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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF IN OPPOSITION

Lewis Kahn
Neil Rothstein
Special Counsel to Lead Plaintiff and the Class
KAHN SWICK & FOTI, LLC
206 Covington Street
Madisonville, LA 70447
Tel.: (504) 455-1400

David Boies
dboies@bsfllp.com
Counsel of Record
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
Tel.: (914) 749-8200

E. Lawrence Vincent
3948 Legacy Drive
#106-324
Plano, TX 75023
Tel.: (214) 680-1668

Carl E. Goldfarb
BOIES, SCHILLER & FLEXNER LLP
401 E. Las Olas Blvd.
Suite 1200
Ft. Lauderdale, FL 33301
Tel.: (954) 356-0011

Counsel for Respondent

*additional counsel listed on inside cover

Kim Miller, Esq.
kim.miller@ksfcounsel.com
KAHN SWICK & FOTI, LLC
500 Fifth Avenue
Suite 1810
New York, NY 10110
Tel.: (212) 696-3730
Special Counsel to Lead Plaintiff and the Class

QUESTIONS PRESENTED

1. Does this case present a proper vehicle for reconsidering the fraud-on-the-market presumption recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), even though Defendants conceded the efficiency of the market for Halliburton's stock and did not challenge *Basic* until nearly two years after this Court reversed the Fifth Circuit in this case in 2011.

2. Should this Court revisit its holding regarding the fraud-on-the-market presumption in *Basic*, even though Congress has amended the federal securities laws several times since *Basic* was issued without legislatively overruling *Basic*, and has considered but rejected a proposal to overrule *Basic*.

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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I. INTRODUCTION

This petition presents a case of déjà vu. Some of the arguments in Defendants' petition are little more than a thin repackaging of arguments previously presented to and rejected by this Court unanimously more than two years ago. The remaining arguments should have been presented then at the very latest, but were not raised for nearly two more years. All are meritless, and there is no reason for further review of the class certification order in this securities class action that has now been pending for well over a decade.

The last time this case was before this Court in *Erica P. John Fund, Inc. v. Halliburton Co.,* 131 S. Ct. 2179 (2011) ("*EPJ Fund*"), this Court ruled 9-0 that plaintiffs in federal securities actions need not prove loss causation at class certification to invoke the fraud-on-the-market presumption established in *Basic Inc. v. Levinson*, 485 U.S. 224 (1984). On remand, the district court granted Plaintiff's motion to certify a class of Halliburton shareholders. The United States Court of Appeals for the Fifth Circuit unanimously affirmed that ruling. In their petition for rehearing *en banc* before the Fifth Circuit in 2013, Defendants abruptly shifted course and argued for the first time since this action began in 2002 that this Court's seminal decision in *Basic*, the cornerstone for modern private securities litigation, should be overruled. They also argued that the Fifth Circuit's opinion widened a pre-existing circuit split

between the Seventh Circuit and the Second and Third Circuits.

This case does not warrant the exercise of this Court's *certiorari* jurisdiction. As a preliminary matter, the Fifth Circuit, following this Court's decision in *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), correctly held that Defendants could not introduce evidence of an alleged lack of price impact at class certification in an effort to rebut the fraud-on-the-market presumption in a case where they did not challenge the efficiency of the market for Halliburton's stock. The court reasoned that price impact evidence is common to the class and even a successful rebuttal will not cause individual issues to predominate. As the Fifth Circuit stated: "If Halliburton were to successfully show that the price did not drop when the truth was revealed, then no plaintiff could establish loss causation." Pet. App. 18a. As in *Amgen*, a successful rebuttal showing lack of price impact—like a showing of the lack of materiality—would prevent Plaintiff from establishing loss causation (as well as materiality, reliance, and damages), and so defeat the claims of all class members. The Fifth Circuit's decision below is consistent with this Court's precedents, does not conflict with any other circuit court opinion, and does not warrant review.

The purported circuit split that Defendants want this Court to resolve is non-existent. The cases that Defendants claim are in conflict *pre-date* this Court's opinion in *Amgen*, which resolved the split

which Defendants tout in an effort to gain *certiorari*. Defendants do not cite a single circuit court that has permitted the use of price impact evidence after this Court's opinion in *Amgen* to rebut the fraud-on-the-market presumption at class certification for the simple reason that there is none.

This case does not present a proper vehicle for overruling or even substantially modifying *Basic* not only because of a crucial concession by Defendants, but also due to procedural hurdles, which bar Defendants from mounting their challenge on this record. Defendants' contentions that *Basic* should be overturned or substantially modified both rest largely on their argument that the efficient market hypothesis has been discredited because efficiency is not a binary yes or no question; they contend a market can be efficient for processing certain types of information but not others. However, in this case, Defendants did not challenge Plaintiff's assertion that the market for Halliburton's stock was efficient and so conceded the same. In admitting the efficiency of the market for Halliburton's stock, Defendants conceded their argument, because an attack on *Basic* based on perceived flaws in market efficiency has no relevance in a case where the market for the stock is concededly efficient.

As to procedural bars, they are numerous. For example, this Court remanded this case with instructions that Defendants could raise any other objections to class certification they had "preserved." *EPJ Fund*, 131 S. Ct. at 2187. But Defendants failed to preserve a challenge to *Basic* because they did not

mount a challenge to *Basic* until after this Court had remanded the case. Nor did Defendants timely raise a challenge to *Basic* on remand, but rather did not do so until their petition for rehearing *en banc*. Under Fifth Circuit precedent, they were procedurally barred from raising a new issue in an *en banc* motion and so this issue was never properly raised below. Defendants are precluded by this Court's mandate from raising this issue on continued appeal of class certification as a result of their failure to have previously preserved the argument. Nor was it passed on by the district court or the Court of Appeals. Accordingly, this Court should adhere to its "traditional rule" and decline to grant *certiorari* because the issues raised in the petition were not "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992).

Indeed, far from challenging *Basic*, between 2007 when the class certification motion was filed and 2013 when defendants sought rehearing *en banc* in the second appeal in this case, Defendants invoked *Basic* to argue that class certification should be denied. *See, e.g.*, Halliburton's Supreme Court Respondents' Brief *EPJ Fund* at 11-52. Allowing Defendants to shift course and raise an argument now that they could have raised the first time this case was before this Court "would lead to endless litigation." *United States v. Camou*, 184 U.S. 572, 574 (1902). This Court should not condone such delaying tactics. Plaintiff and the Class have waited for their day in court long enough.

This Court should not reconsider the fraud-on-the-market presumption of reliance endorsed in *Basic* and certainly should not do so on this record. The fraud-on-the-market presumption of reliance has been repeatedly reaffirmed by this Court and is the foundation for modern, private securities litigation. Congress, which could have legislatively overruled use of the fraud-on-the-market presumption in any of the many changes to federal securities laws it has enacted over the past 25 years, has never done so. Indeed, even when the question was directly considered by Congress, it was rejected and the tenets of *Basic* left as the law of the land. Principles of *stare decisis*, especially in light of Congress's endorsement of the fraud-on-the-market presumption, weigh heavily against a judicial alteration of private securities law.

Significantly, neither the Securities and Exchange Commission ("SEC") nor the U.S. Department of Justice ("DOJ"), the two agencies charged with enforcing federal securities law, have called for repeal of the fraud-on-the-market presumption. Rather, the SEC and the DOJ have repeatedly stressed the importance of private securities litigation, made possible largely through the fraud-on-the-market presumption, as a complement to governmental enforcement efforts.

Basic's endorsement of the fraud-on-the-market doctrine does not, as Defendants claim, rest on outdated and discredited economic theory, but rather on Congressional policy as embedded in the Securities Exchange Act of 1934. Moreover, the

semi-strong efficient market hypothesis, which played only an ancillary role in the Court's adoption of the fraud-on-the-market theory in *Basic*, continues to enjoy widespread support among economists.

Finally, Defendants' alternative argument that *Basic* should be substantially modified by requiring Plaintiff to demonstrate price impact in order to invoke the fraud-on-the-market presumption is untenable. The argument cannot be raised on this record and has no relevance in this case because Halliburton previously disavowed that very argument in this Court, conceding that "a plaintiff must prove price impact only after *Basic*'s presumption has been successfully rebutted by the defendant." *See EPJ Fund*, 131 S. Ct. at 2187. That argument also flatly contradicts this Court's holding in *Amgen* because it requires Plaintiff to prove that it will prevail as to reliance, not just that reliance will turn on common evidence. *See Amgen*, 133 S. Ct. at 1196.

II. STATEMENT

A. Background

This case is a securities class action brought on June 3, 2002 by the Archdiocese of Milwaukee Supporting Fund, Inc., now known as the Erica P. John Fund, Inc. (the "EPJ Fund" or "Plaintiff"), against the Halliburton Company and David J. Lesar, its president and chief executive officer (collectively, "Halliburton" or "Defendants"). The

EPJ Fund is a not-for-profit group that supports the outreach work of the Archdiocese of Milwaukee, with a special emphasis on inner-city educational programs and programs that serve persons with severe and persistent mental illness. The fourth amended complaint ("Complaint"), alleges that during the class period—June 3, 1999, to December 7, 2001—Halliburton violated §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.

In order to recover in a private action under Section 10(b) and Rule 10b-5(b), a plaintiff must prove: (1) a material misrepresentation or omission by the defendant; (2) that the defendant acted with scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) plaintiff's reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation, meaning that defendant's misrepresentation or omission proximately caused plaintiff's loss. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).

