

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH WILDER, on behalf of himself and all others
similarly situated,

Plaintiff,

vs.

LIBERATE TECHNOLOGIES, INC.,
CREDIT SUISSE FIRST BOSTON CORPORATION,
BANCOSTON ROBERTSON STEPHENS, INC.,
MERRILL LYNCH, PIERCE, FENNER & SMITH
INCORPORATED, MITCHELL E. KERTZMAN,
and NANCY J. HILKER,

Defendants.

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Index No.

**CLASS ACTION COMPLAINT
FOR VIOLATIONS OF THE
FEDERAL SECURITIES
LAWS**

Plaintiff, by his undersigned attorneys, individually and on behalf of the Class described below, upon information and belief, based upon, inter alia, the investigation of counsel, which includes, among other things, a review of public announcements made by defendants, Securities and Exchange Commission ("SEC") filings made by defendants, and press releases, and media reports, except as to the paragraph applicable to the named plaintiff which is alleged upon personal knowledge, brings this Complaint (the "Complaint") against defendants named herein, and alleges as follows:

SUMMARY OF ACTION

1. This is a securities class action alleging that the Registration Statement and Prospectus dated July 27, 1999 for the issuance and initial public offering of 6,250,000 shares of Liberate Technologies, Inc. ("Liberate" or the "Company") common stock (the "Offering"),

contained material misrepresentations and/or omissions. The Registration Statement and Prospectus are referred to herein collectively as the "Prospectus." Defendants are Liberate and two members of its senior management team, who were responsible for the materially false and misleading statements made in the Prospectus, and three of the underwriters of Liberate's Offering, who engaged in a pattern of conduct to surreptitiously extract inflated commissions greater than those disclosed in the Offering materials, among other acts of misconduct.

JURISDICTION

2. This Court has jurisdiction over the subject matter of this action pursuant to § 27 of the Securities Exchange Act of 1934 (the "Exchange Act") (15 U.S.C. § 78aa), Section 22 of the Securities Act of 1933 (the "Securities Act") (15 U.S.C. § 77v) and 28 U.S.C. § 1331. 3.

Plaintiff brings this action pursuant to the Securities Exchange Act of 1934 as amended (15 U.S.C. §§ 78j(b) and 78t(a)), and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5), and pursuant to Sections 11 (15 U.S.C. § 77k), 12(a)(2) (15 U.S.C. § 77l) and 15 (15 U.S.C. § 77o) of the Securities Act of 1933. Venue is proper in this District as defendants conduct business in this District and many of the wrongful acts alleged herein took place or originated in this District.

4. In connection with the acts alleged in this complaint, defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including, but not limited to, the mails, interstate telephone communications and the facilities of the national securities markets.

PARTIES

5. Plaintiff Joseph Wilder purchased shares of Liberate issued in connection with and traceable to the Offering.

6. Defendant Liberate is a Delaware corporation whose principal place of business is 1000 Bridge Parkway, Redwood Shores, California. In the Prospectus, Liberate purported to be a leading provider of a comprehensive software platform for delivering Internet-enhanced content and applications to information appliances. In the Offering, pursuant to the Prospectus, Liberate issued to the investing public 6,250,000 shares of common stock at a price of \$16 per share.

7. Defendant Credit Suisse First Boston Corp. ("Credit Suisse") was, at all relevant times herein, a registered broker-dealer and member of the National Association of Securities Dealers, Inc. ("NASD"). Credit Suisse was a co-lead underwriter of the Offering and substantially participated in the wrongs alleged herein. At all relevant times, Credit Suisse had a duty to promptly disseminate truthful and accurate information with respect to the Offering and Liberate.

8. Defendant BancBoston Robertson Stephens, Inc. ("Robertson Stephens") was, at all relevant times herein, a registered broker-dealer and member of the National Association of Securities Dealers, Inc. ("NASD"). Robertson Stephens was a member of the Offering underwriter group and substantially participated in the wrongs alleged herein. At all relevant times, Robertson Stephens had a duty to promptly disseminate truthful and accurate information with respect to the Offering and Liberate.

9. Defendant Merrill Lynch, Pierce Fenner & Smith Incorporated ("Merrill Lynch") was, at all relevant times herein, a registered broker-dealer and member of the National

Association of Securities Dealers, Inc. ("NASD"). Merrill Lynch was a member of the Offering underwriter group and substantially participated in the wrongs alleged herein. At all relevant times, Merrill Lynch had a duty to promptly disseminate truthful and accurate information with respect to the Offering and Liberate.

