

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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DENIS FAZIOLI, On Behalf of Himself and All :

Others Similarly Situated, :

:

Plaintiff, : CLASS ACTION COMPLAINT

-against- :

: JURY TRIAL DEMANDED

MARKETWATCH. COM, INC., LARRY S. :

KRAMER, JAMES A. DePALMA, ALAN J. :

HIRSCHFIELD, ALLAN R. TESSLER, :

MARK F. IMPERIALE, ANDREW HEYWARD, :

MICHAEL H. JORDAN, SALOMON SMITH :

BARNEY, INC., BANCOSTON ROBERTSON :

STEPHENS, INC., CREDIT SUISSE :

FIRST BOSTON CORPORATION, THE :

GOLDMAN SACHS GROUP, INC., MERRILL :

LYNCH, PIERCE, FENNER & SMITH, :

INCORPORATED, and MORGAN STANLEY :

DEAN WITTER & CO., INCORPORATED, :

:

Defendants. :

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**Plaintiff, by and through his attorneys, for his Class Action Complaint, alleges upon personal knowledge as to his own acts and as to all other matters upon information and belief based upon, inter alia, the investigation made by and through his attorneys, which investigation included, among other things, a review of reports filed by MarketWatch.com, Inc. ("MarketWatch" or "the Company") with the Securities and Exchange Commission or disseminated to MarketWatch's shareholders (including without limitation, Form 10-Ks, Form 10-Qs, proxy statements, Quarterly Reports to Shareholders, the Prospectus and Registration Statement dated January 15, 1999, (the Prospectus) published reports, news articles, publicly available information concerning the daily prices and trading volume of MarketWatch's securities and interviews as follows:**

#### **JURISDICTION AND VENUE**

**1. The claims asserted herein arise under and pursuant to Sections 11, 12 and 15 of the Securities Act of 1933 (the "Securities Act") 15 U.S.C. ' ' 77k, 77l(2) and 77o and Sections 10 (b) and 20(a) of the Exchange Act 15 U.S.C. ' ' 78j(b) and 78t(a) and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission 17 C.F. R. ' 240.10b-5.**

**2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. ' ' 1331 and 1337, Section 22 of the Securities Act 15 U.S.C. ' 77v, and Section 27 of the Exchange Act 15 U.S.C. ' 78aa.**

3. Venue is proper in this district because many of the material acts and injuries alleged herein occurred within this judicial district. Such acts include practices and conduct violative of the Securities Act, including the preparation and dissemination in this judicial district of the Prospectus and Registration Statement dated January 15, 1999 and annual and quarterly reports to shareholders

of defendant MarketWatch, which documents were materially false and misleading, during the Class Period (including the trading of MarketWatch stock based upon misleading information). In addition, Salomon Smith Barney, Inc., Credit Suisse First Boston Corporation, The Goldman Sachs Group, Inc., Merrill Lynch Pierce Fenner & Smith, Incorporated and Morgan Stanley Dean Witter, Incorporated maintain their headquarters in New York.

4. In connection with the acts, conduct, and other wrongs complained of herein, the defendants, directly and indirectly, used the means and instrumentalities of interstate commerce, including the mails, telephone communications and the facilities of interstate commerce.

### **THE PARTIES**

5. Plaintiff Denis Fazioli purchased shares of MarketWatch as set forth on the certification attached hereto and has been damaged thereby.

6. Defendant MarketWatch is a Delaware corporation whose principal place of business is located at 825 Battery Street, San Francisco, California. MarketWatch described itself in its IPO prospectus as "a leading Web-based provider of comprehensive, real-time business news, financial programming and analytic tools," and stated that through its web site it offered "several tiers of paid subscription products, personal finance commentary and data, community features and other services designed to provide a "one-stop-shop" for our audience's financial information needs."

7. Defendant Larry S. Kramer served as Chairman of the Board of Directors, President and Chief Executive Officer since October 1997 and still served in such capacities at the time of the filing of the MarketWatch Form 10-K on April 2, 2001. As of November 3, 2000, Kramer beneficially owned or controlled 193,260 shares, or 1.2 percent, of MarketWatch's common stock.

8. Defendant James A. DePalma served as a director of MarketWatch since December 1998 and at the time of the MarketWatch IPO.

3 . Defendant Alan J. Hirschfield served as a director of MarketWatch since March 1998 and at the time of the MarketWatch IPO.

4 . Defendant Allan R. Tessler served as a director of MarketWatch since August 1998 and at the time of the MarketWatch IPO.

9. Defendant Mark F. Imperiale served as a director of MarketWatch since October 1997 and at the time of the MarketWatch IPO.

5 . Defendant Andrew Heyward served as a director of MarketWatch since March 1998 and still served in such capacity at the time of the filing of the MarketWatch Form 10-K on April 2, 2001.

