NO. 13-317

In The Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR, PETITIONERS,
V.
ERICA P. JOHN FUND, INC. FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., RESPONDENT.

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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether this Court should overrule or modify *Basic v. Levinson*, 485 U.S. 224 (1988), a statutory interpretation precedent that Congress has left unchanged for more than a quarter century while enacting major legislation concerning private securities actions and which properly construed the Securities Exchange Act of 1934.

2. Whether evidence of price impact may be considered at class certification to rebut the fraud-on-the-market presumption even though price impact turns on common evidence and absent price impact, all class members' claims will fail.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent, the Erica P. John Fund, Inc., formerly known as the Archdiocese of Milwaukee Supporting Fund, Inc., states that it has no parent corporation and no stock.

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STATEMENT OF THE CASE

Respondent Erica P. John Fund, Inc. (the "EPJ Fund" or "Plaintiff") brought this securities-fraud action against petitioners Halliburton Company and its president and chief executive officer (collectively, "Halliburton" or "Defendants"). The operative fourth amended complaint alleges that the Defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act") and U.S. Securities and Exchange Commission's ("SEC") Rule 10b-5. Plaintiff alleges that Defendants falsified Halliburton's financial results and misled the public about: (1) Halliburton's liability for asbestos claims, including the adequacy of its reserves for pending claims, and its liability for potential claims, including those arising from the operations of Harbison-Walker Refractories Company, a former subsidiary of Dresser Industries ("Dresser"), R4558; (2) its probability of collecting revenue on unapproved claims on fixed-price construction contracts, which Halliburton knew its customers were not likely to pay, R4562-63 (Record ("R.")); and (3) the touted efficiencies of its merger with Dresser, which Halliburton knew would not be realized, R4236.

Plaintiff sought class certification, invoking the fraud-on-the-market presumption recognized by *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Halliburton stock is closely watched, as it trades on the New York Stock Exchange ("NYSE"); there are 848 million shares outstanding. But Plaintiff did not merely rely on those facts to show the market's efficiency. Instead, Plaintiff showed that the market for Halliburton's stock efficiently incorporates material information. See J.A. (joint appendix) 149a-152a, 549a n.8.

Specifically, Plaintiff submitted an extensive report by an expert financial economist, presenting an event study demonstrating that Halliburton's stock price generally moved in response to unexpected news. See J.A. 167a-208a, 263a-327a, S.A. (supplemental appendix) 9-453, J.A. 585a-629a. Plaintiff's expert conducted a regression analysis to filter out movements in Halliburton stock that were driven by market-wide and industry-wide developments. The expert identified 31 days on which there was a Halliburton-specific, statistically significant movement in the stock's price. App. 012, 016, 018-19. On about two-thirds of those days, there was significant, unexpected Halliburton-specific news to which the market was reacting. The share price increased with positive news and dropped with negative news. The expert found that the data demonstrated that Halliburton's stock as a general matter reacted promptly to unexpected news. App. 018-022; App. 039-66. She concluded: "In general, large significant changes in Halliburton's stock price are associated with material, new and unexpected information about the Company." App. 019.

Further, with respect to the specific allegations of Plaintiff's complaint, Halliburton's stock dropped a statistically significant amount net of market and industry movements at the time of each of its corrective disclosures. Most significantly, on December 7, 2001, the stock plunged more than 42% when Halliburton announced the last in a series of adverse asbestos verdicts and judgments it disclosed in a single week. J.A. 230, 343-44. Halliburton submitted its own expert report in opposition to class certification. But its expert could not identify any other adverse news that day that would explain the price drop, except a change in Moody's rating of Halliburton, which the expert admitted itself reflected recent information regarding Halliburton's asbestos exposure. Brief in Opposition App. 23a-26a.

The evidence was so plain that Halliburton *conceded* that the market for its stock is efficient. J.A. 753. Halliburton instead argued that the class should not be certified because Plaintiff had failed to establish "loss causation"—*i.e.*, that the alleged fraud had caused Plaintiff's loss. J.A. 348, 399. Applying Fifth Circuit precedent, the district court agreed and denied class certification. Pet. App. 55a.[1] The court of appeals affirmed. Pet. App. 34a.

This Court granted certiorari and reversed, ruling that loss causation is not relevant to certifying a securities-fraud class. *Erica P. John Fund, Inc. v. Halliburton Co. ("Halliburton")*, 131 S. Ct. 2179, 2183 (2011). The Court reasoned that loss causation does not inform whether the purchasers relied in common on the defendant's misrepresentations. See *id.* at 2185-86.

On remand, the district court granted Plaintiff's motion to certify the class. Pet. App. 26a. The Fifth Circuit

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[1] Based on the limited discovery which was available to Plaintiff at that early stage of the case and which primarily concerned accounting issues, the district court deemed the information Halliburton disclosed in December 2001 to be unexpected bad news, not corrective disclosures. Subsequently, Plaintiff has obtained through discovery evidence that in fact the information was not unexpected. For instance, Halliburton disclosed three adverse judgments (totaling $35.7 million) handed down on December 5, 2001. But those judgments resulted from motions filed by plaintiffs long before (in June 2001) to enforce *binding* settlement agreements. See *infra* Part III.B (explaining that requiring plaintiffs to demonstrate price impact at class certification with limited discovery creates a substantial risk of wrongful denials of certification in meritorious actions).

affirmed, holding that price impact should not be decided as part of the class-certification determination. Pet. App. 2a. The court, relying on both *Halliburton* and this Court's subsequent ruling in *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013), reasoned that "price impact evidence is common to the class." Pet. App. 16a. Further, "because a showing of negative price impact is required to establish loss causation, plaintiffs who cannot establish price impact cannot establish loss causation." *Ibid*. Thus, if the defendant proved the absence of price impact, either at the time of the fraudulent statement or corrective disclosure, all the plaintiffs' claims would fail, and individual questions could not predominate. *Id*. at 11a, 18a.

This Court granted certiorari.

SUMMARY OF THE ARGUMENT

In *Basic*, this Court recognized the "fraud-on-the-market" presumption in private suits under Section 10(b) of the Exchange Act and the SEC's Rule 10b-5. *Basic* is now well-settled. This Court has repeatedly cited its holding favorably, including just three years ago in a unanimous opinion in this very case. *Halliburton*, 131 S. Ct. at 2185. For decades, the SEC has consistently supported private securities actions employing the *Basic* framework as an essential supplement to federal securities enforcement efforts. Individuals and institutions have relied on the deterrent effect of the legal regime for private securities actions—of which *Basic* is a central component—in investing in U.S. markets. Without *Basic*, securities-fraud class actions and many individual fraud actions simply could not be brought in 10(b) and 10b-5 cases based on affirmative misrepresentations.

Nonetheless, Halliburton asks this Court to do something it has not done in decades—reverse a settled statutory precedent in a field that Congress has closely superintended without disturbing the Court's prior interpretation. Congress has expressly considered overturning *Basic*, and could have done so at any time over the past quarter century. But it has chosen another route as it repeatedly revised the Exchange Act, leaving in place the ability to bring such suits under the *Basic* framework but imposing rigorous standards on, for example, pleading securities-fraud actions and the appointment of lead counsel. Indeed, as this Court recently recognized, in enacting the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, Congress considered overruling *Basic* but ultimately "rejected calls to undo the fraud-on-the-market presumption." *Amgen*, 133 S. Ct. at 1201.

Not only is the question of whether to overrule *Basic* the prerogative of Congress under well-established principles of *stare decisis*, but *Basic* was correctly decided. This Court's holding faithfully tracks the Securities Act of 1933 ("1933 Act") and the Exchange Act and closely parallels two other opinions of this Court construing reliance requirements under the Exchange Act. *Basic* also gives effect to Congress's intent in adopting the Exchange Act and is consistent with the common-law treatment of fraud disseminated into a public market.

Halliburton argues that certain academic economists have discredited the efficient capital market hypothesis ("ECMH") and especially proponents' claims that markets incorporate material information to reach a "correct" valuation for securities. But as *Basic* itself makes clear, the long-standing economic debate over the ECMH is irrelevant to the Court's holding. *Basic* is built upon the obvious fact recognized in the history of the Exchange Act—which even critics of the ECMH almost uniformly accept—that stock prices generally react reasonably promptly to material, public information by incorporating that information into the stock price. In turn, investors typically rely in common on the stock price as reflecting the available material information about the stock. *Basic* accounts for the fact that not all markets are efficient by requiring plaintiffs to submit proof sufficient to trigger the presumption and by permitting defendants to rebut it.

Halliburton's remaining arguments for overruling *Basic* both highlight that Congress is the correct forum to resolve them and dramatically understate the significant burdens that securities-fraud plaintiffs bear in securing class certification. Indeed, Halliburton's policy arguments were generally aired in the congressional hearings on the PSLRA. Contrary to Halliburton's submission that the *Basic* presumption arises automatically and cannot as a practical matter be defeated, district courts regularly require plaintiffs to demonstrate the existence of an efficient market, and in many cases have found that proof wanting and denied class certification. Halliburton's parade of horribles is an exaggerated, one-sided account because private securities class actions in fact play an essential role in deterring securities fraud and compensating defrauded investors when deterrence fails.

If this Court were to embrace Halliburton's criticism of the ECMH to overturn *Basic* on the ground that markets are "fundamental[ly] inefficient[]" (Pet. Br. 16 (quoting heading)), it would call into question an array of settled securities law principles. Several SEC regulations rest squarely on the principle that issuers need only disclose information to the market, which will incorporate that information into the price as a matter of course. If this Court overturns *Basic*, the SEC might have to adopt substantially more onerous disclosure or substantive requirements. Further, in pursuing criminal and civil violations of federal securities laws, the Department of Justice and the SEC regularly rely on the assumption that information is generally incorporated into the market price of stocks, including through the use of "event studies" that parallel those used in private suits under *Basic*. Defendants likewise rely on event studies to defend against some securities-fraud claims.

As a fallback, Halliburton argues that this Court should modify *Basic* by requiring plaintiffs to demonstrate at the class-certification stage that defendant's fraud had an impact on the stock price in order to trigger the presumption. That attempt to insert a merits inquiry into the class-certification process cannot be reconciled with Rule 23 or this Court's indistinguishable decisions in *Halliburton* and *Amgen*. As the Fifth Circuit correctly recognized, the existence of "price impact" does not inform whether common questions predominate over individual ones. Instead, absent price impact, all the plaintiffs' claims fail together.

Halliburton further argues that the Court should permit defendants to rebut the presumption at class certification through evidence of a lack of price impact. Not only is that approach inconsistent with *Basic*, which indicated such rebuttal was a matter for trial, 485 U.S. at 249 n.29, it is also conflicts with Rule 23 and this Court's opinion in *Amgen*, because a successful rebuttal would not cause individual questions to predominate; rather, it would defeat the claims of all class members.

Finally, to the extent a defendant seeks an earlier ruling on price impact, it is free to move for summary judgment on that issue.

ARGUMENT

I. *BASIC* SHOULD NOT BE OVERRULED

A. *Basic*'s Common-Sense Rationale and Application

In *Basic*, this Court—agreeing with the SEC's *amicus curiae* brief and "nearly every court" that considered the question—adopted a rebuttable fraud-on-the-market presumption. 485 U.S. at 241-50 & n.25. The Court explained that in modern security markets with millions of shares changing hands daily, "the market is interposed between seller and buyer and ideally transmits information to the investor in the processed form of a market price." *Id.* at 244. The Court noted that the presumption recognizes that, in well-developed markets, material public information is generally reflected in the market price of a security and that investors generally rely in common on the integrity of this market price in making investment decisions. *Id.* at 245-47. The presumption of reliance is thus "consistent with, and, by facilitating Rule 10b-5 litigation, supports, the congressional policy embodied in the 1934 Act," because "Congress expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance on the integrity of those markets * * * ." *Id*. at 245-46.