10. Credit Suisse, Robertson Stephens and Merrill Lynch are referred to herein collectively as the "Underwriter Defendants."

11. Defendant Mitchell E. Kertzman ("Kertzman") was, at all relevant times, Liberate's President and Chief Executive Officer and a Liberate director. Kertzman signed the Prospectus.

12. Nancy J. Hilker ("Hilker") was, at all relevant times, Liberate's Vice President and Chief Financial Officer. Hilker signed the Prospectus.

13. Kertzman and Hilker are referred to herein collectively as the "Individual Defendants."

CLASS ACTION ALLEGATIONS

14. Plaintiff brings this action as a class action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of a class consisting of all persons and entities who acquired the common stock of Liberate pursuant or traceable to the false and misleading Prospectus between July 28, 1999 and December 6, 2000 (the "Class").

15. Members of the Class are so numerous that joinder of all members is impracticable. Specifically:

a. There were 6,250,000 shares of Liberate common stock issued pursuant to the Prospectus; and

b. While the exact number of Class members is unknown to the plaintiff at this time and can only be ascertained through appropriate discovery, plaintiff believes that there are thousands of Class members who acquired Liberate shares pursuant to the Prospectus.

16. Plaintiff's claims are typical of the claims of the other members of the Class. Plaintiff and the other members of the Class have sustained damages because of defendants' unlawful activities alleged herein. Plaintiff has retained counsel competent and experienced in class and securities litigation and intend to prosecute this action vigorously. The interests of the Class will be fairly and adequately protected by plaintiff. Plaintiff has no interests which are contrary to or in conflict with those of the Class which plaintiff seeks to represent.

17. A class action is superior to all 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.

18. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact of common to the Class are:

- a. whether the federal securities laws were violated by defendants' acts as alleged herein;
- b. whether the Prospectus omitted and/or misrepresented material facts about the Offering;
- c. whether defendants participated directly or indirectly in the course of conduct complained of herein; and

d. whether the members of the Class have sustained damages as a result of defendants' conduct, and the proper measure of such damages.

CONTROLLING PERSON LIABILITY

19. The Individual Defendants, by reason of their executive positions and board membership were controlling persons of the Company and had the power and influence, and exercised the same, to cause Liberate to engage in the conduct complained of herein. Thus, the Individual Defendants controlled the public dissemination of the false and misleading information in the Prospectus and were controlling persons of the Company as set forth in Section 15 of the Securities Act.

SUBSTANTIVE ALLEGATIONS

20. On July 28, 1999, Liberate and the Individual Defendants made an initial public offering of 6,500,000 shares of Liberate common stock pursuant to the Prospectus. According to the Prospectus, the proceeds of the Offering were for general corporate purposes, including product development, expansion of our sales, marketing and service capabilities and other working capital requirements.

21. The Prospectus cover stated, in relevant part:

6,250,000 Shares

{LIBERATE TECHNOLOGIES LOGO}

Common Stock

The underwriters have an option to purchase a maximum of 937,500 additional shares to cover over-allotments of shares. [. . .]

	Price to Public	Underwriting Discounts and Commissions	Proceeds to Liberate
Per Share.....	\$16.00	\$1.12	\$14.88
Total.....	\$100,000,000	\$7,000,000	\$93,000,000

22. The Prospectus further stated:

The underwriters propose to offer the shares of common stock initially at the public offering price on the cover page of this prospectus and to selling group members at that price less a concession of \$0.67 per share. The underwriters and selling group members may allow a discount of \$0.10 per share on sales to other brokers/dealers. After the initial public offering, the public offering price and concession and discount to broker/dealers may be changed by the representatives. [. . .]

The underwriters have reserved for sale, at the initial offering price, up to 312,500 shares of common stock for employees, directors and certain other persons associated with us who have expressed an interest in purchasing common stock in the offering. The number of shares available for sale to the general public in the offering will be reduced to the extent such persons purchase such reserved shares. Any reserved shares not so purchased will be offered by the underwriters to the general public on the same terms as other shares.

23. Thus according to the Prospectus, the underwriting group was to receive discounts and a commissions of \$1.12 per share, or a total of \$7,000,000, based on the spread between the per share proceeds to Liberate of (\$14.88) and the Offering price to the public (\$16.00 per share). Pursuant to the Prospectus, Liberate agreed to sell the Underwriter Defendants 3,039,200 of the

6,250,000 shares issued in connection with the Offering, with Credit Suisse receiving 2,828,740 shares and Robertson Stephens and Merrill Lynch each receiving 85,230, shares.

