

JUDGE SWEET

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

4054

PHILLIP GOLDBERG, on behalf of himself and all others
similarly situated, x

Civil No. _____

Plaintiffs, x

JURY TRIAL DEMANDED

V.

NASDAQ OMX GROUP, INC. and THE NASDAQ
STOCK MARKET LLC,

Defendants.



CLASS ACTION COMPLAINT

FINKELSTEIN THOMPSON LLP

Douglas G. Thompson, Jr.
Michael G. McLellan
Robert O. Wilson
1077 30th Street, NW
Suite 150
Washington, DC 20007
Ph: (202) 337-8000

LOVELL STEWART HALEBIAN JACOBSON LLP

Christopher Lovell (CL 2595)
Victor E. Stewart (VS 4309)
Fred T. Isquith, Jr. (FI 1064)
61 Broadway, Suite 501
New York, NY 10006
Telephone: (212) 608-1900
Facsimile: (212) 719-4677

Counsel for Plaintiffs

INTRODUCTION

1. As set forth more fully herein, this action stems from Facebook, Inc.'s ("Facebook's") May 17, 2012 initial public offering ("IPO").
2. This is a federal class action brought on behalf of all individuals or entities seeking to purchase shares of Facebook during the IPO whose purchase and/or cancellation orders were not promptly and accurately processed, were delayed, or otherwise were adversely affected by the events described herein, and who suffered monetary losses thereby.
3. Defendants operate NASDAQ, an American stock exchange. Facebook trades on the NASDAQ under the stock symbol FB, and has done so since its IPO.
4. Facebook's IPO was hotly anticipated. Many investors – both retail and institutional – sought to purchase shares in that IPO.
5. However, due to Defendants' negligence, that IPO was badly mishandled. Because NASDAQ failed to process Facebook trades promptly and efficiently, parties attempting to purchase Facebook shares were unable to determine if they had properly done so. Indeed, NASDAQ failed to process some trade orders for hours on end, and failed to cancel other orders despite customer requests to do so.
6. This damaged Plaintiff and class members in a variety of ways. For example, some class members placed buy orders, and then placed timely cancellations of those orders when the market price declined. These class members were damaged when the cancellations were not promptly and correctly executed by NASDAQ, and instead the buy orders were executed after Facebook prices had declined in value, meaning those class members overpaid for their Facebook shares. Other class members were unable to determine if their buy orders had been executed. These class members did not know whether they owned Facebook shares, or at what price, and were accordingly unable to timely sell those shares, suffering losses.

7. By this action, Plaintiff seeks recovery for himself and for class members for damages suffered because of NASDAQ's negligence.

PARTIES

8. Plaintiff Phillip Goldberg ("Plaintiff") is a resident of the state of Maryland. On May 18, 2012, Plaintiff placed purchase and cancellation orders for Facebook's stock that NASDAQ failed to promptly and accurately execute. Plaintiff suffered losses thereby.

9. Defendant The Nasdaq Stock Market LLC ("NASDAQ LLC") is a Delaware limited liability company with its principal place of business at One Liberty Plaza, New York, New York 10006. NASDAQ LLC, together with NASDAQ OMX, operates the NASDAQ.

10. Defendant The Nasdaq OMX Group, Inc. ("NASDAQ OMX") is a Delaware corporation with its principal place of business at One Liberty Plaza, New York, New York 10006. NASDAQ OMX, together with Nasdaq LLC, operates the NASDAQ.

JURISDICTION AND VENUE

11. This Court has jurisdiction over the subject matter presented by this class action complaint because it is a class action arising under the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (2005), which explicitly provides for the original jurisdiction of the Federal Courts over any class action in which any member of the plaintiff class is a citizen of a state different from any defendant, and in which the matter in controversy exceeds in the aggregate the sum of \$5,000,000.00, exclusive of interest and costs. Plaintiff alleges that the total claims of the individual members of the Class in this action are in excess of \$5,000,000.00 in the aggregate, exclusive of interest and costs, as required by 28 U.S.C. §1332(d)(2), (5).

12. Plaintiff is a citizen of Maryland and Defendants can be considered citizens of New York and Delaware for purposes of diversity. Therefore, diversity of citizenship exists under CAFA as required by 28 U.S.C. § 1332(d)(2)(A). Furthermore, Plaintiff alleges members of the proposed Class in the aggregate are citizens of a state other than New York, where this action is originally being filed, and that the total number of members of the proposed Class is greater than 100, pursuant to 28 U.S.C. § 1332(d)(5)(B).

13. Jurisdiction is also conferred by 28 U.S.C. § 1332. There is complete diversity among the parties and the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

14. Venue is proper in this District pursuant to 28 U.S.C. §1391(b) because Defendants' principal place of business was located in this district at all times relevant to this action, and many of the acts charged herein occurred in this district.

SUBSTANTIVE ALLEGATIONS

15. The NASDAQ is an American stock exchange. Its trading platforms allow the routing and execution of buy and sell orders for securities.