In markets to which the presumption applies, material statements typically affect the price of a stock through the conduct of analysts who report on significant public statements and market professionals and others who trade on that information. Ordinary investors generally rely on the integrity of the market price, rather than studying the myriad disclosures of publicly-traded companies. When the stock price is inflated or kept from declining in value by a material misrepresentation, all purchasers are effectively relying in common on that misrepresentation. Under such circumstances, there is no fraud-free price at which anyone can buy the stock. The presumption thus rests not on economic theory, see *id.* at 246 n.24 ("[w]e need not determine by adjudication what economists and social scientists have debated"), but rather on "common sense and probability"—namely, that "*most* publicly available information is reflected in [the] market price," and therefore "market professionals *generally* consider most publicly announced material statements about companies." *Id.* at 246 & n.24, 247.[2]

The *Basic* presumption does not arise from the mere fact that a security is publicly traded. Plaintiffs must first establish that the market for the security at issue is "open and developed" or "well-developed," that the defendant made public misrepresentations, and that the plaintiff traded the shares between the time the misrepresentations were made and the time the truth was revealed in order to give rise to the presumption. *Id.* at 241, 244, 246-48 & nn.27 & 29. Establishing these predicates demonstrates that reliance for all class members will rise or fall together, and that common questions will predominate over individual ones. See *Amgen*, 133 S. Ct. at 1192-93, 1198. If the plaintiffs fail to carry their burden on any of the three prerequisites

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[2] Unless otherwise indicated, all internal quotations and citations are omitted and all emphasis added.

(efficiency, publicity, or timing), the presumption does not attach.

To invoke this fraud-on-the-market presumption, plaintiffs, whether pursuing claims individually or as a class, must establish, not simply allege, that all three prerequisites have been met, especially that a market is well-developed, and district courts must weigh all competing evidence. *E.g.*, *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 5-6 (1st Cir. 2005). In determining whether the market is in fact well-developed because the stock price responds to material news, courts typically look to so-called "event studies," which even Halliburton acknowledged are "a reliable and court-endorsed method to isolate the effects of particular statements on a company's stock price." USCA5 7466. For over thirty years, courts have relied on event studies, which use widely-accepted statistical methods to isolate the impact of company-specific information on prices. See, *e.g.*, *In re DVI, Inc. Sec. Litig.*, 2010 WL 3522090, at *13 (E.D. Pa. Sept. 3, 2010) (event study is "accepted method" of analysis for market efficiency), aff'd 639 F.3d 623 (3d Cir. 2011). Academics have also embraced event studies. See, *e.g.*, Bhagat & Romano, Event Studies and the Law: Part I: Technique and Corporate Litigation, 4 Am. L. & Econ. Rev. 141, 142 (2002) ("Event study methodology is well accepted and extensively used.").

Courts have frequently found that plaintiffs have failed to establish the market is efficient and have denied class certification on that basis or remanded for a more rigorous examination. See, *e.g.*, *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 210 (2d Cir. 2008); *Unger v. Amedisys Inc.*, 401 F.3d 316, 322-25 (5th Cir. 2005); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 368 (4th Cir. 2004).

Importantly, once the presumption attaches, defendants may rebut it with "[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." *Basic*, 485 U.S. at 248. This Court indicated in *Basic* and reiterated recently that such rebuttal should be considered at summary judgment or trial. *Id*. at 249 n.29; *Amgen*, 133 S. Ct. at 1203-04. The case law shows the presumption is genuinely rebuttable. See *infra* Part II.G.

B. *Stare Decisis* Strongly Favors Preserving The Fraud-On-The-Market Presumption Recognized In *Basic*

Time and again, this Court has affirmed that "*stare decisis* in respect to statutory interpretation has special force," *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008), for in cases involving statutory interpretation, "the legislative power is implicated, and Congress remains free to alter what we have done." *Hilton v. South Carolina Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991); see also *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 260 (2008) (Roberts, C.J., concurring in part and concurring in the judgment) ("principles of *stare decisis* have their greatest effect" in "matters of statutory interpretation"). On numerous occasions, this Court has treated its prior construction of a statute as absolutely settling the statute's meaning. See, *e.g.*, *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1841 (2012); *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2641 (2011); *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011); see also *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1375 n.2 (2013) (Ginsburg, J., dissenting) (joined by Kennedy, J. and Scalia, J.).

Principles of *stare decisis* apply with full force to *Basic*, a twenty-five-year-old precedent that this Court has cited favorably five times within the last ten years (including in this very case three years ago). See *Amgen*, 133 S. Ct. at 1192; *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 n.6 (2011); *Halliburton*, 131 S. Ct. at 2185; *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 US 148, 159 (2008); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). Congress has not disturbed *Basic* despite twice engaging in a comprehensive reappraisal of the law governing private securities actions. Halliburton thus asks this Court to reverse a statutory precedent in an area where Congress has repeatedly passed significant legislation without disturbing the Court's prior construction. The Court has not done so in over fifty years, since at least *James v. United States*, 366 U.S. 213 (1961) (overruling its previous statutory interpretation of "gross income" in *Comm'r of Internal Revenue v. Wilcox*, 327 U.S. 404 (1946)); see *id.* at 230-32 (Black, J., concurring in part and dissenting in part).[3] *Basic* is a quintessential statutory interpretation case that this Court should not overrule.

[3] *Pearson v. Callahan*, 555 U.S. 223, 233-43 (2009), in which the Court modified its prior opinion in *Saucier v. Katz*, 533 U.S. 194 (2001) regarding qualified immunity claims, is not to the contrary. While the Court's understanding of qualified immunity indirectly "affected Section 1983 [litigation]," (Pet. Br. 30), a qualified immunity defense arises from the common law and the Constitution, not Section 1983.

1. *Stare Decisis* Applies With Special Force To *Basic*, Which Congress Declined To Disturb.

Halliburton's claim that "Congress has not addressed *Basic*'s presumption" is wrong. (Pet. Br. 34). In enacting the PSLRA, Congress considered many of the very arguments that Halliburton and its *amici* advance here. Congress specifically considered overruling *Basic*, but "rejected" calls to do so. *Amgen*, 133 S. Ct. at 1201. Despite taking substantial "steps to curb abusive securities-fraud lawsuits [in the PSLRA], Congress rejected calls to undo the fraud-on-the-market presumption of class-wide reliance endorsed in *Basic*." *Ibid*.

Congress thus had before it—but did not adopt—a specific proposal to overturn *Basic*. The initial version of the House of Representatives bill that culminated in the PSLRA "would have required actual reliance on a fraudulent misstatement or omission, a requirement which would have effectively eliminated cases brought under a fraud on the market theory of liability." H.R. Rep. No. 104-50, at 44 (1995); see Common Sense Legal Reform Act of 1995, H.R. 10, 104th Cong. (1995). As this Court recognized in *Amgen*, the bill "would have undone *Basic*," and was supported by testimony before Congress criticizing the fraud-on-the-market presumption. 133 S. Ct. at 1201 (quoting Langevoort, *Basic* at Twenty, Rethinking Fraud on the Market, 2009 Wis. L. Rev. 151, 153 & n.8). The provision was defeated in substantial part because of staunch opposition from the SEC, which favored retention of the presumption to allow private parties to continue supplementing the SEC's limited enforcement resources. H.R. Rep. No. 104-50, at 44 ("The Commission[ ] appreciates the Committee's recognition of the need to preserve this important concept [fraud on the market].”). This history shows that “Congress has homed in on the precise” issue now raised by Halliburton. *Amgen*, 133 S. Ct. at 1201. Thus, *Basic* “was squarely on Congress’ plate,” yet Congress chose to retain the fraud-on-the-market presumption. Langevoort, Judgment Day for Fraud-on-the-Market?: Reflections on *Amgen* and the Second Coming of *Halliburton*, Georgetown Public Law and Legal Theory Research Paper No. 13-058, at 21.[4]

Moreover, the PSLRA’s entire framework is premised on the existence of the regime of private securities litigation—including the *Basic* presumption—which Halliburton attacks. This Court “normally assume[s] that, when Congress enacts statutes, it is aware of relevant judicial precedent.” *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010). But here there is much more. The PSLRA was a direct response “to the flood of securities class actions that *Basic* spawned.” Pritchard, *Stoneridge Investment Partners v. Scientific-Atlanta:* The Political Economy of Securities Class Action Reform, 2008 Cato. Sup. Ct. Rev. 217, 244 (2007-08). “Indeed, the structure of the PSLRA makes no sense except when read as a political compromise that preserves the foundation of the fraud-on-the-market class action while making it harder for plaintiffs [to] bring, plead and prove a successful claim * * *.” Langevoort, Judgment Day, *supra*, at 6. “Congress chose some very aggressive reforms * * * but all within the framework established by *Basic*, without fundamentally altering the presumption.” *Id.* at 21. In short, the “statute was *about* fraud-on-the-market litigation.” *Id.* at 6 n.17 (emphasis in original). Referencing

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[4] http://ssrn.com/abstract=2281910 (Nov. 16, 2013). All internet sources are on file with counsel.

the PSLRA, *Stoneridge* explained that "Congress thus ratified the implied right of action," and "[i]t is appropriate for us to assume that when [the PSLRA] was enacted, Congress accepted the § 10(b) private cause of action *as then defined* but chose to extend it no further." 552 U.S. at 165-66.[5]

In the PSLRA, Congress thus addressed perceived abuses in private securities-fraud actions by, *inter alia*, establishing procedures for appointment of lead plaintiffs

[5] An *amicus* brief on behalf of certain members of Congress and others unconvincingly seeks to rewrite the history of the PSLRA. The legislative record demonstrates that Congress was aware of the *Basic* presumption and adopted restrictions on securities-fraud actions that assume the presumption's vitality. The suggestion that a majority of Congress might have voted to repeal or modify *Basic* absent a need for a super-majority to override a threatened presidential veto (see Amicus Br. 22-23), effectively concedes that Congress considered repealing the fraud-on-the-market presumption, but did not do so. In any event, President Clinton had not threatened a veto before the bill was sent to him for signature. See Gordon, Clinton Still Mum on Possible Veto of Securities Fraud Bill, Associated Press, Dec. 6, 1995. And, notably, only one of the legislative-inaction cases cited by *amici* occurred in the *stare decisis* context, where it is unnecessary to show ratification of a judicial decision, just that Congress had the opportunity but chose not to overrule this Court. That case is not on point because there was no indication Congress had its attention directed to the Court's prior decision, "even by any bill that found its way into a committee pigeon-hole." *Helvering v. Hallock*, 309 U.S. 106, 120 (1940).

and lead counsel in class actions, 15 U.S.C. § 78u-4(a)(3); heightening pleading requirements, *id.* § 78u-4(b)(1)-(2); mandating a discovery stay pending resolution of a motion to dismiss, *id.* § 78u-4(b)(3)(B); codifying a loss causation requirement, *id.* § 78u-4(b)(4); creating a safe-harbor for forward-looking statements, *id.* § 78u-5; authorizing sanctions for abusive litigation, *id.* § 78u-4(c); and limiting damages and attorney's fees, *id.* § 78u-4(a)(6) and (e).

Another provision can only fairly be characterized as resting on the validity of the *Basic* presumption. Before the PSLRA, an "investor's damages [were] presumed to be the difference between the price the investor paid for the security and the price of the security on the day the corrective information gets disseminated to the market." H.R. Conf. Rep. No. 104-369, at 42 (1995). Damages thus rested on the premise that material information affects stock prices. Congress did not disturb that principle. But to prevent plaintiffs from achieving a windfall where there was a price overcorrection following the revelation of fraud, Congress limited damages to the purchase price of the security, reduced by its mean trading price for the 90–day period after the corrective disclosure. 15 U.S.C. § 78u-4(e)(1); see H.R. Conf. Rep. No. 104-369, at 42 (provision is a "[l]imitation on 'windfall' damages"); S. Rep. No. 104-98, at 20 & n.58 (1995) (citing Lev & de Villiers, Stock Price Crashes and 10b-5 Damages: A Legal, Economic, and Policy Analysis, 47 Stan. L. Rev. 7, 9-11 (1994)). While "[s]ome have read this as undermining the fraud on the market presumption because of this realization of market inefficiency," in fact "it seems to do just the opposite." Langevoort, Judgment Day, *supra*, at 21 n.77. Indeed, it illustrates that Congress specifically considered "[r]ecent theoretical work in financial economics" discussing "fundamental" inefficiencies in the market, Lev & de Villiers, *supra*, at 10—the same type of work that Halliburton relies on here—yet found no reason to modify *Basic* or even question it.[6]

In the wake of the PSLRA, securities-fraud plaintiffs increasingly filed their actions in state court. Congress responded by modifying the securities laws, again without modifying *Basic*. It enacted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227, to prevent private plaintiffs from proceeding under state law to circumvent the PSLRA requirements. Subsequently, Congress has enacted three more major reforms to the 1934 Act,[7] including extending the time to file private actions, see *Merck*, 559 U.S. at 646-47, all without altering the fraud-on-the-market presumption.[8]

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[6] Contrary to *amici*'s assertion (Former SEC Comm'rs Br. 26-27), *Basic* reserved ruling only on the "proper *measure* of damages in litigation of this kind," not the *requirements* for obtaining damages. 485 U.S. at 248 n.28. Moreover, Congress has since addressed the measurement of damages in the PSLRA without requiring actual reliance.

