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No. 09-1403

IN THE

Supreme Court of the United States

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Petitioner,

v.

HALLIBURTON CO. ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's denial of class certification where the evidence showed that the alleged misrepresentations had no impact on the company's stock price.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent Halliburton Company states that it is a publicly held company, which has no parent company.

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BRIEF FOR RESPONDENTS

STATEMENT

In *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), a four-Justice majority of this Court created a rebuttable presumption that securities purchasers rely "on the integrity of the market price," which, in turn, is presumed to incorporate all public, material misrepresentations. *Id.* at 247. That presumption enables a Rule 10b-5 plaintiff to submit proof of an efficient market in lieu of proof that individual plaintiffs relied on defendant's misrepresentations. The defendant, however, may "rebut the presumption of reliance" by "show[ing] that the misrepresentation

in fact did not lead to a distortion of price." *Id.* at 248. Where the rebuttal is successful, "the causal connection" between the misrepresentation and the plaintiff's reliance is "broken" because "the basis for finding that the fraud had been transmitted through market price"—and thus that class members all relied on a distorted market price—is "gone." *Ibid.*

This case presents a fundamental question regarding *Basic*'s rebuttable presumption: Must a class be certified where the evidence shows that the alleged misrepresentation did *not* distort the market price? The answer must be "no." The predicate for presuming classwide reliance vanishes when the market price on which class members presumptively relied was not affected by the challenged statement. Instead, any reliance would have to be proved on an individualized, plaintiff-by-plaintiff basis, making class certification inappropriate.

The contrary view of petitioner Erica P. John Fund, Inc. (the Fund) and its *amici* defies common sense, judicial efficiency, and *Basic* itself. It would deploy the *in terrorem* effect of class certification under the fraud-on-the-market theory even where the alleged misrepresentation did not affect the market price. And it would needlessly postpone rebuttal of the presumption, requiring courts to retroactively decertify classes that never should have been certified in the first place.

The Fund's claim that courts must defer ruling on the viability of the presumption of reliance until after the class is certified misconceives the "commonality" and "predominance" showings that must be made to justify class certification under Rule 23. For class certification to be proper, the judge must find that issues subject to common proof predominate. Thus, class certification may be appropriate if the fraud-on-the-market presumption can be used to establish classwide reliance on a distorted market price. But if the market price was not dis-

torted by the fraud, and the class could not have universally relied on that distorted price, then the issue of reliance cannot be resolved on a classwide basis. The failure of the fraud-on-the-market presumption in this context does not disprove the merits of any fraud claim. It instead shows that the reliance issue will require the sort of individualized inquiry inappropriate for resolution in a class action. This Court should reject the Fund's invitation to render *Basic*'s rebuttable presumption virtually irrebuttable at the certification stage.

I. BACKGROUND

1. This Court has "implied * * * a private damages action" for securities fraud from Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and the SEC's Rule 10b-5, 17 C.F.R. 240.10b-5. *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341 (2005).

Like other claimants, a named plaintiff seeking class certification in a federal securities-fraud suit must satisfy Rule 23's requirements. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613-614 (1997); *Gen. Tel. Co. of the Sw.* v. *Falcon*, 457 U.S. 147, 156 (1982).

Here, the Fund sought certification under Rule 23(b)(3), which requires a plaintiff to prove that "the questions of law or fact common to class members predominate over any questions affecting only individual members." J.A. 146a-148a; see Fed. R. Civ. P. 23(b). It appears undisputed (see Pet. Br. 46; U.S. Br. 9-10 & n.1) that the Fund must establish predominance, as well as the other Rule 23 requirements, by a preponderance of the evidence. See *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008); *Teamsters Local 445* v. *Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008); *Oscar Private Equity Invs.* v. *Allegiance Telecom, Inc.*, 487 F.3d 261, 267-269 (5th Cir. 2007).

2. The traditional rule in fraud lawsuits was that the element of reliance required individualized proof: Each plaintiff had to show that he relied on the misrepresentations, *i.e.*, that absent the misrepresentations, he would not have entered into the transaction. *Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 367 (4th Cir. 2004); see *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 159, 160 (2008). As this Court recognized in *Basic*, "[r]equiring proof of individualized reliance * * * effectively * * * prevented [plaintiffs] from proceeding with a class action, since individual issues * * * overwhelmed the common ones." 485 U.S. at 242.

To remedy that perceived difficulty, *Basic*'s four-Justice majority ruled that a putative class-action plaintiff may obtain a rebuttable presumption of classwide reliance by invoking the "fraud-on-the-market" theory. 485 U.S. at 245.[1] The fraud-on-the-market theory assumes that in an efficient, well-developed market, all public information about a company is known to the market and reflected in the company's stock price. *Id.* at 246. The theory further posits that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of [the market] price." *Id.* at 247. Because misrepresentations presumably distort the market price, "an investor's reliance on any public, material misrepresentations * * * may be presumed for purposes of a Rule 10b-5 action." *Ibid.*; see *Stoneridge*, 552 U.S. at 159.

To trigger the fraud-on-the-market presumption of reliance, the plaintiff must show that (1) the defendant "made public, material misrepresentations"; (2) the de-

[1] Chief Justice Rehnquist and Justices Scalia and Kennedy did not participate. *Basic*, 485 U.S. at 250. Justice Blackmun wrote the majority opinion joined by Justices Brennan, Marshall, and Stevens. *Id.* at 226. Justices White and O'Connor dissented in relevant part. *Id.* at 250-263.

fendant's shares were traded in an "efficient market"; and (3) "the plaintiff traded shares between the time the misrepresentations were made and the time the truth was revealed." *Basic*, 485 U.S. at 248 & n.27. This showing establishes the "threshold facts" for a presumption that the entire class relied on the misrepresentation by relying on the market price. *Id.* at 248.

The presumption of reliance, however, is "subject to rebuttal." *Basic*, 485 U.S. at 245. Indeed, "*[a]ny showing* that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." *Id.* at 248 (emphasis added). Thus, a defendant may "rebut the presumption of reliance" by "show[ing] that the misrepresentation in fact did not lead to a distortion of price." *Ibid.* Such a rebuttal breaks the "causal connection" because "the basis for finding that the fraud had been transmitted through the market price would be gone." *Ibid.*

3. Although some proponents of the efficient-market hypothesis believed that its adoption would curtail the number of securities-fraud class actions, Fischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities*, 38 Bus. Law. 1, 16 (1982), they were proven wrong. Between 1988 and 1991, the number of such suits nearly tripled, see O'Brien, *The Class-Action Shakedown Racket*, Wall St. J., Sept. 10, 1991, at A20, and notwithstanding the enactment of the PSLRA, the number increased still further over the ensuing decades. Plancich & Starykh, *2008 Trends in Securities Class Actions* (Nat. Econ. Res. Assoc.), Dec. 2008, at 2.

II. Proceedings Below

A. Proceedings In District Court

The Fund filed this putative securities-fraud class action against Respondents Halliburton Company and its CEO David Lesar (collectively, Halliburton) in the U.S. District Court for the Northern District of Texas on June 3, 2002. J.A. 9a; Pet. App. 111a-112a. The complaint alleged that Halliburton made misrepresentations about three divergent topics: (1) potential liability in asbestos litigation; (2) accounting for revenue on fixed-price construction contracts; and (3) benefits from a merger with Dresser Industries. Pet. App. 112a-113a. The Fund claimed that investors lost money when Halliburton's stock price declined following the release of negative news touching upon one or more of the subjects of the alleged misstatements.

Five years after the Fund filed its complaint, it moved for class certification. J.A. 97a, 126a. During those five years, the Fund amended its complaint four times and obtained extensive discovery, including more than 600,000 pages of documents from Halliburton.

In support of certification, the Fund relied exclusively on an event study and a report from its expert, Jane Nettesheim. The Fund's motion recognized that "[t]he cause and effect relationship between unexpected information released to the market and movement of the stock price *is the essence* of an efficient market and the foundation for the fraud-on-the-market theory." J.A. 151a (emphasis added). The accompanying event study, which examined every day in the 2½ year class period, was the Fund's sole proof of both market efficiency and the alleged misrepresentations' impact on market price. J.A. 166a-167a, 271a, 590a-592a; S.A. 97-453. Although the Fund alleged that Halliburton made dozens of misrepresentations during the class period, J.A. 516a-525a, the

Fund's event study revealed that the stock price did not react to any of them. J.A. 349a, 391a-394a, 526a, 664a, 721a.

In light of that, the Fund argued that it could prove the alleged misrepresentations' impact on market price instead by showing that the stock price *dropped* following the release of various items of negative information. In response, Halliburton submitted an expert report and documentary evidence demonstrating that its stock price declines were caused by the release of unrelated negative news and a variety of other causes, not by "corrective" disclosures that revealed the falsity of any prior misrepresentation. J.A. 469a-537a, 691a-721a.

The Fund never requested additional discovery in connection with its motion for class certification. Nor did it claim that inadequate discovery somehow hampered its ability to show that the misrepresentation affected the market price. To the contrary, the Fund argued that it had "satisfied [that] burden through the submission of the Nettesheim expert report." J.A. 155a. And it emphasized that "[i]n preparation of the Report, Nettesheim reviewed all publicly available, relevant information for the Class Period." *Ibid.*

The district court denied the Fund's request for class certification. Pet. App. 3a-54a. The court explained that, under the Fifth Circuit's decision in *Oscar*, plaintiffs invoking *Basic*'s presumption of reliance must show that the false statements affected the value of the stock. *Id.* at 6a. The court noted that the Fund did not even claim that Halliburton's alleged misrepresentations moved the stock price when they were made. *Id.* at 7a & n.11, 11a. And the court concluded that the Fund had not shown the required effect on market price through later price declines. The price declines upon which the Fund relied did not follow disclosures that revealed the falsity of any previous misrepresentation. *Id.* at 14a-54a. Instead, the

Fund simply "offer[ed] evidence of a decrease in price following the release of negative information" that would not support an inference that the earlier misrepresentation affected the market price. *Id.* at 51a.