10. Defendant Michael H. Jordan served as a director of MarketWatch since June 1998 and at the time of the MarketWatch IPO. As of November 3, 2000, Jordan beneficially owned 5,833 shares, or less than 1.0%, of Marketwatch's common stock.

6 . Defendant Salomon Smith Barney, Inc. (ASalomon@) is an international brokerage and investment banking firm with its principal offices located at 7 World Trade Center, New York, New York. Salomon was a lead underwriter of the MarketWatch initial public offering of 2,750,000 shares of common stock at \$17.00 per share pursuant to a Prospectus and Registration Statement dated January 15, 1999 (the AOffering@). Salomon substantially participated in the commission of the wrongs alleged herein through its involvement in the Offering of MarketWatch shares to the public. Salomon, as a lead underwriter, received substantial fees in conjunction with the Offering.

11. Defendant BancBoston Robertson Stephens, Inc. (ABancBoston@) is an international brokerage and investment banking firm with its principal offices located at 100 Federal Street, Boston, Massachusetts. BancBoston was an underwriter, but not a lead underwriter, of the Offering, and substantially participated in the wrongs alleged herein through their involvement in the Offering of MarketWatch shares to the public. BancBoston received substantial fees in conjunction with the

Offering.

12. Defendant Credit Suisse First Boston Corporation (ACredit Suisse@) is an international brokerage and investment banking firm with its principal offices located at 11 Madison Avenue, New York, New York. Credit Suisse was an underwriter, but not a lead underwriter, of the Offering and substantially participated in the wrongs alleged herein through their involvement in the Offering of MarketWatch shares to the public. Credit Suisse received substantial fees in conjunction with the Offering.

13. Defendant The Goldman Sachs Group, Inc. (hereinafter referred to, along with its various subsidiaries, as "Goldman") is an international brokerage and investment banking firm organized and existing under the laws of the State of Delaware, with its principal offices located at 85 Broad Street, New York, New York. Goldman was an underwriter, but not a lead underwriter, of the Offering and substantially participated in the wrongs alleged herein through their involvement in the Offering of MarketWatch shares to the public. Goldman received substantial fees in conjunction with the Offering.

14. Defendant Merrill Lynch, Pierce, Fenner & Smith, Incorporated ("Merrill") is an international brokerage and investment banking firm with its principal offices located at 4 World Financial Center, 250 Vesey Street, New York, New York. Merrill was an underwriter, but not a lead underwriter, of the Offering, and substantially participated in the wrongs alleged herein through their involvement in the Offering of MarketWatch shares to the public. Merrill received substantial fees in conjunction with the Offering.

15. Defendant Morgan Stanley Dean Witter & Co., Incorporated ("Morgan") is an international brokerage and investment banking firm with its principal offices located at 1585 Broadway, New York, New York. Morgan was an underwriter, but not a lead underwriter, of the Offering, and substantially participated in the wrongs alleged herein through their involvement in the Offering of MarketWatch shares to the public. Morgan received substantial fees in conjunction with the Offering.

16. Defendants Salomon, BancBoston, Credit Suisse, Goldman, Merrill and Morgan are collectively referred to herein as the ~~A~~Underwriter Defendants.@

17. Defendants Kramer, DePalma, Hirschfield, Tessler, Imperiale, Heyward, and Imperiale are collectively referred to herein as the ~~A~~Individual Defendants.@

18. Each of the defendants owed to the purchasers of the Company's stock, including plaintiff, the duty to make a reasonable and diligent investigation of the statements contained in the Prospectus, the Company's financial statements and press releases and in conversations with shareholders. This duty included insuring that the statements contained therein were true, and that there were no omissions of material fact required to be stated in order to make the statements contained in such not misleading. As alleged herein, each defendant violated those specific duties and obligations and knowingly, or with reckless disregard, issued and caused to be issued false and misleading statements concerning the Company's initial public offering.

19. Defendants had a duty to disseminate promptly accurate and truthful information with respect to MarketWatch's initial public offering or to cause and direct that such information be disseminated and to correct promptly any previously disseminated information that was incorrect or materially misleading. Defendants' failure to do so caused the price of MarketWatch common stock to be artificially inflated.

20. The Individual Defendants, because of their managerial and/or board positions with the Company, controlled the contents of all public statements and filings including quarterly and annual reports and press releases. Each of the Individual Defendants was provided with or had unlimited access to copies of the reports and press releases alleged herein to be materially false and/or misleading prior to or shortly after issuance and had the ability to either prevent their issuance or cause them to be corrected. The Individual Defendants, by virtue of their positions, had access to material inside information available to them but not to the public and each individual defendant knew or

recklessly disregarded the adverse facts specified herein and did not disclose them. Therefore, the Individual Defendants are responsible for these releases under the *group publication* doctrine. Moreover, all the Individual Defendants signed the Prospectus.