[7] The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), and the Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

[8] Citing *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 292 (1993), Halliburton argues that federal courts have accepted "principal responsibility" for 10b-5 claims. (Pet. Br. 32-33). But *Musick* was decided in 1993—two years *before* the major, modern securities-fraud

2. Halliburton's Arguments For Departing From *Stare Decisis* Are Meritless

Halliburton argues that *Basic* is entitled to less deference as a statutory precedent because "the presumption is largely a procedural and evidentiary construct." (Pet. Br. 29). That is inaccurate. As this Court recently recognized, the presumption is in fact "a substantive doctrine of federal securities-fraud law." *Amgen*, 133 S. Ct. at 1193; see also *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 174-75 (1993) (*Basic* presumption is a "judicially created presumption[ ] *under [a] federal statute[ ]*"). In interpreting statutory schemes, this Court frequently establishes presumptions to fulfill congressional policy. See, *e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *AT & T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650-51 (1986); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448-49 (1984); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-55 (1981). Those presumptions warrant no less deference than any other form of statutory construction.

Alternatively, Halliburton attempts to draw a parallel between *Basic* and precedents interpreting the Sherman Act, where the force of statutory *stare decisis* is reduced because "Congress expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); (see Pet. Br. 33) (citing *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 899-900 (2007)). But in *Stoneridge*, a securities case, this Court expressly rejected that analogy and

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litigation reform bills governing private securities actions under 10(b) and 10b-5 were passed.

the relevance of *Leegin*, explaining "[t]his is not a case in which Congress has enacted a regulatory statute and then has accepted, over a long period of time, broad judicial authority to define substantive standards of conduct and liability." 552 U.S. at 163. *Stoneridge* explained that, unlike in the antitrust field, Congress has been heavily involved in amending the laws governing private securities class actions. See *id.* at 162-66.

C. *Basic* Was Correctly Decided

In *Basic*, this Court properly interpreted federal securities statutes in construing the reliance component of a Section 10(b) claim. *Basic* applied the same methodological approach of this Court's prior decisions in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972) and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) interpreting the Exchange Act's reliance requirements. In each case, the Court tailored the required proof of reliance to the role of the particular statutory provision before it. On that basis, the *Basic* Court correctly rejected an actual-reliance requirement for 10b-5 actions.

The Court in *Basic* grounded its decision in the securities laws, particularly the Exchange Act, which Congress enacted "to facilitate an investor's reliance on the integrity of [the securities] markets." *Basic*, 485 U.S. at 246. In enacting those laws in the midst of the Great Depression, "Congress expressly relied on the premise that securities markets are affected by information," notwithstanding the dramatic, and still-fresh evidence that the market also could be infected by speculation and bubbles. *Ibid.*[9]

As the Court recognized, "[u]nderlying the adoption of extensive disclosure requirements was a legislative philosophy: 'There cannot be honest markets without honest publicity. Manipulation and dishonest practices of the market place thrive upon mystery and secrecy.'" *Id.* at 230 (quoting H.R. Rep. No. 73-1383, at 11 (1934)); see *id.* at 246 ("The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings about a situation where the market price reflects as nearly as possible a just price.") (quoting H.R. Rep. No. 73-1383, at 11). The same passage quoted in *Basic* continues: "The disclosure of information materially important to investors may not instantaneously be reflected in market value, but despite the intricacies of security values truth does find relatively quick acceptance on the market." H.R. Rep. No. 73-1383, at 11. And the legislative history of the 1933 Act endorsed the fraud-on-the-market doctrine in all but name:

> The statements for which [issuers] are responsible, although they may never actually have been seen by the prospective purchaser, because of their wide dissemination, determine the market price of the security, which in the last analysis reflects those

[9] See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 376 (1991) (Kennedy, J., dissenting) ("rules facilitating § 10b litigation 'suppor[t] the congressional policy embodied in the 1934 Act' of combatting all forms of securities fraud") (quoting *Basic*, 485 U.S. at 245).

> manifold causes that are the impelling motive of the particular purchase. The connection between the statements made and the purchase of the security is clear * * *.

H.R. Rep. No. 73-85, at 10 (1933).

Congress also enacted the 1933 and 1934 Acts against the backdrop of widespread acceptance of the fraud-on-the-market principle. For example, then-Professor William O. Douglas, who was deeply involved in drafting the securities laws and later served as SEC Chairman, touted the doctrine. See Douglas, Protecting the Investor, 23 Yale Rev. 522, 524 (1934) ("[E]ven though an investor has neither the time, money, nor intelligence to assimilate the mass of information in the registration statement, there will be those who can and who will do so, whenever there is a broad market. The judgment of those experts will be reflected in the market price. Through them investors who seek advice will be able to obtain it."). In addition, Adolph Berle, Jr., Columbia Law Professor and member of President Franklin Roosevelt's "brain trust," wrote in 1931:

> Is it necessary that the purchaser knows of the specific false statement? Probably not * * *. The chain of causation between the statement relied upon and price adopted by the investor is slightly longer than in the ordinary case of deceit, but is no less direct. If the X corporation states that its earnings are $13 a share when, in fact, its income statement should really show a loss, and the market estimates the value of the stock at $130 on the basis of such statement, and the investor buys at the market price, he has relied on the

market situation, which in turn resulted from the false statement.

Berle, Jr., Liability for Stock Market Manipulation, 31 Colum. L. Rev. 264, 269-70 (1931).

Congress was also informed by early judicial decisions embracing the doctrine. In 1899, this Court approvingly quoted an English case stating that manipulation "'strikes at the price of a vendible commodity in the market, and, if it gives it a fictitious price by means of false rumors, it is a fraud leveled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day.'" *McMullen v. Hoffman*, 174 U.S. 639, 649 (1899) (quoting *Rex v. De Beringer*, 3 Maule & S. 67, 72 (1814)). This passage, a clear endorsement of the doctrine, was also quoted in an important market manipulation case decided in November 1933. *United States v. Brown*, 5 F. Supp. 81, 86 (S.D.N.Y. 1933), aff'd 79 F.2d 321 (2d Cir. 1935) (Hand, J.); see *Rosenberg v. Hano*, 121 F.2d 818, 820 & n.9 (3d Cir. 1941) (1934 Act "gave statutory sanction" to *Brown* and other case law). Indeed, "[t]he gist of the decisions at common law seems to be that interference with a free market is actionable." *Goess v. Lucinda Shops, Inc.*, 93 F.2d 449, 453-54 (2d Cir. 1937) (Manton, J., dissenting) (citing cases); cf. *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 7 & n.4 (1985) (interpreting Exchange Act "consistent with" common law and citing *Brown*).[10]

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[10] This accords with early fraud cases, where evidentiary rules precluded parties from testifying; instead, plaintiffs proved reliance circumstantially, typically by showing that action was taken consistent with reliance upon the

Basic also properly considered the structure of the securities laws and related provisions. In endorsing the fraud-on-the-market presumption, *Basic* cited and followed the methodological approach of this Court's earlier decisions in *Affiliated Ute* and *Mills*. 485 U.S. at 243, 245. In *Affiliated Ute*, this Court "dispensed with a requirement of positive proof or reliance" in cases under 10(b)—the statute at issue here—which primarily involve omissions. *Id.* at 243; see *Affiliated Ute*, 406 U.S. at 153-54. The Court relied heavily on, and sought to effectuate, "the congressional philosophy and purpose, so clearly emphasized by the Court," of full disclosure embodied in the Exchange Act. *Affiliated Ute*, 406 U.S. at 151.

Affiliated Ute relied in turn on *Mills*, *id.* at 154, which held that plaintiffs alleging a Section 14(a) claim based on a false proxy statement need not prove reliance *at all*, since such proof would "not be feasible." See 396 U.S. at 381-85 & n.5. The Court held that the required causal connection between falsity and injury was established by showing that the misstatement or omission was material, because materiality demonstrated that it "*might* have been considered important by a reasonable shareholder[.]" *Id.* at 384. In doing so, the Court relied on Section 14(a)'s legislative history and repeatedly sought to "effectuate the congressional policy of ensuring" full disclosure. *Id.* at 381-83, 385. *Basic* faithfully applied these precedents.

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misrepresentation. See, *e.g.*, *Ste. Marie v. Wells*, 108 A. 270, 270-71 (Vt. 1919) (discussing *Smith v. Chadwick*, [1884] H.L. 9 App. Cas. 187, 196 (Lord Blackburn)).

D. Overturning *Basic* Would Have Drastic and Untoward Consequences Reaching Far Beyond Private Securities Actions

Modern enforcement of the securities laws, both by public and private actors, has grown up around *Basic*'s fraud-on-the-market presumption. Adopting Halliburton's position would disrupt broad swaths of the enforcement regime. See *Quill Corp. v. N.D. By and Through Heitkamp*, 504 U.S. 298, 317 (1992) ("adher[ing] to settled precedent" where it had "engendered substantial reliance and ha[d] become part of the basic framework of a sizable industry").

1. Overruling *Basic* Would Mean the Demise of Private Securities Actions And The Deterrent And Compensatory Role They Serve

Overruling *Basic* would preclude certification in the vast majority of private securities-fraud class actions, as this Court has recognized. See *Amgen*, 133 S. Ct. at 1193; *Wal-Mart*, 131 S. Ct at 2552 n.6; *Halliburton*, 131 S. Ct. 2185; *Basic*, 485 U.S. at 242.[11] In fact, if this Court were to eliminate the fraud-on-the-market presumption, most defrauded investors would be left without any legal recourse from fraud. That is particularly true for individual investors, who simply do not have the time to review financial statements, SEC filings, and the like, and thus could never establish actual reliance even in an individual action.

The legal landscape would be worse for the change. This Court has repeatedly characterized private securities

[11] In omission cases, plaintiffs could invoke the presumption of reliance recognized in *Affiliated Ute*, 406 U.S. at 153-54.

litigation as an "*essential supplement* to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); see *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986) (quoting *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964))); see also *Dura*, 544 U.S. at 345; *Lampf*, 501 U.S. at 376 (Kennedy, J., dissenting).

The SEC also recognizes the importance of private actions. See, *e.g.*, Brief of the United States as Amicus Curiae Supporting Respondents, *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633 (2010) (No. 08-905), 2009 WL 3439204, at *1; Brief of the SEC, Amicus Curiae, *In re WorldCom, Inc. Sec. Litig.*, No. 03-9350 (2d Cir. Apr. 19, 2004), 2004 WL 1432278.

While there are limits to the deterrent effect of private actions, "[a] stack of empirical studies confirms that [fraud-on-the-market] actions have some deterrent impact." Bratton & Wachter, The Political Economy of Fraud on the Market, 160 U. Pa. L. Rev. 69, 111 (2011). Indeed, one study found that "private plaintiffs' attorneys, if anything, providing greater deterrence against more serious securities law violations compared with the SEC." Choi & Pritchard, SEC Investigations and Securities Class Actions: An Empirical Comparison, Mich. Law & Econ. Research Paper No. 12-202, at 38-39.[12] Concerned about being sued, managers are "motivated to avoid * * * violations in order to avoid the issuer losses involved in paying damages[.]" Fox, Civil Liability and Mandatory Disclosure, 109 Colum. L.

[12] http://ssrn.com/abstract=2109739 (Jan. 20, 2014).

Rev. 237, 281 (2009). This motivation stems from fear of dismissal, see Coffee, Reforming the Securities Class Action: An Essay on Deterrence and its Implementation, 106 Colum. L. Rev. 1534, 1554 (2006); fear of reputational harm, see Pritchard, Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers, 85 Va. L. Rev. 925, 996 (1999); and fear of personal, financial consequences, see Coffee, *supra*, at 1551-53. When deterrence fails, private actions are the principal vehicle for compensating investors for their losses caused by securities fraud. *Id.* at 1536.

