

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE THERESA T. FADEM TRUST and
BRUCE A. FADEM, as Trustee, :
on behalf of themselves :
and all others similarly situated, :

Plaintiff, :

01-CV-7161 (KMW)

CLASS ACTION
COMPLAINT

v. :

JURY TRIAL DEMANDED

CREDIT SUISSE FIRST BOSTON CORP.,
THE GOLDMAN, SACHS GROUP, INC., :
MERRILL LYNCH, PIERCE, FENNER :
& SMITH, INC., MORGAN STANLEY :
DEAN WITTER & CO., BANCOSTON :
ROBERTSON, STEPHENS, INC., and :
SALOMON SMITH BARNEY, INC. :

Defendants. :

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Plaintiff complains¹ of defendants as follows:

¹ Plaintiff's allegations pertaining to plaintiff and his counsel are made on knowledge. All other allegations are made upon information (including that derived from analysis of documents filed with the Securities and Exchange Commission ("SEC"), speeches and testimony by SEC officials, press releases, statements of securities analysts, news reports, and the investigation conducted by and through plaintiff's counsel) and belief.

I. JURISDICTION AND VENUE

1. The claims asserted herein arise under and pursuant to Sections 11 and 12 of the Securities Act of 1933 (the Securities Act), 15 U.S.C. ' 77k and 77l(2), and Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. ' 78j(b) 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 pursuant to Section 22 of the Securities Act, Section 27 of the Exchange Act, and 28 U.S.C. ' 1391(b). Plaintiff's purchase occurred here; and the acts complained of (including the trading of the stock based upon misleading information), occurred in substantial part in this District. Defendant does business in this District.

4. In connection with the acts alleged in this

Complaint, defendants, directly or indirectly, used the mails and the means and instrumentalities of interstate commerce, including telephonic communications.

II. PARTIES

5.(a) Plaintiffs Theresa T. Fadem Trust and Bruce Fadem (collectively referred to herein as "plaintiff") purchased a Class Security, Internet Infrastructure HOLDRS, as set forth on Schedule "A" annexed hereto after their broker, and the lead underwriter of such security, defendant Merrill Lynch, issued favorable research reports in violation of the Exchange Act concerning the constituent class securities that determined the price of Internet Infrastructure HOLDRS. This included the following Class Securities for which Merrill Lynch had acted as lead underwriter: Exodus Communications, Inc., Inktomi Corp., Vitria Technology Inc., Software.com, and E.piphany, Inc.

(b) Plaintiff and class members relied or are deemed to have relied on market prices and on the integrity of the market for Class Securities.

III. DEFENDANTS

6. Defendant CREDIT SUISSE FIRST BOSTON CORP. is a corporation organized and existing under the laws of the State of Massachusetts, with its principal place of business in New York, New York. During the relevant time period, CREDIT SUISSE FIRST BOSTON CORP. served as a member of the selling group for one or more of the Class Securities, and issued standardized research reports which included favorable "buy" recommendations for Class Securities.

7. Defendant THE GOLDMAN, SACHS GROUP, INC. is a corporation ("GOLDMAN, SACHS") organized and existing under the laws of the State of Delaware, with its principal place of business in New York, New York. During the relevant time period, GOLDMAN, SACHS served as a member of the selling group for one or more of the Class Securities, and issued standardized research reports which included favorable "buy" recommendations for Class Securities.

8. Defendant MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. is a corporation organized and existing under the laws of

the State of Delaware, with its principal place of business in New York, New York. During the relevant time period, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. served as a member of the selling group for one or more of the Class Securities, and issued standardized research reports which included favorable "buy" recommendations for Class Securities.

9. Defendant MORGAN STANLEY DEAN WITTER & CO. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York, New York. During the relevant time period, MORGAN STANLEY DEAN WITTER & CO. served as a member of the selling group for additional Class Securities, and issued standardized research reports which included favorable "buy" recommendations for Class Securities.

10. Defendant BANCOSTON ROBERTSON, STEPHENS, INC. is a corporation organized and existing under the laws of the State of California, with its principal place of business in San Francisco, California. During the relevant time period, BANCOSTON ROBERTSON, STEPHENS INC. served as a member of the selling group for one or more of the Class Securities, and issued

standardized research reports which included favorable "buy" recommendations for Class Securities.

