(a), the movant must be able to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is "a two-pronged inquiry, requiring evaluation of: (1) whether class counsel is qualified, experienced, and generally able to conduct the proposed litigation; and (2) whether Plaintiff's claims are sufficiently interrelated with and not antagonistic to the class claims as to ensure fair and adequate representation." *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 561 (D.S.C. 2000); *see also Falcon*, 457

U.S. at 158 (Rule 23(a)(4) requirement "raises concerns about the competency of class counsel and conflicts of interest."). In other words, Plaintiff must be willing and able "to take an active role in and control the litigation and to protect the interests of absentees." *Berger*, 257 F.3d at 479 (internal quotation marks omitted). And Plaintiff's counsel should likewise be zealous and competent. *Id*. (citing *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982)). To this end, courts should endeavor to uncover conflicts of interest between named plaintiffs and proposed class members, *Feder*, 429 F.3d at 130, while also keeping in mind that any such differences exist "only where those differences create [actual] conflicts between the named plaintiffs' and the class members' interests." *Berger*, 257 F.3d at 480 (emphasis added); *see also Ward v. Dixie Nat. Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) ("[A] conflict will not defeat the adequacy requirement if it is 'merely speculative or hypothetical[.]'") (quoting *Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417, 430 (4th Cir. 2003)).

With respect to the first prong, the Court has no doubt that Plaintiff's counsel will ably and vigorously prosecute this action on behalf of the Class. With respect to the second prong, Plaintiff contends that, in the course of this litigation, it (i) undertook a thorough investigation to evaluate the case before filing, (ii) has reviewed and approved all significant pleadings, filings, and documents in this matter, including the Amended Complaint, (iii) has thoroughly and exhaustively fulfilled its discovery obligations, including searching for and producing documents, responding to numerous interrogatories, and preparing for and giving deposition testimony through three separate knowledgeable witnesses, and (iv) continues to closely and actively oversee the litigation, including attending and participating in meetings and proceedings with its counsel. [Doc. 178] at 8 (citing PX 37 at 56:14-57:22; 85:9-12, 17-20). In this regard, Plaintiff "reviewed periodic updates and other correspondence from Lead Counsel regarding this

case, reviewed the [Amended] Complaint and associated motions filed in this case, and participated in periodic meetings and discussions with Lead Counsel regarding the progress and status of the case, including litigation strategy and significant developments in the litigation." *Id.* (citing PX 16 ¶ 6); *see also* PX 37 at 129:21-25.

Opposing Plaintiff's adequacy as a class representative, the ValueAct Defendants, contend, based on the testimony of Plaintiff's corporate designee, Norman Hamill, that Plaintiff has failed to show, as they must, "knowledge and control" over this litigation since the decision to bring this litigation rested squarely with Plaintiff's counsel, Bernstein, Litowitz, Berger & Grossman LLP ("Bernstein"), and that Plaintiff had not considered bringing claims against the Defendants until Bernstein suggested pursuing the litigation pursuant to a portfolio monitoring agreement. [Doc. 163] at 3. But, as Plaintiff points out, the monitoring agreement specifically provides that Plaintiff was not obligated to retain Bernstein if it pursues litigation. *See* [Doc. 178] at 6; *see also* PX 37 at 118:13-17; PX 40 at 36 (No. 15) (describing terms of monitoring agreement). And "[c]ourts have routinely rejected attacks on the propriety of portfolio monitoring agreements" in such circumstances. *Plumbers & Pipefitters Nat. Pension Fund v. Burns*, 292 F.R.D. 515, 523 (N.D. Ohio 2013) (collecting cases). Moreover, as reflected in Hamill's deposition, Plaintiff, prior to moving for lead counsel designation, reviewed the documents and held discussions in evaluating the "sufficiency of [Plaintiff's] claims," issuing a recommendation in favor of pursuing this litigation. *See* PX 37 at 56:14-57:22; 85:9-12, 17-20. Overall, the current record sufficiently reflects Plaintiff's involvement in this litigation, including remaining well-informed of the developing facts, the types of proxy solicitations at issue, and Plaintiff's theory of damages. *See* PX 16 ¶¶ 6-8; PX 37 at 129:21-25, 144:21-156:6, 161:9-14, 180:18-181:6, 204:15-25.

Second, the ValueAct Defendants contend that Plaintiff is inadequate because it could have commenced (but did not) an appraisal action in Delaware shortly after the Merger announcement, suggesting that Plaintiff was not interested in this litigation until Bernstein approached them. [Doc. 163] at 4. But the Plaintiff's failure to bring an appraisal action is not a basis for disqualification as a class representative with respect to the § 14(a) claims at issue here. Indeed, it appears that at time the prior appraisal action was filed, the alleged misstatements and omissions giving rise to Plaintiff's § 14(a) claim were not publicly known. *See* Am. Compl. ¶ 215; *see also* 8 Del. Corp. Code § 262(d), (e) (requiring appraisal demand to be filed before the merger vote).