Government enforcement, which Halliburton promotes as a panacea (Pet. Br. 45-47), is only a partial solution. Even with a significant increase in the SEC's budget over the last twenty-five years (*id.* at 45-46), the SEC remains an "overworked, underfunded agency that is subject to severe resource constraints." Coffee, SEC Enforcement: What Has Gone Wrong?, Nat'l L.J., Dec. 3, 2012. Some 85% of settled private cases do not have a parallel SEC action. Cox & Thomas, SEC Enforcement Heuristics: An Empirical Inquiry, 53 Duke L.J. 737, 777 (2003). Given its limited resources and wide-ranging responsibilities, the government must give priority to the most egregious examples of corporate fraud, especially during times of financial crisis. Coffee, SEC Enforcement. And criminal prosecution is not appropriate where the misconduct, no matter how harmful to investors, does not rise to a criminal level or where there is not sufficient evidence to support prosecution. See Eric Holder, U.S. Att'y Gen., Speech at

Columbia Univ. Law School on Preventing and Combating Fin. Fraud, Feb. 23, 2012.[13]

2. Numerous SEC Regulations And The Practice Of Proving Market Effects Through Event Studies Are Based On The Premise That Securities Prices React To Material Information

Halliburton's argument challenges the very premise of the federal securities laws that "[t]he investing public has a legitimate expectation that the prices of actively traded securities reflect publicly available information about the issuer of such securities." H.R. Rep. No. 100-910, at 8 (1988). Accordingly, a holding in Halliburton's favor would indirectly call into question numerous SEC regulations and policies that are based on the presumption that markets efficiently process information.

For example, "[t]he Commission's system of integrated disclosure [via Form S-3] has, since its inception [in 1982], been premised on the idea that a company's disclosure in its registration statement can be streamlined to the extent that the market has already taken that information into account." Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3, 72 Fed. Reg. 73,534, 73,536 (Dec. 27, 2007); see also *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 510 (7th Cir. 1989); Shelf Regulation, 48 Fed. Reg. 52,889, 52,892 (Nov. 23, 1983). The SEC has also enacted numerous regulations premised on the notion that prices react to material

[13] http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120223.html.

information. See, *e.g.*, Amendments to Regulation SHO, 75 Fed. Reg. 11,232, 11,234 & n.18 (Mar. 10, 2010); Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716, 51,719, (Aug. 24, 2000); Self-Regulatory Organizations, Exchange Act Release No. 30,569, 1992 WL 81728, at *3 (Apr. 10, 1992).

Basic's understanding that public, material statements generally affect the price of securities also serves as the basis for event studies, which are regularly used by federal prosecutors, SEC attorneys, and defendants alike in an array of public and private securities enforcement actions. A decision by this Court adopting Halliburton's position that markets are "fundamental[ly] inefficient[]" (Pet. Br. 16 (quoting heading)) or even generally not efficient would raise questions about these practices, and also raise concerns about the reliability of expert testimony based on event studies. See Fed. R. Evid. 702.

For criminal prosecutions, often "the most significant determinant of [a securities-fraud defendant's] sentence is the guidelines loss calculation," *United States v. Olis*, 429 F.3d 540, 545 (5th Cir. 2005), and "[t]he entire theory of market loss is premised on the efficient capital markets hypothesis that securities markets reflect all publicly available information." McCormick, Comment, Untangling the Capricious Effects of Market Loss in Securities Fraud Sentencing, 82 Tul. L. Rev. 1145, 1175 (2008); see *United States v. Peppel*, 707 F.3d 627, 646 (6th Cir. 2013). When calculating loss, courts must exclude losses caused by factors unrelated to the fraud. See, *e.g.*, *United States v. Berger*, 587 F.3d 1038, 1045-47 (9th Cir. 2009). The government often uses event studies to perform this calculation, *e.g.*, *United States v. Kumar*, 617 F.3d 612, 631-35 (2d Cir. 2010); as well as to prove materiality, *e.g.*, *United States v. Schiff*, 602

F.3d 152, 171-77 (3d Cir. 2010); calculate restitution, *e.g.*, *United States v. Gushlak*, 728 F.3d 184, 198-203 (2d Cir. 2013); and calculate forfeiture, *e.g.*, *United States v. Hatfield*, 795 F. Supp. 2d 219, 231-36 (E.D.N.Y. 2011).

Likewise, the SEC routinely uses event studies to prove materiality in civil enforcement actions. See, *e.g.*, *SEC v. Koenig*, 557 F.3d 736, 743 (7th Cir. 2009). And it frequently uses event studies to seek disgorgement of illicit profits. See, *e.g.*, *SEC v. Razmilovic*, 738 F.3d 14, 22-23, 33-35 (2d Cir. 2013).

Even defendants rely on event studies to establish a "negative causation" defense under Sections 11(e) and 12(b) of the Securities Act of 1933. See, *e.g.*, *Akerman v. Oryx Communications, Inc.*, 810 F.2d 336, 342-43 (2d Cir. 1987). Indeed, negative causation is seldom proven without an event study. See *Adair v. Kaye Kotts Associates, Inc.*, 1998 WL 142353, at *6-7 (S.D.N.Y. Mar. 27, 1998) (Sotomayor, J.). On Halliburton's view, cautionary language and disclaimers upon which defendants rely, see, *e.g.*, 15 U.S.C. § 78u-5(c) (safe-harbor provision), presumably would no longer be reflected in the market price, see *Asher v. Baxter Int'l Inc*., 377 F.3d 727, 732 (7th Cir. 2004), and thus defendants would have to demonstrate that plaintiffs actually relied on such language.

II. PETITIONER'S ARGUMENTS FOR OVERRULING *BASIC* LACK MERIT

A. Halliburton's Reliance On Section 18 Is Misguided

Halliburton argues that the majority in *Basic* erred in not accepting the argument of the dissenters, 485 U.S. at

257-58, that plaintiffs under Section 10(b) claims must prove actual reliance because Section 18 contains a reliance requirement. (Pet. Br. 12-13). Even assuming *arguendo* that Section 18's reliance requirement does not permit indirect proof of reliance, a proposition never addressed by this Court, this is precisely the type of argument that should not cause this Court to revisit its prior construction of a statute.

The PSLRA in particular makes Halliburton's argument unpersuasive. Although, prior to Congress's enactment of the PSLRA, this Court sought "to infer how the 1934 Congress would have addressed the issue had the 10b–5 action been included as an express provision in the 1934 Act," even then it recognized that "historical reconstruction" is "not a promising venture." *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 294-95 (1993); see also *Lampf*, 501 U.S. at 359 (referring to historical reconstruction as an "awkward task"). But that venture need not be undertaken here because the 1995 Congress actually considered, and chose not to overrule, *Basic*'s interpretation of Section 10(b) when enacting the PSLRA. See *supra* Part I.B.1. The Court in *Stoneridge* similarly did not speculate about the 1934 Congress' views on secondary-actor liability under Section 10(b) because Congress effectively addressed that issue in the PSLRA. See 552 U.S. at 157-58, 162-63; cf. *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2880-81 (2010) (historical reconstruction inappropriate where Congress has considered the issue).

In any event, Halliburton's reliance on Section 18 is misguided. Halliburton's argument that this Court has favorably compared Sections 10(b) and 18 omits that those comparisons have also always included the cause of action in Section 9, 15 U.S.C. § 78i, which prohibits certain practices manipulating securities prices. See *Musick*, 508 U.S. at 295

("There are * * * two sections of the 1934 Act, §§ 9 and 18 (15 U.S.C. §§ 78i and 78r), that, as we have noted, are close in structure, purpose, and intent to the 10b–5 action."). Critically, however, Section 9 does *not* contain an actual-reliance requirement. Compare 15 U.S.C. § 78r(a) with 15 U.S.C. § 78i(f).

Section 9 is more analogous than Section 18. Section 18 does not address price manipulation and is narrowly limited to misleading statements in documents publicly filed with the SEC. By contrast, Sections 9 and 10 are codified side-by-side and each explicitly addresses "manipulation." See 15 U.S.C. § 78i ("Manipulation of security prices"); *id.* § 78j ("Manipulation and deceptive practices"); see also *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476-77 (1977).[14] This Court has explained that "[u]se of the word 'manipulati[on]' is especially significant," because it is "virtually a term of art when used in connection with securities market." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976).

"Manipulation," moreover, "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." *Ibid.* Thus, in asking "what could justify permitting a far *lesser* showing" for Section 10(b) than for Section 18 (Pet. Br. 13), Halliburton overlooks that, unlike Section 10(b), Section 18 does not require *scienter*. See *In re Stone & Webster, Inc. Sec. Litig.*, 414 F.3d 187, 193 (1st Cir. 2005).[15] Thus, even assuming that Section 18 requires actual reliance,

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[14] Notably, Section 9(a)(4) prohibits false statements.

[15] Section 18 recognizes a good faith, affirmative defense. 15 U.S.C. § 78r(a).

importing actual reliance into Section 10(b) would destroy the symmetry between those two sections, see *Ross v. A.H. Robins Co., Inc.*, 607 F.2d 545, 556 (2d Cir. 1979) ("the far more difficult task which confronts a plaintiff seeking to proceed under § 10(b) provides a rationale for dispensing with the reliance requirement inherent in § 18"), and impose a significant additional burden on a 10b-5 claim that is not supported by the statutory structure. See *Stoneridge*, 552 U.S. at 165-66.

Notably, the Court has addressed a circumstance in which differences between Sections 9 and 18 required it to choose between the two in construing Section 10(b). The Court chose Section 9. In *Lampf*, this Court relied on the limitations periods in Sections 9 and 18 in determining the statute of limitations for Section 10(b). 501 U.S. at 359-61 & n.6. While the limitations periods in Sections 9 and 18 were the same, the statutory terminology differed. In addressing that difference, the Court stated: "To the extent that these distinctions in the future might prove significant, we select as the governing standard for an action under § 10(b) the language of § 9(e) of the 1934 Act." *Id.* at 364 n.9; see also *Merck*, 559 U.S. at 646-47. There is no reason why Section 9 should govern Section 10(b)'s statute of limitations but Section 18 its reliance requirement.

B. Criticism Of Aspects Of The Efficient Capital Market Hypothesis Does Not Justify Overruling *Basic*

Halliburton relies heavily on criticisms of certain versions and aspects of the efficient capital market hypothesis ("ECMH") by various academic economists.

(Pet. Br. 14-22).[16] These economists dispute, *inter alia*, that markets are "fundamentally efficient" in the sense of setting the "correct" price for individual securities. (See *id.* at 16-18).