21. Each of the Individual Defendants is liable to plaintiff as a primary violator and as a control person pursuant to Section 15 of the Securities Act and Section 20 of the Exchange Act.

### **CLASS ACTION ALLEGATIONS**

22. This action is brought as a class action pursuant to Rule 23(a) and 23(b) (3) of the Federal Rules of Civil Procedure, on behalf of plaintiff and all persons and entities who purchased, converted, exchanged, or otherwise acquired the common stock of MarketWatch from the effectiveness of the Offering on January 15, 1999 through April 16, 2001, both dates inclusive (the *Class Period*). Excluded from the class are defendants herein, members of the immediate family of the defendants, any entity in which any of the defendants has a controlling interest, and the legal representatives, heirs, successors or assigns of any of the defendants.

23. This action is properly maintainable as a class action for the following reasons:

(a) The Class is so numerous that joinder of all members is impracticable.

MarketWatch's common stock has been actively traded during the Class Period on the NASDAQ National Market, an efficient market. Defendants sold 2.75 million shares of the Company's common stock in the Offering. As a result, it is believed that there are at least hundreds of members of the Class located throughout the United States.

(b) There are common questions of law and fact involved herein which predominate over any questions affecting only individual members of the Class. These common questions of law and fact include:

(i) Whether the federal securities laws were violated by defendants' acts

as alleged herein;

(ii) Whether the Prospectus, Registration Statement, documents, filings, releases and statements disseminated by defendants to the investing public in connection with the Offering omitted and/or misrepresented material facts about the MarketWatch Offering; and

(iii) The extent of injuries sustained by members of the Class and the appropriate measure of damages.

(c) Plaintiff's claims are typical of the claims of the other members of the Class. The damages suffered by plaintiff and all other Class members arise from and were caused by the same violations and course of conduct. Plaintiff does not have interests antagonistic to, or in conflict with, the Class.

(d) Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained competent counsel experienced in class and securities litigation to vigorously prosecute this action.

(e) A Class action is superior to other available methods for the fair and efficient adjudication of this controversy. Plaintiff knows of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action. Furthermore, since the damages suffered by individual members of the Class may be relatively small, the expense and burden of individual litigation make it impracticable for the members of the Class to seek redress individually for the wrongs they have suffered.

(f) The names and addresses of the record purchasers of MarketWatch common stock pursuant to the IPO are available from MarketWatch, its agents, and the underwriters who distributed MarketWatch common stock in the IPO. Notice can be provided to Class members via a combination of published notice and first class mail using techniques and forms of notice similar to

those customarily used in class actions arising under the federal securities laws.

7. Plaintiff will rely, in part, upon the presumption of reliance established by the fraud-on-the-market doctrine in that:

(a) defendants made public misrepresentations during the Class Period, as alleged herein;

(b) the misrepresentations were material;

(c) shares of MarketWatch securities were traded on a developed national stock exchange, namely the NASDAQ National Market, which is an efficient market within the meaning of that term in the context utilized herein; and

(d) plaintiff and the other members of the Class purchased their MarketWatch securities between the time defendants made the representations and the time the truth was revealed, and made such purchases without knowledge of the falsity of the misrepresentations.

24. Based upon the foregoing, plaintiff is entitled to a presumption of reliance upon the integrity of the market with respect to the omissions alleged herein.

### **WRONGFUL COURSE OF CONDUCT**

25. The Prospectus cover stated, in relevant part:

	<b><u>PRICE TO PUBLIC</u></b>	<b><u>UNDERWRITING DISCOUNTS AND COMMISSIONS</u></b>	<b><u>PROCEEDS TO COMPANY</u></b>
Per Share	\$17.00	\$1.19	\$15.81
Total	\$46,750,000	\$3,272,500	\$43,477,500

31. Therefore, according to the Prospectus, the underwriting group was to receive a commission of \$1.19 per share, or a total of \$3,272,500, based on the spread between the per share proceeds to MarketWatch (\$15.81) and the Offering price to the public (\$17.00 per share). Pursuant to the Prospectus and an Underwriting Agreement dated January 15, 1999, annexed as Exhibit 1.01 to the Registration Statement, MarketWatch agreed to sell the underwriters 2,750,000 shares issued in connection with the Offering with Salomon receiving 366,000 shares, BancBoston receiving 60,000 shares, Credit Suisse receiving 60,000 shares, Goldman receiving 60,000 shares, Merrill receiving 60,000 shares and Morgan receiving 60,000 shares. The remaining shares were offered and sold to the other members of the underwriting group.