B. The Court Of Appeals' Decision

The court of appeals affirmed. Pet. App. 111a-136a. The court began by explaining that its precedent requires the misrepresentation's effect on market price to be assessed at the class-certification stage. Pet. App. 115a; see *Oscar*, 487 F.3d at 264 ("without [the fraud-on-the-market] presumption, questions of individual reliance would predominate, and the proposed class would fail"). Thus, a plaintiff invoking the fraud-on-the-market presumption to obtain class certification must prove that the misstatement "actually moved the market." Pet. App. 115a. In *Oscar*, the court of appeals had drawn that requirement from *Basic*'s holding that "the presumption of reliance may be rebutted by '[a]ny showing that severs the link between the alleged misrepresentation and * * * the price received (or paid) by the plaintiff.'" 487 F.3d at 265 (quoting *Basic*, 485 U.S. at 248). For instance, the link could be severed by "publicly available information that the misrepresentation didn't move the stock price." *Ibid.* *Oscar* observed that, "[a]s a matter of practice, the oft-chosen defensive move is to make '*any* showing that severs the link' between the misrepresentation and the plaintiff's loss; to do so rebuts on arrival the plaintiff's fraud-on-the-market theory." *Ibid.*

Thus, a touchstone for applying the fraud-on-the-market presumption is whether the alleged misrepresentation "actually inflated the company's stock price." Pet. App. 116a. That can be proved in at least two ways. It "may be proved *either* by an increase in stock price immediately following the release of positive information, *or* by showing negative movement in the stock price after release of the alleged 'truth' of the earlier falsehood."

Ibid. (emphasis added). The court noted that, in this case, the Fund did not attempt to prove that the stock price moved in response to Halliburton's alleged misrepresentations (indeed, its evidence showed the opposite). *Ibid.* Rather, the Fund "relie[d] only on stock price decreases following allegedly corrective disclosures by Halliburton." *Ibid.*

To demonstrate a misrepresentation's price impact via alleged corrective disclosures, the court of appeals explained, a plaintiff must do more than simply allege a misrepresentation and show a price decline following a subsequent disclosure of negative information. Pet. App. 116a. Instead, a plaintiff must prove that the negative stock-price movement "resulted directly *because* of the correction to a prior misleading statement." *Id.* at 117a. Without such proof, "there would be no inference raised that the original, allegedly false statement caused an inflation in the price to begin with." *Ibid.* Quoting *Oscar*, the court of appeals explained that this showing must be made "at the class certification stage by a preponderance of all admissible evidence." *Id.* at 115a.[2]

Thus, plaintiffs must show that "a loss occurred from the decline in stock price because the truth made its way into the marketplace, rather than for some other reason, such as a result of changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other factors independent of the fraud." Pet. App. 117a (punctuation omitted).

[2] *Oscar* repeatedly emphasized that it was addressing a situation where the plaintiff attempted to prove the misrepresentation's price impact through price declines following allegedly corrective disclosures. 487 F.3d at 262, 265 n.22, 267. In that context, *Oscar* often used the term "loss causation" as a shorthand for the showing the plaintiff must make. *E.g.*, *id.* at 265 ("in cases like this," the court "[e]ssentially" requires proof of loss causation).

Similarly, "if a company releases multiple items of negative information on the same day, the plaintiff must establish a reasonable likelihood that a subsequent decline in stock price is due to the revelation of the truth of the earlier misstatement rather than to the release of the unrelated negative information." *Id.* at 117a-118a.[3] And a plaintiff may not rely on the release of "confirmatory information"—information that repeats facts already known to the market and thus already reflected in the stock price. *Id.* at 119a. In sum, "a subsequent disclosure that does not correct and reveal the truth of the previously misleading statement" is not a sufficient basis for certifying a class under the fraud-on-the-market presumption. *Id.* at 118a (citing *Alaska Elec. Pension Fund* v. *Flowserve Corp.*, 572 F.3d 221, 230 (5th Cir. 2009) (*per curiam*; panel including O'Connor, J.)).

Turning to the facts here, the court held that the Fund failed to show that any of Halliburton's alleged misrepresentations had distorted the market price on which investors presumptively relied. Pet. App. 123a-136a. As noted, the Fund's own analysis showed that Halliburton's stock price never increased following any of the alleged misrepresentations. *Id.* at 116a. And the court concluded that the evidence failed to show that any disclosure followed by a stock-price decline was "corrective"—that it revealed the falsity of any of Halliburton's alleged misrepresentations. *Id.* at 123a. It was "not enough merely to show that the market declined after a statement reporting negative news." *Id.* at 116a. Rather, the evidence had to show that the decline in price following a

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[3] The Fifth Circuit does not require evidence that all of the price decline was attributable to the corrective disclosure, only that it was "more probable than not that it was this [corrective disclosure], and not other unrelated negative statements, that caused a significant amount of the decline." *Oscar*, 487 F.3d at 266.

disclosure "raise[d] an inference that the price was actually affected by earlier alleged misrepresentations." *Id.* at 117a.

In this case, a straightforward comparison between the alleged misrepresentations and the claimed "corrective" disclosures provided no basis for inferring that any alleged misrepresentation moved the market in the first place.[4] Pet. App. 123a-136a. Consequently, there was no basis on which to presume that the Fund (and the putative class) relied on the misrepresentations by relying on the market price. *Id.* at 112a. Because there was no basis for assuming the putative class had relied on a distorted market price, reliance would have to be proved plaintiff-by-plaintiff, precluding certification. See *id.* at 136a.

SUMMARY OF ARGUMENT

A class may not be certified under the fraud-on-the-market presumption of reliance where the evidence shows that no alleged misrepresentation affected the market price.

I. In *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), this Court created a presumption of reliance that allowed plaintiffs to overcome the difficulty of proving individualized reliance on misrepresentations. That presumption rests on the premise that investors rely on the integrity of market prices, which incorporate all public information, including any material misrepresentations.

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[4] For instance, both courts below held that certain alleged misrepresentations about the benefits of the Dresser merger merely confirmed statements made before the class period, and thus could not have inflated market price. Pet. App. 45a, 47a-48a, 53a, 134a n.50. The court of appeals further concluded that the later disclosures were not in fact corrective of any previous alleged misstatements. *Id.* at 129a-132a. The Fund does not even mention this category of alleged misrepresentations in the argument section of its brief.

The *Basic* presumption of reliance, however, is rebuttable. Defendants rebut the presumption by proffering evidence that an alleged misrepresentation did not inflate the market price that plaintiffs paid. That makes sense. Such a showing refutes the foundational premise of the reliance presumption—that, when relying on the market price, plaintiffs were effectively relying on defendants' alleged misrepresentations.

A plaintiff bears the ultimate burden under Rule 23 to show that common issues predominate over individual ones. If a plaintiff cannot sustain the presumption of reliance or otherwise show that common issues predominate, then that plaintiff has failed to satisfy Rule 23 and a class may not be certified. The Fund has not met its burden here.

II. Whether a misrepresentation distorted the market price is thus directly relevant to whether a plaintiff can show that common issues predominate. As a result, that inquiry must be considered at the class-certification stage. That is true even if the misrepresentation's impact on the market price may overlap with "merits" issues. As all parties recognize, courts must ensure that Rule 23's requirements are met, including when the certification and merits inquiries coincide.

The Fund and its *amici* urge that classes must be certified under the presumption of reliance even when defendants' alleged misrepresentations did not distort market prices. And they insist that defendants may not rebut the presumption of reliance until after class certification. That would contradict the logic of *Basic*, waste judicial resources, and impose *in terrorem* settlement pressure on defendants even in meritless cases. *Basic* allows plaintiffs to establish classwide reliance through a rebuttable presumption that all investors relied on misrepresentations by relying on market prices. But if a market price does not reflect the alleged misrepresenta-

tions, the presumption that *all* plaintiffs relied on the misrepresentations through the market price is destroyed and individual questions predominate.

There is no logical reason why defendants should be prohibited from rebutting plaintiffs' attempts to satisfy Rule 23's requirements at the class-certification stage. No one disputes that the *other* prerequisites to the presumption of reliance (*e.g.*, an efficient market) may be rebutted at the class-certification stage. There is no reason to treat price-impact rebuttal differently. Moreover, postponing defendants' ability to rebut the presumption of reliance would result in countless classes being certified with the certain knowledge that they would have to be decertified later, once the evidence inevitably reveals that the alleged misrepresentations did not in fact affect the relevant market price.

III. Under these principles, the court of appeals' decision should be affirmed. The evidence showed that Halliburton's alleged misrepresentations did not inflate the market price of Halliburton's stock and that none of the later stock-price declines were attributable to corrective disclosures that revealed the truth of any alleged misrepresentation. As a result, the Fund cannot use the presumption of reliance to satisfy Rule 23(b)(3)'s predominance requirement, and class certification was properly denied.

ARGUMENT

Traditionally, the element of "reliance" in fraud cases required individual proof that the plaintiff would not have entered into the transaction absent the misrepresentation. As a result, the reliance element tended to preclude plaintiffs from satisfying Rule 23's commonality and predominance requirements. The fraud-on-the-market theory endorsed in *Basic*, however, recognized an alternative means of proving reliance. Under *Basic*, if a plaintiff

proves certain threshold facts, courts may rebuttably presume that (a) the market efficiently incorporates all information into stock prices, including false statements; and that (b) plaintiffs rely on those market prices when making purchasing decisions. Thus, where an allegedly false statement inflates a stock's market price, courts may rebuttably presume that all class members relied on that market price when making their purchases.

The question in this case is whether plaintiffs may obtain class certification by insisting that reliance is a classwide rather than individualized issue even though *Basic*'s essential premise—that the alleged false statements altered the market price—has been rebutted. The answer must be "no." Plaintiffs cannot claim that all class members relied on the alleged misrepresentations by relying on the market price where the alleged misrepresentations did not affect the market price. And if plaintiffs cannot make out a case for classwide proof of reliance under *Basic*, reliance remains an individualized issue. To hold otherwise would wrongly relieve plaintiffs of their burden to satisfy Rule 23 and needlessly impose the *in terrorem* effect of class certification in cases unsuited to classwide treatment. Postponing rebuttal of the presumption would undermine judicial efficiency, requiring courts to labor over class actions that never should have been certified in the first place.