In *Basic*, 485 U.S. at 241-48, this Court addressed the manner in which plaintiffs in a private securities fraud suit could prove reliance through evidence common to the class, thereby allowing class certification under FED. R. CIV. P. 23. The Court recognized that "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class" often would "prevent[] [plaintiffs] from proceeding with a class action, since individual issues then would * * * overwhelm[] the

common ones." *Id.* at 242. The Court held that plaintiffs may overcome that obstacle by invoking a rebuttable presumption of reliance based on the fraud-on-the-market doctrine. *Id.* at 242-247.

Under that doctrine, the Court explained, "the market price of shares traded on well-developed markets reflects all publicly available information," including "any public material misrepresentations," and "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." *Id.* at 246-247. Public material misrepresentations in an efficient market are reflected in the stock's price and thus "an investor's reliance on any public material misrepresentations * * * may be presumed for purposes of a Rule 10b-5 action." *Id.* at 247. Therefore, evidence regarding the applicability of that presumption will generally be common to all members of a properly defined class, and the case may proceed as a class action. *Id.* at 242, 248.

In *Amgen*, this Court addressed whether defendants could rebut the materiality of misstatements at class certification. The Court held they could not, because the failure to prove materiality would not lead to the predominance of individual issues for purposes of Rule 23. "Instead, a failure of proof on the issue of materiality would end the case, given that materiality is an essential element of the class members' securities-fraud claims." *Amgen*, at 1191. Thus, there would be no

individual issues to predominate because the case would be over.[1]

B. The Complaint In This Action

The Complaint alleges that Halliburton violated federal securities laws by knowingly or severely recklessly falsifying Halliburton's financial results and knowingly or severely recklessly misleading the public about: (1) its liability for asbestos claims; (2) its probability of collecting revenue on unapproved claims on fixed-price construction contracts; and (3) the benefits of its merger with Dresser Industries ("Dresser").

C. Asbestos Liability

Halliburton made numerous public misrepresentations regarding its asbestos exposure. For example, on January 31, 2001, Halliburton represented that "prospective asbestos liabilities . . . should have minimal adverse impact on the company going forward." R4265.[2]

Most of Halliburton's asbestos liability derived from claims against Harbison-Walker Refractories Company ("Harbison-Walker"), a former subsidiary

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

[2] References to "R" are to the corresponding pages to the record in *EPJ Fund*, 131 S. Ct. 2179; selected additional pages of the record following remand are reproduced at Respondent's Appendix ("Resp. App.").

of Dresser, which Halliburton acquired in 1998. R4558. On June 28, 2001, Halliburton disclosed that Harbison-Walker needed assistance with more than 165,000 pending claims, and that Halliburton's net exposure would be $50-60 million. R4270-72. Halliburton's stock declined 4.6% the next day. The Complaint alleges that Halliburton knew that Harbison-Walker would require financial assistance, even before Halliburton disclosed that adverse news. R4575.

On August 22, 2001, Halliburton also said that "asbestos exposure concerns appear to be overblown" and that Halliburton's asbestos claims are a "manageable problem." R4276. On November 8, 2001, Halliburton stated that "open asbestos claims will be resolved without a material adverse effect on our financial position or the results of operations." R4596.

On December 7, 2001, Halliburton disclosed a $30 million asbestos verdict, issued on December 5 against Dresser, Halliburton's subsidiary. R6961-62, R7752-54. Halliburton's stock plummeted that day by 42.7%. R6963. Several analysts issued reports on December 7 that sounded the alarm about Halliburton's asbestos liability. TheStreet.com declared: "Halliburton Buried as Investors Stopped Believing." "Halliburton's share dove to nine-year lows . . . as investors lost faith in the company's claims." R4577, R6962.

Halliburton's own expert acknowledged that she was not aware of any other adverse news that

day, except a change in Moody's rating of Halliburton, which she admitted reflected recent information regarding Halliburton's asbestos exposure. Resp. App. 23a-26a.

D. Booking Revenue for Cost Overruns

During the class period, Halliburton booked unapproved claim orders from overages on fixed price contracts as revenue even though Halliburton knew its customers were not likely to pay for these claims. R4562-63. On March 14, 2000, Halliburton announced that its 1998 and 1999 revenues included $89 million and $98 million in unapproved claims, respectively. R7695. Halliburton knew those sums were not probable of collection. R4608-09. On April 26, 2000, Halliburton released its 2000 first quarter results, also falsely inflated by unapproved claims that Halliburton knew were not probable of collection. R4246, R4611.

In a December 21, 2000 press release, Halliburton disclosed it would take approximately a $95 million charge because "negotiations with customers regarding cost increases on seven . . . projects have not resulted in resolution of certain claims as originally anticipated." R6910, R7742-43. The next day, Halliburton's stock price declined 3.9%. R6912.

E. The Dresser Merger

The Complaint further alleges that Halliburton misrepresented the financial impact of the Dresser acquisition, touting efficiencies it knew would not be realized. On September 13, 1999, a year after the acquisition, an analyst reported that Lesar said regarding the merger, that "following further headcount reductions and significant consolidations, the company is now projecting annual benefits of $500 million." R4236. On December 21, 2000, the company disclosed it was taking a $120 million charge, with $25 million due to losses stemming from the Dresser merger, and the stock fell 3.9% the next day. R6903, R6912, R7742.

III. PROCEEDINGS BELOW

A. District Court Proceedings

On September 17, 2007, the EPJ Fund moved to certify a class of all persons and entities who purchased Halliburton's common stock during the class period. *See* Resp. App. 2a-9a. The EPJ Fund provided evidence that the proposed class met the requirements set forth in Fed. R. Civ. P. 23(a), and also satisfied the predominance requirement of Rule 23(b)(3). R6831-44. The EPJ Fund invoked the fraud-on-the-market doctrine, Resp. App. 4a-9a, and filed an expert report and event study in support of its motion.

Halliburton did not challenge the contention that the market for Halliburton's stock is efficient.

Resp. App. 10a-15a, 18a-19a n.8. Halliburton's own expert did not opine on the efficiency of the market for Halliburton's stock and did not even examine that issue. *Id.* 20a-23a. Rather, Halliburton argued that the EPJ Fund did not establish loss causation. *See, e.g.*, R7574-5, R7595.

The district court denied the motion solely because it found that the EPJ Fund had failed to prove loss causation by a preponderance of the evidence, Pet. App. 55a, 98a, as required by *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 265 (5th Cir. 2007), *abrogated by* this Court's *EPJ Fund* opinion. The court expressly acknowledged that "[a]bsent this requirement," it "would [have] certif[ied] the class." Pet. App. 55a.

B. Court of Appeals Proceedings

Citing *Oscar*, the Fifth Circuit affirmed the order denying class certification, holding Plaintiff had failed to prove loss causation by a preponderance of the evidence, as required under controlling Fifth Circuit precedent. Pet. App. 32a-34a, 54a-47a, *rev'd by EPJ Fund*, 131 S. Ct. 2179. The court noted that Halliburton had conceded the efficiency of the market, stating the parties "do not dispute the efficiency of the market[.]" Pet. App. 35a.

C. The Supreme Court

This Court reversed the Fifth Circuit in a unanimous opinion authored by Chief Justice Roberts. The Court held that securities fraud

plaintiffs need not prove loss causation to obtain class certification. *EPJ Fund,* 131 S. Ct. at 2183. The Court held that the Fifth Circuit requirement "is not justified by *Basic* or its logic." *Id.* This Court explained: "Loss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory." *Id.* at 2186. This Court vacated the Fifth Circuit's opinion, and remanded the case, stating: "To the extent Halliburton has preserved any further arguments against class certification, they may be addressed in the first instance by the Court of Appeals on remand." *Id.* at 2187.

D. On Remand To The District Court

In its supplemental brief to the district court on remand, Halliburton did not contest the requirements of Rule 23(a), which it previously conceded had been met. R10684. Nor did it claim that Plaintiff had failed to prove that the market for Halliburton's stock was efficient, which it had previously conceded as well. R10685.

On January 27, 2012, the court certified the class. The court noted that it would have certified the class previously but for the Fifth Circuit requirement on loss causation, which the Supreme Court had stricken. Pet. App. 27a. The court again found that Plaintiff had met the requirements of Rule 23(a). *Id.* 27a-30a. The court also held that Plaintiff met the requirements of Rule 23(b)(3): "The fraud-on-the-market theory applies to this case, so

proof of each individual class member's reliance is not required." *Id.* 30a.

E. The Fifth Circuit Decision And Halliburton's Petition For Rehearing *En Banc*

On April 30, 2013, the Fifth Circuit unanimously affirmed the district court's order, rejecting Halliburton's contention that it should be able to rebut the fraud-on-the-market presumption at class certification with evidence allegedly showing a lack of price impact. On May 24, 2013, Halliburton filed a petition for rehearing *en banc*. In its petition, it argued that the Fifth Circuit's decision deepened a circuit split between the Seventh Circuit in *Schleicher v. Wendt*, 68 F.3d 679 (7th Cir. 2010) and the Second and Third Circuits' opinions in *In re Salomon Analyst Metromedia Litig.*, 544 F3d 474, 484 (2d Cir. 2008) and *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 638 (3d Cir. 2011). Halliburton also argued in the last page and a half of its petition that *Basic*'s presumption of reliance should be overruled, but did not argue it should be modified. Resp. App. 45a-46a. That was the first time Defendants challenged *Basic* since this litigation began in 2002. On June 11, 2013, the Fifth Circuit denied the petition. No member of the panel or active Fifth Circuit Judge called for an *en banc* vote. Pet. App. 24a.