11. Defendant SALOMON SMITH BARNEY, INC. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York, New York. SALOMON SMITH BARNEY, INC. is herein being sued with respect to its own activities and as successor to, or with respect to the underwriting transacted through, Shearson Lehman Brothers, Inc. which SALOMON SMITH BARNEY acquired in approximately 1993. During the relevant time period, SALOMON SMITH BARNEY, INC. served as a co-lead underwriter for United Parcel Service, Inc., or member of the selling group for one or more of the Class Securities, and issued standardized research reports which included favorable "buy" recommendations for Class Securities.

12. The acts charged in this Complaint have been done by Defendants, and were ordered and performed by their officers, directors, agents, employees or representatives while actively engaged in the management, direction, control or transaction of Defendants' business or affairs.

IV. CLASS ACTION ALLEGATIONS

13.(a) Plaintiff brings this action as a class action pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure, on behalf of himself and a class (the "Class") of all persons who purchased shares of Class Securities between August 1, 1998 and the present ("Class Period"). Class Securities include Internet Infrastructure HOLDERS, the constituent securities thereof, and all other internet and information technology securities for which defendants issued misleading research reports as alleged herein during the Class Period. A sub-class consists of plaintiff and those persons who purchased Internet Infrastructure HOLDERS pursuant to the standardized but misleading Prospectus alleged herein.

(b) Excluded from the Class are defendants herein; members of the immediate family of each of the Individual Defendants; the directors, officers, affiliates, subsidiaries and parents of defendants, as well as all of its subsidiaries and operating affiliates; any person in which any excluded person has a controlling interest; and the legal representatives, agents,

heirs, successors-in-interest or assigns of any excluded person.

14. The members of the Class are geographically dispersed and so numerous that joinder of all members is impracticable. The precise number of Class members is unknown to plaintiff at this time but Class members are believed to number in the thousands.

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

(a) whether defendants systematically issued misleading research reports which had the reciprocal effect of inflating the prices of Class Securities;

(b) whether defendants intentionally made material misstatements and/or omitted to state material facts in connection with Class Securities;

(c) whether the federal securities laws were violated by defendants' acts as alleged herein; and

(d) The extent of the inflation of prices and other injuries sustained by members of the Class and the appropriate

measure of damages.

16. 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.

17. Plaintiff will fairly and adequately represent and protect the interests of the members of the Class. Plaintiff has retained competent counsel experienced in class action litigation under the federal securities laws to further ensure such protection and intends to prosecute this action vigorously.

18. A class action is superior to other available methods (if any) for the fair and efficient adjudication of this controversy. Since the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it virtually impossible for individual Class members to seek redress for the wrongful conduct alleged. Plaintiff knows of no difficulty which will be encountered in the management of this litigation that would preclude its maintenance

as a class action.

19. The names and addresses of the record purchasers of Class Securities are available from the records of defendants, brokers, the underwriters of Class Securities, and others. 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.

V. UNDERLYING ALLEGATIONS

20. A material factor affecting the prices of securities generally is the research report issued by influential brokerage firms.

21. Given the lack of Abricks and mortar[®] valuation criteria, a critical factor in the determination of prices in the efficient markets for the trading of the internet and technology companies constituting the Class Securities was the systematic issuance by the defendants of standardized research reports.

22. In such research reports, defendants systematically made recommendations that Class Securities be purchased.

23. Such recommendations had a material and cumulative effect on the price of Class Securities both at and shortly after the time of their issuance and thereafter. However, defendants' research reports on Class Securities systematically violated Section 10(b) of the Exchange Act in that those standardized reports systematically failed to disclose, among others, the following material facts:

- (a) The internal operations of defendants mandated that defendants' analysts issue a favorable recommendation to purchase such Class Security as an adjunct to defendants' obtaining (and their analysts' directly or indirectly sharing in) investment banking fees and other fees and business from the issuer of such Class Security (or, indeed, issuers of other Class Securities).
- (b) Defendants and their employees, including analysts, frequently acquired shares of class

securities at a fraction of the price that public investors later paid therefor. Such analysts were, therefore, involved in an overall "game" to increase the prices of Class Securities in a manner that would profit the analysts' own individual holdings and their firm's holdings. This allowed the analyst, his or her employer, and his or her co-workers to sell their Class Security internet and technology holdings at the generally higher prices caused by the violations alleged herein.

- (c) Defendants purposely failed to have vigilant compliance procedures to scrutinize and prevent the systematically misleading recommendations and to insure that there was no slanting of the contents of reports to serve the financial interests of the defendant rather than those of the defendants' clients.