I. A PLAINTIFF CANNOT SUSTAIN THE PRESUMPTION OF RELIANCE WHERE THE ALLEGED MISREPRESENTATION DID NOT DISTORT THE MARKET PRICE

A. *Basic* Creates A *Rebuttable* Presumption That Investors Rely On Misrepresentations Where They Are Reflected In The Market Price

1. The fraud-on-the-market presumption is founded on the premise that an efficient market reflects all "public material misrepresentations" and that "[a]n investor

who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 247 (1988). By creating a classwide presumption of reliance on the market price, *Basic* allows certification where the need for individualized proof of reliance would otherwise preclude it. *Id.* at 242. But *Basic* is not condition-free. It requires assurances that the market price was actually affected by the alleged misrepresentations. *Id.* at 248. The entire class cannot claim to have relied on the misrepresentation by relying on the market price if "the market price [was] not * * * affected by [the] misrepresentation." *Ibid.* Without such evidence, "the causal connection" between the misrepresentation and the plaintiff's reliance "[w]ould be broken" because "the basis for finding that the fraud had been transmitted through market price would be gone." *Ibid.*

To trigger the fraud-on-the-market presumption of reliance, the plaintiff must "plead and prove" certain "threshold facts": that (1) the defendant "made public, material misrepresentations"; (2) the defendant's shares were traded in an "efficient market"; and (3) "the plaintiff traded shares between the time the misrepresentations were made and the time the truth was revealed." *Basic*, 485 U.S. at 248 & n.27. A plaintiff who makes that showing is entitled to a "*nonconclusiv[e]* presum[ption] that the price of a publicly traded share reflects a material misrepresentation and that plaintiffs have relied upon that misrepresentation." *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005) (emphasis added).

That presumption of reliance remains "subject to rebuttal." *Basic*, 485 U.S. at 245. A defendant may rebut the presumption of reliance by, for example, "show[ing] that the misrepresentation in fact did not lead to a distor-

tion of price." *Id.* at 248; see Pet. Br. 45.[5] "*Any showing* that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff" will "rebut the presumption of reliance." *Basic*, 485 U.S. at 248 (emphasis added). Thus, where the record shows that "the market price [was] not * * * affected by [the] misrepresentations," the presumption is rebutted—the plaintiff class *cannot* have relied on misrepresentations by relying on a distorted market price where the market price was not affected. *Ibid.*

2. For those reasons, the Fifth and Second Circuits recognize that the presumption of reliance is unavailable—and class certification is inappropriate—where the record shows that the alleged misstatements did not affect market price. For example, in *Oscar*, the Fifth Circuit held that a plaintiff wishing to use the fraud-on-the-market presumption to obtain class certification must provide "proof that the misstatement *actually moved* the market." *Oscar Private Equity Invs.* v. *Allegiance Telecom, Inc.*, 487 F.3d 261, 265 (5th Cir. 2007). The court drew that requirement from *Basic*'s holding that "the presumption of reliance may be rebutted by '[a]ny showing that severs the link between the alleged misrepresentation and * * * the price received (or paid) by the plaintiff.'" *Ibid.* (quoting *Basic*, 485 U.S. at 248). That link is necessarily severed by, for example, "publicly available information that the misrepresentation didn't move the stock price." *Ibid.* The misrepresentation's effect on market price must be assessed at the class-certification stage, the court explained, for "without [the fraud-on-the-market] presumption, questions of individual reliance

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[5] A defendant may also "rebu[t] proof of the elements giving rise to the presumption" or show "that an individual plaintiff traded or would have traded despite his knowing that the statement was false." *Basic*, 485 U.S. at 248.

would predominate, and the proposed class would fail." *Id.* at 264.

In *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474 (2d Cir. 2008), the Second Circuit agreed that a class may not be certified under the fraud-on-the-market presumption if the evidence shows that the alleged misrepresentations did not affect market price. The defendant, that court held, may rebut the presumption of reliance by "showing that there was no price impact" from the misrepresentation. *Id.* at 483; see also *ibid.* (defendant may rebut the presumption by "show[ing] that the misrepresentation in fact did not lead to a distortion of price"). Defendants, *Salomon* emphasized, are entitled to demonstrate the absence of impact on market price "prior to class certification." 544 F.3d at 484. "The *Basic* Court," the Second Circuit observed, "explained that successful rebuttal *defeats* certification by defeating the Rule 23(b)(3) predominance requirement." *Id.* at 485 (citing *Basic*, 485 U.S. at 249 n.29).[6]

3. The Fund (Br. 27, 33) assails the requirement that "the misstatement actually moved the market," *Oscar*, 487 F.3d at 265, as requiring plaintiffs to prove the merits of "loss causation" as a prerequisite to class certification. But that is incorrect. Indeed, the Fund concedes

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[6] In opinions by then-Judge Alito, the Third Circuit has similarly held that *Basic*'s requirement of a "material" misrepresentation means that, to invoke the presumption of reliance, a plaintiff must establish a misrepresentation's price impact. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997); *Oran* v. *Stafford*, 226 F.3d 275, 282 (3d Cir. 2000). While those cases arose at the motion-to-dismiss stage, their rationale would preclude class certification under the fraud-on-the-market theory absent proof that the misrepresentation affected market price. Consequently, one scholar has remarked that the Third Circuit's approach to materiality is simply "*Oscar* in another guise." Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 Wisc. L. Rev. 151, 190 (2009).

(Br. 43, 45), that proof of price impact "will not itself constitute or proximately cause the relevant economic loss." *Dura*, 544 U.S. at 342.

The decision below makes that clear. The court of appeals observed that "the causal connection between an allegedly false statement and the price of the stock may be proved *either* by an increase in stock price immediately following the release of positive information," *i.e.*, by showing *price inflation* in response to falsity, "*or* by showing negative movement in the stock prices after release of the alleged 'truth' of the earlier falsehood," *i.e.*, price declines properly correlated to corrective disclosures. Pet. App. 116a (emphasis added). Thus, a plaintiff need only show that the misrepresentation affected market price in the first instance, not that the misrepresentation caused the later loss.

While *Oscar* sometimes used the shorthand "loss causation," it did so only in the context where—as here—a plaintiff *cannot* directly show that the misrepresentation initially moved the market price and therefore attempts to prove the misrepresentation's price impact by showing that the price declined following allegedly corrective disclosures. The evidence and analysis for determining whether later price declines raise an inference that the misrepresentation distorted market price necessarily overlap to some degree with that of loss causation. Cf. *Dura*, 544 U.S. at 343 (recognizing that a price decline "may reflect not the earlier misrepresentation," but a "tangle of [other] factors affecting price"). But the overlap is only partial: Unlike a plaintiff proving loss causation, a plaintiff proving price impact need not provide "quantification of damages" or show what "percentage of the drop was attributable to the corrective disclosure," but need only make "some empirically-based showing that the corrective disclosure was more than just present at the scene." *Oscar*, 487 F.3d at 271. Regardless of how

the plaintiff opts to proceed, the Fifth Circuit (like the Second Circuit) requires only that the misrepresentation affect market price for the presumption of reliance to be sustained.

Assessing whether the plaintiff proved price impact in this way does not improperly conflate reliance and loss causation. Pet. Br. 42-43, 46; U.S. Br. 7-8. *Basic* holds that a defendant may rebut the presumption by refuting the elements of the presumption (*e.g.*, market efficiency) or by making "*[a]ny* showing that severs the link between the alleged misrepresentation and *either* the price received (or paid) by the plaintiff, *or* his *decision to trade* at a fair market price." 485 U.S. at 248 (emphasis added). Thus, a demonstrated absence of *either* price impact *or* transaction causation rebuts the presumption of reliance. That makes sense, since if either is lacking there is no reason to presume that plaintiffs relied on misrepresentations via the market price.

B. Neither *Basic* Nor Rule 301 Relieve Plaintiffs Of The Ultimate Burden Of Showing That Rule 23's Requirements Have Been Met

Under *Basic*, the fraud-on-the-market theory of class-wide reliance is rebutted whenever a defendant makes "*[a]ny* showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff." 485 U.S. at 248 (emphasis added). When that occurs, plaintiffs must reforge the severed link to re-establish the presumption, or demonstrate that, despite the presumption's failure, all of Rule 23's requirements are nonetheless met.

1. In establishing the fraud-on-the-market presumption, *Basic* invoked Federal Rule of Evidence 301. See 485 U.S. at 245. Under Rule 301, an initial burden of production may shift to the defendant, but the presumption "does *not* shift * * * the burden of proof in the sense

of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." Fed. R. Evid. 301 (emphasis added). In other words, despite the fraud-on-the-market presumption, plaintiffs always retain the ultimate burden of proof. Thus, for purposes of class certification, the successful rebuttal of the presumption of reliance requires that class certification be denied unless plaintiffs can show that the market price was in fact distorted or otherwise can satisfy Rule 23.

Instead of invoking Rule 301 itself, the Fund relies on the Advisory Committee's notes to a version of Rule 301 *that Congress rejected.* See Pet. Br. 36. The *Federal Practice and Procedure* treatise reprints the text invoked by the Fund under the heading "Advisory Committee's Note To *Rejected* Rule 301." 21B Wright & Graham, *Federal Practice and Procedure* 344 (2d ed. 2005) (emphasis added). The distinction between the real Rule 301 and the rejected Rule 301 is significant. Had Congress adopted the rejected Rule 301 (and had *Basic* still cited it), that would have been powerful evidence for a strong presumption placing, as the Fund would have it, "the burden of both production and persuasion on defendants." Pet. Br. 36. But Congress rejected that version precisely to prevent shifting the burden of proof. Motivated by a firestorm of protest, Wright & Graham, *supra*, § 5121, at 355-359 (describing "[t]he Congressional battle"), both Houses of Congress opposed that burden shifting. See House and Senate Judiciary Comm. Notes on Fed. R. Evid. 301, 28 U.S.C. App., pp. 323-324 (2006 ed.).[7] Explaining the vast difference between adopted Rule 301 and the former proposed Rule 301, the Conference Committee Report declared that a presumption against a

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[7] These notes are part of "the commentary to Rule 301," Pet. Br. 36, and are printed with the Advisory Committee's notes to the rejected Rule.

party "does *not* shift to that party the burden of persuasion on the existence of the presumed fact." *Id.* at 324 (emphasis added).