Halliburton's argument misses the mark because those criticisms are not responsive to *Basic*'s reasoning. Instead, *Basic* rests on a simple economic truth: markets generally react reasonably promptly to material public information. See *supra* Part I.A. Most behavioral economists, even those highly critical of the ECMH, do not purport to refute that modest claim. For example, behavioral economist Robert Shiller recently described his differences with Eugene Fama, his co-Nobel laureate, the "father of the modern efficient-markets theory, which says financial prices efficiently incorporate all available information and are in that sense perfect." Shiller, Sharing Nobel Honors, and Agreeing to Disagree, N.Y. Times, at BU6, Oct. 27, 2013. As to his own views, Shiller wrote: "In contrast, I have argued that the theory makes little sense, except in fairly trivial ways. *Of course, prices reflect available information*. But they are far from perfect." *Ibid*. See also Shiller, Finance and the Good Society 186 (2012) ("But enough of the variability of individual stock prices, or other individual

[16] The broad label ECMH is generally recognized as including three different hypotheses. The strong version holds that stock prices incorporate all information about a corporation, including confidential information. The semi-strong version holds that stock prices incorporate only public information. The weak version holds that stock prices reflect historical stock prices and related publicly available information. See *Schleicher v. Wendt*, 618 F.3d 679, 684-85 (7th Cir. 2010).

asset prices, *does* make sense that the market remains an extremely important source of information for directing resources.") (emphasis in original). While behavioral economists show that investors sometimes overreact and underreact to information, and that markets form bubbles and crash, they do not show that a company's stock price is unrelated to public information. It is consistent with their views that a disclosure of corporate fraud will cause the price of the stock to decline, harming investors, even if the stock or market as a whole is otherwise overvalued, undervalued, or volatile relative to some theoretical benchmark.[17]

[17] Several of Halliburton's sources address fundamental rather than informational efficiency, and they also confirm that "bubbles" and market crashes are consistent with the premise that market prices react predictably to new information. See Lev & de Villiers, *supra*, at 21; Ayers, Back to Basics: Regulating How Corporations Speak to the Market, 77 Va. L. Rev. 945, 974-75 (1991); (Pet. Br. 16, 18). For example, Halliburton cites Professor Ayres' article for the proposition that Black Monday shows that the NYSE is not fundamentally efficient (Pet. Br. 18), but Ayres acknowledges in the very next paragraph that the market collapse of October 19, 1987 "does not refute the notion that the market is informationally efficient." Ayers, *supra*, at 974. See also Gilson & Kraakman, Market Efficiency After the Fall: Where Do We Stand After the Financial Crisis, in Research Handbook on the Economics of Corporate Law, 457, 465-73 (2012) (Hill & McDonnell, eds.); Fischel, Efficient Capital Markets, The Crash, and the Fraud on the Market Theory, 74 Cornell L. Rev. 907, 917 (1989). Put simply, "[t]hat the resulting price may be inaccurate does not detract from the fact that false statements affect it." *Schleicher*, 618 F.3d at 685 (Easterbrook, J.). Moreover, bubbles and crashes do not lead to windfall damages because

Many scholars have recognized that anomalies in the market are typically modest and, even when they lead to speculative bubbles and crashes, do not undermine *Basic*'s assumption that individual security prices incorporate information in a reasonably prompt way. See, *e.g.*, Malkiel, A Random Walk Down Wall Street 268-69 (10th ed. 2011) ("sometimes there is underreaction for a short period," but "by and large, prices reasonably reflect whatever public knowledge there is about each company"); Lucas, In Defense of the Dismal Science, The Economist, Aug. 6, 2009 (anomalies "are too small to matter"). Moreover, this Court recently recognized that "it is reasonable to presume that most investors—knowing that they have little hope of outperforming the market in the long run based solely on their analysis of publicly available information—will rely on the security's market price as an unbiased assessment of the security's value in light of all public information." *Amgen*, 133 S. Ct. at 1192.

Although the work of behavioral economists has gained increased prominence in recent years, challenges to aspects of the ECMH existed long before *Basic*.[18] *Basic*

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plaintiffs must disaggregate the culpable from non-culpable factors that caused their stock price to drop as part of the requirement to demonstrate loss causation. See *infra* Part III.B (discussing disaggregation); see also *supra* Part I.B.1 (discussing 15 U.S.C. § 78u-4(e)).

[18] See, *e.g.*, LeRoy, Efficient Capital Markets and Martingales, 27 J. Econ. Lit. 1583 (1989) (citing numerous empirical studies from the 1970s and early 1980s); De Bondt & Thaler, Does the Stock Market Overreact?, 40 J. Fin. 793 (1985); Shiller, Stock Prices and Social Dynamics, 2 Brookings Papers on Econ. Activity 457 (1984); Shiller, The

referred to the ECMH approvingly in one sentence and an accompanying footnote, 485 U.S. at 246 & n.24, but only in the context of stating explicitly that it was unnecessary to "determine by adjudication what economists and social scientists have debated through the use of sophisticated analysis and the application of economic theory." *Id.* at 246 n.24. The Court therefore declined to "adopt any particular theory of how quickly and completely publicly available information is reflected in market price." *Id.* at 248 n.28.[19]

Use of Volatility Measures in Assessing Market Efficiency, 36 J. Fin. 291 (1981); Ball, Anomalies In Relationships Between Securities Yield and Yield Surrogates, 6 J. Fin. Econ. 103 (1978); Basu, Investment Performance of Common Stocks in Relation to their Price-Earnings Ratios: A Test of the Efficient Market Hypothesis, 32 J. Fin. 663 (1977); Ball & Brown, An Empirical Evaluation of Accounting Income Numbers, 6 J. of Accounting Research 159, 173-74 (1968); see also Brief of American Corp. Counsel Ass'n as Amicus Curiae in Support of Petitioners, *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) (No. 86-279), 1987 WL 881069, at *7-10 ("The 'Fraud On The Market' Theory Conflicts With Modern Economic Principles").

[19] While *Basic* indicated at one point that well-developed markets incorporate "all publicly available information," 485 U.S. at 246, the Court clarified that it suffices if markets generally incorporate material information. See *id*. at 246 n.24 ("market professionals generally consider most publicly announced material statements"); *id.* at 247 ("most publicly available information is reflected in market price"); *id.* at 244 ("the dissemination of material misrepresentations or withholding of material information typically affects the price of the stock"); see also *Amgen*, 133 S. Ct at 1192

The *Basic* Court certainly did not think markets always reacted rationally: Black Monday, October 19, 1987, when the NYSE plummeted 22% on a single day, took place *two weeks* before oral argument in *Basic*. (Pet. Br. 18). Nor did the Court assert, or even imply, that investors are always rational (an assumption not required by ECMH), or that stock prices reflect the fundamental value of corporations.[20] Rather, irrespective of other forces that may move the markets at times, the Court simply concluded that "most publicly available information is reflected in market price." *Basic*, 485 U.S. at 247.

As Professor Langevoort correctly recognizes, citing footnote 24 of *Basic*, "the majority was not insisting on anything approaching perfect efficiency," and that it is a mistake to "obsess[ ] on high levels of efficiency to justify the presumption of reliance." Langevoort, Judgment Day, *supra*, at 18 n.66. "The key question in assessing the presumption of reliance is whether the market segment in which the securities are traded is such that it has *sufficient* efficiency properties to make us reasonably confident that

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(presumption applies if, *inter alia*, "market is generally efficient").

[20] See Goshen & Parchomovsky, The Essential Role of Securities Litigation, 55 Duke L. J. 711, 769-70 & n.221 (2006). While the Court in *Basic* said that the market tells investors, "given all the information available to it, the value of the stock is worth the market price," 485 U.S. at 244, that only means that investors are entitled to the "supposition that the market price is validly set and that no unsuspected manipulation has artificially inflated the price." *Blackie v. Barrack*, 524 F.2d 891, 907 (9th Cir. 1975).

misinformation is likely to distort the stock price. Most well-organized markets meet this condition." *Id.* at 19.

Several articles cited by Halliburton, including Professor Langevoort's, acknowledge that the fraud-on-the-market presumption does not rise or fall with the ECMH. See, *e.g.*, Black, Behavioral Economics and Investor Protection: Reasonable Investors, Efficient Markets, 44 Loy. U. Chi. L.J. 1493, 1502 (2013); Bebchuk & Ferrell, Rethinking *Basic*, Discussion Paper No. 756, Harvard Olin Ctr. For Law, Bus. & Econ., at 2.[21] (Pet. Br. 21-22, 39, 43).

Nor is there merit to Halliburton's assertion that *Basic* relied on a now-rejected "binary" notion that markets are either efficient or inefficient. (*Id.* at 20-21). That is merely a restatement of Halliburton's flawed claim that *Basic* depends on the ECMH, when in fact this Court simply recognized the uncontroversial proposition that developed markets generally respond to material information. Just as important, there is nothing binary about *Basic*, which is entirely case-specific: it recognizes a rebuttable presumption, which itself applies only with sufficient proof about the efficiency of the market for the specific security at issue. Defendants are free at class certification to introduce any evidence they wish to show that the stock prices of the defendant corporation do not react to new information, including to particular types of information. If the plaintiff fails to demonstrate that the market is efficient, that the misstatements are not public, or that the plaintiff did not trade between the time of the misstatement and the corrective disclosure, the presumption does not apply in the first place. And once the presumption attaches, defendants are free at

[21] http://ssrn.com/abstract=2371304 (Jan. 2013).

summary judgment or trial to rebut the presumption in the manner set forth in *Basic*.

It is instead Halliburton's argument that suffers from the supposed flaw it identifies, because Halliburton would have this Court enact a categorical rule that all markets are inefficient and do not incorporate material information. In this very case, Halliburton has never argued that the market for its shares was inefficient for processing certain types of information, and there is no evidence that the market was inefficient in digesting any information at issue here. Yet Halliburton would reject the fraud-on-the-market presumption in this case.

C. *Basic* Is Administrable In Practice

Halliburton also contends that *Basic* is unworkable, because courts cannot consistently and reliably determine market efficiency. That argument has no bearing on this case because Halliburton conceded that the market for its stock is efficient. J.A. 753; Resp. App. 10a-15a, 18a-19a n.8; see *Amgen*, 133 S. Ct. at 1197 n.6 (declining to consider similar argument where market efficiency conceded). But in any event, Halliburton ignores the uniform case law applying *Basic* and relies almost exclusively on snippets from law review articles. Although the *Basic* decision did not establish a test for determining whether a market is "well-developed," courts in all circuits (except the D.C. Circuit, which has not addressed the issue) look to the factors enumerated in *Cammer v. Bloom*, 711 F. Supp. 1264, 1286-87 (D.N.J. 1989): 1) average weekly trading volume; 2) number of analysts following the stock; 3) number of market makers and arbitrageurs; 4) eligibility to file a Form S-3 registration statement; and 5) cause-and-effect relationship between corporate events/financial releases and stock price.[22] The courts have identified the fifth *Cammer* factor as "the most important." *Teamsters*, 546 F.3d at 207. Commentators agree. "The last factor, usually measured by reference to speed of adjustment, is the standard test for informational efficiency, and *would seem to be sufficient to address the issue*." Langevoort, *Basic* at Twenty, *supra*, at 167. *Krogman v. Sterritt*, 202 F.R.D. 467, 477-78 (N.D. Tex. 2001), added three factors: 1) company's market capitalization; 2) bid-ask spread; and 3) percentage of the stock not held by insiders (the "float").

Halliburton cites a Third Circuit opinion stating "there has been some confusion and contradiction in court rulings." *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 632-633 (2011), abrogated in part, *Amgen*, 133 S. Ct. at 1991; (Pet. Br. 23). But the two areas of confusion referenced were resolved by *Halliburton* and *Amgen*. See *DVI*, 639 F.3d at

[22] See, *e.g.*, *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 4-5 (1st Cir. 2005); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 204 n.11 (2d Cir. 2008); *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 634 n.16 (3d Cir. 2011); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 368 (4th Cir. 2004); *Unger v. Amedisys Inc.*, 401 F.3d 316, 323 (5th Cir. 2005); *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990); *In re Northfield Laboratories, Inc. Sec. Litig.*, 267 F.R.D. 536, 545-47 (N.D. Ill. 2010); *In re Retek Inc. Sec. Litig.*, 236 F.R.D. 431, 436-37 (D. Minn. 2006); *Binder v. Gillespie*, 184 F.3d 1059, 1064-65 (9th Cir. 1999); *In re Nature's Sunshine Product's Inc. Sec. Litig.*, 251 F.R.D. 656, 662 (D. Utah 2008); *In re HealthSouth Corp. Sec. Litig.*, 261 F.R.D. 616, 632 (N.D. Ala. 2009).

636-38. Tellingly, the Third Circuit did not question the methodology for determining market efficiency. See *id.* at 634-36 & n.16. The only other case Halliburton cites, *Unger*, 401 F.3d at 324-325, criticized the lower court for its lack of rigor in applying the *Cammer*/*Krogman* factors. Thus, Halliburton does not provide any meaningful support for its contention that the courts have reached inconsistent results on similar facts in applying the *Cammer*/*Krogman* factors. To the contrary, the case law indicates that the courts are applying an established methodology, as reflected by their universal embrace of a common framework, and are applying that framework in consistent and workable fashion, as evidenced by the lack of any circuit split on its application.

D. ***Basic*** Is Consistent With This Court's Recent Class-Certification Jurisprudence

A securities-fraud plaintiff relying on *Basic* in seeking class certification must establish not only the efficiency of the market, but also the timing of the class members' trades and that the defendant's misstatements were made publicly. *Amgen*, 133 S. Ct. at 1192-93, 1198. Though the plaintiff ultimately must prove the materiality of the misstatements, materiality need not be established at class certification because, in the absence of materiality, the claims of the entire class will fail on the merits; materiality thus does not go to the issue at class certification: whether common questions predominate over individual questions for purposes of Rule 23(b)(3). *Id.* at 1196, 1198-99.