32. Regarding the selling price of the shares and the underwriting discounts and commissions, the Prospectus also stated:

The Underwriters propose to offer the shares of Common Stock to the public at the public offering price set forth on the cover page of this Prospectus and to certain dealers at a price that represents a concession not in excess of \$0.71 per share under the public offering price. The underwriters may allow, and such dealers may re-allow, a concession not in excess of \$0.10 per share to certain other dealers. After the initial public offering, the offering price and other selling terms may be changed by the representatives of the Underwriters.

33. Unbeknownst to investors, and contrary to the representations on the cover page of the Prospectus and other related statements in the Prospectus set forth above, the Underwriter Defendants solicited and received additional, excessive and undisclosed commissions from certain investors in exchange for which it allocated to those investors substantial blocks of the MarketWatch shares issued in connection with the Offering.

34. The additional, excessive and undisclosed commissions were paid by, among other

means, the following practice: in exchange for Offering share allocations, customers agreed to and did pay the Underwriter Defendants excessive commissions on transactions in other securities (commissions greater than those contemplated under NASD and SEC regulations and which, when added to the seven percent commission disclosed on the front page of the Prospectus, caused the Underwriter Defendants to receive greater underwriting commissions and fees than were disclosed in the Prospectus). In some cases, the amount of the commissions was determined ex post facto by arrangements including specific formulas tied to the investor's profits on the Offering.

35. In addition, and unbeknownst to investors, the Underwriter Defendants entered into agreements with customers whereby the Underwriter Defendants agreed to allocate MarketWatch shares to those customers in the Offering in exchange for which the customers agreed to purchase additional MarketWatch shares in the aftermarket at pre-determined prices that were above the IPO price. Such tie-in arrangements were designed to, and did maintain, distort and/or inflate the market price for MarketWatch shares in the aftermarket and were thus an undisclosed benefit to the Underwriter Defendants with respect to the additional shares that they had an option to purchase for over allotments as well as a method of locking in additional underwriters' discounts and commission revenues on transactions in MarketWatch securities.

36. On January 15, 1999, MarketWatch shares began trading pursuant to the Offering. The stock opened to the public at \$90.00 per share, an increase of over 400% over the IPO price, and rose to an intra-day high of \$130.00 before closing at \$97.50.

37. Unbeknownst to investors who purchased in the aftermarket, the increase in share price was a result, in part, of the tie-in arrangements that locked in demand for MarketWatch shares at levels well above the Offering price and the price at which MarketWatch securities would have traded were it not for the aforementioned arrangements.

38. Facts relating to the type of underlying scheme employed by the Underwriter Defendants began to emerge on December 7, 2000, when *The Wall Street Journal* first published an

article regarding a joint SEC and U.S. attorney's investigation into the payment by certain investors of extra-large, undisclosed "kickbacks" for allocations in initial "hot IPOs." The article mentioned that Credit Suisse was "an early focus" of the investigation.

39. With regard to the joint SEC and U.S. Attorney's investigation of Credit Suisse and other underwriters, *The Wall Street Journal* stated:

Federal authorities have launched an investigation examining whether Wall Street securities firms have asked some big investors to pay unusually large trading commission in exchange for hot initial public-stock offerings, people familiar with the matter say.

\* \* \* \*

Some of the arrangements could have included specific formulas tied to investors' profits on offerings, the people familiar with the probe say. Many of the offerings doubled or more in their first day of trading during an IPO mania that began in later 1998.

\* \* \* \*

For example, at times dealers asked investors to pay commissions equaling 25% to 40% or more of the investors' IPO profits on those particular dealers' IPOs, according to traders and people with knowledge of the probe. In other instances, investors paid big commissions to a dealer the day after receiving a lucrative IPO allocation, according to one person with knowledge of the probe.

Sometimes, traders say, the commissions were routed to dealers through a series of trades, sometimes with offsetting purchases and sales of equal amounts of the same stock conducted solely to generate commissions.

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40. On December 13, 2000, *The Wall Street Journal* reported that the SEC was "stepping up" its investigation into questionable initial public offering practices. In that article, Morgan and Goldman were named as firms that had also received requests for information from the New York office of the SEC.

41. On January 8, 2001, *The Wall Street Journal* reported that the SEC was "intensifying" its investigation into questionable initial public offering practices.

42. Due to the undisclosed material facts alleged above and hereinafter, the price of MarketWatch was artificially inflated during the Class Period and, as the end of the Class period on April 16, 2001, the price of MarketWatch common stock closed at \$3.70 per share.