24. The market anticipated that the price of the Liberate shares would skyrocket in subsequent trading and investors who bought at the Offering price of \$16 per share could make huge profits by reselling the shares at much higher prices in the aftermarket. Consequently, the right to purchase shares at the Offering price of \$16 per share was extremely valuable and highly coveted.

25. 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 material portions of the restricted number of Liberate shares issued in connection with the Offering.

26. 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 Liberate Prospectus). In some cases, the amount of the commissions was determined ex post facto by arrangements including specific formulas tied to investors' profits on the Offering.

27. In addition, and unbeknownst to investors, the Underwriter Defendants entered into agreements with customers whereby the Underwriter Defendants agreed to allocate Liberate shares to those customers in the Offering in exchange for which the customers agreed to purchase additional Liberate shares in the aftermarket at pre-determined prices. Such tie-in arrangements were designed to and did maintain, distort and/or inflate the market price for Liberate 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 as well as a method of locking-in additional commissions on transactions in Liberate securities that otherwise would have been left to the free choice of its customers.

28. On July 28, 1999, Liberate announced over the PR Newswire the initial public offering of 6.25 million shares of its common stock at a price of \$16 per share. On the first day of trading, Liberate's share price increased 27 percent to \$20 3/8 as 10.15 million shares changed hands.

29. Unbeknownst to investors who purchased in the after-market, the increase in share price was a result, in part, of the tie-in arrangements, which locked in demand for Liberate shares in the after-market at levels well above the Offering price, thereby unlawfully and deceptively manipulating the market in Liberate shares.

30. The truth began to emerge on December 6, 2000, when The Wall Street Journal began to publish articles regarding a joint SEC and U.S. Attorneys' investigation into the payment by certain investors of extra-large, undisclosed "kickbacks" for allocations in initial "hot IPOs" that singled out Credit Suisse as an underwriting firms that had received requests for information in connection with the probe.

31. With regard to the joint SEC and U.S. Attorneys' investigation of Credit Suisse, Morgan Stanley, and other underwriters, The Wall Street Journal stated, in an article published on December 7, 2000:

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

* * * *

The authorities are scrutinizing ways in which Wall Street dealers may have sought and obtained larger-than-typical commissions in return for giving coveted allocations of IPOs to certain investors. 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 late 1998.

An early focus of the investigation is the Credit Suisse First Boston unit of Credit Suisse Group, the people say. In a statement, the firm confirmed the inquiry. "We have received requests from governmental agencies for information regarding the allocations of shares to investors in IPOs," CSFB [*i.e.* Credit Suisse] said. [Emphasis added.]

* * * *

In most cases, a majority of IPO shares are allocated to institutional investors, including fast-trading hedge funds, which cater to wealthy individuals; these funds are among Wall Street dealers' best customers because they routinely generate the largest stock-trading commissions. The probe focuses on whether some investors and dealers took that arrangement a step further by linking IPO profits to commission levels in ways that came to resemble kickbacks to the dealers from the investors, the people say.

* * * *

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. [Emphasis added.]

* * * *

Some traders have recounted conversations with Credit Suisse First Boston sales people, contending that they urged investors to boost their commissions with the firm's trading desk, citing investors' profits on CSFB-led IPOs. Indeed some traders say such "step-it-up" calls from Wall Street firms to investors were not uncommon.

Robert Meglio, a trader at Oracle Partners hedge fund, which specializes in biotechnology and health-care stocks, said in an August interview that his CSFB salesman told him: "You've made \$2 million in IPO profits but you've paid us \$500,000 in commissions" Mr. Meglio added in the interview: "They were saying, 'Listen, can you step it up?'"

Mr. Meglio says he declined.

32. Credit Suisse did not deny the account in the preceding paragraph. Rather, according to the article:

Responding to the account, CSFB said: "In the normal course of customer relationships on Wall Street, sales people in any investment bank discuss levels of business and ask for more business."

33. An article in The Wall Street Journal on the investigation, published on December 13, 2000, also singled out Credit Suisse:

The Credit Suisse First Boston unit of Credit Suisse Group has been an early focus of the probe. That firm, as well as Goldman and Morgan Stanley, dominated the market for the kind of high-octane IPOs that initially surged in price after the offerings. The three firms accounted for 53.1% of all IPOs dollar volume since mid-1998, according to Thomson Financial Securities Data, a Newark, N.J. data service.