F. Status of the Case

Discovery is proceeding. The district court set a November 2014 deadline for summary judgment motions and a May 2015 trial date. Under the Court of Appeals' decision, Halliburton may present its rebuttal evidence regarding price impact at summary judgment and at trial.

IV. REASONS FOR DENYING THE PETITION

A. The Fifth Circuit Properly Applied This Court's Holdings In *Amgen* And *EPJ Fund* and Ruled Correctly in this Case.

Relying on this Court's 6-3 opinion in *Amgen*, the Fifth Circuit correctly determined that Defendants may not present evidence of an alleged lack of price impact at class certification to rebut the fraud-on-the-market presumption because such a rebuttal will not cause individual issues to predominate. The court correctly found that evidence of price impact or the lack thereof will be common to the class and so subject to a class-wide analysis. Pet. App. 17a-18a. The Court also found that the absence of price impact will not cause individual questions of law or fact to predominate for purposes of Rule 23(b)(3). *Id.* at 19a-20a. On the contrary, absent evidence of price impact, class members will not be able to demonstrate loss causation and the claims of all class members will fail on the merits "because they could not establish an essential element of the fraud action." *Id.* 18a.

The court recognized that price impact evidence offered by Halliburton is both similar to and offered for much the same reason as the materiality evidence considered by the Supreme Court in *Amgen*. *Id.* 18a-19a n.10. The court acknowledged that Halliburton claimed it was "questioning reliance and not materiality," found "there is a fuzzy line between price impact evidence directed at materiality and price impact evidence directed at reliance," *id.*, and concluded:

> Because *Amgen* determined that defendants are not permitted to use evidence of no price impact to rebut materiality (and thereby rebut the fraud-on-the-market theory) at class certification, it would be anomalous to permit Halliburton to nonetheless use evidence of no price impact to "generally" rebut the fraud-on-the-market theory at class certification.

Id.[3]

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[3] Because Amgen conceded that the market for its securities is efficient, *Amgen*, 133 S. Ct. at 1193-94, 1197, this Court did not consider what evidence was relevant to determining market efficiency. That issue is not presented here either because Halliburton did not contend the market for its stock was not efficient. *See supra* at 13-14. As the Fifth Circuit noted, "[W]hile rebuttal evidence concerning an issue which *is* relevant at class certification—

In an effort to distinguish *Amgen*, Halliburton strains to conjure up a scenario where an individual plaintiff could proceed with its claim after a proposed class failed to establish price impact at class certification. *See, e.g.*, Halliburton Supp. Br. at 7, *Erica P. John Fund, Inc. v. Halliburton Co.*, 718 F.3d 423 (5th Cir. 2013) ("in the absence of price distortion there is at least some possibility that individual plaintiffs could prove actual, as opposed to presumed, reliance on alleged misrepresentations."), Resp. App. 39a. However, this Court has noted that such unreasonable scenarios did not alter its analysis. *See Amgen*, 133 S. Ct. at 1197 ("No doubt a clever mind could conjure up fantastic scenarios in which an individual investor might rely on immaterial information (think of the superstitious investor who sells her securities based on a CEO's statement that a black cat crossed the CEO's path that morning). But such objectively unreasonable reliance does not give rise to a Rule 10b–5 claim."). Simply put, without evidence of price impact, Plaintiff could not establish reliance, materiality, loss causation, and damages, and the Fifth Circuit correctly followed this Court's precedents in rejecting a challenge to certification

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such as market efficiency—would seemingly be relevant to the question of common question predominance and therefore admissible at class certification, that question is not before us and nor was it before the *Amgen* Court. Pet. App. 11a n.4 (emphasis in original).

based on an alleged lack of impact on stock prices at class certification under the facts of this case.

"Merits questions may be considered—only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 133 S. Ct. at 1195. Halliburton's argument constitutes the "free-ranging merits inquiry" that this Court expressly prohibited because a lack of price impact does not show that individual issues predominate. Rather, failure of proof on price impact "would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate." *Id.* at 1196.

Halliburton contends that the Fifth Circuit erroneously concluded that "*Amgen* determined that defendants are not permitted to use evidence of no price impact to rebut materiality * * * at class certification." Pet. 29-30 (quoting Pet. App. 18a-19a n.10). This Court determined that Amgen could not rebut materiality at class certification, and the logic of the Court's opinion does not turn on whether the rebuttal was with price impact evidence or not. *See Amgen*, 133 S. Ct. at 1203 ("*Amgen*'s evidence was offered to rebut the materiality predicate of the fraud-on-the-market theory").

The conflict of Defendants' claims with both the record and this Court's *EPJ Fund* opinion is even more direct. There is no dispute that Halliburton's stock dropped more than 42% on December 7, 2001, when the company disclosed an adverse asbestos

verdict. Halliburton's alleged lack of price impact evidence is not evidence that Halliburton's stock price did not plummet that day. Rather, Halliburton's evidence concerns what caused its stock price to drop and whether the news was unexpected, in other words whether it constituted a corrective disclosure.[4] In a case like this one where the allegations are not that the misrepresentations caused the stock price to rise, but rather that they maintained the price, a determination that the price fell because of a corrective disclosure necessarily leads to an inference that the price was previously artificially inflated by the misrepresentation. Thus, in this case, there is no meaningful difference between proof of loss causation, prohibited by this Court's decision in the *EPJ Fund* case, and proof of price impact (or proof of lack of price impact), which Halliburton seeks here.

B. There is No Circuit Split

Halliburton claims that the Fifth Circuit opinion in this case deepened a circuit split between the Second Circuit decision in *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474 (2d Cir. 2008) and Third Circuit decision in *In re DVI, Inc. Sec.*

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[4] In its petition, Halliburton repeatedly relies on alleged factual findings by the courts below. However, because the Court of Appeals opinion was vacated and the district court opinion was based on a flawed legal framework, those alleged factual findings are a nullity. *See Falcon v. Gen. Tel. Co.*, 815 F.2d 317, 320 (5th Cir. 1987).

Litig., 639 F.3d 623, 638 (3d Cir. 2011) on one hand, and the Seventh Circuit decision in *Schliecher v. Wendt*, 618 F.3d 679 (7th Cir. 2010) on the other hand. Pet. 30-32. Halliburton fails to recognize that this Court's opinion in *Amgen* resolved the purported split Halliburton advances. Both the Second and Third Circuit decisions allowing use of price impact evidence at class certification *predate* this Court's *Amgen* opinion were abrogated by this Court's *EPJ Fund* decision. Halliburton identifies no circuit that has allowed the use of price impact evidence post-*Amgen* to rebut the fraud-on-the-market presumption at class certification, and there is none. The circuit split Halliburton cites does not exist.

Amgen held that rebuttal evidence insofar as it would negate materiality (and by implication any element of Plaintiffs' claim) is "a matter for trial," referencing *Basic*, and stating:

> We recognized as much in *Basic* itself. ***A defendant could "rebut the [fraud-on-the-market] presumption of reliance," we observed in* Basic*, by demonstrating that "news of the [truth] credibly entered the market and dissipated the effects of [prior] misstatements." 485 U.S. at 248-249. We emphasized, however, that "[p]roof of that sort is a matter for trial" (and presumably also for a summary-judgment motion under Federal Rule of Civil Procedure 56).*** *Id.* at 249 n.29.

Amgen, 133 S. Ct. at 1204. Any reading of the Second and Third Circuit cases to permit rebuttal at class certification with evidence common to the class, and which would cause all class members' claims to fail, is not good law. Indeed, district courts in the Second Circuit have recognized that *In re Salomon* is no longer controlling precedent. *See, e.g.*, *GAMCO Investors, Inc. v. Vivendi, S.A.*, 927 F. Supp. 2d 88, 99 (S.D.N.Y. 2013); *In re Citigroup Inc. Sec. Litig.*, Case Nos. 09 MO 2070 (SHS), 07 Civ. 9901 SHS, 2013 WL 3942951, at *28 (S.D.N.Y. Aug. 1, 2013).

There is no need for this Court to exercise *certiorari* jurisdiction, as the Courts of Appeals are united in rejecting the use of price impact evidence at class certification under the facts that have arisen to date.

C. This Case Is Not a Proper Vehicle for Challenging *Basic*

Contrary to Halliburton's incredible assertion, this case does not "present[] an ideal vehicle for the Court to reconsider *Basic*." Pet. 23. Quite to the contrary, even if this Court were inclined to revisit *Basic*, this case presents a particularly inappropriate vehicle for doing so. Not only has Halliburton conceded that the market for its stock is efficient, thereby undercutting the predicate for its own attack on *Basic*, Halliburton has also repeatedly waived the argument that *Basic* should be overruled or modified and is procedurally barred on multiple independent grounds from seeking to raise that argument now. Further, neither of the courts below passed on the

issue. Accordingly, the Court should apply its "traditional rule" and decline to grant *certiorari* because the issues raised in the petition were not "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (quoting *Duignan v. United States*, 274 U.S. 195, 200 (1927)); *see also Glover v. United States*, 531 U.S. 198, 204 (2000).