**DEFENDANTS= MATERIALLY FALSE AND MISLEADING  
STATEMENTS AND VIOLATIONS OF SEC  
AND NASD RULES AND REGULATIONS**

43. The Prospectus contained materially false and misleading statements, as referred to more fully herein, because it contained the following materially false statements or did not disclose the following material facts, among others:

(a) that the Underwriter Defendants had solicited and received fees, commissions and other economic benefits in connection with the Offering over and above those disclosed in the Prospectus as set forth more fully herein; and

(b) that the Underwriter Defendants entered into unlawful tie-in and other arrangements and agreements with customers, as set forth more fully herein, which were designed to

and did have the effect of maintaining, distorting and/or inflating the price for MarketWatch shares.

44. MarketWatch was required to comply with all relevant SEC regulations regarding the Prospectus, including, inter alia, Regulation S-K. Regulation S-K, Item 501(b)(3) required MarketWatch to disclose all underwriter discounts and commissions. Item 501(b)(8) required MarketWatch to identify the nature of the underwriting arrangements.@ As set forth more fully herein, defendants failed to do so.

45. In addition, Regulation S-K, Item 508 requires that the Prospectus disclose all underwriter compensation. Specifically, Regulation S-K, Item 508(e) provides:

Underwriters Compensation. Provide a table that sets out the nature of the compensation and the amount of discounts and commissions to be paid to the underwriter for each security and in total. The table must show the separate amounts to be paid by the company and the selling shareholders. In addition, include in the table all other items considered by the National Association of Securities Dealers to be underwriting compensation for purposes of that Association Rules of Fair Practice.

#### Instructions to Paragraph 508(e)

1. The term "commissions" is defined in paragraph (17) of Schedule A of the Securities Act. Show separately in each table the cash commissions paid by the registrant and selling security holders. Also show in the table commissions paid by other persons. Disclose any finder's fee or similar payments in the table.

46. The Prospectus violated Regulation S-K and was false and misleading because it failed to show in the table, or to otherwise disclose that the Underwriter Defendants received additional and excessive commissions "paid by other persons" as set forth more fully herein.

47. With regard to offering transactions, Regulation S-K, Item 508(I)(1) required as

follows:

Briefly describe any transaction that the underwriter intends to conduct during the offering that stabilizes, maintains, or otherwise affects the market price of the offered securities. Include information on stabilizing transactions, syndicate short covering transactions, penalty bids, or any other transactions that affect the offered security's price. Describe the nature of the transactions clearly and explain how the transactions affect the offered security's price. Identify the exchange or other market on which these transactions may occur. If true, disclose that the underwriter may discontinue these transactions at any time.

48. The Prospectus violated Regulation S-K and was materially false and misleading because it failed to disclose that, in connection with the Offering, the Underwriter Defendants intended to conduct, and that they subsequently did conduct, transactions that stabilized and affected the offered security's price, as set forth herein.

49. The NASD, which operates subject to SEC oversight, is the self-regulatory organization of the securities industry responsible for the regulation of the NASDAQ Stock Market. Since the Offering occurred on the NASDAQ market, the Underwriter Defendants were subject to NASD conduct rules.

50. NASD Conduct Rule 2110 requires that: "A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles." The NASD publishes guidelines to the Conduct Rules. Guideline IM-2110- I(b) states that it is a violation of Rule 2110 for a member to "fail to make a bona fide public distribution at the public offering price of securities of a public offering which trade at a premium in the secondary market."

51. (a) The Underwriter Defendants violated NASD conduct rule 2110, and the Prospectus was materially false and misleading, because the Prospectus contained the following misstatements and/or omissions of material facts: the Underwriter Defendants did not make a bona fide public distribution of the Offering securities because they accepted kickbacks in exchange for

Offering allocations, took steps with customers to inflate, and distort the market for MarketWatch shares and thereby offered the securities to the public at prices in excess of the public offering price of the securities.

(b) Moreover, in the SEC Division of Market Regulation, Staff Legal Bulletin No. 10, dated August 25, 2000, the SEC specifically stated that the tie-in arrangements alleged herein are a violation of Regulation M, which governs market manipulation. Indeed, the Staff Legal Bulletin states:

Tie-in agreements are a particularly egregious form of solicited transaction prohibited by Regulation M. As far back as 1961, the Commission addressed reports that certain dealers participating in distributions of new issues had been making allotments to their customers only if such customers agreed to make some comparable purchase in the open market after the issue was initially sold. The Commission said that such agreements may violate the anti-manipulative provisions of the Exchange Act, particularly Rule 10b-6 (which was replaced by Rules 101 and 102 of Regulation M) under the Exchange Act, and may violate other provisions of the federal laws.

Solicitations and tie-in agreements for aftermarket purchases are manipulative because they undermine the integrity of the market as an independent pricing mechanism for the offered security. Solicitations for aftermarket purchases give purchasers in the offering the impression that there is a scarcity of the offered securities. This can stimulate demand and support the pricing of the offering. Moreover, traders in the aftermarket will not know that the aftermarket demand, which may appear to validate the offering price, has been stimulated by the distribution participants. Underwriters have an incentive to artificially influence aftermarket activity because they have underwritten the risk of the offering, and a poor aftermarket performance could result in reputational and subsequent financial loss.