Notwithstanding Rule 301's text and history, the Fund seems to read *Basic* as adopting a presumption of the sort that was contemplated but rejected in Rule 301. See Pet. Br. 36. But Rule 301 specifically *prohibits* such a novelty. The Rule applies "[i]n all civil actions and proceedings not otherwise provided for *by Act of Congress or by these rules*." Fed. R. Evid. 301 (emphasis added). In adopting a rebuttable presumption while citing Rule 301, *Basic* clearly intended to incorporate, not depart from, the standards of Rule 301.

2. Under those principles, once plaintiffs successfully invoke the presumption of reliance, defendants have "the burden of going forward with evidence to rebut or meet the presumption," Fed. R. Evid. 301—and that is all. A defendant has no duty to "establish the nonexistence" of the fraud-of-the-market prerequisites, as the rejected Rule and the Fund would have it. See Pet. Br. 36. Rather, if defendants cast sufficient doubt on the presumption—that is, if there is enough that a reasonable fact-finder *could* believe that the "link" between the alleged misrepresentation and the price has been "sever[ed]," *Basic*, 485 U.S. at 248, then defendants have rebutted the presumption.

The very case cited by the Fund (Br. 36 n.12) makes that clear. In *ITC Ltd.* v. *Punchgini, Inc.*, 482 F.3d 135, 149 (2d Cir. 2007), the court addressed the presumption of abandonment of a trademark. It held that rebuttal under Rule 301 need not conclusively establish the nonexistence of a fact. Instead, rebuttal is sufficient "as long as the [proffered] evidence *could* support a reasonable jury finding of 'the nonexistence of the presumed fact.'" *Ibid.* (citation omitted and emphasis added). Thus, following "a *prima facie* case of abandonment under the

Lanham Act," the opposing party need "come forward only with such contrary evidence as, when viewed in the light most favorable to [that party], would *permit* a reasonable jury to infer that it had not abandoned the mark." *Ibid.* (emphasis added). At that point, the plaintiff must meet his burden of persuasion. *Ibid.*

The modesty of the economic reasoning that undergirds *Basic*'s presumption also weighs strongly against placing a heavy rebuttal burden on defendants. The four-Justice majority in *Basic* invoked the theory with some tentativeness, relying on "common sense," "probability," "recent empirical studies," and the "applau[se]" of three "commentators," 485 U.S. at 246, to conclude only that "[i]t is *not inappropriate* to apply a presumption of reliance supported by the fraud-on-the-market theory." *Id.* at 250 (emphasis added). *Basic*, moreover, rested on an efficient-market theory that was hotly disputed even when *Basic* was decided. For one thing, rather than relying on the integrity of the market price, many investors attempt to locate undervalued stocks in an effort to "beat the market," thus "betting that the market for the securities they are buying is in fact inefficient." Macey, *The Fraud on the Market Theory: Some Preliminary Issues*, 74 Cornell L. Rev. 923, 925 (1989). Skepticism has grown since: "Doubts about the strength and pervasiveness of market efficiency are much greater today than they were in the mid 1980s." Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 175 (2009). And the fraud-on-the-market "regime established in *Basic*" has been criticized for shift[ing] money from one shareholder pocket to another at enormous expense." Pritchard, Stoneridge Investment Partners *v.* Scientific Atlanta*: The Political Economy of Securities Class Action Reform*, 2008 Cato S. Ct. Rev. 217, 218 (2008). These concerns weigh dispositively against con-

verting fraud-on-the-market reliance from an ordinary presumption to a categorical imperative.

3. A defendant in this context meets his "burden of going forward with evidence to rebut or meet the presumption," Fed. R. Evid. 301, by making "*[a]ny showing* that severs the link between the alleged misrepresentation and * * * the price received (or paid) by the plaintiff," such as evidence that "the misrepresentation in fact did not lead to a distortion of price." *Basic*, 485 U.S. at 248 (emphasis added). As the Second Circuit has explained, a defendant need only "*submi[t] evidence* to show that the misrepresentations did not affect market price." *Salomon*, 544 F.3d at 485 (emphasis added). And in the Fifth Circuit, "the link [can be] severed by publicly available information that the misrepresentation didn't move the stock price." *Oscar*, 487 F.3d at 265. Even the Fund—while disputing its relevance at class certification—concedes that evidence showing a lack of "'price impact' * * * at the time of the misstatement" would rebut the presumption. Pet. Br. 45; accord U.S. Br. 20.

The evidence submitted here more than adequately rebutted the presumption that investors "relied" on alleged misrepresentations by relying on the market price, because it severed the link between Halliburton's alleged misrepresentations and that market price. Indeed, the Fund's own expert report and event study revealed that Halliburton's stock price did *not* react to any of the alleged misrepresentations when made. J.A. 349a, 391a-394a, 526a, 664a, 721a. And the Fund has never argued to the contrary. Pet. App. 7a n.11, 11a, 116a. Halliburton, moreover, submitted its own expert report and supporting documents, which, along with an examination of the disclosures, showed that none of the price declines on which the Fund relies were attributable to disclosures that corrected the truth of any previous misrepresenta-

tion. J.A. 469a-537a, 691a-721a. This showing constitutes ample evidence that the misrepresentation did not affect the market price, and therefore rebuts the presumption of reliance.

C. Plaintiffs Failed To Respond To The Rebuttal By Showing That The Misrepresentation Distorted The Market Price Or By Otherwise Satisfying Rule 23

When a defendant successfully rebuts the presumption of reliance, the plaintiff must come forward in reply with sufficient proof to either re-establish the presumption or satisfy Rule 23 in some other way.

1. This Court regularly follows that pattern in other contexts. For example, in Title VII cases, a plaintiff who shows membership in a protected class, qualification for a job, and rejection, is entitled to a presumption that he was subjected to discrimination. *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-254 (1981). The defendant then must rebut the presumption of discrimination (by producing evidence of legitimate and neutral reasons) with evidence that *could* be believed by the trier of fact. See *id.* at 254 & n.8. If the presumption is so rebutted, then the plaintiff must prove the discrimination case. See *id.* at 255 n.10, 256.

The same approach applies here. To invoke the fraud-on-the-market presumption, the plaintiff must show "threshold facts," such as that material misstatements were relayed to an efficient market. See, *e.g.*, *Basic*, 485 U.S. at 248 n.27. The party opposing certification can rebut the fraud-on-the-market presumption with "any showing" severing the link between the misrepresentation and the price paid by plaintiff. *Id.* at 248-249; Part I.B., *supra*. At that point, the plaintiff must meet the burden of satisfying the Rule 23 factors nonetheless—by either establishing price impact by a preponderance of

the evidence or by otherwise demonstrating why common issues predominate despite individualized issues of reliance.

Consistent with that approach, the Second Circuit has held that once the defendant "submit[s] evidence to show that the misrepresentations did not affect market price," *Salomon*, 544 F.3d at 485, the ultimate burden shifts back to the plaintiff. Thus, "[i]f defendants attempt to make a rebuttal * * * the district judge must receive enough evidence * * * to be satisfied that each Rule 23 requirement has been met." *Id.* at 486. Similarly, in the Fifth Circuit, once the presumption of reliance is rebutted by evidence that "the misrepresentation didn't move the stock price," the plaintiff bears the ultimate burden to prove that "the misstatement actually moved the market." *Oscar*, 487 F.3d at 265.

2. The Fund failed to meet that burden here. Conceding that the misrepresentations did not move the stock price when made, the Fund urged that one could *infer* price impact because Halliburton's stock price declined following "corrective disclosures" that revealed the alleged falsity of the challenged statements. For such a price decline to have probative value as to whether the misrepresentation affected the stock price, however, the price decline must follow a disclosure that is *corrective* of the misrepresentation—*i.e.*, one that reveals the truth obscured by the previous misrepresentation, as opposed to a price decline that follows the release of other negative information. *Basic*, 485 U.S. at 249 (referencing price impact after "corrective statements"); *Oscar*, 487 F.3d at 265; *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 41 (2d Cir. 2009) (declining to certify class absent "sufficient evidence on which the lower court could conclude that any of the events revealed the truth about the subject of any of Defendants' alleged misstatements"). A price decline following the release of

mere negative information that does not correct any previous misrepresentation is no indication that the alleged misrepresentation inflated the market price.

To ensure that it was the *misrepresentation* that affected the market price, a plaintiff must show that a later price decline is attributable to the corrective disclosure and not to general market declines or other information unrelated to the truth of the alleged misrepresentation. Pet. App. 117a-118a; *Salomon*, 544 F.3d at 485 (courts must assess whether "other statements in the 'sea of voices' of market commentary were responsible for price discrepancies" instead of the alleged misrepresentation). These requirements parallel the prerequisites this Court recognized when dealing with the issue of loss causation. See *Dura*, 544 U.S. at 347 (requiring price decline "after the truth became known"). *Dura* recognized that a price decline "may reflect *not the earlier misrepresentation*, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price." *Id.* at 343 (emphasis added). It is unremarkable that statistically valid proof is required, and that non-fraud causes must be eliminated, to prove a misrepresentation's price impact; junk evidence and unproven correlations are insufficient proof across legal contexts. Indeed, *Basic* itself recognized that invoking the presumption of reliance could overlap with concepts of loss causation, noting that the class's invocation of the rebuttable presumption "established the threshold facts for *proving their loss*." *Basic*, 485 U.S. at 248 (emphasis added).

In this case, the evidence fell woefully short of the required showing. Although the Fund attempted to rely on an inference from later events—disclosures that coincided with declines in price—it utterly failed to show that the declines were properly attributed to correction of the

misrepresentations it challenged. Pet. App. 123a-136a; pp. 46-51, *supra*. Because the absence of price impact prevented the Fund from sustaining the presumption of reliance—and because, absent the presumption, individual issues indisputably predominate—the Fifth Circuit properly affirmed the denial of class certification.