1. Halliburton Has Conceded the Market for its Stock is Efficient, Thereby Negating the Basis for its Attack on *Basic*

Even though Halliburton argues that market efficiency is not a binary question and contends that *Basic* should be reversed or substantially modified, based largely on that argument, Pet. 13-19, it has not challenged the finding that Halliburton's stock trades in an efficient market, and so has conceded the efficiency of that market. But if the market for Halliburton's stock is efficient, any attack on *Basic* based on alleged inefficiencies in the stock market, whether seeking to reverse *Basic* or substantially modify it, has no application in this action.

Halliburton cites much the same economic research that *Amgen* did. Given Halliburton's concession that the market for its stock is efficient, which mirrors a comparable concession by Amgen regarding the efficiency of the market for its stock, what this Court said in *Amgen* is equally applicable here: "In any event, this case is a poor vehicle for exploring whatever implications the research Amgen cites may have for the fraud-on-the-market

presumption recognized in *Basic*."[5] *Amgen*, 133 S. Ct. at 119 n.6.

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[5] Halliburton repeatedly cites the writings of Professor Donald C. Langevoort in support of its challenge to the efficient capital market hypothesis. Pet. 13-14, 16, 19-20, 23-24. In *Amgen*, Justice Thomas in his dissent and Justice Alito in his concurrence, also cite Langevoort in questioning the efficient market hypothesis. *See Amgen*, 133 S. Ct. 1206, 1208 n.4, (Thomas, J., dissenting); *id.* at 1204 (Alito, J., concurring). However, in a forthcoming article, *Amgen and the Fraud- on-the-Market Class Frozen in Time?*, Georgetown Law Faculty Publications, Public Law Research Paper No. 13-58, 10 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_*id*=2281910, Langevoort states that he does not believe this Court should reconsider *Basic*'s presumption and that the inevitable imperfections in the functioning of the capital markets do not "undermine[] a presumption of reliance that is based either on the relative wisdom of passivity or an entitlement to assume stock price integrity." *Id.* at 17. Similarly, Halliburton cites Barbara Black, *Behavioral Economics and Investor Protection*, 44 Loy. U. Chi. L.J. 1493, 1500 (2013) (Pet. 16-17) as "repudiate[ing] *Basic*'s economic premise". Black, however, writes that the "debate over competing economic theories, while important and interesting, has *nothing to do with the continuing viability of the fraud-on-the-market presumption*." *Id.* at 1503-4.

2. Under This Court's Precedent, Halliburton Cannot Raise An Issue In The Second Petition That Was Open To Dispute In The First Petition

Under this Court's precedent, a party on a second appeal to the Supreme Court is precluded from raising issues that were or could have been raised in the first appeal. As this Court has explained: "None of the questions which were before the court on the first writ of error can be reheard or examined on the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation." *United States v. Camou*, 184 U.S. 572, 574 (1902).

In the initial appeal, the petitioner was a private individual challenging a denial of his claim to certain land; in the second appeal, the petitioner was the United States. And just as in this case, the successive petitions were filed by different parties. Moreover, the argument that the United States wanted to make in the second petition, that the land grant was invalid for vagueness, is an argument that the government could have, but did not make, in seeking to affirm the ruling at issue in the first appeal. *See generally Camou*, 184 U.S. at 572-73. As the Court noted, "everything involving the question of validity . . . might be deemed to have been determined on the first appeal." *Id.* at 574. This Court should follow its prior reasoning and not

open the floodgates to the creation and litigation of new arguments on appeal which could or should have been raised before—especially not on the instant record—because that would foster the "endless litigation," specter first recognized in *Camou*. *See also Illinois v. Illinois Central R. Co.*, 184 U.S. 77, 91– 92 (1902) (cautioning against entertaining successive appeals of legal questions open to dispute in an initial appeal).

3. Halliburton Has Waived The Right To Seek To Overturn *Basic* Due To Its Failure To Offer That Argument In Timely Fashion

Like other circuits, the Fifth Circuit will not hear an issue on appeal if it was not raised in the district court, absent extraordinary circumstances. *See Celanese Corp. v. Martin K. Eby Const. Co., Inc.*, 620 F.3d 529, 531 (5th Cir. 2010). Nor will the Fifth Circuit entertain a new issue in a petition for panel rehearing. *See F.D.I.C. v. Massingill*, 30 F.3d 601, 605 (5th Cir. 1994); *Lowry v. Bankers Life & Cas. Ret. Plan*, 871 F.2d 522, 525 (5th Cir. 1989). Similarly, the Fifth Circuit will not consider new issues in an *en banc* appeal. *See Morgan v. Swanson*, 659 F.3d 359, 405-07 (5th Cir. 2011); *Franks Inv. Co. LLC v. Union Pacific R. Co.*, 593 F.3d 404, 409 (5th Cir. 2010). Thus, Halliburton's attempt to raise a challenge to *Basic* for the first time in its petition for rehearing *en banc* was procedurally improper, and does not suffice to press the issue below.

This procedural bar has special bite here because when this Court reversed the Fifth Circuit in 2011 and remanded this case, the Court stated: "To the extent Halliburton ***has preserved any further arguments against class certification***, they may be addressed in the first instance by the Court of Appeals on remand." *See EPJ Fund*, 131 S. Ct. at 2187. It is undisputed, however, that Halliburton did not seek to overturn *Basic* or urge that the holding of *Basic* be modified until its petition for rehearing *en banc* to the Fifth Circuit in the *second* appeal regarding certification in this case. Halliburton did not raise the arguments it now posits in derogation of *Basic* before this Court the first time around—not in its brief in opposition, nor in its supplemental brief in opposition, nor in its merits brief, nor even in oral argument. Accordingly, this record does not properly pose the question Defendants seek to litigate for the first time in this Court, and Defendants are procedurally barred from raising a challenge to *Basic* at this stage because they did not preserve any such argument. *See Alleghany Corp. v. Breswick & Co.*, 355 U.S. 415, 416 (1958) (reversing the lower court and remanding "for consideration by that court of the only claim that was left open at this Court's prior disposition of this litigation"); *see also Queran v. Jordan*, 440 U.S. 332, 346 n.18 (1978) (court may consider only those "matters left open by the mandate of this Court").

There is no excuse for Halliburton's failure to raise a timely challenge to *Basic*, which had been

applied and criticized for almost 20 years by 2007 when Plaintiff originally moved for class certification. Another eight years of appellate litigation was conducted *in this case* before May 2013 when Halliburton *first* challenged *Basic* in its Fifth Circuit petition for rehearing *en banc*.

This Court's intervening cases also do not excuse Halliburton's failure. *Amgen* merely confirmed *Basic*'s assertion that rebuttal of the presumption was generally for trial. *Amgen*, 133 S. Ct. at 1204. *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011), held plaintiffs must "demonstrate" compliance with Rule 23, but prohibited merits examinations at class certification not tied to Rule 23, as Halliburton seeks to do here. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) required "evidentiary proof" at class certification that damages could be determined with common evidence, but not that plaintiffs would prevail on the merits. Moreover, as Halliburton notes, Pet. 2, this Court held as early as *Gen. Tel. Co. of SW v. Falcon*, 457 U.S. 147, 160 (1982) that "actual, not presumed conformance with [Rule 23] remains indispensable." Thus, Halliburton's belated attack on *Basic* is nothing more than an opportunistic change in strategy. *See* Pet. 12 (citing concurring and dissenting opinions in *Amgen*).

Having hitched its defense to the right established in *Basic* to rebut the fraud-on-the-market presumption, it is much too late in this race for Halliburton to switch horses now.

4. *Lebron* And Progeny Do Not Excuse Halliburton's Failure To Make A Timely Challenge To *Basic*

Halliburton contends, citing *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) and *Citizens United v. FEC*, 558 U.S. 310, 330-331 (2010), that it was not required to raise a challenge to *Basic* below because Halliburton is presenting "'not a new claim * * * but a new argument to support what has been [Petitioner's] consistent claim,' namely that class certification should be denied." Pet. 23 n.6 (quoting *Lebron*, 513 U.S. at 379). Those cases do not help Halliburton because Halliburton has not made any ***claim*** here. As this Court said: "Our traditional rule is that '[o]nce a ***federal claim*** is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron*, 513 U.S. at 379 (quoting *Yee v. Escondido, Cal.*, 503 U.S. 519, 534 (1992)). Here, the only claims in this case were brought by Plaintiff for violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. Halliburton has merely opposed class certification. No Supreme Court case applying this doctrine has construed the term "claim," to mean "argument" or "issue." *See Citizens United*, 558 U.S. 310 (party bringing First Amendment claim may provide an alternate argument supporting its claim); *Lebron*, 513 U.S. at 379 (same); *see also Yee*, 503 U.S. at 533 (party with taking claim may offer alternative argument

supporting its claim."). Under Halliburton's exaggerated reading of these cases, parties could always advance a newly minted argument on appeal as long as the argument was in support of the same general objective they had previously pursued. That is not the law.

D. This Court's Holding In *Basic* Should Not Be Reconsidered

The fraud-on-the-market presumption, adopted by this Court in *Basic*, has been repeatedly endorsed by this Court, Congress, the SEC, and the DOJ and enjoys widespread support among economists. This Court should decline Halliburton's invitation to abandon twenty-five years of established precedent and eliminate or hamstring the ability of private parties to bring securities fraud actions.

1. *Basic* Is A Seminal Decision That Has Been Reaffirmed By This Court And Repeatedly Endorsed By Congress, The SEC, And The U.S. Department Of Justice.