That approach is consistent with this Court's Rule 23 jurisprudence, including *Wal-Mart*, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147 (1982). Far from criticizing *Basic*, this

Court in *Wal-Mart* approvingly discussed the fraud-on-the-market presumption without suggesting that it was somehow inconsistent with its holding that Rule 23 compliance must be "affirmatively demonstrate[d]." 131 S. Ct. at 2552 & n.6.

Contrary to Halliburton's argument, *Basic* does not embrace an assumption of commonality. Rather, plaintiffs must demonstrate commonality by satisfying the prerequisites of market efficiency, timing, and publicity. See *Amgen*, 133 S. Ct. at 1192-93, 1198-99. The class is certified only if the court determines, after considering the evidence and argument presented by both sides, that plaintiffs have satisfied that substantial burden. Such a case is perfectly suited to recognizing "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart*, 131 S. Ct. at 2551.[23]

In *Comcast*, the plaintiffs sought class certification on the basis that damages from the defendant's allegedly anticompetitive conduct could be calculated on a class-wide basis. But the plaintiffs' proof of the existence of common damages relied on theories of antitrust liability that the district court had already rejected. This Court held that the class was not properly certified. It rejected the court of appeals' view that it was improper to consider the validity of the antitrust theories at the preliminary class-certification stage. See *Comcast*, 133 S. Ct. at 1432-35.

The Court's decision in *Comcast* does not inform the correctness of *Basic*. In a securities-fraud action, the

[23] Halliburton's contrary argument seemingly depends on its incorrect assumption (see *Amgen*, 133 S. Ct. at 1191) that plaintiffs must "guarantee" that material information affects the stock's price. (Pet. Br. 38).

plaintiff's proof of the market's efficiency does not rely on an invalid theory of securities liability. And the Court's decisions in *Halliburton* and *Amgen* refuse to interject a free-flowing inquiry into the merits of the plaintiff's suit at the class-certification stage.

E. Defendants' Assorted Policy Arguments Are Exaggerated And Misleading

Halliburton complains that class certification forces large settlement without regard to the merits. (Pet. Br. 40-41). Again, this is precisely the type of empirical question that Congress is institutionally suited to evaluate. Further, the data show that Halliburton's claims are wrong. Defendants are often successful in dismissing weak cases, just as the PSLRA intended. For cases filed in 2000 and later, a motion to dismiss was filed in 95% of all cases; 48% of the motions were granted, 25% were granted in part and denied in part, and 8% were voluntarily dismissed by plaintiffs. Comolli & Starykh, Recent Trends in Securities Class Action Litigation: 2013 Full-Year Review 18 (2014).[24] From 2000 to 2012, only 31% of the cases continued, at least in part, past the pleading stage. Comolli et al., Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review 16 (2013).[25] And dismissal rates "have been on a rising trend since 2000." Comolli & Starykh, *supra*, at 24.

In total, 73% of cases were resolved, through dismissal or settlement, *before* a motion for class

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[24] http://www.nera.com/nera-files/PUB_2013_Year_End_Trends_1.2014.pdf.

[25] http://www.nera.com/nera-files/PUB_Year_End_Trends_01.2013.pdf.

certification was *ever* filed and another 12% were resolved before a ruling on the class-certification motion. *Id.* at 19. Thus, the vast majority of cases, fully 85%, were resolved *before* a ruling on a class-certification motion. As of the end of 2012, motions for summary judgment were filed in 9% of the cases, a significant number considering how many cases are settled or dismissed. Defendants are frequently successful at summary judgment, fully prevailing 37% of the time and partially prevailing another 25% of the time. Comolli et al, *supra*, at 22.

Halliburton points to the aggregate $73 billion in class settlements since the PSLRA, and implies that companies are paying billions to settle meritless litigation. (Pet. Br. 40-41). That is wrong. First, most cases settle only after surviving a motion to dismiss, see Comolli et al., *supra*, at 16, including the PSLRA's heightened pleading requirement for *scienter*, which screens out many meritless cases. Second, the ten largest cases alone count for $29.7 billion in settlements, Comolli & Starykh, *supra*, at 30, and there can be no serious question that executives at most if not all of those companies, which include Enron, WorldCom, and Tyco, committed significant securities fraud. Third, given the evidence that defendants in securities-fraud cases have prevailed in summary judgment, at trial, and on appeal, see *id.* at 36; Comolli et al, *supra*, at 22, 39, it is implausible that sophisticated defense counsel advised their clients to pay tens or hundreds of millions of dollars to settle meritless cases. Tellingly, Halliburton does not provide a single example of such a case.

The $73 billion figure is also misleading. Not only do the ten largest settlements alone account for approximately $29 billion, but, from 2003-12, the number of settlements in excess of $100 million annually accounted for

5-16% of all settled cases, yet 40-95% of all settlement money. Ryan & Simmons, Securities Class Action Settlements: 2012 Review and Analysis 4 (2013).[26] Furthermore, the $73 billion figure includes settlements in Sections 11 and 12 cases (which have no reliance requirement) and cases involving secondary actors who would likely no longer be liable following *Stoneridge* and *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011). See *id.* at 11, 13; Comolli & Starykh, *supra*, at 13. And the figure pales in comparison to the $2 trillion in investor losses suffered since only 2005. Comolli & Starykh, *supra*, at 8.

Halliburton also points to the number of filings and attorneys' fees, but disregards that, "[i]n 2012, securities class action filings were at their lowest levels since 2007," Comolli et al., *supra*, at 3, though they did rise in 2013, Comolli & Starykh, *supra*, at 2, and that, "[o]ver the period of 2010-2012, [attorneys'] fees have declined markedly compared to 1996-2009," Comolli et al., *supra* at 34.

Halliburton further overlooks the fact that "settlement amounts come largely from external sources," such as insurance companies and accounting firms, and therefore "securities class actions do not simply shift money from one set of investors to another * * *." Cox, Making Securities Fraud Class Actions Virtuous, 39 Ariz. L. Rev. 497, 512-13 (1997). Insurers alone are estimated to pay more than half of all settlements. See Coffee, Reforming the Securities Class Action, *supra*, at 1550-51 & nn.61-62. And accounting firms often contribute as well. See Harwood et al., What Makes Securities Class Actions with Accounting Allegations

[26] http://www.cornerstone.com/files/upload/Cornerstone_Research_2012_Settlements.pdf.

Different?, at 1 (Am. Bar Ass'n, 2011) ("from 2005 through 2010, 19 of the 20 largest settlements of securities class actions were all accounting cases").[27]

F. State Courts Do Not Refuse To Follow *Basic*

Halliburton argues that state courts refuse to follow *Basic*. (Pet. Br. 24-25). The straightforward answer is that the federal securities laws are distinct statutes. But in any event, Halliburton is incorrect. Several states *have* applied *Basic*. See, *e.g.*, *State v. Marsh & McLennan Companies, Inc.*, 292 P.3d 525, 532-37 (Or. 2012); *Farmers Ins. Exch. v. Benzing*, 206 P.3d 812, 821-22 (Col. 2009); *Allyn v. Wortman*, 725 So. 2d 94, 101 & n.3 (Miss. 1998). Moreover, the decisions which Halliburton cites merely declined to extend *Basic* to common-law fraud, and did so in part because *Basic*'s presumption remained available under federal (and, in one instance, state) law. See, *e.g.*, *Kaufman v. i-Stat Corp.*, 754 A.2d 1188, 1192, 1201 (N.J. 2000) ("plaintiff already had an adequate remedy under federal securities law"); *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1090, 1101 (Cal. 1993) ("Plaintiffs already have remedies under the federal and state securities laws"); see also *Malone v. Brincat*, 722 A.2d 5, 13 (Del. 1998) ("defer[ring] to the panoply of federal protections"). And *Mirkin* explicitly approved of *Basic*'s premise that "stock prices adjust in response to the dissemination of material information." 5 Cal. 4th at 1101.

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[27] http://www.cornerstone.com/getattachment/c6b4254e-5ea4-4f02-8949-beeb7d304ae2/What-Makes-Securities-Class-Actions-with-Accountin.aspx.

G. The Presumption Recognized in *Basic* is Rebuttable

Contrary to Halliburton's submission, the fraud-on-the-market presumption is genuinely rebuttable, and defendants can seek to do so in an early motion for summary judgment. While *amici* (Former SEC Comm'rs Br. 24-25) and Professor Grundfest profess that they can identify only a handful of successful rebuttal cases, they disregard numerous cases in which defendants rebutted the presumption at summary judgment by establishing that the misrepresentation at issue could not have affected the market because the market was already aware of the truth. See, *e.g.*, *Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256, 1262-63 (4th Cir. 1993); *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113-16 (9th Cir. 1989); *In re Boston Scientific Corp. Sec. Litig.*, 708 F. Supp. 2d 110, 128-29 (D. Mass. 2010). Such a "truth-on-the-market" defense is a well-established method of rebuttal. See *Amgen*, 133 S. Ct. at 1203; *Basic*, 485 U.S. at 248-49.

They also omit rebuttals—decided before *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 483-86 & n.9 (2d Cir. 2008) was abrogated by *Amgen*, 133 S. Ct. at 1203-04—that were based on a lack of price impact. See, *e.g.*, *In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480, 492-93 (S.D.N.Y. 2011); *In re Am. Int'l Group, Inc. Sec. Litig.*, 265 F.R.D. 157, 186-88 (S.D.N.Y. 2010), vacated on other grounds, 689 F.3d 229 (2d Cir. 2012); *In re Credit Suisse First Boston Corp. (Latronix, Inc.) Analyst Sec. Litig.*, 250 F.R.D. 137, 142-49 & n.11 (S.D.N.Y. 2008); see also *In re*

Zonagen, Inc. Sec. Litig., 322 F. Supp. 2d 764, 780-81 (S.D. Tex. 2003) (rebuttal at summary judgment).[28]

In analogous cases brought under Section 11, defendants have negated causation on a class-wide basis at summary judgment and trial by showing a lack of price impact. See, *e.g.*, *Akerman*, 810 F.2d at 340-43; *Collins v. Signetics Corp.*, 605 F.2d 110, 114-16 (3d Cir. 1979), abrogated in part on other grounds, *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628 (3d Cir. 1989). And defendants have likewise successfully rebutted the analogous *Affiliated Ute* presumption of reliance. See, *e.g.*, *Smith v. Ayers*, 845 F.2d 1360, 1364 (5th Cir. 1998); *Kiernan v. Homeland, Inc.*, 611 F.2d 785, 788-90 (9th Cir. 1980).

Finally, courts frequently grant motions to dismiss on loss causation or materiality grounds for failure to plead price impact, where it is clear from the face of the complaint (and judicially-noticed securities prices) that the stock price did not drop or did not drop as a result of a corrective disclosure—obviating the need for rebuttal. See, *e.g.*, *Meyer v. Greene*, 710 F.3d 1189 (11th Cir. 2013); *Ind. State Dist. Council of Laborers and Hod Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 944-45 (6th Cir. 2009); *Oran v. Stafford*, 226 F.3d 275, 282-83 (3d Cir. 2000) (Alito, J.); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997) (Alito, J.).

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[28] Defendants can rebut the presumption at trial, *GAMCO Investors, Inc. v. Vivendi S.A.*, 927 F. Supp. 2d 88 (S.D.N.Y. 2013), and in post-trial claims proceedings.

III. THIS COURT SHOULD REJECT HALLIBURTON'S ARGUMENTS FOR SUBSTANTIALLY MODIFYING *BASIC*

Halliburton's argument that Plaintiffs should be required to prove price impact at class certification—or that defendants should be able to rebut the presumption by showing a lack of price impact at class certification—is directly contrary to this Court's precedent and to Rule 23.[29]

There is no need for this Court to radically alter federal-securities jurisprudence just to permit defendants a fact-based, merits challenge at the class-certification stage. Rule 56 of the Federal Rules of Civil Procedure already provides an appropriate vehicle to accomplish their stated goal. If a defendant believes that there is no evidence of price impact, and that such absence would dispose of all class claims, it can seek leave to move for summary judgment as to reliance or loss causation or materiality (which Halliburton did not do), without prejudice to the right to move for summary judgment later on *other* issues if the motion is unsuccessful. Cf. Fed. R. Civ. P. 56(a) & 2010 comm. notes (clarifying that partial summary-judgment motions are permissible). That motion can even be filed and decided prior to class certification. 7B Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1798 (3d ed. 2005). If plaintiffs believe they "cannot present facts essential to justify [their] opposition," they can seek additional discovery under Rule 56(d). This well-established procedure allows defendants to mount an early, fact-based challenge to any meritless cases that advance beyond the

[29] The former argument is also directly contrary to Halliburton's concession in the first appeal before this Court. See *Halliburton*, 131 S. Ct. at 2187 n.*.

pleading stage, and confines merits issues not tied to Rule 23 to the summary judgment and trial stages where they belong, under the proper standard of proof.