(c) The Underwriter Defendants= foregoing violations of Rules 101 and 102 of Regulation M, and the additional financial incentive and motivation that these violations supplied to the Underwriter Defendants to recommend and sell the securities, were not disclosed.

**STATUTORY SAFE HARBOR**

52. The statutory safe harbor provided for forward-looking statements does not apply here as the statements challenged in the Registration Statement and Prospectus were not forward looking.

**AS AND FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS****FOR VIOLATION OF SECTION 11 OF THE SECURITIES ACT**

53. Plaintiff repeats and realleges each and every allegation contained above as though fully set forth herein.

54. This cause of action is brought by plaintiff pursuant to Section 11 of the Securities Act, 15 U.S.C. ' 77k, on behalf of the Class against all defendants and does not sound in fraud.

55. The Registration Statement, which contained the Prospectus for the Initial Public Offering, was inaccurate and misleading, contained untrue statements of material facts, omitted to state other facts necessary to make the statements made not misleading, and concealed and failed adequately to disclose material facts as described above.

56. MarketWatch is the registrant for the shares sold to plaintiff and other members of the Class. MarketWatch issued, caused to be issued and participated in the issuance of materially false and misleading written statements to the investing public that were contained in the Registration Statement. As an issuer of the shares, MarketWatch is strictly liable to plaintiff and the Class for the material misstatements or omissions.

57. Each of the Individual Defendants, either personally or through an attorney-in-fact, signed the Registration Statement for the IPO and was a director and/or senior executive of MarketWatch at the time of the IPO.

58. Each of the Underwriter Defendants was an underwriter of the MarketWatch stock as that term is used in Section 11(a)(5) of the Securities Act.

59. The defendants named herein were responsible for the contents and dissemination of the Registration Statement and the Prospectus. None of the defendants named herein made a reasonable investigation or possessed reasonable grounds for believing that the statements contained in the Registration Statement and Prospectus were true and did not omit any material facts and were not materially misleading.

60. Plaintiff and the members of the Class acquired shares of MarketWatch pursuant to, or traceable to, the Registration Statement and did not know of untrue statements or omissions of material facts.

61. Plaintiff and the Class have sustained damages.

62. This action is commenced within three years after MarketWatch stock was bona fide offered to the public and the claims asserted herein were brought by plaintiff within one year after plaintiff discovered or, by the exercise of reasonable diligence, should have discovered the misrepresentations and omissions alleged herein. The price of MarketWatch stock on the date this action was filed was below the purchase price paid by plaintiff and members of the Class.

**AS AND FOR A SECOND CAUSE OF ACTION FOR  
VIOLATION OF SECTION 12(2) OF THE SECURITIES ACT  
AGAINST THE UNDERWRITER DEFENDANTS**

63. Plaintiff repeats and realleges each and every allegation contained above as though fully set forth herein.

64. This cause of action is being asserted by plaintiff against the Underwriter

Defendants as set forth above, under and pursuant to Section 12(2) of the Securities Act of 1933, 15 U.S.C. ' 77l(2). It does not sound in fraud.

65. The Underwriter Defendants and other broker-dealers acting on their behalf sold MarketWatch stock to plaintiff and the Class within the meaning of Section 12(1) of the Securities Act. They did so by means of the false and misleading Registration Statement and Prospectus described above, which included untrue statements of material fact and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading in violation of Section 12(2) of the Securities Act.

66. The Underwriter Defendants are "sellers" within the meaning of the Securities Act because the Underwriter Defendants (a) transferred title to MarketWatch stock to the members of the Class; (b) transferred title to MarketWatch stock to other underwriters and/or broker-dealers that sold MarketWatch stock as agents for the Underwriter Defendants; and (c) solicited the purchase of MarketWatch stock by the Class, motivated at least in part by a desire to serve the Underwriter Defendants' own financial interests, including but not limited to commissions on their own sales of MarketWatch stock and separate commissions on the sales of MarketWatch stock by non-underwriter broker-dealers.

67. Plaintiff and the Class did not know of all of the untruthful statements and omissions alleged and in the exercise of reasonable care could not have known of them.

68. As a direct and proximate result of the Underwriter Defendants' wrongful conduct in violation of Section 12(2) of the Securities Act of 1933, 15 U.S.C. ' 77l(2), plaintiff and the Class suffered actual damages in connection with their purchase of MarketWatch stock.

69. Plaintiff and the Class are entitled to statutory damages (or to tender their MarketWatch stock to the defendants and seek rescission of their purchases of MarketWatch stock to the extent that they continue to own such securities, and they are entitled to damages if they no longer

own the securities).