This Court has repeatedly endorsed *Basic*'s reliance analysis since the decision was handed

down in 1988. *See U.S. Dept. of Justice v. Landano*, 508 U.S. 165, 174 (1993) (fraud-on-the-market presumption supported by considerations of "fairness, public policy, and probability, as well as judicial economy"); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005) (citing *Basic* as "nonconclusively presuming that the price of a publicly traded share reflects a material misrepresentation and that plaintiffs have relied upon that misrepresentation as long as they would not have bought the share in its absence"); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148 (2008). "[U]nder the fraud-on-the-market doctrine, reliance is presumed when the statements at issue become public."); and *Amgen*, 133 S. Ct. 1193 (reaffirming *Basic*'s fraud on the market analysis). In 2011, this Court unanimously reaffirmed *Basic*'s fraud-on-the-market analysis. *See EPJ Fund*, 133 S. Ct. at 1184.

The fraud-on-the-market presumption is crucial to private securities actions, as this Court has repeatedly noted, *EPJ Fund*, 131 S. Ct. at 2185 (citing *Basic*, 485 U.S. at 242, 245), and meritorious private security fraud actions are "an essential supplement to criminal prosecutions and civil enforcement actions brought[.]" *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007); *see also Amgen*, 133 S. Ct. at 1201 ("private securities litigation furthers important public policy interests."); *Dura*, 544 U.S. at 345 (private securities actions "maintain public confidence in the marketplace."); *Basic*, 485 U.S. at 231 (a private

securities action "constitutes an essential tool for enforcement of the 1934 Act's requirements").

Congress has recognized that private securities litigation "promotes public and global confidence in our capital markets and helps to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs." *Joint Explanatory Statement of the Committee of Conference on H.R. 1058 (Joint Explanatory Statement)* at 31, reprinted in 2 U.S.C.C.A.N. 730 (104th Cong., 1st Sess. 1995).

While Congress has repeatedly acted to make needed adjustments in federal securities law governing private actions, it has directly considered *and rejected* the extreme step of eliminating the presumption created by *Basic*. In the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, Congress responded to perceived abuses in private securities fraud actions by, *inter alia*, establishing procedures for appointment of lead plaintiffs and lead counsel in class actions, 15 U.S.C. 78u-4(a)(3); tightening pleading requirements, 15 U.S.C. 78u-4(b)(1)-(2); mandating a discovery stay pending resolution of a motion to dismiss, 15 U.S.C. 78u-4(b)(3)(B); creating a safe-harbor for forward-looking statements, 15 U.S.C. 78u-5; authorizing sanctions for abusive litigation, 15 U.S.C. 78u-4(c); and limiting damages and attorney's fees, 15 U.S.C. 78u-4(a)(6) and (e). *See Tellabs*, 551 U.S. at 319-322. Three years later, Congress enacted the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112

Stat. 3227, to prevent private plaintiffs from proceeding under state law to circumvent the PSLRA requirements. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80-83 (2006).

As this Court recognized in *Amgen*, Congress, while "taking steps to curb abusive securities-fraud lawsuits, rejected calls to undo the fraud-on-the-market presumption of classwide reliance endorsed in *Basic*." *Amgen*, 133 S. Ct. at 1201. "The initial version of H.R. 10, 104th Cong., 1st Sess. (1995), an unenacted bill that, like the PSLRA, was designed to curtail abuses in private securities litigation, 'would have undone *Basic*[.]'" *Id.* (citing and quoting Langevoort, Basic *at Twenty*: *Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 153, and n.8.)." In the *Common Sense Legal Reform Act: Hearings Before the Subcomm. on Telecomm. and Finance of the H. Comm. on Commerce*, 104th Cong., 1st Sess., 92, 236–237, 251–252, 272 (1995), "witnesses criticized the fraud-on-the-market presumption and expressed support for H.R. 10's requirement that securities-fraud plaintiffs prove direct reliance." *Amgen*, 133 S. Ct. at 1201. Tellingly, Congress rejected that bill and the testimony of those witnesses and chose not to overrule *Basic*. In *Amgen*, this Court properly deferred to Congress, *id.*, and should do so here. *See Watson v. United States*, 552 U.S. 74, 82-83 (2007) ("this long congressional acquiescence [14 years] has enhanced even the usual precedential force we accord to our interpretations of statutes").

The SEC and DOJ also recognize the importance of private securities litigation. *See*, *e.g.*, Brief of the U.S. as *Amicus Curiae* in Support of Respondent at 1, *Amgen Inc.*, 133 S. Ct. 1184 (2013) ("Meritorious private securities-fraud actions, including class actions, are an essential supplement to criminal prosecutions and SEC enforcement actions."); Brief of the U.S. as Amicus Curiae Supporting Respondents at 1, *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784 (2010) ("Meritorious private securities-fraud actions are an essential supplement to criminal prosecutions and civil enforcement actions brought by the United States and the Securities and Exchange Commission (SEC).").

The SEC has stressed the centrality of the fraud-on-the-market presumption to private enforcement of the securities laws: "While the Commission is not required to show reliance in its own enforcement actions, the Commission believes that the proper interpretation and application of the fraud-on-the-market presumption is important to the effective enforcement of the federal securities laws.'" *E.g.*, Brief of SEC as Amicus Curiae at 3, *In re WorldCom, Inc. Sec. Litig.*, Case No. 02 Civ. 3288 (DLC), 2004 WL 831018 (2d Cir. Apr. 19, 2004).

2. *Stare Decisis* Favors Preserving *Basic*.

Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and

contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citing *Vasquez v. Hillery*, 474 U.S. 254, 265-266 (1986)). Here, *stare decisis* weighs heavily in favor of continued adherence to the fraud-on-the-market presumption endorsed in *Basic*.

Halliburton argues that "*stare decisis* considerations support overruling *Basic* without further delay[,]" Pet. 24-25, relying *solely* on cases involving constitutional rulings,[6] but the strength of *stare decisis* principals is at its nadir in constitutional cases "because in such cases correction through legislative action is practically impossible[.]" *Payne*, 501 U.S. at 827. By contrast, this Court has recognized that "stare decisis in respect to statutory interpretation has special force, for Congress remains free to alter what we have done." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2007). Where, as here, Congress has acquiesced in and endorsed the Court's interpretation of federal securities law, *stare decisis* principles carry particular weight. *Id.*; *see also Shepard v. United States*, 544 U.S. 13, 23 (2005). Congress specifically

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[6] *Pearson* v. *Callahan*, 555 U.S. 223, 235 (2009) (whether plaintiff properly alleged constitutional violation); *Montejo* v. *Louisiana,* 556 U.S. 778, 792 (2009) (right to counsel); *United States v. Gaudin*, 515 U.S. 506, 521 (1995) (right to jury trial); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (constitutionality of death penalty); *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986) (equal protection).

considered overruling the fraud-on-the-market presumption but decided not to do so. That is an additional and weighty reason for this Court to continue to adhere to *Basic*.[7]

In considering whether "special justification" exists to overrule this Court's precedent, relevant factors "include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Citizens United*, 558 U.S. at 363. Those factors weigh heavily in favor of preserving *Basic*. Not only is *Basic* a twenty-five-year-old established precedent, *Basic*'s holding has also been repeatedly affirmed by this Court, and investors, the SEC, and the DOJ securities have come to rely upon private actions, facilitated by the fraud-on-the-market presumption. *See supra* at 30-35.

3. *Basic* Has Not Been Undermined By Economic Developments.

Halliburton claims that *Basic* should be overruled or modified because its underlying economic rationale is no longer viable. Halliburton is mistaken on two fronts. First, this Court based its adoption of the fraud-on-the-market presumption in

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[7] Halliburton argues that *stare decisis* concerns are at their nadir in cases "involving procedural and evidentiary rules." Pet. 25 (*citing Payne*, 501 U.S. at 828). The fraud-on-the-market presumption, however, is "a substantial doctrine of federal securities-law." *See Amgen*, 133 S. Ct. at 1193.

Basic primarily on congressional policy. "The presumption of reliance employed in this case is consistent with, and, by facilitating Rule 10b-5 litigation, supports, the congressional policy embodied in the 1934 Act. In drafting that Act, 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[.]" *Basic*, at 245-46; *see also* H.R. Rep. No. 1382, 73d Cong., 2nd Sess. 1934 (legislative history of Securities Exchange Act of 1934) ("The disclosure of information materially important to investors may not instantaneously be reflected in market value, but despite intricacies of security value, truth does find relatively quick acceptance on the market."). This Court further stated that the fraud-on-the-market presumption was supported by considerations of "fairness, public policy, and probability, as well as judicial economy[.]" *Basic*, 485 U.S. at 245. Economic theory provided a secondary, not primary role in the Court's decision to endorse the fraud-on-the-market presumption, because "recent empirical studies have tended to confirm Congress' premise[.]" *Id.* at 246. The Court specifically rejected the contention that it was adopting a particular view of market rationality. *Id.* at 246 n.24, 248 n.28.