Credit Suisse has confirmed receiving inquiries about its IPO allocations, which it says were in line with industry practice.

34. April 20, 2001, the Wall Street Journal reported that two senior employees in Credit Suisse's technology group had been placed on administrative leave and that the employees were John Schmidt ("Schmidt"), a top manager in the group, and Michael Grunwald ("Grunwald"), who reports to him.

35. On May 15, 2001, the Wall Street Journal, citing "people familiar with the situation," reported that Credit Suisse had informed Schmidt and Grunwald that, "an internal review found that they violated firm policy in allocating initial public stock offerings." The article further reported that:

The development regarding Messrs. Schmidt and Grunwald comes as a half dozen or more CSFB employees have been notified that they face possible disciplinary action by NASD's regulatory unit, NASDR, Inc. These other employees haven't been placed on administrative leave.

The employees notified of possible NASDR charges include Andrew S. Benjamin, formerly head of the firm's private-client services unit, which caters to wealthy individuals and hedge funds; George W. Coleman, a senior global stocktrading executive; Thomas E. Fusco, a salesman who dealt with institutional investors; and John P. Coen, a private-client broker in New York, according to the records.

The names of the other employees couldn't be determined. ***According to people familiar with the matter, the potential NASDR charges involve receiving inflated commissions on trades with big institutional clients that got IPO allocations from CSFB.*** Messrs. Benjamin, Coen, Coleman and Fusco all deny wrongdoing. [. . .]

Among the broad rules governing IPO sales, as set by the NASD, is the "free riding and withholding" rule, which requires underwriters to fully and fairly distribute shares of an IPO. Charging unusually large commissions on other trades in exchange for extra shares of an IPO could be considered a violation of that rule because it would give the underwriters an effective economic stake in the stock, according to securities lawyers.

Another regulatory provision involves the "fair dealing" rule, which requires brokers to deal with their customers fairly and honestly. Among the violations of such a rule, according to the NASD, is the "establishment of fictitious accounts in order to execute transactions which otherwise would be prohibited, such as the purchase of hot issues, or to disguise transactions which are against firm policy." [Emphasis added.]

36. In subsequent media accounts, Robertson Stephens and Merrill Lynch were identified as an underwriting firms having received requests for information in connection with the investigation.

37. As of the date of the filing of this complaint, the price of Liberate common stock is \$8.75.

**Defendants' False and Misleading Statements
and Violations of SEC and NASD Regulations**

38. The statements in the Prospectus and referenced in ¶¶21-23 were materially false and misleading because they contained the following misstatements and/or omissions of material facts, among others:

(a) that the Underwriter Defendants had solicited and received additional, excessive and undisclosed fees, commissions and other economic benefits in connection with the allocation of Offering shares by virtue of the acts, conduct and transactions described above; and

(b) that the Underwriter Defendants had entered into tie-in and other similar arrangements with certain customers, as described herein, which were designed to and did maintain, distort and/or inflate the market price for Liberate shares in the aftermarket.

39. Liberate was required to comply with SEC regulations in connection with the Prospectus. Item 501 of Regulation S-K specifically governs the forepart of the Registration Statement and outside front cover page of the prospectus. Item 501(b)(3) required Liberate to disclose therein the underwriters' discounts and commissions and Item 501(b)(8) required Liberate to identify the "nature of the underwriting arrangements."

40. The Prospectus violated Regulation S-K and was materially false and misleading because it failed to show in the table, or to otherwise disclose the true commissions received by the Underwriter Defendants and the actual nature of the underwriting arrangements.

41. Item 508 of SEC Regulation S-K specifically governs disclosures in the Prospectus regarding the Plan of Distribution of the Offering shares. With regard to underwriter compensation, 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 Associations 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.*** [Emphasis added.]

42. 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."

43. With regard to offering transactions, Regulation S-K, Item 508 (l) (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 transaction that affects 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. [Emphasis added.]

44. 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.

45. 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 was subject to NASD conduct rules.

46. 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-2110-1 (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."

47. 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 fact: The Underwriter Defendants did not make a bona fide public distribution of the Offering securities because it accepted kickbacks in exchange for Offering allocations, took steps to stabilize and distort the market for Liberate shares and thereby offered the securities to the public at prices in excess of the public offering price of the securities.