70. This action is being brought within one year after plaintiff discovered or, by the exercise of reasonable diligence, should have discovered the aforesaid violations of Section 12(2) of the Securities Act.

**AS AND FOR A THIRD CAUSE OF ACTION PURSUANT  
TO SECTION 15 OF THE SECURITIES ACT**

71. Plaintiff repeats and realleges each and every allegation contained above as though fully set forth herein.

72. This cause of action is brought by plaintiff pursuant to Section 15 of the Securities Act, 15 U.S.C. ' 77o, on behalf of the Class against the Individual Defendants.

73. MarketWatch is liable as an issuer under Section 11 of the Securities Act as set forth in the first cause of action herein.

74. Each of the Individual Defendants was a control person of MarketWatch with respect to the IPO by virtue of his position as a senior executive officer and/or director of MarketWatch.

75. As a result, the Individual Defendants are liable under Section 15 of the Securities Act for MarketWatch's primary violations of Sections 11 of the Securities Act.

**AS AND FOR A FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR  
VIOLATIONS OF SECTION 10(b) OF THE EXCHANGE ACT AND  
RULE 10b-5 PROMULGATED THEREUNDER**

76. Plaintiff repeats and realleges each and every allegation contained above as though

fully set forth herein except that this claim does sound in fraud.

77. In addition to the duties of full disclosure imposed on all defendants as a result of the Registration Statement and their making of affirmative statements and reports, or participation in the making of such statements and reports to the investing public, such defendants had a duty promptly to disseminate truthful information that would be material to investors in compliance with the integrated disclosure provisions of the SEC as embodied in SEC regulations S-X (17 C. F. R. ' ' 210.01 et seq.) and Regulation S-K (17 C. F. R. ' ' 229.10 et seq.) and other SEC regulations. This included but was not limited to accurate and truthful information with respect to the underwriting of the MarketWatch IPO so that the IPO and market price of the MarketWatch stock would be based on truthful, complete and accurate information.

78. During the Class Period, defendants carried out an unlawful plan and undisclosed, scheme and course of conduct which was intended to and, throughout the Class Period, did: (i) deceive the investing public, including plaintiff and other Class members, as alleged herein; (ii) artificially inflate and maintain the market price of MarketWatch's securities at artificially inflated prices. In furtherance of this unlawful scheme, plan and course of conduct, defendants, and each of them, took the actions set forth herein.

79. Defendants: (a) employed devices, schemes and artifices to defraud; (b) made untrue statements of material fact and/or omitted to state material facts necessary to make the statements not misleading; and (c) engaged in acts, practices, and a course of business which operated as a fraud and deceit upon the purchasers of MarketWatch's stock in an effort to maintain artificially high market prices for MarketWatch's stock in violation of Section 10(b) of the Exchange Act and Rule 10b-5. Defendants are sued either as primary participants in the wrongful and illegal conduct charged herein or as controlling persons as alleged below.

80. Defendants individually and in concert, directly and indirectly, by the use, means or instrumentalities of interstate commerce and/or of the mails, engaged and participated in

a continuous course of conduct to conceal adverse material information about the true nature of the MarketWatch IPO as specified herein.

81. These defendants employed devices, schemes and artifices to defraud, while in possession of material adverse non- public information and engaged in acts, practices, and a course of conduct as alleged herein in an effort to assure investors that the underwriting of MarketWatch's stock was in compliance with the securities laws and that the compensation received by the Underwriter Defendants therefor was fair and reasonable and within the permissible boundaries of the NASD regulations governing underwriter compensation, which included the making of, or the participation in the making of, untrue statements of material facts and omitting to state material facts necessary in order to make the statements made about MarketWatch and its IPO not misleading and failed to disclose the scheme alleged herein which in the light of the circumstances under which they were made, not misleading, as set forth more particularly herein, and engaged in transactions, practices and a course of business which operated as a fraud and deceit upon the purchasers of MarketWatch's common stock during the Class Period.

82. The Individual Defendants' primary liability, and controlling person liability, arise from the following facts: (i) the Individual Defendants were high-level executives and/ or directors of MarketWatch during the Class Period and members of the MarketWatch's management team and had control thereof; (ii) the Individual Defendants by virtue of their responsibilities and activities as senior officers and/or directors of MarketWatch, were privy to and participated in the creation and development and preparation of materials related to the initial public offering of MarketWatch stock; (iii) the Individual Defendants enjoyed significant personal contact and familiarity with the other members of the Underwriter Defendants and were advised of and had access to the work product and the Underwriter Defendants; (iv) the Individual Defendants were aware of MarketWatch's dissemination of information to the investing public which they knew or recklessly disregarded was materially false and misleading.