Second, though economic theory has continued to evolve, the semi-efficient market hypothesis continues to enjoy widespread support among economists. *See*, *e.g.*, Brief of Financial Economists as *Amici Curiae* in Support of Respondent at 13,

Amgen, ("economic evidence that markets may process different sorts of information at different rates does not undermine *Basic*'s presumption."); Brief of Financial Economists as Amici Curiae in Support of Petitioner at 15, *EPJ Fund* ("Despite the anomalies that have been discovered, the major U.S. securities markets are typically efficient enough to justify the limited presumptions at issue here—that is, that a false statement will impact price at least to some degree . . . In sum, Semi Strong Efficient Market Hypothesis ("SSEMH") has been subjected to perhaps the most intensive and extensive testing of any hypothesis in all of the social sciences—and this extraordinary scrutiny has confirmed the strong empirical support for the theory."); *see also Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010) (Easterbrook, J.) ("Many economists think that the strong form of the [efficient capital market] hypothesis has been refuted, but the weak and semi-strong forms are widely accepted. And the fraud-on-the-market doctrine rests on the semi-strong form.").[8]

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[8] Most economists generally support the SSEMH. Dariusz Wojcik, Nicholas Kreston & Sarah McGill, *Freshwater, Saltwater, and Deepwater: Efficient Market Hypothesis versus Behavioral Finance*, Oxford University School of Geography and the Environment Working Paper No. 12-03 (February 21, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2008788 (general predominance among academics of view that markets are

informationally efficient and a recent analysis of the finance literature concludes that "BF (Behavioral Finance) lags behind EMH (Efficient Market Hypothesis) in terms of the quantity, dynamics, scope," and SSEMH remains the "benchmark" for academic economists); BURTON G. MALKIEL, A RANDOM WALK DOWN WALL STREET, 269 (10th ed. 2011) (modern financial markets are "amazingly successful devices for reflecting new information rapidly. The response time may not be immediate; sometimes there is underreaction for a short period. But by and large, prices reasonably reflect whatever public knowledge there is about each [publicly traded] company."); *id.* at 268-69 (both academic research and practical experience "resoundingly confirm" the validity of SSEMH); Ray Ball, *The Global Financial Crisis and the Efficient Market Hypothesis: What Have We Learned?*, 21 J. Applied Corp. Fin. 15 (2009) (As a practical matter, the idea that prices efficiently incorporate information is an indispensable foundation for how we organize the real world, and although not entirely free of anomalies, the anomalies that have been demonstrated are sufficiently limited to not impact real world behavior and reliance on SSEMH); Esther Bruegger & Frederick Dunbar, *Estimating Financial Fraud Damages with Response Coefficients*, 35 J. Corp. L. 11, 46 (2009) ("[M]ost academic studies accept the hypothesis that capital markets are efficient."); Sanjai Bhagat & Roberta Romano, *Empirical Studies of Corporate Law*, in *Handbook of Law and Economics*, 948 n.1 (Polinsky & Shavell,

4. There Is No Basis For Amending *Basic*.

Halliburton contends that *Basic* should be modified "to require plaintiffs to prove price impact in order to invoke the presumption in the first place." Pet. 24. Under that approach, Plaintiff would be required to prove at class certification, not simply that reliance will turn on common evidence, but also that Plaintiff would prevail on the merits in establishing reliance, contrary to this Court's recent opinion. *See Amgen*, 133 S. Ct. at 1196 (at class certification, plaintiffs "need not, at that threshold, prove the predominating question will be answered in their favor").

Moreover, Halliburton previously disavowed before this Court the very argument it seeks to untimely raise here. *See EPJ Fund*, 131 S. Ct. at 2187 n.*. ("According to Halliburton, a plaintiff must prove price impact only after *Basic*'s presumption has been successfully rebutted by the defendants.")

Finally, this Court, in holding that Plaintiff need not establish loss causation to invoke the fraud-on-the-market presumption, has also effectively held that Plaintiff does not have to establish price impact either, at least in a case where the

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eds. 2007) (Empirical support for the theory has been confirmed by "perhaps the most intensive and extensive testing of any hypothesis in all of the social sciences").

misrepresentations maintained the stock price, because in such cases there is virtually no difference between proof of loss causation and proof of price impact. Halliburton's argument for substantially modifying *Basic* also fails for the same reason its quest to overrule *Basic* should fail.

V. CONCLUSION

This Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

Lewis Kahn
Neil Rothstein
Special Counsel to Lead Plaintiff
KAHN SWICK & FOTI, LLC
206 Covington Street
Madisonville, LA 70447
Tel.: (504) 455-1400
Kim Miller, Esq.
kim.miller@ksfcounsel.com
KAHN SWICK & FOTI, LLC
500 Fifth Avenue,
Suite 1810
New York, NY 10110
Tel.: (212) 696-3730
Special Counsel to Lead Plaintiff and the Class

David Boies
dboies@bsfllp.com
Counsel of Record
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
Tel.: (914) 749-8200
Carl E. Goldfarb
BOIES, SCHILLER & FLEXNER LLP
401 E. Las Olas Blvd.
Suite 1200
Ft. Lauderdale, FL 33301
Tel.: (954) 356-0011

E. Lawrence Vincent
3948 Legacy Drive
#106-324
Plano, TX 75023
Tel.: (214) 680-1668

October 2013

APPENDIX

APPENDIX A — EXCERPTS OF U.S. SUPREME COURT RECORD IN ERICA P. JOHN FUND, INC. V. HALLIBURTON CO., 131 S. CT. 2179 (2011)

- **EXCERPT OF LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES DISTRICT COURT NORTHEN DISTRICT OF TEXAS DALLAS DIVISION, DATED SEPTEMBER 17, 2007**

- **EXCERPT OF DEFENDANTS' RESPONSE TO LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES DISTRICT COURT NORTHEN DISTRICT OF TEXAS DALLAS DIVISION, DATED NOVEMBER 16, 2007**

- **EXCERPT OF LEAD PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES DISTRICT COURT NORTHEN DISTRICT OF TEXAS DALLAS DIVISION, DATED DECEMBER 21, 2007**

- **EXCERPTS OF DEPOSITION OF LUCY ALLEN**

Appendix A

EXCERPT OF LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES DISTRICT COURT NORTHEN DISTRICT OF TEXAS DALLAS DIVISION, DATED SEPTEMBER 17, 2007

Master Docket No. 3:02-CV-1152-M

CLASS ACTION

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., *et al.*, On Behalf of itself and All Others Similarly Situated,

Lead Plaintiff,

vs.

HALLIBURTON COMPANY, *et al.*,

Defendants.

This Document Relates to:

ALL ACTIONS.

LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND INCORPORATED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Appendix A

[i] **TABLE OF CONTENTS**

* * *

[16] 2. *The Issue of Reliance Will Not Defeat Certification*

Lead Plaintiff relies on the fraud-on-the-market theory recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) for of a class-wide presumption of reliance. The fraud-on-the-market presumption provides that:

> An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.

Id. at 247.

Under the Fifth Circuit's recent interpretation of *Basic*, in order to avail upon the fraud-on-the-market

presumption, plaintiffs must show that Halliburton stock traded on an efficient market and that the corrective disclosure affected the stock price. *Oscar Private Equity Investments v. Allegiance*, 487 F.3d 261. The *Allegiance* court made clear however, that plaintiffs need not quantify damages, or prove that some percentage of the drop was attributable to the corrective disclosure, but need only offer some empirically based showing that "the corrective disclosure was more than just present on the scene." *Id.* at 271. Once the proposed Class establishes entitlement to the fraud-on-the-market presumption of reliance, Defendants can rebut that presumption only "by showing that the nondisclosures did not" affect the Halliburton's stock price. *Fine v. Am. Solar King Corp.*, 919 F.2d 290, 299 (5th Cir. 1990).

a. *Halliburton's Common Stock Traded in an Efficient Market*

The court in *Unger v. Amedisys*, 401 F.3d 316 (5th Cir. 2005), expanding upon the five factors recognized by *Cammer v. Bloom*, 711 F. Supp. 1276 (D.N.J. 1989), identified eight factors for determining market efficiency: (1) average weekly trading volume expressed as a percentage of total outstanding shares; (2) number of securities analysts following and reporting on the stock; (3) extent to which market makers and arbitrageurs trade in the stock; (4) [17] Company's eligibility to file SEC registration Form S-3 (as opposed to Form S- or S-2); (5) existence of empirical facts "showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price;" (6) Company's market capitalization; (7) bid-ask

spread for stock sales; and (8) float, the stock's trading volume without counting insider-owned stock. *See also, Bell*, 422 F.3d at 313. Under each of these factors it is clear that the market for Halliburton stock was efficient. Report, ¶¶ 9-24.

Factor 1: Volume

Halliburton's stock traded at an average weekly volume of over 16,796,502 shares during the Class Period. Report, ¶ 22. Weekly trading volume for Halliburton was on average, 3.8% of the outstanding shares, significantly more than the 2% volume courts have found sufficient to raise a "strong presumption" of market efficiency for stocks traded on the NASDAQ, and more than the 1% volume courts have deemed sufficient for stocks traded on the NYSE. Report, ¶ 21, fn.16.

Factor 2: Analyst Coverage

Securities analysts from several firms covered and reported on Halliburton during the Class Period.[6] Such

6. Halliburton was covered by at least ABN Amro Bank N.Y. U.S.A; A.G. Edwards & Sons, Inc.; Argus Research Corporation; Bear, Stearns & Co., Inc.; Brown Brothers Harriman & Co.; Capital One Southcoast, Inc; CIBC World Markets Corp.; Deutsche Bank Securities Inc.; ING Financial Markets USA; Jefferies & Company, Inc.; Johnson, Rice & Co.; Painewebber Inc.; PNC Institutional Investment Service; Prudential Equity Group, Inc.; RBC Capital Markets; Sanford C. Bernstein & Co., Inc.; Smith Barney Citigroup; Southwest Securities; Stephens Inc.; SunTrust Robinson Humphrey Capital Markets; UBS (US); and Wachovia Securities.

expansive analyst coverage is an indicator of market efficiency. Report, ¶ 27.