16. NASDAQ is operated by NASDAQ OMX and NASDAQ LLC. NASDAQ OMX's website states it has "unparalleled" processes. The website goes on to state that NASDAQ OMX's trading model is the "standard for markets worldwide." It additionally asserts that it is "the power behind 1 in 10 of the world's securities transactions" and that "[s]eventy exchanges in 50 countries trust our trading technology to power their markets." The website also asserts that the NASDAQ stock market is "the fastest trading platform in the world." Finally, it asserts that "[o]ur commitment to excellence goes beyond our 99.999% uptime record for

mission critical operations. It includes our passion for flawless execution and our relentless pursuit to anticipate customer requirements.”

17. On May 18, 2012, Facebook, Inc. (“Facebook”) began public trading on the NASDAQ. Trading began at the IPO price of \$38 a share, which valued the company at approximately \$104 billion. This was reportedly the largest valuation to date for a newly public company.

18. While Facebook’s first official trade should have begun at 11:05 AM on May 18, that opening was delayed due to malfunction in NASDAQ’s design for processing order cancellations. This prevented certain trades from processing properly.

19. Normally, trades placed by retail investors through brokerage services execute nearly immediately, as do cancellations. However, orders placed by investors seeking to purchase Facebook shares during the first trading day often took hours to execute. In the meantime, the investors seeking to purchase those shares had no idea if their trades had executed, and, accordingly, had no idea if they owned Facebook shares at all.

20. A May 18, 2012 *Wall Street Journal* article described a typical experience:

Eric Hamrick was eager to get his hands on newly minted Facebook Inc. stock, placing an order for 500 shares at 6 a.m. Friday before the company's debut on the Nasdaq Stock Market.

The order to buy shares for as much as \$49 apiece never made it through. By 11:30 a.m., after the opening of the stock was delayed by a half hour, Mr. Hamrick got nervous and tried to cancel his order. But his online brokerage, Scottrade, displayed the cancellation as “pending,” leaving him wondering whether he had bought shares or had stayed out of trading.

At 4 p.m., his Scottrade account showed the order expired.

21. In short, legions of investors seeking to purchase Facebook stock had no idea if they had successfully done so, and other investors seeking to cancel trades not yet executed had no idea if they had successfully done so. The May 18th article described these problems:

Professional traders who placed big orders on behalf of hedge funds, mutual funds and other institutions waited more than two hours after Facebook shares started trading at 11:30 a.m. to hear whether the orders would be honored or canceled. These traders said the uncertainty caused some big investors to bail out of Facebook stock, because they didn't know for sure what they had bought or sold, or at what price.

Meanwhile, small-time buyers like Mr. Hamrick who placed orders through online brokerages like Fidelity and Scottrade also fretted for hours whether their trades or cancellations went through.

22. In some instances, orders investors sought to cancel were nevertheless processed.

23. One such example was recounted in a May 21, 2012 article in the *Wall Street*

Journal:

George Brady, a 66-year-old recruiter in North Carolina, bought 1,000 shares of Facebook a few minutes after it opened for trading Friday. He said by Monday morning, he sold his holding, taking a \$2,770 loss.

Mr. Brady said he tried not to purchase the shares in the first place, but was unable to withdraw his order on his Charles Schwab account, calling the situation "ridiculous." Technical problems on the Nasdaq Stock Market prevented some investors from confirming their trades or trade cancellations.

24. Plaintiff's experience was similar to that of the investors described in the *Wall Street Journal* article.

25. On the morning of the IPO, Plaintiff attempted to place a series of limit buy orders through the Charles Schwab Corporation's online brokerage service. When those trades failed to execute, Plaintiff sought to cancel them.

26. Rather than cancelling the trades, Plaintiff's account simply listed the cancellations as "pending." This persisted throughout the day.

27. Despite Plaintiff's timely cancellation orders, one limit buy trade was eventually executed approximately three hours after it was placed, and after Plaintiff had placed a timely cancellation order. While the trade was placed at \$41.23, it finally executed when Facebook shares were trading at approximately \$38.

28. Because Plaintiff was unable to determine what shares, if any, of Facebook he held, he was unable to trade in accordance with a rational trading strategy. Moreover, because a trade placed at \$41.23 failed to execute until the stock traded at \$38, NASDAQ's failure to execute his trade orders promptly, accurately and efficiently immediately cost Plaintiff money.

29. Public reports indicate these problems were the fault of NASDAQ. For example, a May 21, 2012 Reuters article stated:

The Nasdaq Stock Market, where Facebook is listed, had problems sending electronic messages back to the brokerages that handle orders from individual, or "retail," investors, according to people with direct knowledge of the situation.

Because the electronic acknowledgements didn't come back from the exchange, the brokers were unable to tell their clients that trades had been executed. Such acknowledgements usually occur almost instantaneously. The delay meant that, in one of the most anticipated stock offerings ever, frustrated brokers and investors didn't know if orders had actually gone through.

30. NASDAQ acknowledged it was at fault. A different May 21, 2012 Reuters article stated that "Nasdaq Chief Executive Robert Greifeld said in a conference call with reporters on Sunday that there had been a malfunction in the trading system's design for processing order cancellations."

31. Because Defendants' execution of trades is private business rather than a quasi-governmental function, Defendants are not immune from suit.