II. UNDER BOTH *BASIC* AND RULE 23, DEFENDANTS MAY REBUT THE PRESUMPTION OF RELIANCE AT THE CLASS-CERTIFICATION STAGE

The Fund does not dispute that *Basic*'s "rebuttable presumption" is pivotal to the propriety of certification. But it nonetheless urges that defendants cannot seek to defeat certification by rebutting that presumption. That contention is unsound. The essential premise underlying *Basic*'s presumption is that, if the misrepresentations affect the market price, the entire class presumptively relies because most purchasers rely on the market price's integrity. Where a defendant can rebut the presumption of classwide reliance by showing that the alleged misrepresentation did not affect the market price, however, there can be no classwide proof of reliance and individual issues of reliance will predominate. The Fund's and the Government's contrary arguments rest primarily on their effort to characterize the issue as a question of "loss causation" rather than classwide reliance. But once that label is removed, the propriety of addressing this threshold predominance issue at the certification stage becomes apparent. Plaintiffs cannot simultaneously rely upon a rebuttable presumption to obtain certification, while denying defendants the ability to defeat certification by rebutting the presumption.

A. Plaintiffs Seeking Certification Must Present Evidence That They Have Satisfied The Rule 23 Requirements Even If That Evidence Overlaps With The Merits

1. Notwithstanding how it framed the second question presented, the Fund (like the Government) now agrees that courts ruling on certification motions may consider facts that overlap with the merits. Pet. Br. 47; U.S. Br. 23-24. That concession is well founded. Rule 23(b)(3) requires plaintiffs to present enough evidence for the court to "*find[]* that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3) (emphasis added).

This Court thus has long recognized that "[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 n.12 (1978). As a result, "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. of the Sw.* v. *Falcon*, 457 U.S. 147, 160 (1982). A court must therefore take "a close look at the case before it is accepted as a class action," *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 615 (1997), which requires a "rigorous analysis" of the Rule 23 requirements. *Falcon*, 457 U.S. at 161.

Courts of appeals thus regularly recognize that "[t]he Rule 23 requirements must be established by at least a preponderance of the evidence." *Brown* v. *Kelly*, 609 F.3d 467, 476 (2d Cir. 2010); see also *Alaska Elec. Pension Fund* v. *Flowserve Corp.*, 572 F.3d 221, 229 (5th Cir. 2009); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307, 320 (3d Cir. 2008). The preponderance-of-the-evidence standard recognizes that "the requirements

of Rule 23 must be *met*, not just supported by some evidence." *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 33 (2d Cir. 2006) (*IPO*) (emphasis added). Plaintiffs must provide the district judge with "enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met." *Id.* at 41. In this Court's words, "actual, not presumed, conformance * * * remains * * * indispensable." *Falcon*, 457 U.S. at 160; *Vega* v. *T-Mobile USA, Inc.*, 564 F.3d 1256, 1268-1270 (11th Cir. 2009).

"[B]ecause each requirement of Rule 23 must be met," moreover, "a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements." *Hydrogen Peroxide*, 552 F.3d at 320. "Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives." *West* v. *Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002). For example, "when an expert's report or testimony is critical to class certification, * * * a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion." *Am. Honda Motor Co., Inc.* v. *Allen*, 600 F.3d 813, 815-816 (7th Cir. 2010). As the Second Circuit has explained, a district court must make a "'definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues,' and *must* resolve material factual disputes relevant to each Rule 23 requirement." *Brown*, 609 F.3d at 476 (quoting *IPO*, 471 F.3d at 41; emphasis added).

2. Despite those longstanding rules, the Seventh Circuit last year became the first court of appeals to hold that a class may be certified under the fraud-on-the-market presumption without considering whether the alleged misrepresentations affected the market price. *Schleicher* v. *Wendt*, 618 F.3d 679 (7th Cir. 2010). The

court hyperbolically equated the Second and Fifth Circuits' requirement "that the contested statements actually caused material changes in stock prices" to an "insist[ence] that before a class can be certified plaintiffs must prove everything (except falsity) to win on the merits." *Id.* at 683. Price impact, the Seventh Circuit, declared, is a "questio[n] on the merits" that "affect[s] investors alike," and is therefore categorically excluded from consideration at the class-certification stage. *Id.* at 685.

That is incorrect. The Seventh Circuit ignored this Court's ruling in *Basic* that a defendant may "rebut the presumption of reliance" by "showing that the misrepresentation in fact did not lead to a distortion of price." *Basic*, 485 U.S. at 248. It likewise ignored *Basic*'s recognition that the presumption of reliance is essential to a plaintiff's ability to satisfy Rule 23(b)(3)'s predominance requirement. *Id.* at 242. And it is in serious tension with the Seventh Circuit's own prior recognition that class-certification issues will often overlap with the merits. See *Am. Honda*, 600 F.3d at 815.[8]

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[8] *Schleicher* also rests on the false premise that the Fifth Circuit requires proof of loss causation to establish price impact. *Schleicher*'s hypothetical scenario of injured plaintiffs who would be precluded from class certification by the Fifth Circuit's rule (recounted at Pet. Br. 44) is simply wrong. In the hypothetical case, class certification *would be allowed* under the Fifth Circuit's approach because the misrepresentation "increase[d] a stock's price by $1 a share," *Schleicher*, 618 F.3d at 686—and price impact "may be proved * * * by an increase in stock price immediately following the release of positive information." Pet. App. 116a. The same hypothetical also wrongly presumes that a corrective disclosure may come only from the company, *Schleicher*, 619 F.3d at 686-687, when in fact such disclosures may come from a third party. *Nathenson* v. *Zonagen, Inc.*, 267 F.3d 400, 416 (5th Cir. 2001) (corrective disclosures contained in research report from a short seller).

3. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), is not to the contrary. In that case, the Court stated that there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* at 177. But an over-expansive reading of that language cannot be reconciled with *Coopers & Lybrand* and *Falcon*, both of which recognize that merits and certification issues may overlap. See *Coopers & Lybrand*, 437 U.S. at 469 & n.12; *Falcon*, 457 U.S. at 160.

The point of *Eisen* was not that any overlap with the merits is categorically off limits. As the Second Circuit has observed, *Eisen*'s dictum "was made in a case in which the district judge's merits inquiry had *nothing to do with determining the requirements for class certification*." *IPO*, 471 F.3d at 33 (emphasis added). Rather, "the district court, after determining that the case was appropriate for class certification, was concerned with which side should bear the cost of notice to the class." *Ibid.* Thus, the statement in *Eisen* should not be "taken out of context and applied in cases where a merits inquiry either concerns a Rule 23 requirement or overlaps with such a requirement." *Id.* at 34. No merits inquiry should be undertaken at the class certification stage unless "necessary to determine a Rule 23 requirement," *Hydrogen Peroxide*, 552 F.3d at 317, but a court may do so for the *different* inquiry into whether a potential class has satisfied its burden under Rule 23.

B. Courts May Consider The Propriety Of Presuming Classwide Reliance When Deciding Class-Certification Issues

1. The Fund and the Government do not deny that courts may consider issues relevant to class certification under Rule 23 even if those issues overlap with the merits. They simply assert that the question the district

court and the Fifth Circuit resolved below—whether the alleged misrepresentations distorted the stock's market price—is irrelevant to Rule 23's requirement that common issues predominate.

But that issue is plainly relevant for the reasons given above. See pp. 15-17, *supra*. *Basic* established the presumption of reliance to enable plaintiffs to satisfy Rule 23(b)(3)'s requirement that common issues predominate by making otherwise individualized issues of reliance subject to classwide proof. 485 U.S. at 228, 230, 242. It did so in the context of upholding a district court's certification of a class. *Id.* at 250. And it recognized that, absent the presumption, "[r]equiring proof of individualized reliance * * * effectively would have prevented [plaintiffs] from proceeding with a class action, since individual issues then would have overwhelmed the common ones." *Id.* at 242.

The Fund and the Government do not dispute that the presumption of reliance is vital to a plaintiff's ability to satisfy Rule 23(b)(3). Given that, it is hard to see how rebuttal of that presumption through a showing that severs the link between the misrepresentation and the presumptively-relied-upon price would not be fatal to class certification. Precisely because the presumption of reliance is essential to proving predominance, "successful rebuttal" must "*defea[t]* certification by defeating the Rule 23(b)(3) predominance requirement." *Salomon*, 544 F.3d at 485; accord *Oscar*, 487 F.3d at 264 ("without [the fraud-on-the-market] presumption, questions of individual reliance would predominate, and the proposed class would fail"); *IPO*, 471 F.3d at 43 ("[w]ithout the *Basic* presumption, individual questions of reliance would predominate over common questions" in most securities actions). Indeed, the predominance inquiry "cannot be made without determining whether defendants can successfully rebut the fraud-on-the-market presumption." *Salomon*, 544 F.3d

at 485. Consequently, the defendant's rebuttal must be considered "prior to class certification." *Id.* at 484.

2. The Fund and the Government assert that a misrepresentation's impact on market price is a "merits" issue unsuitable for consideration prior to class certification. See, *e.g.*, Pet. Br. 3, 25, 35, 36, 40, 47, 48; U.S. Br. 7-8, 22-24. But, as explained above, "[a] contested [Rule 23] requirement is not forfeited in favor of the party seeking certification merely because it is similar or even identical to one normally decided by a trier of fact." *Hydrogen Peroxide*, 552 F.3d at 318.

Rebuttal evidence regarding a misrepresentation's impact on stock price is not considered at class certification to resolve the merits element of reliance (or loss causation). Rather, rebuttal evidence is considered at class certification to assess whether plaintiff may sustain the *classwide* presumption of reliance that exists when a misrepresentation affects the price of stock, and the *class* of plaintiffs claims to have relied on the misrepresentations by relying on the distorted market price. So long as the courts properly recognize that they may address the price impact of the misrepresentation only for purposes of determining whether reliance is best proved classwide or on an individualized basis, it is not error to consider it—any more than it would be error to consider the absence of a common policy affecting all class members in a discrimination case, or the absence of a uniform misrepresentation in a face-to-face fraud case. To the contrary, because classwide reliance is necessary to certification under Rule 23, the district court *must* address that issue.