Factor 3: Opportunity for Arbitrage

For stocks traded on the NYSE, the function of market makers—that is, to ensure the competitive, orderly and efficient market for securities, is performed by a single specialist. [18] Report, ¶ 28. Specialists achieve this function by performing four critical roles: (1) as an auctioneer, continually showing the best bids and offers, and maintaining order in the crowd; (2) as an agent for SuperDot orders (direct electronic routing system to and from the trading floor) as well as for brokers; (3) as a catalyst for order flow by informing interested parties of items available in the market; and (4) as a principal, where the specialist has an obligation to enter into a transaction using its own capital if there is a willing buyer or seller with no counterparty in the marketplace. Specialists thus facilitate continuous trading during market hours. Report ¶ 29. As with the market makers, the role of the specialist assures the existence of arbitrage opportunities. Report, ¶ 31. As evidenced by the level of short interest, the short-selling of Halliburton's stock was not constrained during the Class Period, and arbitrage opportunities could be exploited, which is evidence in support of market efficiency. Report, ¶¶ 32-37.

Factor 4: Form S-3 Eligibility

The Company was eligible to file an SEC registration Form S-3 during the Class Period. Indeed, Halliburton filed an amended Form S-3 before the Class Period, on

September 25, 1998, and during the Class Period, filed a Form S-3 on December 3, 2001. Thus, this factor supports a finding of market efficiency. Report, ¶¶ 38-39.

Factor 5: Cause and Effect Relationship

The cause and effect relationship between unexpected information released to the market and movement of the stock price is the essence of an efficient market and the foundation for the fraud-on-the-market theory. *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 508 (1st Cir. 2005) (stating that the cause and effect relationship between pricing and new information is implicit in an efficient market). The movement of Halliburton's stock price during the Class Period when unexpected news was disseminated shows that Halliburton's stock traded in an efficient market. Report, ¶¶ 40-46.

[19] *Factor 6: Market Capitalization*

During the Class Period, the market capitalization for Halliburton stock ranged from $5.1 billion, on the last day of the Class Period, to a Class Period high of $24 billion. Report, ¶ 47. Even at the lower end of this range, Halliburton's market capitalization supports a finding that the market for Halliburton stock was efficient. Report, ¶ 48.

Factor 7: Bid/Ask Spread

Bid/ask spreads are a measure of transaction costs; low transactions costs indicate that arbitrage opportunities can be exploited readily. Report, ¶ 49. During the Class

Period, the average bid/ask spread as a percentage of the mean bid/ask price for Halliburton was 0.22%; the average for Halliburton's competitors was 0.36%. Such a low bid/ask spread indicates that arbitrage opportunities could be exploited, which is evidence of market efficiency. Report, ¶ 50.

Factor 8: Public Float

Courts have held that a large float percentage (percentage of shares held by the public) can be an indicator of market efficiency. *Unger*, 401 F.3d at 323; *Bell*, 422 F.3d 307 and 313, n. 10. During the Class Period, there were between 429.0 million and 445.5 million shares of Halliburton stock outstanding, of which approximately 99% were held by the public. This large public float indicates an efficient market. Report, ¶ 51.

Each of the *Unger* factors supports the conclusion that Halliburton stock traded in an efficient market. In addition, Halliburton's listing on a national exchange; the presence of sophisticated investors; and, the coverage of Halliburton by wire services, financial press, and general media also support a finding of market efficiency. Report, ¶¶ 52-64.

b. *Loss Causation*

The Fifth Circuit, in *Oscar Private Equity Investment v. Allegiance*, recently held that to avail itself of the benefits of the fraud-on-the-market presumption of reliance at the class . . . .

* * * *

Appendix A

EXCERPT OF DEFENDANTS' RESPONSE TO LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES DISTRICT COURT NORTHEN DISTRICT OF TEXAS DALLAS DIVISION, DATED NOVEMBER 16, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:02-CV-1152-M

ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., et al., On Behalf Of Itself and All Others Similarly Situated,

Lead Plaintiff,

vs.

HALLIBURTON COMPANY and DAVID J. LESAR,

Defendants.

DEFENDANTS' RESPONSE TO LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Respectfully submitted,

GODWIN PAPPAS RONQUILLO, LLP
/s/ Donald E. Godwin
Donald E. Godwin
State Bar No. 08056500
Marcos G. Ronquillo
State Bar No. 17226000
Jose L. Gonzalez
State Bar No. 08129100
Renaissance Tower
1201 Elm, Suite 1700
Dallas, Texas 75270-2084
Telephone: 214.939.4400
Facsimile: 214.760.7332

COUNSEL FOR DEFENDANT
DAVID J. LESAR

BAKER BOTTS L.L.P.
/s/ Robb L. Voyles
Robb L. Voyles
State Bar No. 20624100
Jessica B. Pulliam
State Bar No. 24037309
2001 Ross Avenue, Suite 600
Dallas, Texas 75201-2980
Telephone: 214.953.6500
Facsimile: 214.953.6503

Appendix A

David Sterling
State Bar No. 19170000
Rebecca Robertson
State Bar No. 00794542
Jeff McNabb
State Bar No. 24046406
One Shell Plaza
910 Louisiana
Houston, Texas 77002-4995
Telephone: 713.229.1234
Facsimile: 713.229.1522

COUNSEL FOR DEFENDANT HALLIBURTON COMPANY

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Appendix A

EXCERPT OF LEAD PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION, DATED DECEMBER 21, 2007

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:02-CV-1152-M

THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., *et al.*, On Behalf of itself and All Others Similarly Situated,

Lead Plaintiff,

v.

HALLIBURTON COMPANY, *et al.*,

Defendants.

LEAD PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR CLASS CERTIFICATION

Respectfully submitted,

BOIES, SCHILLER & FLEXNER LLP

/s/ David Boies
David Boies
333 Main Street
Armonk, NY 10504
Telephone: (914) 749-8200
Facsimile: (914) 749-8300

Caryl L. Boies, TSB # 02565420
Sashi B. Boruchow, FSB #0398276
401 E. Las Olas Blvd., Suite 1200
Ft. Lauderdale, FL 33301
Telephone: (954) 356-0011
Facsimile: (954) 356-0022

LEAD COUNSEL FOR LEAD PLAINTIFF, THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.

Additional counsel appear on signature page

* * *

[5]

II. LEAD PLAINTIFF HAS SATISFIED THE REQUIREMENTS OF RULE 23(b)(3)

Certification under Rule 23(b)(3) requires a plaintiff to establish that issues common to the class will predominate over issues affecting any individual class member, and

that a class action is superior to other available methods of adjudication. Defendants do not challenge that the class action mechanism is the superior vehicle for resolving the securities fraud claims alleged by Plaintiff in the Complaint. Defendants' sole challenge is that Plaintiff has failed to establish entitlement to rely on the fraud-on-the-market presumption, and therefore, that individual issues of reliance will predominate. Defendants are wrong.[7]

A. *Defendants Overstate Plaintiffs' Class Certification Burden.*

Pursuant to the Fifth Circuit's recent decision in *Oscar Private Equity Investments v. Allegiance*, 487 F.3d 261 (5th Cir. 2007), and as discussed in *Ryan v. Flowserve Corp.*, 245 F.R.D. 560 (N.D. Tex. 2007), in order to prevail upon the fraud-on-the-market presumption, a Plaintiff must now establish loss causation.[8] While *Allegiance*

7. Defendant David J. Lesar ("Lesar") cites no authority for his position that the class cannot be certified against him under these circumstances. Indeed, the authority is to the contrary. Courts in this circuit routinely certify securities fraud class actions against corporations and their officers collectively. *See e.g., Feder v. Elec. Data Syst. Corp.*, 429 F.3d 125 (5th Cir. 2005) (affirming certificationof class action by securities purchaser against corporation and its former CEO and CFO). Moreover, as shown below, the relevant misrepresentations were either authorized by Lesar, or made directly by him.

8. Defendants' Response does not dispute that the stock of Halliburton trades on an efficient market. An efficient market is by definition one in which "it is assumed that all public information concerning a company is known to the market and reflected in

raised the bar for class certification, it does not raise it to the extent that Defendants suggest.

1. The Impact of Defendants' Fraud Is Demonstrated Through Showing a Material Price Decline Following Partial Disclosure of the Fraud.

Defendants argue that to show loss causation Plaintiff must show a statistically significant price increase following a misrepresentation.[9] However, both *Greenberg v.* . . . .

* * * *

the market price of the Company's stock." *Greenberg Crossroads Systems, Inc.*, 364 F.3d 657, 661, n.6 (5th Cir. 2004) (*citing Blackie v. Barrack*, 524 F.2d 891, 907 (9th Cir. 1975)).

9. For instance, Defendants state: . . . .

Appendix A

EXCERPTS OF DEPOSITION OF LUCY ALLEN

[Allen]

* * *

[42] . . . economic loss in general terms.