48. NASD Conduct Rule 2440 governs Fair Prices and Commissions and, in relevant part, requires that a member:

shall not charge his customer more than a fair commission or service charge, taking into consideration all relevant circumstances, including market conditions with respect to such security at the time of the transaction, the expense of executing the order and the value of any service he may have rendered by reason of his experience in and knowledge of such security and market therefor.

49. Guideline IM-2440 states, in relevant part,

It shall be deemed a violation of Rule 2110 and Rule 2440 for a member to enter into any transaction with a customer in any security at any price not reasonably related to the current market price of the security or to charge a commission which is not reasonable. [. . .] (a)(4) A mark-up of 5% or even less may be considered unfair or unreasonable under the 5% policy.

50. The Underwriter Defendants violated NASD Conduct Rules 2110 and 2440, and the Prospectus was materially false and misleading, because the Prospectus contained the following misstatements and/or omissions of material fact: in the connection with the Offering and aftermarket sales of the shares, The Underwriter Defendants charged customers commissions that were unfair, unreasonable, and in excess of 5% as consideration for receiving allocations of shares in the Offering.

51. 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.

52. Accordingly, defendants have violated Rules 101 and 102 of Regulation M.

COUNT I
(Against All Defendants
For Violation of Section 11 of the Securities Act of 1933)

53. Plaintiff repeats and realleges the allegations set forth above as if set forth fully herein, except to the extent that any such allegation may be deemed to sound in fraud.

54. Liberate is named as the issuer of the Liberate shares offered pursuant to the Prospectus filed with the SEC on or about July 27, 1999 and is therefore strictly liable to plaintiff and the class. Kertzman is named in this count as a director of Liberate on the date the Prospectus became effective and Kertzman and Hilker are named in this count as persons who signed the Prospectus.

55. The Underwriter Defendants are named in this Count as the underwriters with respect to the Offering.

56. As set forth above, there were untrue statements of material fact, or omissions of material fact, from the Prospectus.

57. This action is brought within one year after discovery of the untrue statements and omissions in and from the Prospectus should have been made through the exercise of reasonable diligence, and within three years of the effective date of the Prospectus.

58. By virtue of the foregoing, plaintiff and the other members of the class are entitled to damages under Section 11 as measured by the provisions of Section 11(e), from the defendants and each of them, jointly and severally.

COUNT II
(Against The Underwriter Defendants
For Violation of Section 12(a)(2) of the Securities Act of 1933)

59. Plaintiff repeats and realleges the allegations set forth above as if set forth fully herein, except to the extent that such allegation may be deemed to sound in fraud.

60. This Count is brought pursuant to Section 12(a)(2) of the Securities Act, 15 U.S.C. § 771(a)(2), on behalf of the Class against The Underwriter Defendants.

61. The statements referred to herein above were each made in a "prospectus" as that term is defined in Section 2(a)(10) of the Securities Act, 15 U.S.C. § 77b(a)(10), contained untrue statements of material facts, omitted to state other facts necessary to make the statements made not misleading, and concealed and failed to disclose material facts. The Underwriter Defendants acted to sell shares of Liberate in the form of common stock by way of the Prospectus. The actions included participating in the preparation of the Prospectus and other materials used in the sale of Liberate shares.

62. Plaintiff and the other members of the Class purchased or acquired the Company's common stock pursuant to a Prospectus. Plaintiff and the other members of the class, did not

know, or in the exercise of reasonable diligence could not have known, of the untruths and omissions contained in or made in connection with the Prospectus.

63. By reason of the conduct alleged herein, The Underwriter Defendants violated Section 12(a)(2) of the Securities Act. Accordingly, purchasers who acquired the Liberate shares in the Offering and pursuant to the Prospectus have the right to rescind and recover the consideration paid for the Company's shares and may rescind and tender their shares of the Company to the defendant sued herein. Class members who have sold their Liberate shares are entitled to rescissory damages.

64. Less than three years has elapsed from the time that the securities upon which this Count is brought were sold to the public to the time of the filing of this action. Less than one year has elapsed from the time when plaintiff discovered or reasonably could have discovered the facts upon which this Count is based to the time of the filing of this action.

COUNT III
(Against The Individual Defendants)
For Violation of Section 15 of the Securities Act)

65. Plaintiff repeats and realleges the allegations set forth above as if set forth fully herein, except to the extent that such allegation may be deemed to sound in fraud.