Putative "merits" issues often bear on the propriety of certification. *Basic* recognizes that "in order to invoke the presumption, a plaintiff must allege and prove" (among other things) that "the misrepresentations were

material." 485 U.S. at 248 n.27.[9] As a result, virtually all of the courts of appeals to consider the issue have held that a plaintiff must establish materiality to invoke the presumption of reliance and obtain class certification.[10] The Fund itself has previously conceded that a plaintiff must show materiality in order to obtain class certification via the presumption of reliance. Pet. 13, 19.[11]

That makes sense. If a misrepresentation is not material, or is not "transmitted through the market price," *Basic*, 485 U.S. at 248, there is no reason to presume that it induced classwide reliance. While materiality and price impact also happen to be merits-related issues, the fact that they are essential to sustaining the presumption of reliance means that they must be assessed at the class certification stage to determine whether individual issues predominate. See *Salomon*, 544 F.3d at 484 (considering

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[9] Although the Court was describing the court of appeals' holding, it plainly adopted the lower court's materiality prerequisite as its own. *Basic*, 485 U.S. at 248 n.27 ("Given today's decision regarding the definition of materiality * * * , elements (2) and (4) may collapse into one."); see also *Dura*, 544 U.S. at 342 (describing the *Basic* presumption as applying to "material misrepresentation[s]").

[10] *Desai* v. *Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 940 (9th Cir. 2009); *Salomon*, 544 F.3d at 481; *Oscar*, 487 F.3d at 264-265; *In re Poly-Medica Corp. Sec. Litig.*, 432 F.3d 1, 8 n.11 (1st Cir. 2005); *In re PEC Solutions, Inc. Sec. Litig.*, 418 F.3d 379, 387 (4th Cir. 2005); *Gebhardt* v. *ConAgra Foods, Inc.*, 335 F.3d 824, 831 (8th Cir. 2003); *Oran* v. *Stafford*, 226 F.3d 275, 282 (3d Cir. 2000) (Alito, J.); but see *Schleicher*, 618 F.3d at 687. While the Seventh Circuit rejected materiality as a prerequisite to class certification in *Schleicher*, Judges Easterbrook and Posner had previously referred to the "fraud on the market doctrine" as involving "material misstatements." *Stark Trading* v. *Falconbridge Ltd.*, 552 F.3d 568, 572 (7th Cir. 2009)

[11] The Fund apparently no longer believes that materiality is a prerequisite to invoking the presumption of reliance (Pet. Br. 27, 32), no doubt because that would destroy its argument that "merits" elements cannot be considered prior to class certification.

price impact even though it "is identical to an issue on the merits"). In other words, if a plaintiff invokes the fraud-on-the-market presumption to satisfy Rule 23(b)(3), a defendant's rebuttal is nothing but a challenge to certification under Rule 23(b)(3), even though defendants might use similar arguments to challenge the presumption when litigating the merits.[12]

For similar reasons, the Fund's Seventh Amendment argument (Pet. Br. 62-64) is meritless. The Seventh Amendment has *never* precluded district courts from making initial factual determinations relevant to procedural issues. See, *e.g.*, *Shepard* v. *United States*, 290 U.S. 96, 101-102 (1933) (dying declaration may be inadmissible if party "satisfies the judge" it is unreliable). And *denial* of certification—much less allowing rebuttal of an asserted basis for predominance—cannot infringe "the right of trial by jury." U.S. Const. amend. VII. It determines only the form of a suit, individual or class, and not whether it gets to a jury at all.[13] Finally, and most fundamentally, rebuttal of the presumption at the class-certification stage does not address the merits of a 10b-5

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[12] For that reason, the Fund errs in citing cases like *PolyMedica*, 423 F.3d at 7 n.10, and *Kaplan* v. *Rose*, 49 F.3d 1363, 1378 n.3 (9th Cir. 1994), for the proposition that any rebuttal *must* be at trial. See Pet. Br. 35. The cited language means only that that rebuttal can *also* be at trial, at least where the rebuttal seeks to disprove a merits element. Thus, *PolyMedica* recognized that, "assuming the plaintiff gets the benefit of the rebuttable presumption at the class-certification stage, the defendant may *still* rebut this presumption at trial." 423 F.3d at 7 n.10 (emphasis added). And *Kaplan* simply held that *summary judgment* was not appropriate on an issue because, in light of the conflicting evidence, "the *ultimate* resolution of this question is an issue for trial." 49 F.3d at 1378 n.3 (emphasis added).

[13] The Fund's complaint that summary judgment requires a higher showing than a preponderance, see Pet. Br. 63, is thus short of the mark. Summary judgment disposes of an issue on the merits and for good; denial of certification is not a merits determination.

claim; it addresses a Rule 23 issue. Whether the requirements of Rule 23 are satisfied is never a jury question. Rule 23(b)(3) certification depends on whether "*the court finds*" the prerequisites satisfied. The court's Rule 23 determinations do not bind the trier of fact, whether ultimately in a class or individual action. See, *e.g.*, *Flowserve*, 572 F.3d at 229; *Hydrogen Peroxide*, 552 F.3d at 317-318 & n.19; *IPO*, 471 F.3d at 41.

3. The Fund's primary argument seems to be that a misrepresentation's impact on market price may not be considered at class certification because price impact is by definition an issue common to the class. See, *e.g.*, Pet. Br. 39, 49; U.S. Br. 7, 17; *Schleicher*, 618 F.3d at 685 (rejecting consideration of price impact because it "affects all investors alike"). But that misconceives the relevant inquiry. A question must be resolved prior to class certification where it sheds light on whether common issues predominate over individual ones. The absence of price impact stemming from a misrepresentation is precisely such an issue. Absent price impact there can be no basis for assuring classwide reliance on the misrepresentation via the market price; as a result, individual issues predominate. It makes no difference that the *reason* for a lack of predominance is "common" to all class members. A court may not certify a class if Rule 23(b)(3) is unmet, regardless of whether the reason it is not met applies uniformly.[14]

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[14] The Fund and the Government suggest that a district court within the Second Circuit does not consider common rebuttal issues prior to class certification, at least with respect to "loss causation." See Pet. Br. 39; U.S. Br. 18. But that is not true with respect to price impact, even when price impact is purportedly shown through declines following allegedly corrective disclosures. *Salomon*, 544 F.3d at 484 (holding that defendant may "rebut the presumption * * * by showing * * * the absence of a price impact"); *In re Am. Int'l Group, Inc. Sec. Litig.*, 265 F.R.D. 157, 182, 186-188 (S.D.N.Y. 2010) (declining to

The Fund's own concessions illustrate the fallacy of its position. The Fund concedes that market efficiency must be established prior to class certification. *Basic*, 485 U.S. at 247 & n.27; Pet. Br. 48 & n.15. But whether a stock trades in an efficient market is, like price impact, an issue common to all members of the class. Yet the Fund correctly recognizes that market efficiency is relevant to class certification and subject to rebuttal at that stage because, without it, the presumption of reliance fails and individual issues predominate. The same is true of a misrepresentation's impact on market price.

Basic recognizes that defendants may rebut the presumption of reliance by "rebut[ting] proof of" any of "the elements giving rise to the presumption," including the "threshold facts" necessary for invoking the presumption, such as materiality and market efficiency. 485 U.S. at 248. The Fund can identify no reason why some evidence rebutting the presumption can be considered at class certification, see Pet Br. 35 (admitting that "defendants can challenge at class certification plaintiffs' evidence of market efficiency"), while rebuttal evidence showing a lack of price impact cannot. Both rebut the presumption of classwide reliance. And, in doing so, both make it all but impossible for a plaintiff to establish that common issues predominate over individual ones.

Ultimately, the Fund and its *amici* misunderstand the nature of the certification inquiry. The fact that evidence *rebutting predominance* is subject to common proof cannot be the "common question" that unites all class members. That would convert the question the court must answer in deciding class certification into a common issue that makes certification appropriate. Yet that circular

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certify class with respect to two alleged misrepresentations because stock price did not significantly decline following alleged corrective disclosures).

reasoning is effectively what the Fund and its *amici* ask this Court to adopt: They urge this Court to treat whether or not plaintiffs may assert classwide reliance based on a distorted market price as a common question favoring certification. But whether there was a distorted market price upon which presumptive reliance can be premised is the very question that determines whether there is a classwide reliance issue that unites class members or whether there are instead individualized reliance issues that separate them.

4. The case law on which *Basic* relied in creating its presumption of reliance demonstrates that the Court did not intend to create a rebuttable presumption for use at certification, yet—with no explanation—render that "rebuttable presumption" *irrebuttable* at certification. *Basic* invoked the presumption of reliance in *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128, 153-154 (1972), which arises when an issuer makes material omissions despite a duty to disclose. See *Basic*, 485 U.S. at 243, 245. Courts have always understood that the *Affiliated Ute* presumption was rebuttable at the class-certification stage. Less than a month before *Basic* was handed down, for instance, the Eleventh Circuit spent considerable energy deciding whether "[t]he presumption, derived from *Ute*" had been rebutted by the defendant. *Ross* v. *Bank South, N.A.*, 837 F.2d 980 (11th Cir. 1988). That discussion, *id.* at 993-998, took place in Part II, "Class Certification"—*not* in Part III, "Merits," where the Fund's theory would place it.[15] While the court

[15] The Eleventh Circuit subsequently took the case *en banc*, where (as to some issues) it departed from the panel, finding no securities-fraud violation. See *Ross* v. *Bank South, N.A.*, 885 F.2d 723, 732 (11th Cir. 1989) (*en banc*). The panel opinion thus is cited here merely as an illustration of when the presumption could be rebutted (a conclusion unchallenged by the *en banc* court).

concluded that defendants had not successfully rebutted the presumption, *id.* at 997, it went out of its way to emphasize that it did "not, of course, intend to preclude a district court from exercising its discretion in a proper case to *deny certification*" in cases where rebuttal was successful. *Id.* at 996 n.11 (emphasis added).

The Fund places great weight on a single phrase buried in a single footnote in *Basic* to support its claim that defendant's rebuttal must be made at "trial." Pet. Br. 35 (citing 485 U.S. at 249 n.29); see also U.S. Br. 7, 16-17. The footnote, however, discusses a specific scenario where, "despite petitioners' allegedly fraudulent attempt to manipulate market price, news of the merger discussions credibly entered the market and dissipated the effects of the misstatements." *Basic*, 485 U.S. at 248-249. In that context, the Court reasoned that a defendant could show at "trial" that certain members of the class—"those who traded *Basic* shares *after the corrective statements*"—lacked a "connection to the fraud." *Id.* at 249 & n.29 (emphasis added). If some plaintiffs were excluded from the class for this reason, the Court explained, "the District Court retain[s] the authority to amend the certification order as may be appropriate." *Id.* at 249 n.29.