CLASS ACTION ALLEGATIONS

32. Plaintiff brings this class action under rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure, on behalf of the following class:

All individuals or entities who placed buy, sell or cancellation orders with respect to Facebook stock on the NASDAQ on May 18, 2012 whose orders were not promptly, timely, correctly and efficiently processed, and were delayed, or otherwise were adversely affected by the events described herein, and who suffered monetary losses thereby.

33. The class is so numerous that joinder of all class members is impracticable. Some reports indicate that as many of 30 million Facebook shares were affected by NASDAQ's negligence, and, upon information and belief, there are thousands of class members.

34. There are questions of law and fact common to members of the class that predominate over any questions affecting individual members, which include:

- a. Whether the problems publicly reported in the days following the Facebook's debut on the NASDAQ affected members of the class;
- b. Whether Defendants had a duty to ensure Plaintiff and the class's trades in Facebook stock were processed promptly and effectively;
- c. Whether Defendants were negligent in failing to take the steps necessary to ensure Plaintiff and the class's trades in Facebook stock were processed promptly and effectively; and
- d. Whether, as a result of Defendants misconduct, Plaintiff and the class are entitled to relief, and the amount and nature of such relief.

35. Plaintiff's claims are typical of the claims of the class. Plaintiff has no interests antagonistic to those of the class, and Defendants have no defenses unique to Plaintiff.

36. Plaintiff will fairly and adequately assert and protect the interests of the class, and has retained attorneys experienced in class and complex litigation.

37. A class action is superior to other available methods for the fair and efficient adjudication of this controversy for the following reasons:

- a. The class is readily definable;
- b. It is economically impracticable for members of the class to prosecute individual actions, because the amount which may be recovered by each individual class member would be insufficient to support separate actions;
- c. The aggregate amount which may be recovered by individual class members will be large enough in relation to the expense and effort in administering the action to justify a class action;
- d. Plaintiff is seeking relief with respect to the class as a whole; and
- e. Prosecution as a class action will eliminate the possibility of repetitious and possibly contradictory litigation.

38. A class action will cause an orderly and expeditious administration of the claims of the class. Economies of time, effort, and expense will be fostered and uniformity of decisions will be ensured.

39. This class action presents no difficulties in management that would preclude maintenance as a class action. The class is readily definable and is one for which records of the names and addresses of the members of the class exist in the files of Defendants or third parties.

COUNT I

(Negligence)

40. Plaintiff hereby incorporates each of the preceding and subsequent paragraphs as if fully set forth herein.

41. Defendants owed Plaintiff and the class the duty of reasonable care, which they breached. In addition, as a stock exchange, defendant NASDAQ LLC and defendant NASDAQ OMX owed Plaintiff and the Class a duty to exercise reasonable care to execute trade orders promptly, accurately and efficiently and to maintain an orderly trading market.

42. Defendants were negligent in performing these duties, rendering them liable and/or strictly liable, for the following reasons:

- a. Failing to ensure Plaintiff's and the class's trade orders in Facebook stock were timely and effectively executed;
- b. Failing to implement effective quality control procedures regarding Plaintiff and the class's transactions in Facebook stock;
- c. Failing to oversee the employees or independent contractors who had the responsibility to ensure that Plaintiff and the class's transactions in Facebook stock were timely and effectively executed; and
- d. Any and all other acts of negligence, recklessness, and omissions to be proven through discovery or at the time of trial of this matter, all of which are in contravention of the duties imposed on Defendants in favor of Plaintiff and class members.

43. As a result of Defendants' breach of its legal duties, Plaintiff and the class suffered damages as described herein.

44. The damages suffered by Plaintiff and the class were all general and special damages arising from the natural and foreseeable consequences of defendants' conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and all other individuals similarly situated, prays for judgment as requested above against Defendants and further prays for:

- A. An order certifying this case as a class action and appointing Plaintiff as the lead plaintiff and his counsel as lead counsel pursuant to Fed. R. Civ. P. 23(g);
- B. A determination as to Defendants' liability for damages;
- C. A determination as to declaratory and injunctive relief;
- D. An award of restitution, rescission, and damages;
- E. An award of pre-judgment and post-judgment interest on all damages as allowed by law;
- F. An award from a common fund created, attorneys' fees and the costs of filing and litigating this suit; and
- G. An award of such other relief as this Court may deem just and proper.

JURY TRIAL DEMAND

Plaintiff demands a jury trial on all issues so triable.


Dated: May 22, 2012

Respectfully submitted,

FINKELSTEIN THOMPSON LLP

Douglas G. Thompson, Jr.
Michael G. McLellan
Robert O. Wilson
1077 30th Street, NW
Suite 150
Washington, DC 20007
Ph: (202) 337-8000

LOVELL STEWART HALEBIAN JACOBSON LLP


Christopher Lovell (CL 2595)
Victor E. Stewart (VS 4309)
Fred T. Isquith, Jr. (FI 1064)
61 Broadway, Suite 501
New York, NY 10006
Telephone: (212) 608-1900
Facsimile: (212) 719-4677

Counsel for Plaintiffs