A. Adjudicating Price Impact At Class Certification Is Contrary to *Amgen* And *Halliburton* Because It Is a Merits Issue, Not Tethered to Rule 23

In *Amgen*, this Court held that plaintiffs need not prove materiality at class certification for two reasons. First, "because the question of materiality is an objective one," materiality "can be proved through evidence common to the class." *Amgen,* 133 S. Ct. at 1195. "Second, there is no risk whatever that a failure of proof on the common question of materiality will result in individual questions predominating," because "the failure of proof" on materiality "would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate." *Id.* at 1196.

Amgen's analysis applies equally to price impact. The fact that materiality is an element of the claim, while price impact is technically not, is a distinction without a difference. Like materiality, price impact is an objective inquiry that turns on common evidence. And, absent price impact, all members of the proposed class will lose because no one will be able to demonstrate loss causation. Halliburton itself defines loss causation as "price impact *plus* a subsequent loss caused by the fraud" (Pet. Br. 7), and this Court has said that "[l]oss causation * * * requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss." *Halliburton,* 131 S. Ct. at 2186. Thus, absent price impact, there can be no loss causation. And, without price impact, there cannot be damages either. Thus, all plaintiffs would suffer from "a fatal similarity," *Amgen*, 133 S. Ct. at 1197, actually multiple fatal similarities, and individual questions could not possibly predominate. By contrast, plaintiffs who cannot show publicity or market efficiency cannot invoke the fraud-on-the-market presumption, but can proceed under a "traditional" showing of reliance. *Id.* at 1199.

Halliburton argues that "price impact is essential to loss causation only in fraud-on-the-market cases," (Pet. Br. 51) (emphasis omitted), and it points to atypical cases where individual plaintiffs brought claims involving non-publicly-traded securities or non-public misrepresentations. (*Id.* at 52). That argument proves nothing, since it is the typical fraud-on-the-market cases that are the ones currently before this Court. In any event, even in fraud-on-the-market cases, plaintiffs can establish loss causation without a public corrective disclosure.[30]

Halliburton argues that "price impact is indistinguishable from publicity," (*id.* at 51), which must be established at class certification to trigger the *Basic* presumption. The analogy does not hold. Publicity is a predicate for showing individual questions will not

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[30] Under a realization-of-the-risk model, see *Lentell v. Merill Lynch & Co.*, 396 F.3d 161, 173-74 (2d Cir. 2005), it is the realization of a risk concealed by the misrepresentation that causes the loss. See *In re Vivendi Universal, S.A. Sec. Litig.*, 634 F. Supp. 2d 352 (S.D.N.Y. 2009) (downgrades of a company's credit ratings sufficed to establish prima facie claim as to loss causation); *In re Parmalat Sec. Litig.*, 375 F. Supp. 2d 278, 306-07 (S.D.N.Y. 2005) (company's inability to meet its debt and Italian regulators' suspension of the trading of its stock stated a claim as to loss causation).

predominate over common ones for purposes of demonstrating reliance, but price impact is not. Moreover, fraud-on-the-market cases require a public misrepresentation to show that the information was transmitted to the market, but the question of publicity (unlike price impact) is not inextricably tied to elements of a Section 10(b) claim; nor is it common to all plaintiffs. Even absent a public statement, any individual plaintiff who heard the misrepresentation may be able to sue, as Halliburton concedes. (*Id.* at 52).

Requiring plaintiffs to establish price impact at the time of the misrepresentation, which necessarily establishes materiality, is directly contrary to *Amgen*'s holding that plaintiffs do not have to establish materiality at class certification. 133 S. Ct. at 1191. And requiring plaintiffs to establish price impact at the time of the corrective disclosure, which necessarily establishes loss causation, is directly contrary to *Halliburton*'s holding that plaintiffs do not have to establish loss causation at class certification. 131 S. Ct. at 2183.

In short, unlike market efficiency and publicity, which are entirely collateral to the merits of the claim, price impact goes to the heart of a Rule 10b-5 claim. See *Schleicher*, 618 F.3d at 683 (proving price impact at class certification would effectively require "plaintiffs [to] prove everything (except falsity) required to win on the merits"). And, because compliance with Rule 23 must be shown by a preponderance of the evidence, see *Teamsters*, 546 F.3d at 202, requiring proof of price impact at class certification would require plaintiffs to meet a higher burden than required to defeat a summary-judgment motion. Such a requirement would not only impose a new and entirely improper merits test, it would allow defendants to circumvent Rule 56 and impinge on plaintiffs' right to a jury trial. Cf. *Tellabs*, 551 U.S. at 326-28.

The same analysis precludes price-impact rebuttal evidence at class certification because, absent price impact, all plaintiffs will lose on the merits. See *Amgen*, 133 S. Ct. at 1203-04.[31] While Halliburton contends that permitting price-impact rebuttal at class certification is consistent with *Basic* (Pet. Br. 49), that is not right. Rather, *Basic* indicated such rebuttal "is a matter for trial," 485 U.S. at 249 n.29, and as this Court recently clarified, for summary judgment as well, *Amgen*, 133 S. Ct. at 1204. Tellingly, the Court in *Basic* affirmed the grant of class certification, rather than vacating and remanding for possible rebuttal. 485 U.S. at 249-50; see *Amgen*, 133 S. Ct. at 1202-03.

Of course, under the current legal regime, defendants can introduce evidence at class certification of lack of price impact as some evidence that the market is not efficient. But in analyzing whether a market is efficient, courts do not limit their analysis to the specific statements that are alleged by the plaintiff to be fraudulent. See, *e.g.*, *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 513 (1st Cir. 2005).

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[31] Nor is the *Affiliated Ute* presumption rebuttable at class certification. (See Wash. Legal Found. Br. 14). The cases upon which *amici* rely found the presumption did not apply because defendant did not owe a duty to plaintiffs, as *Basic*'s presumption does not apply absent proof of market efficiency.

B. Adjudicating Price Impact At Class Certification Is Inappropriate Because It Often Requires Merits Discovery

Adjudicating price impact at class certification, rather than at summary judgment or trial, would also be inefficient and premature because merits discovery is often required. See *Amgen*, 133 S. Ct. at 1201 (proof of materiality would "necessitate a mini-trial"); Fed. R. Civ. P. 23(c)(1)(A) (class-certification order should issue at "an early practicable time").

For example, where the stock price declines following a "corrective" disclosure, discovery will often be necessary to determine whether that disclosure did in fact correct an earlier misrepresentation. See, *e.g.*, *In re Williams Sec. Litig.-WCG Subclass*, 558 F.3d 1130, 1140 (10th Cir. 2009) (expert did not show disclosure "relate[d] back to the misrepresentation"). Likewise, discovery will often be necessary to determine whether an event preceding a decline in stock price was the foreseeable materialization of a risk that was fraudulently concealed. See, *e.g., In re Motorola Sec. Litig.*, 505 F. Supp. 2d 501, 546 (N.D. Ill. 2007) (plaintiffs did not show that "aspects of the still-concealed fraud in fact provided the catalyst for an anticipated failure to meet earnings forecasts"), abrogated in part on other grounds, *Merck*, 130 S. Ct. 1784.

Fact discovery will also often be necessary to support expert testimony establishing that culpable, rather than non-culpable, factors were responsible for impacting the stock price. See, *e.g., Robbins v. Koger Properties, Inc.*, 116 F.3d 1441, 1448-49 (11th Cir. 1997) (insufficient evidence that drop in stock price was due to culpable conduct). The need for such discovery is particularly compelling in this case because Fifth Circuit law requires Plaintiffs to prove that "it is more probable than not" that culpable, rather than non-culpable, factors caused the decline in stock price. *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 666 (5th Cir. 2004). Other circuits require plaintiffs to demonstrate only that the culpable conduct was a substantial cause of plaintiffs' loss. *E.g.*, *Nuveen Mun. High Income Opportunity Fund v. City of Alameda, Cal.*, 730 F.3d 1111, 1123 (9th Cir. 2013); *Mass. Ret. Sys. v. CVS Caremark Corp.*, 716 F.3d 229, 239 (1st Cir. 2013); *Meyer*, 710 F.3d at 1196; *Gould v. Winstar Comm'n., Inc.*, 692 F.3d 148, 161 (2d Cir. 2012).

Finally, if price impact were adjudicated at class certification without fact discovery, defendants could immunize themselves by artfully drafting corrective disclosures, disguising the true cause of price drops, and strategically timing releases to coincide with unrelated negative, but non-culpable, news. See, *e.g.*, *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 230 (5th Cir. 2009).

C. To Rebut the Presumption, Halliburton Bears The Burden Of Persuasion To Prove No Price Impact By A Preponderance Of The Evidence

To rebut the presumption, a defendant must make an actual "showing that *severs* the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff." *Basic*, 485 U.S. at 248. Defendants thus bear the burden of persuasion. They must make such a showing, under the appropriate standard of proof, at summary judgment or trial, and assuming *arguendo* that price-impact rebuttal were permissible at class certification (which it should not be, other than to the extent it is relevant for determining market efficiency), they must make such a showing at class certification as well.

In *Affiliated Ute*, this Court established a presumption of reliance in Rule 10b-5 cases primarily involving material omissions. 406 U.S. at 153-54. Rebutting that presumption requires defendants to prove by a preponderance of the evidence that the plaintiff's transaction decision would not have been affected had the omission been disclosed. See *DuPont v. Brady*, 828 F.2d 75, 78 (2d Cir. 1987) (citing cases). Defendants' burden to rebut the *Basic* presumption should be the same. The two presumptions derive from the Exchange Act, fulfill the same function, and are frequently analyzed together, including by this Court. *E.g.*, *Stoneridge*, 552 U.S. at 159; *Basic*, 485 U.S. at 234, 243, 245. Thus, there is no basis for treating them differently.

Halliburton contends that the presumption established in *Basic* is governed by Fed. R. Evid. 301, which imposes only a burden of production. But that Rule applies to presumptions "unless a federal statute * * * provide[s] otherwise," Fed. R. Evid. 301, and the Exchange Act "provides otherwise," as recognized in *Basic*. Indeed, the *Affiliated Ute* presumption upon which *Basic* relied was established nearly three years *before* Rule 301 was adopted, and so cannot be governed by Rule 301. And, while *Basic* included a single, "see also" reference to Rule 301 in generally describing the utility of presumptions, 485 U.S. at 245, nowhere did this Court indicate that fraud-on-the-market defendants would bear only a burden of production. By contrast, where this Court has invoked Rule 301 to impose a burden of production, it has done so expressly. See, *e.g.*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993); *Burdine*, 450 U.S. at 253-55 & n.8.

Finally, imposing only a burden of production on defendants would render the *Basic* presumption toothless. According to Halliburton, defendants in every case could satisfy their burden simply by "put[ting] an expert on the stand" and having the expert "say there was no price impact." Transcript of Oral Argument at 39, *Halliburton*, 131 S. Ct. 2179 (No. 09-1403).[32] That would effectively require plaintiffs to prove price impact, eviscerating the presumption and requiring proof of materiality and a "mini" trial on the merits in derogation of *Amgen*. It would also undermine *Halliburton* because, in price-maintenance cases such as this one (and many—perhaps the vast majority—of fraud-on-the-market cases involve price maintenance), proof of price impact is indistinguishable from proof of loss causation.

IV. CONCLUSION

For the foregoing reasons, this Court should reaffirm *Basic* and affirm the decision below.

Respectfully submitted,

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[32] http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1403.pdf.