The Court's statement that "[p]roof *of that sort* is a matter for trial" means at most that, if new information comes to light pertaining to *class definition*, the Court may amend the certification order at trial. It does not mean that defendants cannot, to oppose class certification, show that the presumption of reliance is inapplicable across the board. Such a reading of footnote 29 would set that language at war with the rest of *Basic*, which repeatedly recognizes that a variety of challenges to the presumption, including whether the market was efficient and whether the price was distorted by the alleged misrepresentations, are properly raised when resisting class certification.

In any event, *Basic* was decided when old Rule 23(c)(1)(C) allowed courts to avoid tough calls early on by conditionally certifying classes. 485 U.S. at 249 n.29. But *Basic* could not have predicted that dissatisfaction with a too-lenient practice would result in deletion of the authority to certify classes conditionally. And, as amended in 2003, Rule 23 requires reaching a certification decision "[a]t an early practicable time," Fed. R. Civ. P. 23(c)(1)(A), eliminating the old Rule's perceived urgency. Moreover, consistent with *Falcon*, 457 U.S. at 160, Rule 23 now permits certification only once the court is "satisfied that the requirements of Rule 23 have been met"—and if the court is not yet satisfied, the court "should refuse certification until [those requirements] have been met." Advisory Comm. Notes on Fed. R. Civ. P. 23 (2003 amends.), 28 U.S.C. App., p. 144 (2006 ed.). Consequently, courts now routinely hear expert testimony and resolve complex factual disputes at the class-certification hearing rather than postponing such issues until trial. Thus, even if *Basic*'s reference to proof at "trial" had any bearing on the timing of rebuttal evidence when *Basic* was decided, overreading that footnote would be particularly inadvisable now.

C. Postponing Consideration Of Rebuttal Evidence Until After Certification Harms Judicial Economy

The Fund's position effectively reduces to the claim that, although the presumption of reliance is rebuttable, defendants—already disadvantaged through plaintiffs' use of the presumption—should be rendered defenseless in opposing it at the certification stage.[16] That view does

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[16] Rebuttal is, in fact, one of few tools for already nearly defenseless certification-stage securities-fraud defendants. Nearly a decade ago, *94%* of putative securities class actions were certified. Roosevelt,

not merely improperly render the rebuttable presumption conclusive at the class certification stage. Cf. *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 137 (2008) ("the word 'rebuttable' means that the presumption is not conclusive"). It also imposes the enormous costs and pressures of class certification based upon a minimal showing, while requiring defendants to wait until trial to prove that the class should not have been certified in the first place.

1. That result cannot be reconciled with the notions of "fairness, public policy, * * * probability, [and] judicial economy," on which *Basic* relied in creating its presumption of reliance. 485 U.S. at 245. To defer for merits resolution questions essential to whether the case should have proceeded as a class action in the first instance is wasteful in the extreme. It is unfair to absent class members, who may suffer the preclusive effects of an adverse decision due to class counsel's decision to pursue certification based on a classwide reliance theory without ever examining whether absent class members could make a better showing individually. And "[t]he practical consequences of an expansion" for defendants are stark. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 159, 163 (2008). The Court has repeatedly cautioned that "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak" securities fraud "claims to extort settlements from innocent companies." *Ibid.* (citing *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740-741 (1975)).

That prospect is grave once a class is certified. Class certification is usually the entire ballgame for defendants. "Certification of a large class may so increase the

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Defeating Class Certification in Securities Fraud Actions, 22 Rev. Litig. 405, 407 (2003).

defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand*, 437 U.S. at 476; accord *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims"). Judge Friendly described such settlements as "blackmail." Friendly, *Federal Jurisdiction: A General View* 120 (1973). Certifying fraud-on-the-market classes without affording defendants the opportunity to rebut the presumption of reliance will inevitably lead to the settlement of countless marginal cases—indeed, cases that are not only meritless, but which never should have been certified—because the amounts at stake are simply too enormous to justify the risk of litigation. That, in turn, would give rise to more frivolous lawsuits. See Bone & Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1302 (2002). By allowing rebuttal prior to class certification, "[t]he law guards against a flood of frivolous or vexatious lawsuits." *Salomon*, 544 F.3d at 484.

2. "Concerns with the judicial creation of a private cause of action" under Section 10(b) also "caution against its expansion" here. *Stoneridge,* 552 U.S. at 165. The fact that the Fund's claim derives from a judicially created cause of action—*and* a judicially created presumption of reliance—doubly counsels against allowing certification of classes without offering defendants the opportunity of rebuttal. *Stoneridge*'s concerns about the Court's expansion of its own jurisdiction, *id.* at 164-165, are only compounded where the Court is asked to allow judicially implied claims to proceed as a far-reaching class without allowing rebuttal of a presumption the Court itself created to ease the burden of complying with Rule 23.

To be sure, the securities laws "seek to maintain public confidence in the marketplace * * * by deterring fraud." *Dura*, 544 U.S. at 345. But they are not intended "to provide investors with broad insurance against market losses." *Ibid.* (citing *Basic*, 485 U.S. at 252 (White, J., dissenting)). Allowing enormous classes to be certified based on a judicially created presumption where the evidence shows that the market price was not distorted hardly deters fraud. Rather, it punishes innocent defendants (and their current shareholders) who must settle cases after certification to avoid the massive risks and expense of litigation. Such settlements in effect provide "insurance against market losses"—such as the price declines here—that are not attributable to fraud by defendants. *Ibid.*; see *id.* at 347-348 (recognizing that a rule that promotes settlement of meritless cases improperly "transform[s] a private securities action into a partial downside insurance policy").[17]

D. A Defendant's Right To Rebuttal Should Not Be Denied At Class Certification Because Of A Purported Need For Merits Discovery

1. The Fund and the Government protest that it is unfair to assess whether a misrepresentation affected market price at the "threshold" class-certification stage without "merits discovery." Pet. Br. 52; U.S. Br. 26-27. But district courts are amply capable of deciding how much discovery is necessary before certification issues are resolved. Besides, given the extraordinary discovery pro-

[17] The Fund (like the Seventh Circuit in *Schleicher*) argues that Congress's failure to amend the PSLRA to address the presumption of reliance somehow supports the Fund's position. But that argument merely presumes that existing law favors the Fund, and thus begs the question presented. Halliburton seeks nothing more than a proper application of *Basic* and Rule 23, not a judicial amendment to the securities laws.

vided in this case, those protests ring particularly hollow. The motion for class certification here was filed *five years* after the initial complaint, after Halliburton produced over *600,000 pages* of discovery. The Fund never asked the district court for additional discovery in connection with its class-certification motion. Nor did it claim that insufficient discovery hampered its effort to show that alleged misrepresentations affected market prices. To the contrary, the Fund argued that it had "satisfied th[at] burden through the submission of the Nettesheim expert report." J.A. 155a. It emphasized that Nettesheim reviewed "all publicly available, relevant information for the Class Period." *Ibid.* The Fund did not complain of insufficient discovery on appeal. Pet. C.A. Br. 52. Nor did its certiorari petition identify specific issues on which additional discovery was needed.

That is hardly surprising. In many cases, there will be scant reason for discovery before deciding certification issues. As *Oscar* observed, the "proof" for "the fraud on the market regimen" often "is drawn from public data and public filings." 487 F.3d at 267. *Basic* also recognized that, ruling that the presumption of reliance is assessed by considering "public" statements and the effect of those statements on "market price." 485 U.S. at 248. While the Government complains that "full consideration of loss causation is a detailed and complex inquiry," U.S. Br. 26, it does not identify any *discovery* that is necessary to determine whether misrepresentations moved the market. It may be that expert testimony is often required to demonstrate that stock-price movement resulted from the misrepresentation and not something else. U.S. Br. 27. But expert testimony is common in modern class-certification proceedings. And the necessity for expert testimony to evaluate *publicly available*

information does not show why discovery is needed to prove price impact before class certification.[18]

Securities-fraud plaintiffs already routinely use event studies and expert testimony to demonstrate market efficiency, which undisputedly must be proven to invoke the presumption. Cf. *Cammer* v. *Bloom*, 711 F. Supp. 1264, 1287 (D.N.J. 1989) (to establish market efficiency, a plaintiff must prove stock price reacted to unexpected company-specific news). The same event studies used to show market efficiency are often also used to show that the alleged misrepresentations affected the market price. See, *e.g.*, Fisher, *Does the Efficient Market Theory Help Us Do Justice in a Time of Madness?*, 54 Emory L.J. 843, 871, 878 (2005); *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 512 & n.10, 513 (1st Cir. 2005) (affirming finding of market efficiency where plaintiffs presented an "event study" showing that stock "reacted strongly" to corrective disclosures). The Fund did just that here, proferring the same event study to address both market efficiency and price impact. See J.A. 590a-592a.

In any event, even if there are some instances where "merits" discovery may be necessary to establish a misrepresentation's impact on market price, that is no reason to exclude consideration of this issue at class certification. Where disputed "merits" issues are relevant to the Rule 23 requirements, a district judge has ample discretion to permit necessary discovery—by plaintiffs seeking to prove price impact or defendants seeking to disprove it—before ruling on class certification. *Salomon*, 544 F.3d at 486; Advisory Comm. Notes on Fed. R.

[18] After *Salomon*, district courts within the Second Circuit have routinely assessed price impact and certified classes based upon expert analysis of publicly available information. *E.g.*, *Am. Int'l Group,* 265 F.R.D. at 182, 186-188; *Fogarazzo* v. *Lehman Bros., Inc.*, 263 F.R.D. 90, 102-106 (S.D.N.Y. 2009).

Civ. P. 23 (2003 amends.), 28 U.S.C. App., p. 144 (2006 ed.) ("it is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis").

2. The Fund nonetheless devotes considerable energy to fact-bound claims regarding specific items of discovery it now purports to desire. Pet. Br. 52-56. But the demand that class certification be deferred pending further discovery was neither pressed nor passed on below. See p. 44, *supra*. As a result, this Court should not address it in the first instance. *Nat'l Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 469 (1999).