24. Defendants= systematic violations of the Exchange Act which inflated the price of one Class Security mutually and reciprocally caused, supported and justified increases in the

prices of the other Class Securities. Merrill Lynch's standardized research reports issued during the Class Period included favorable recommendations on class securities as to which Merrill Lynch was a co-lead underwriter. See, e.g., par. 5(a) hereof. However, Merrill Lynch and other defendants failed to disclose in all such favorable research reports on all such Class Securities all the material facts alleged in par. 23 and the cumulative effects of such unlawful acts on the prices of Class Securities. Plaintiff maintained his account with Merrill Lynch and paid inflated market prices for Internet Infrastructure HOLDERS based upon defendants' violations of law.

**AS AND FOR A FIRST CAUSE OF ACTION AGAINST
DEFENDANT MERRILL LYNCH**

25. This cause of action is brought by plaintiff pursuant to Sections 11 and 12(2) of the Securities Act, 15 U.S.C. ' 77k, against defendant Merrill Lynch. It does not sound in fraud.

26. The Prospectus of Internet Infrastructure HOLDERS, dated February 24, 2000 (the AProspectus@) did not disclose that the prices of the constituent securities of Internet Infrastructure HOLDERS had been artificially inflated or the other

conduct alleged in par. 23 hereof. The Prospectus and Registration Statement were filed with the Securities Exchange Commission by defendant Merrill Lynch in February 2000.

27. Merrill Lynch is the registrant for the securities of Internet Infrastructure HOLDERS sold to plaintiffs and the subclass. Merrill Lynch issued, caused to be issued and participated in the issuance of materially false and misleading written statements to the investing public which were contained in the Prospectus. As an issuer of Internet Infrastructure HOLDERS, Merrill Lynch is strictly liable to plaintiff for the material misstatements or omissions.

28. Defendant Merrill Lynch was responsible for the contents and dissemination of the Registration Statement and the Prospectus. Defendant Merrill Lynch was a seller and underwriter of Internet Infrastructure HOLDERS to plaintiff and the members of the subclass by means of the misleading Prospectus. Defendant Merrill Lynch did not make a reasonable investigation or possess reasonable grounds for believing that the statements contained in the Registration Statement and Prospectus were true, did not omit any material facts and were not materially misleading.

29. Plaintiff and members of the subclass acquired

Internet Infrastructure HOLDERS pursuant to, or traceable to, the Registration Statement and did not know of untrue statements or omissions of material facts.

30. Plaintiff and members of the subclass have sustained damages.

31. Less than one year has elapsed from the times of the violations and facts upon which this Complaint is based were first disclosed to the time of filing this Complaint. Specifically, Merrill Lynch and other defendants have only recently effected substantial changes in their policies concerning analysts' reports and the SEC announced only yesterday the systematic nature of certain wrongs relating to the conduct alleged herein. Less than three years has elapsed from the time that the holders of Internet Infrastructure HOLDERS was *bona fide* offered to the public to the time of filing this Complaint.

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

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

33. Defendants had a duty promptly to disseminate and disclose all truthful information that would be material to investors when defendants made positive statements concerning Class Securities.

34. However, the 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 the adverse material information that undercut their favorable statements as alleged in par. 23.

35. As a result of the dissemination of the materially false and misleading information and failure to disclose all the material facts, the market price of Class Securities was artificially inflated. In reliance on defendants' conduct and the market, plaintiff and the other members of the Class acquired Class Securities at artificially high prices and were damaged thereby.

36. Plaintiff and the Class members reasonably relied

or are legally deemed to have reasonably relied on defendants' omissions of the previously alleged material facts. Plaintiffs acquisition of Class Securities at inflated prices were the foreseeable **and intended** result of the aforementioned material omissions because said omissions led to the inflation of the price of Class Securities.

37. By virtue of the foregoing, defendants have violated Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder. As a direct and proximate result of said violation, plaintiff and the other members of the Class suffered damages in connection with the purchase of Class Securities during the Class Period.

**AS AND FOR A THIRD CAUSE OF ACTION AGAINST ALL
DEFENDANTS FOR BREACH OF FIDUCIARY DUTY AND OTHER
VIOLATIONS OF THE COMMON AND STATUTORY LAW OF THE
STATE OF NEW YORK**

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

39. Defendants previously alleged conduct constitutes a breach of fiduciary duty under the law of the State of New York

which was the locus of the markets on which all of the Class Securities were traded and the headquarters of almost all of the defendants.

40. Such conduct constitutes other violations of the common law of the State of New York.

41. As a direct and proximate result of such violations, plaintiff and Class members have been caused damages in connection with the purchase of Class Securities.

JURY DEMAND

Plaintiff hereby demands a trial by jury.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for judgment as follows:

A. Declaring this action to be a plaintiff 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, and 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
August 1, 2001

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