66. Defendants Kertzman and Hilker are alleged to be Control Persons with respect to the Offering of Liberate shares through stock ownership, agency or otherwise.

67. Because of their positions of control with respect to the Offering and their knowledge of Liberate's business, they are controlled persons within the meaning of Section 15 of the Securities Act.

68. By virtue of the foregoing, plaintiff and the other members of the Class are entitled to damages against Kertzman and Hilker jointly and severally.

COUNT IV
(For Violations Of Section 10(b) Of The
1934 Act And Rule 10b-5 Promulgated
Thereunder Against The Underwriter Defendants)

69. Plaintiff repeats and realleges the allegations set forth above as though fully set forth herein.

70. During the Class Period, the Underwriter Defendants, and each of them, carried out a plan, 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 Liberate common stock; and (iii) cause plaintiff and other members of the Class to purchase Liberate stock at artificially inflated prices. In furtherance of this unlawful scheme, plan and course of conduct, the Underwriter Defendants, and each of them, took the actions set forth herein.

71. The Underwriter 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 the Company's common stock in an effort to maintain artificially high market prices for Liberate common stock in violation of Section 10(b) of the Exchange Act and Rule 10b-5. The Underwriter Defendants are sued as primary participants in the wrongful and illegal conduct charged herein.

72. In addition to the duties of full disclosure imposed on the Underwriter Defendants as a result of their making of affirmative statements and reports, or participation in the making of affirmative statements and reports to the investing public, they each had a duty to promptly disseminate truthful information that would be material to investors in compliance with the integrated disclosure provisions of the SEC as embodied in SEC Regulation S-X (17 C.F.R. § 210.01 et seq.) and S-K (17 C.F.R. § 229.10 et seq.) and other SEC regulations, including accurate and truthful information with respect to the Company's operations, financial condition and performance so that the market prices of the Company's publicly traded securities would be based on truthful, complete and accurate information.

73. The Underwriter Defendants, individually and in concert, directly and indirectly, by the use of 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 Offering of Liberate common shares of Liberate stock as specified herein, 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 Liberate securities during the Class Period.

74. The Underwriter 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 readily available to them.

75. The Underwriter Defendants' material misrepresentations and/or omissions were done knowingly or recklessly and for the purpose and effect of concealing, inter alia, (a) that the Underwriter Defendants received additional, excessive and undisclosed commissions from its

customers in exchange for allocations of Offering stock; (b) that the Underwriter Defendants had arranged for its customers to purchase Liberate shares in the after-market, which artificially inflated and sustained the after-market price of the Offering shares and thereby benefitted the Underwriter Defendants; and (c) that the Underwriter Defendants also received undisclosed commissions in the form of excessive commissions from its customers in connection with the purchase of other securities.

76. 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 Liberate's common stock was artificially inflated during the Class Period. In ignorance of the fact that the market price of Liberate's shares were artificially inflated, and relying directly or indirectly on the false and misleading statements made by the Underwriter 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 the Underwriter Defendants but not disclosed in public statements by the Underwriter Defendants during the Class Period, plaintiff and the other members of the Class acquired Liberate common stock during the Class Period at artificially inflated high prices and were damaged thereby.

77. 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 and the marketplace known that the price of Liberate shares had been artificially inflated by the Underwriter Defendants' fraudulent scheme, plaintiff and other members of the Class would not have purchased or otherwise acquired their Liberate securities

during the Class Period, or, if they had acquired such securities during the Class Period, they would not have done so at the artificially inflated prices which they paid.

78. By virtue of the foregoing, the Underwriter Defendants each violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.

79. As a direct and proximate result of the Underwriters Defendants' wrongful conduct, plaintiff and the other members of the Class suffered damages in connection with their purchases of the Company's securities during the Class Period.

WHEREFORE, plaintiff, on behalf of himself and on behalf of the Class, prays for judgment as follows:

A. Declaring this action to be a class action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure and certifying plaintiff as class representative of the Class and its counsel as class counsel;

B. Against defendants, jointly and severally for damages suffered, as a result of defendants' violation of the securities laws;

C. Awarding plaintiff and other members of the Class, prejudgment and post-judgment interest, as well as their reasonable attorneys' and experts' witness fees and other costs;

D. Awarding rescission or recessionary damages to members of the class who no longer hold their Liberate stock; and

E. Awarding such other and further relief as this Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury.

DATED: May __, 2001

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