Third, the ValueAct Defendants argue that Plaintiff demonstrated "indifference" and "had no knowledge" that Blair Nicholas, a former Bernstein partner, was involved in the prior appraisal action. [Doc. 163] at 4. But the record, as it currently stands, contains representations as well as a sworn declaration from Plaintiff's counsel that Plaintiff was informed at the very outset of this case about the appraisal action, the ethical wall erected between the appraisal action and this litigation, and that no Bernstein lawyer had access to or has reviewed appraisal action materials. *See* DX 36 at 2 (letter dated June 30, 2020 from counsel for Plaintiff to counsel for Defendants); [Doc. 57-1] ¶ 2 (declaration from Bernstein partner Salvatore Graziano).

Fourth, the ValueAct Defendants argue that Plaintiff "demonstrated a lack of inquiry with respect to the underlying facts," thus defeating adequacy. In support, they argue that Mr. Hamill testified that he had not reviewed the Defendants' underlying documents quoted in the Amended Complaint or cited in Lead Plaintiff's interrogatory responses. [Doc. 163] at 5. But Mr. Hamill's testimony reflects a satisfactory level of knowledge regarding this matter and a permissible level of reliance on counsel. *See In re Mills*, 257 F.R.D. at 109 ("A class

representative is allowed to rely on counsel to keep him abreast of developments and make strategic decisions in a class action lawsuit.").

And *fifth*, the ValueAct Defendants contend that Plaintiff lacks "knowledge and control" over his litigation because Plaintiff's damages claim is based on the same stock price movements that caused it to purchase *more* TW shares. [Doc. 163] at 5. In substance, the ValueAct Defendants contend that the decisions of its portfolio manager to purchase additional shares disqualifies Plaintiff from serving as a class representative. The ValueAct Defendants have not cited any statutory or other legal support for this position, which, in any event, does not appear to have any relationship to the relevant common questions of fact and law pertaining to the class for which the Plaintiff would serve as class representative.

For the above reasons, the Court finds that Plaintiff is an adequate class representative.

IV. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Plaintiff Regents of the University of California's Motion for Class Certification and Appointment of Class Representative and Class Counsel [Doc. 146] be, and the same hereby is, **GRANTED** and, pursuant to Fed. R. Civ. P. 23(a) and (b)(3), a class is hereby certified as follows (with modifications from Plaintiff's proposed class underlined) (the "Certified Class"):

> All persons and entities that were Towers Watson & Co. ("Towers") shareholders of record as of both October 1, 2015, the record date for Towers shareholders to be eligible to vote on the merger of Towers and Willis Group Holdings plc ("Willis"), and January 4, 2016, the date the merger transaction between Towers and Willis closed, and who were damaged thereby. Excluded from the Class are Defendants Willis Towers Watson plc, Willis, Towers, John Haley, Dominic Casserley, ValueAct Capital Management, L.P. ("ValueAct"), and Jeffrey Ubben; members of the immediate family of any Defendant who is an individual; any person who was an officer or director of Willis Towers Watson, Willis, Towers, or ValueAct as

> of October 1, 2015; any firm, trust, corporation, or other entity in which any Defendant has or had a controlling interest; any employee retirement and benefit plans of Willis Towers Watson, Willis, Towers, or ValueAct; Defendants' directors' and officers' liability insurance carriers and any affiliates or subsidiaries of those carriers; any Towers shareholders that completed the exercise of their right to appraisal of their shares under Delaware law; and the legal representatives, agents, affiliates, heirs, successors-in-interest, or assigns of any of the foregoing excluded parties.

And it is further

ORDERED that Plaintiff the Regents of the University of California, be, and the same hereby is, **APPOINTED** as Class Representative for the Certified Class; that, pursuant to Fed. R. Civ. P. 23(g), Bernstein, Litowitz, Berger & Grossman LLP be, and the same hereby is, **APPOINTED** as Class Counsel; and that the Law Offices of Susan R. Podolsky be, and the same hereby is, **APPOINTED** as liaison counsel for the Certified Class; and it is further

ORDERED that the best notice that is practicable under the circumstances be directed to the members of the Certified Class, including individual notice to all members who can be identified through reasonable effort; and it is further

ORDERED that, within twenty (20) days of the date of this Order, Plaintiff, after consultation with Defendants, submit with Defendants' consent a proposed notice to the Certified Class for the Court's approval, which in compliance with Fed. R. Civ. P. 23(c)(2)(B) clearly and concisely states in plain, easily understood language: (1) the nature of this action; (2) the definition of the class certified; (3) the class claims, issues or defenses; (4) that a class member may enter an appearance though an attorney if the member so desires; (5) that the court will exclude from the class any member that so requests and the time and manner for requesting such exclusion from the class; and (6) the binding effect of a class judgment on members under Fed. R. Civ. P. 23(c)(3). Any issues pertaining to the notice to be provided to the Certified Class

that the parties cannot resolve after exhausting good faith efforts to do so should be expeditiously submitted to the Court with appropriate briefing;[22] and it is further

ORDERED that the TW/Willis Defendants' Motion to Strike In Opposition to Lead Plaintiff's Supplemental Submission in Support of Class Certification [Doc. 211] be, and the same hereby is, **GRANTED** in part and [Docs. 206, 206-1 206-2, 206-3, 211, 212, 216, and 217] be, and the same hereby are, included in the record.

The Clerk is directed to forward copies of this Order to all counsel of record.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
September 4, 2020

[22] Once the Court approves the proposed notice, the Court will issue a briefing schedule and schedule a hearing date with respect to the parties' motion(s) for summary judgment.