In any event, the claims lack merit. The Fund now asserts (Br. 53) that it needed discovery to "parse the effect of the culpable from the non-culpable news" allegedly contained in Halliburton's December 21, 2000 press release. That press release attributed the $95 million charge Halliburton was taking to multiple causes—one disclosure the Fund identifies as "correcting" a prior alleged misstatement ("negotiations with customers regarding cost increases" on projects where claims were not resolved "as originally anticipated"), S.A. 520, and another that was concededly just unrelated bad news ("changes in market conditions," including "labor disturbances" abroad). See S.A. 520; Pet. App. 134a-135a. According to the Fund, even though the evidence showed that the press release was not corrective of anything (see Pet. App. 132a-136a), it needed merits discovery "to determine the degree to which overruns were actually due to labor disturbances." Pet. Br. 53. But that makes little sense. The question is how *public markets* responded to public disclosures and, more specifically, the degree to which *public market*s were reacting to one piece of bad news as opposed to another. Halliburton's *non-public* internal documents, never released to the market, have no bearing on that.

The necessary analysis that the Fund failed to perform here is regularly conducted based on public information. Indeed, the Fund's own expert testified that she had previously performed statistical analyses that separated the price effects of multiple disclosures, but she "was asked not to do [so]" in this case. J.A. 402a-403a; Pet. App. 131a.[19] And courts routinely require plaintiffs to prove that price declines stem (at least in part) from corrective disclosures and not from the release of negative (but non-culpable) news. *E.g.*, *Flag Telecom*, 574 F.3d at 36 ("*Dura* requires plaintiffs to disaggregate"); *In re Vivendi Universal S.A. Sec. Litig.*, 634 F. Supp. 2d 352, 369-370 (S.D.N.Y. 2009) (holding that "[p]laintiffs [h]ave [a]dequately [d]isaggregated [c]ompeting [c]ausal [e]vents").[20] *Dura* recognizes that a price decline "may reflect not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price." 544 U.S. at 343.

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[19] Econometricians can craft event studies or other analyses that "disaggregate" the effects on market price stemming from various statements. Bruegger & Dunbar, *Estimating Financial Fraud Damages with Response Coefficients*, 35 J. Corp. L. 11, 25 (2009); Nielsen & Prowse, *Securities Litigation:* Dura*'s Impact on Damages*, 22 InSights, July 2008, at 7–8, 10 n.17; Ferrell & Saha, *The Loss Causation Requirement for Rule 10b-5 Causes of Action,* 63 Bus. Law. 163, 168–170 (2007).

[20] Quoting *Schleicher*, 618 F.3d at 686, the Fund argues that "when true and false statements are made together it is often impossible to disentangle the effects with any confidence." Pet. Br. 67. That unsupported assertion is simply wrong. See n.19, *supra.* And, in any case, the Fifth Circuit does not require "proof that some percentage of the drop was attributable to the corrective disclosure," but only "some empirically-based showing that the corrective disclosure was more than just present at the scene." *Oscar*, 487 F.3d at 271. That is hardly an "impossible" standard to meet.

Those *public* facts may influence the price, and their *public* impact must be discerned. Documents that never reached the public shed no light on how, or why, public markets were responding.

The Fund also claims it needed discovery because the Fifth Circuit "effectively requires proof of scienter" to establish price impact. Pet. Br. 53; see *id.* at 53-56; U.S. Br. 27 n.4. But the court of appeals expressly disavowed any requirement that the Fund prove scienter or intentional fraud. Pet. App. 123a n.35 ("a plaintiff need not prove at the class certification stage intentional fraud by the defendant"); *Flowserve*, 572 F.3d at 230 (rejecting the rule that "a fraud causes a loss only if the loss follows a corrective statement that specifically reveals the fraud"). The court simply held that a negative disclosure that does not "reveal the truth of the previously misleading statement is insufficient to establish" price impact. Pet. App. 118a.[21] The various snippets cited by the Fund (Br. 54 & n.17) are simply other ways of stating the same standard, see Pet. App. 121a-122a, and are no different from tests used in other courts of appeals. See n.21, *infra*. They ensure that the later disclosure claimed to be "corrective" must indeed *correct* the earlier representation. None requires the Fund to establish Halliburton's state of mind at the time the alleged misrepresentation was made.

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[21] This test derives from *Dura*, 544 U.S. at 347 (requiring price decline "after the truth became known"), and variations have been adopted by the lower courts. See *Katyle* v. *Penn Nat. Gaming, Inc.*, --- F.3d ---, 2011 WL 857144 at *7 (4th Cir. 2011); *Flag Telecom*, 574 F.3d at 41; *In re Williams Sec. Litig.*, 558 F.3d 1130, 1139 (10th Cir. 2009); *Metzler Inv. GMBH* v. *Corinthian Colleges*, *Inc.*, 540 F.3d 1049, 1065 (9th Cir. 2008); *McCabe* v. *Ernst & Young, LLP*, 494 F.3d 418, 425-426 (3d Cir. 2007); *Ray* v. *Citigroup Markets, Inc.*, 482 F.3d 991, 995 (7th Cir. 2007).

The Fund claims that the court of appeals held that a June 28, 2001 statement was not corrective because it "did not indicate that Halliburton *knew* of Harbison-Walker's financial difficulties prior to the announcement." Pet. Br. 55. But the Fund's claim actually failed because the June 28, 2001 statement did not correct any misstatement previously *conveyed to the market*. "The June 28, 2001, press release does not correct any specific misrepresentation by revealing a previously obscured truth." Pet. App. 125a; see *id.* at 125a-127a. The Fifth Circuit's analysis thus turned on the state of the market's knowledge, not on Halliburton's scienter.

That ruling was clearly correct. In June 2001, Harbison-Walker unexpectedly "asked Halliburton to provide financial assistance for asbestos claims that Harbison-Walker had previously agreed to assume." Pet. App. 124a. Halliburton promptly disclosed that in a June 28, 2001 press release, announcing that it would need to add new asbestos reserves of $50 to $60 million to cover this unexpected liability; Halliburton's stock declined. Pet. App. 124a-125a, S.A. 523. That press release, however, was not a corrective disclosure that revealed the falsity of a prior statement. To the contrary, Halliburton's 10-Ks—filed much earlier—had repeatedly disclosed both Harbison-Walker's agreement to indemnify Halliburton and that the indemnified claims were *not* previously included in Halliburton's asbestos reserve. S.A. 479-480; see Pet. App. 126a. The market thus knew that, if Harbison-Walker became unable to fulfill its agreement for the asbestos liability, Halliburton might be liable. S.A. 461, 480; Pet. App. 126a. Indeed, the Fund's own expert admitted that Halliburton had not represented that Harbison-Walker "will never request or need our assistance on any of the asbestos claims they agreed to assume." J.A. 415a; Pet. App. 125a ("Plaintiff makes no argument that Halliburton made prior statements about exposure from

claims related to Harbison-Walker."); Pet. App. 16a ("[t]here is no allegation" that "Harbison-Walker required Dresser's assistance prior to this disclosure").

Thus, the disclosure that Harbison-Walker in fact needed financial assistance in June 2001 did not correct a prior false statement. It simply revealed new information. Where the market responds to new information rather than the correction of a prior misrepresentation, the resulting price decline by definition is no evidence that the market price was previously distorted by a misrepresentation. In any event, the Fund cannot show that the district court erred in declining to defer the class-certification ruling pending further discovery where no such request was made.[22]

III. THE COURT OF APPEALS' DECISION SHOULD BE AFFIRMED BECAUSE THE FUND FAILED TO PROVE THAT THE ALLEGED MISREPRESENTATIONS AFFECTED THE MARKET PRICE

The court of appeals correctly held that class certification is improper. The evidence amply rebutted *Basic*'s presumption of classwide reliance on a distorted market price by showing that the alleged misrepresentations did not affect the market price. The Fund's own expert ad-

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[22] The same analysis disposes of the Fund's argument that it needed discovery into whether the announcement of an adverse jury verdict constituted a corrective disclosure. Pet. Br. 56. Analysts saw the verdicts as unexpected. Pet. App. 25a-26a, 128a & n.43. And Halliburton's previous statements notified the markets that bad verdicts could happen; that its asbestos reserves were merely estimates, based upon the number of "open" (not potential) claims and Halliburton's historical cost of resolving such claims; and that adverse court rulings could materially impact the resolution of asbestos claims. Pet. App. 127a; S.A. 479-480, 503. In this context, the adverse jury verdicts were the quintessential unexpected, negative events that cannot serve as corrective disclosures, and thus cannot demonstrate an alleged misrepresentation's impact on market price.

mitted that her event study revealed that Halliburton's stock price did *not* react to any of the alleged misrepresentations. J.A. 349a, 391a-394a, 526a, 664a, 721a; Pet. App. 11a. And the Fund has never argued otherwise. Pet. App. 7a n.11, 116a. That alone constitutes sufficient evidence that the misrepresentation did not affect the market price and rebuts the presumption of reliance. See pp. 19-24, *supra*. Halliburton's expert further rebutted the presumption by showing that none of the price declines identified by the Fund's event study resulted from corrective disclosures. J.A. 469a-537a, 691a-721a.

Despite that successful rebuttal showing, the Fund never succeeded in re-establishing the presumption of reliance, which was its only asserted means to satisfy Rule 23. See pp. 24-27, *supra*. The Fund urged the courts to infer that the alleged misrepresentations distorted the market price because, according to the Fund, the stock's price declined in response to alleged corrective disclosures. In thorough opinions, however, both the district court and the court of appeals properly concluded that the Fund failed to link the declines in Halliburton's stock price to corrective disclosures (as opposed to other factors), and thus did not support an inference that the alleged misrepresentations had affected the market price. Other than the Fund's perfunctory assertion that it was entitled to additional discovery, Pet. Br. 52-56, neither the Fund nor the Government claim that the court of appeals' corrective-disclosure analysis was substantively defective. To the contrary, the Fund's *only* basis for requesting reversal of the judgment below is that it was improper to consider price impact (or "loss causation," as the Fund misstates it) at the class-certification stage. Pet. Br. 68. Because that claim lacks merit—and because the presumption of reliance was conclusively rebutted—there was no error in denying class certification.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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