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APPENDIX

APPENDIX — STATUTORY PROVISIONS

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APPENDIX

Section 11 of the Securities Act, codified at 15 U.S.C. § 77k

Civil Liabilities on Account of False Registration Statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any

person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and

(1) the value thereof as of the time such suit was brought, or

(2) the price at which such security shall have been disposed of in the market before suit, or

(3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the

public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

Section 12 of the Securities Act, codified at 15 U.S.C. § 77l

Civil Liabilities Arising in Connection with Prospectuses and Communications

(a) In general

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraphs (2) and (14) of subsection (a) of said section), by the use of any means or instruments of transportation

> or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b) of this section, to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) Loss causation

In an action described in subsection (a)(2) of this section, if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) of this section represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

Section 9 of the Securities Exchange Act, codified at 15 U.S.C. § 78i

Manipulation of Security Prices

(a) Transactions relating to purchase or sale of security

It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(1) For the purpose of creating a false or misleading appearance of active trading in any security other than a government security, or a false or misleading appearance with respect to the market for any such security,

(A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or

(B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or

(C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with 1 or more other persons, a series of transactions in any security registered on a national securities exchange, any security not so registered, or in connection with any security-based swap or security-based swap agreement with respect to such security creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer, broker, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or a security-based swap agreement with respect to such security, to induce the purchase or sale of any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any 1 or more persons conducted for the purpose of raising or depressing the price of such security.

(4) If a dealer, broker, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or security-based swap agreement with respect to such security, to make, regarding any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security, for the purpose of inducing the purchase or sale of such security, such security-based swap, or such security-based swap agreement any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which that person knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a broker, dealer, security- based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or security-based swap agreement with respect to such security, to induce the purchase of any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any 1 or more persons conducted for the purpose of raising or depressing the price of such security.

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security other than a government security for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) Transactions relating to puts, calls, straddles, options, futures, or security-based swaps

It shall be unlawful for any person to effect, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors—

(1) any transaction in connection with any security whereby any party to such transaction acquires—

(A) any put, call, straddle, or other option or privilege of buying the security from or selling the security to another without being bound to do so;

(B) any security futures product on the security; or

(C) any security-based swap involving the security or the issuer of the security;

(2) any transaction in connection with any security with relation to which such person has, directly or indirectly, any interest in any—

(A) such put, call, straddle, option, or privilege;

(B) such security futures product; or

(C) such security-based swap; or

(3) any transaction in any security for the account of any person who such person has reason to believe has, and who actually has, directly or indirectly, any interest in any—

(A) such put, call, straddle, option, or privilege;

(B) such security futures product with relation to such security; or

(C) any security-based swap involving such security or the issuer of such security.

(c) Endorsement or guarantee of puts, calls, straddles, or options

It shall be unlawful for any broker, dealer, or member of a national securities exchange directly or indirectly to endorse or guarantee the performance of any put, call, straddle, option, or privilege in relation to any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(f) Persons liable; suits at law or in equity

Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

Section 10 of the Securities Exchange Act, codified at 15 U.S.C. § 78j

Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement [1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 14(a) of the Securities Exchange Act, codified at 15 U.S.C. § 78n(a)

Proxies

(a) Solicitation of proxies in violation of rules and regulations

(1) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78l of this title.

Section 18 of the Securities Exchange Act, codified at 15 U.S.C. § 78r

Liability for Misleading Statements

(a) Persons liable; persons entitled to recover; defense of good faith; suit at law or in equity; costs, etc.

Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) ofsection 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

15 U.S.C. § 78u-4

Private Securities Litigation

(a) Private class actions

(1) In general

The provisions of this subsection shall apply in each private action arising under this chapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.

(2) Certification filed with complaint

(A) In general

Each plaintiff seeking to serve as a representative party on behalf of a class shall provide a sworn certification, which shall be personally signed by such plaintiff and filed with the complaint, that—

(i) states that the plaintiff has reviewed the complaint and authorized its filing;

(ii) states that the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel or in order to participate in any private action arising under this chapter;

(iii) states that the plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary;

(iv) sets forth all of the transactions of the plaintiff in the security that is the subject of the complaint during the class period specified in the complaint;

(v) identifies any other action under this chapter, filed during the 3-year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff has sought to serve as a representative party on behalf of a class; and

(vi) states that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4).

(B) Nonwaiver of attorney-client privilege

The certification filed pursuant to subparagraph (A) shall not be construed to be a waiver of the attorney-client privilege.

(3) Appointment of lead plaintiff

(A) Early notice to class members

(i) In general Not later than 20 days after the date on which the complaint is filed, the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class—

(I) of the pendency of the action, the claims asserted therein, and the purported class period; and

(II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.

(ii) Multiple actions If more than one action on behalf of a class asserting substantially the same claim or claims arising under this chapter is filed, only the plaintiff or plaintiffs in the first filed action shall be required to cause notice to be published in accordance with clause (i).

(iii) Additional notices may be required under Federal rules Notice required under clause (i) shall be in addition to any notice required pursuant to the Federal Rules of Civil Procedure.

(B) Appointment of lead plaintiff

(i) In general Not later than 90 days after the date on which a notice is published under subparagraph

(A)(i), the court shall consider any motion made by a purported class member in response to the notice, including any motion by a class member who is not individually named as a plaintiff in the complaint or complaints, and shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members (hereafter in this paragraph referred to as the "most adequate plaintiff") in accordance with this subparagraph.

(ii) Consolidated actions If more than one action on behalf of a class asserting substantially the same claim or claims arising under this chapter has been filed, and any party has sought to consolidate those actions for pretrial purposes or for trial, the court shall not make the determination equired by clause (i) until after the decision on the motion to consolidate is rendered. As soon as practicable after such decision is rendered, the court shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions in accordance with this paragraph.

(iii) Rebuttable presumption

(I) In general Subject to subclause (II), for purposes of clause (i), the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this chapter is the person or group of persons that—

(aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

(II) Rebuttal evidence The presumption described in subclause (I) may be rebutted only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff—

(aa) will not fairly and adequately protect the interests of the class; or

(bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

(iv) Discovery For purposes of this subparagraph, discovery relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class.

(v) Selection of lead counsel The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.

(vi) Restrictions on professional plaintiffs Except as the court may otherwise permit, consistent with the purposes of this section, a person may be a lead plaintiff, or an officer, director, or fiduciary of a lead plaintiff, in no more than 5 securities class actions brought as plaintiff class actions pursuant to the Federal Rules of Civil Procedure during any 3-year period.

* * *

(6) Restrictions on payment of attorneys' fees and expenses

Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.

* * *

(b) Requirements for securities fraud actions

(1) Misleading statements and omissions

In any private action arising under this chapter in which the plaintiff alleges that the defendant—

(A) made an untrue statement of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

(2) Required state of mind

(A) In general

Except as provided in subparagraph (B), in any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

* * *

(3) Motion to dismiss; stay of discovery

(A) Dismissal for failure to meet pleading requirements

In any private action arising under this chapter, the court shall, on the motion of any defendant, dismiss the complaint if the requirements of paragraphs (1) and (2) are not met.

(B) Stay of discovery

In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

* * *

(4) Loss causation

In any private action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages.

(c) Sanctions for abusive litigation

(1) Mandatory review by court

In any private action arising under this chapter, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(2) Mandatory sanctions

If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(3) Presumption in favor of attorneys' fees and costs

(A) In general

Subject to subparagraphs (B) and (C), for purposes of paragraph (2), the court shall adopt a presumption that the appropriate sanction—

(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action.

(B) Rebuttal evidence

The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that—

(i) the award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) Sanctions

If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

* * *

(e) Limitation on damages

(1) In general

Except as provided in paragraph (2), in any private action arising under this chapter in which the plaintiff seeks to establish damages by reference to the market price of a security, the award of damages to the plaintiff shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market.

(2) Exception

In any private action arising under this chapter in which the plaintiff seeks to establish damages by reference to the market price of a security, if the plaintiff sells or repurchases the subject security prior to the expiration of the 90-day period described in paragraph (1), the plaintiff's damages shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the security and the mean trading price of the security during the period beginning immediately after dissemination of information correcting the misstatement or omission and ending on the date on which the plaintiff sells or repurchases the security.

(3) "Mean trading price" defined

For purposes of this subsection, the "mean trading price" of a security shall be an average of the daily trading price of that security, determined as of the close of the market each day during the 90-day period referred to in paragraph (1).

15 U.S.C. § 78u-5

Application of Safe Harbor for Forward-Looking Statements

(a) Applicability

This section shall apply only to a forward-looking statement made by—

(1) an issuer that, at the time that the statement is made, is subject to the reporting requirements of section 78m (a) of this title or section 78o (d) of this title;

(2) a person acting on behalf of such issuer;

(3) an outside reviewer retained by such issuer making a statement on behalf of such issuer; or

(4) an underwriter, with respect to information provided by such issuer or information derived from information provided by such issuer.

(b) Exclusions

Except to the extent otherwise specifically provided by rule, regulation, or order of the Commission, this section shall not apply to a forward-looking statement—

(1) that is made with respect to the business or operations of the issuer, if the issuer—

(A) during the 3-year period preceding the date on which the statement was first made—

(i) was convicted of any felony or misdemeanor described in clauses (i) through (iv) of section 78o (b)(4)(B) of this title; or

(ii) has been made the subject of a judicial or administrative decree or order arising out of a governmental action that—

(I) prohibits future violations of the antifraud provisions of the securities laws;

(II) requires that the issuer cease and desist from violating the antifraud provisions of the securities laws; or

(III) determines that the issuer violated the antifraud provisions of the securities laws;

(B) makes the forward-looking statement in connection with an offering of securities by a blank check company;

(C) issues penny stock;

(D) makes the forward-looking statement in connection with a rollup transaction; or

(E) makes the forward-looking statement in connection with a going private transaction; or

(2) that is—

(A) included in a financial statement prepared in accordance with generally accepted accounting principles;

(B) contained in a registration statement of, or otherwise issued by, an investment company;

(C) made in connection with a tender offer;

(D) made in connection with an initial public offering;

(E) made in connection with an offering by, or relating to the operations of, a partnership, limited liability company, or a direct participation investment program; or

(F) made in a disclosure of beneficial ownership in a report required to be filed with the Commission pursuant to section 78m (d) of this title.

(c) Safe harbor

(1) In general

Except as provided in subsection (b) of this section, in any private action arising under this chapter that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading, a person referred to in subsection (a) of this section shall not be liable with respect to any forward-looking statement, whether written or oral, if and to the extent that—

(A) the forward-looking statement is—

(i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or

(ii) immaterial; or

(B) the plaintiff fails to prove that the forward-looking statement—

(i) if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading; or

(ii) if made by a business entity; [1] was—

(I) made by or with the approval of an executive officer of that entity; and

(II) made or approved by such officer with actual knowledge by that officer that the statement was false or misleading.

(2) Oral forward-looking statements

In the case of an oral forward-looking statement made by an issuer that is subject to the reporting requirements of section 78m (a) of this title or section 78o (d) of this title, or by a person acting on behalf of such issuer, the requirement set forth in paragraph (1)(A) shall be deemed to be satisfied—

(A) if the oral forward-looking statement is accompanied by a cautionary statement—

(i) that the particular oral statement is a forward-looking statement; and

(ii) that the actual results might differ materially from those projected in the forward-looking statement; and

(B) if—

(i) the oral forward-looking statement is accompanied by an oral statement that additional information concerning factors that could cause actual results to materially differ from those in the forward-looking statement is contained in a readily available written document, or portion thereof;

(ii) the accompanying oral statement referred to in clause (i) identifies the document, or portion thereof, that contains the additional information about those factors relating to the forward-looking statement; and

(iii) the information contained in that written document is a cautionary statement that satisfies the standard established in paragraph (1)(A).

(3) Availability

Any document filed with the Commission or generally disseminated shall be deemed to be readily available for purposes of paragraph (2).

(4) Effect on other safe harbors

The exemption provided for in paragraph (1) shall be in addition to any exemption that the Commission may establish by rule or regulation under subsection (g) of this section.

SEC Rule 10b-5, codified at 17 C.F.R. § 240.10b-5

Employment of Manipulative and Deceptive Practices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Federal Rule of Civil Procedure 23

Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

Federal Rule of Civil Procedure 56

Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party;or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Federal Rule of Evidence 301

Presumptions in Civil Cases Generally

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Federal Rule of Evidence 702

Testimony by Expert Witness

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.