83. The Underwriter Defendants had substantial economic motives to conceal the facts

and deceive plaintiff and the market, including the following. By concealing such facts, the Underwriter Defendants obtained underwriting compensation that was greatly in excess of what was legally permissible and were able to perpetuate an unlawful conspiracy to manipulate artificially the prices of future IPOs.

84. The Individual Defendants had actual knowledge of the misrepresentations and omissions of material facts set forth herein, or acted with reckless disregard for the truth in that they failed to ascertain and to disclose such facts, even though such facts were available to them. Such defendants' material misrepresentations and/or omissions were done knowingly or recklessly and for the purpose and effect of concealing the manipulation of the market for MarketWatch securities from the investing public and supporting the artificially inflated price of its securities. As demonstrated by defendants' misstatements and omissions regarding the compensation earned by the Underwriter Defendants and, if they did not have actual knowledge of the misrepresentations and omissions alleged, were reckless in failing to obtain such knowledge by deliberately refraining from taking those steps necessary to discover whether those statements were false and misleading.

85. As a result of the dissemination of the materially false and misleading information and failure to disclose material facts, as set forth above, the market price of MarketWatch's stock was artificially inflated during the Class Period. In ignorance of the fact that market price of MarketWatch's publicly-traded stock was artificially inflated, and relying directly or indirectly on the false and misleading statements made by defendants, or upon the integrity of the market in which the securities trade, and/or on the absence of material adverse information that was known to or recklessly disregarded by defendants but not disclosed in public statements by defendants during the Class Period, plaintiff and the other members of the Class acquired MarketWatch securities during the Class Period at artificially high prices and were damaged hereby.

86. At the time of said misrepresentations and omissions, plaintiff and other members of the Class were ignorant of their falsity, and believed them to be true. Had plaintiff and the other members of the Class known of the aftermarket manipulation of the price for MarketWatch securities

and the artificially inflated prices therefor which were not disclosed by defendants, plaintiff and other members of the Class would not have purchased or otherwise acquired their MarketWatch stock, or, if they had acquired such stock during the Class Period, they would have not done so at the artificially inflated prices which they paid.

87. By virtue of the foregoing, defendants have violated Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.

88. As a direct and proximate result of defendants wrongful conduct, plaintiff and the other members of the Class suffered damages connected with their respective purchases and sales of MarketWatch's stock during the Class Period.

**AS AND FOR A FIFTH CAUSE OF ACTION PURSUANT TO SECTION  
20(a) OF THE EXCHANGE ACT AGAINST THE INDIVIDUAL DEFENDANTS**

89. Plaintiff repeats and realleges each and every allegation contained above as though fully set forth herein.

90. The Individual Defendants acted as controlling persons of MarketWatch within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their high-level positions, and their ownership and contractual rights, participation in and/ or awareness of the Company's operations and/ or intimate knowledge of the underwriting of MarketWatch's IPO, the Individual Defendants had the power to influence and control and did influence and control, directly or indirectly, the decision- making of MarketWatch, including the content and dissemination of the various statements that plaintiff contends are false and misleading. The Individual Defendants were provided with or had unlimited access to copies of MarketWatch's reports, press releases, public filings and other statements alleged by plaintiff to be misleading prior to and/ or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

91. In particular, each of these defendants had direct and supervisory involvement in the day-to-day operations of MarketWatch and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the securities violations herein, and exercise the same.

92. As set forth above, MarketWatch and the Individual Defendants each violated 10(b) and Rule 10b-5 by their acts and omissions as alleged in this Complaint.

By virtue of their positions as controlling persons, the Individual Defendants are liable pursuant to 20(a) of the Exchange Act. As a direct and proximate result of defendants' wrongful conduct, plaintiff and other members of the Class suffered damages in connection with their purchases and/or sales of MarketWatch stock during the Class Period.

### **JURY DEMAND**

93. Plaintiff hereby demands a trial by jury.

### **PRAYER FOR RELIEF**

WHEREFORE, plaintiff prays for judgment as follows:

A. Declaring this action to be a class action properly maintained pursuant to Rule 23 of the Federal Rules of Civil Procedure and certifying plaintiff as Class representative and his counsel as Class counsel;

B. Awarding plaintiff and the Class damages and statutory compensation against each defendant, jointly and severally, and in favor of plaintiff and all other members of the Class, in an amount to be determined to at trial plus pre-judgment Interest thereon;

C. Awarding plaintiff and the Class the costs and expenses of this litigation, including reasonable Attorneys' fees, experts' fees and other costs and disbursements; and,

D. Awarding plaintiff and other members of the Class such other and further relief as to this honorable Court may seem just and proper.

Dated: New York, New York

April 26, 2001

WOLF HALDENSTEIN ADLER FREEMAN  
& HERZ

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