Q. Assuming that that's accurate, why is looking at analyst reports important to that loss causation analysis?

A. Looking at analyst reports is one way of looking at what information is out there in the market.

Q. What is another way of looking at what information is out there in the market other than analyst reports?

A. Well, I think a look at information that's out there in the market you want to look at just analyst reports, you want to look at news stories and what the company is saying and information that is out there, public information. So one of the — what plaintiffs are doing in this case is using the fraud on the market theory and are claiming that Halliburton's stock price traded in an efficient market during the class period. If it trades in an efficient market, then the information is quickly impounded into the stock price, publicly information is quickly impounded in the [43] stock price. So it's helpful to look at what public information is out there. And that's the sort of analysis that Ms. Nettesheim is trying to support in her report.

Q. You used the term efficient market in that last answer, what does efficient market mean, as you use the term?

A. It means a number of different things. The efficient market that Ms. Nettesheim has tried to prove is sometimes called the semi-strong form of the efficient market hypothesis, It's the public information is quickly impounded into the stock price.

Q. In the work that you did, did you reach a conclusion one way or another as to whether the market for Halliburton stock was an efficient market, as you use that term?

A. I did not study whether the market for Halliburton was efficient or not. I was not asked to conduct that analysis.

Q. And would I be correct in saying that as you sit here now, you simply do not have a view one way or the other as to [44] whether the market for Halliburton stock is or is not efficient, as you use that term?

A. I would say that's correct.

Q. Prior to your work on this matter, had you attempted to make assessments as to whether the market for a particular stock was or was not efficient, as you use that term?

A. I've done some work before in analyzing market efficiencies, issues related to market efficiencies previously.

MR. BOIES: Can you read my question back.

(Record read.)

Q. What I'm asking is not have you done some work in the area, it's whether you've made an attempt to determine whether the market for a particular stock was or was not efficient, have you done that?

A. I don't know that I ever actually said precisely the market was or was not efficient or any one particular stock.

Q. Whether or not you've actually said it, have you ever done an analysis to determine it?

[45] A. As I said, I've analyzed issues related to market efficiency. So I have analyzed reports sometimes where an expert claims that there is information that supports market efficiency, but I don't believe I have ever—the question of yes, no, market efficiency, I don't think I have, in fact, ever addressed that question specifically.

Q. I think I understand that, I want to be sure. You understand that one of the things that Ms. Nettesheim did was to reach a conclusion as to whether, in her view, the market for Halliburton stock was or was not efficient?

A. Yes, that's my understanding.

Q. Have you ever tried to do that?

A. I don't think so, no.

Q. Let me go back to the matters that you considered in preparing your report. At the time you prepared your report, were you aware of statements that Halliburton had made concerning its asbestos exposure?

A. I'm sorry, can you repeat that.

* * *

[98] . . . Halliburton's stock price?

A. Around the time—around this time in December, I believe the price of Halliburton stock was falling because of uncertainty regarding asbestos and the change in the asbestos environment, as well as some recent and unexpected verdicts and judgments that related to Halliburton. And I also believe that there is at least some commentary from the analyst that the market reaction around the time was an overreaction, particularly the reaction around the December—around December 7.

Q. Did you reach any judgment or conclusion as to whether the market reaction was, in your terms, an overreaction?

A. I noted that there was a lot of commentary about it being an overreaction. So a lot of the analysts thought that it was an overreaction. I didn't particularly, other than noting that, make a determination about that.

Q. Other than noting that a lot of analysts in your testimony said that, you [99] didn't reach any conclusion

yourself about whether or not the drop in stock price in around December 7 was an overreaction?

A. I would say that's correct.

Q. Now, I asked you about the drop in price on December 7, and you said around this time various things were happening.

Did anything happen on December 7, that in your judgment caused the price of Halliburton stock to decline precipitously?

A. Let me just look back on that because—according to Ms. Nettesheim, there was a jury award of 30 million, a verdict against Dresser. I'm not sure if that actually came out on December 7. I think it actually came out earlier than that.

Q. Have you finished your answer?

A. Yeah. I'm just looking to see if I say it in my report. I know that some of the dates that Ms. Nettesheim claims are alleged curative disclosures that relate to verdicts and judgments on asbestos, the verdict or judgment didn't actually come out on the date that she claims. It actually came out a [100] couple of days earlier and I'm trying to see if this is one of those dates.

Q. My question to you is whether you have a judgment or conclusion as to whether anything happened on December 7 that caused Halliburton stock price to decline precipitously on that date?

A. Well, something that did happen, I believe on December 7, is that Moody's does downgrade them, downgrades Halliburton. And I think that is a negative piece of information regarding Halliburton.

Q. When did Moody's downgrade Halliburton, as you understand it?

A. I believe it's on December 7.

Q. Were they downgrading stock or the debt, as you understand it?

A. It's a credit rating, so it's usually the debt.

Q. What was the credit rating before and after what you say was this downgrade?

A. What was the actual change? I have a story here that changed the rating outlook from stable to negative.

[100] Q. Is it your understanding that stable and negative are Moody ratings?

A. They are ways that Moody—yes, not like the A, B type ratings but stable and negative are terms that Moody, yes, rates companies by, that's my understanding.

Q. Moody's has published ratings of company's debt, correct?

A. Yes.

Q. And those ratings of companies' debt are in the form of letter grades, correct?

A. Yes.

Q. And when Moody's talks about something be stable or negative, what they're doing is predicting changes in the ratings, the letter ratings, correct?

A. I don't know if — I'm not sure that's how I would describe it.

Q. Would you describe Moody's ratings as including references to stable and negative, if you would fine, I'm just trying to get your testimony about it?

A. Sometimes you talk about the

* * *

[114] Q. And that none of those companies is Halliburton?

A. Correct.

Q. And that the decline in Halliburton stock over those three trading days is nowhere mentioned in your report, correct?

A. I don't know if the decline is nowhere mentioned in my report, it's not on that table.

Q. Do you know what Halliburton's decline was over the three trading days that you selected?

A. Do I know as I sit here? No.

Q. If you can tell me by looking at your report, please do so, and tell me what pages you are referring to?

A. I don't think I have Halliburton's stock price.

Q. In your report, is that what you're saying?

A. Correct.

Q. In preparing your report even though you didn't put it in the report, in preparing your report, did you know what [115] Halliburton stock price decline had been over the combination of the three trading days that you reference here?

A. I certainly looked at Halliburton stock prices and the commentary from the analysts about the stock price movement. I don't know if I made an exact calculation of those three days.

Q. You made an exact calculation of those three days for these four other companies?

A. That's right. And actually the story may— that I show may, in fact, tell you what Halliburton stock price reaction is.

Q. What story is that?

A. I think I reference a news story that says that other—the Reuters News article—I don't show the whole Reuters News article.

Q. What Reuters News article are you pointing to?

A. I'm referring to what's referenced on page 39, Reuters News December 10, 2001, anxious investors sell stock of asbestos [116] defendants.

Q. And that report, at least as you've quoted it here says, that on December 10, Monday, other companies facing asbestos claims saw their stock price driven down because of the verdict against Halliburton, correct?

A. Correct.

Q. And that happened on Monday December 10, correct?

A. What happened?

Q. The reference here?

A. The article is on Monday, December 10, correct.

Q. And the article is talking about Monday, December 10, correct, when it says, the verdict spurred continued anxiety on Monday driving down shares of a disparate group of other companies facing asbestos claims, correct?

A. Correct. I'm not sure if—again, it's not—it does mention Monday, continued anxiety on Monday, so perhaps it mentioned prior anxiety on Friday.

[117] Q. You say perhaps, you mean the portions you didn't quote?

A. Correct, I don't.

Q. Do you know whether it did or not?

A. I don't, as I sit here. I did review this story again just yesterday but I don't recall.

Q. As you understand it, did anything other than the issue of asbestos exposure contribute to the decline in Halliburton stock on the three days that you have identified, three trading days that you identified in early December 2001?

A. I think the movement was primarily due to issues relating to asbestos and uncertainty and changing asbestos environment and this verdict. So I didn't see evidence of other new information and the Moody's downgrade, other new information affecting Halliburton's stock price.

Q. Now, the Moody's downgrade, was that, in your view, related to the information regarding asbestos exposure that was revealed in early December 2001?

[118] A. I think it's related to information regarding asbestos. I don't think it's related to the plaintiffs'

allegations in this matter. So I don't think the cause of the Moody's downgrade is curative of plaintiffs' alleged misrepresentations in this matter. I think it is related to asbestos.

Q. And what do you understand the plaintiffs' claim of misrepresentations about asbestos to be?

A. I think I have a quote about that in my report.

Q. Let me just try to get it in your own words right now.

What, as you sit here now, do you understand the basic allegation of the plaintiffs to be about the misrepresentation concerning asbestos exposure?

A. My understanding is that there was the reserves were—that at the beginning of the class period, the reserves that Halliburton had set on their books were misleading and known to be not true by [119] Halliburton.

Q. Do you understand that the plaintiffs make any other assertion of misrepresentations relating to asbestos?

A. Well, my understanding is that the plaintiffs' motion for class certification summarizes the allegations as relating to the asbestos reserves.

Q. My question is whether you understand plaintiffs to make any other allegation about asbestos misrepresentations other than what you've just said which is the beginning of the class period the reserves—

A. I think it's throughout the class period as well.

Q. At the beginning and throughout the class period, the reserves were inadequate.

As you understand it, did the plaintiffs make any other allegations or misrepresentations concerning asbestos?

A. I believe they fall into that same general category.

Q. What is the same general category?

A Of the inadequacy or the misleading [120] nature of the asbestos reserves.

Q. As you understand it, do the plaintiffs claim that one of the misrepresentations that Halliburton made was the assertion that Halliburton insurance should cover the majority of any future claims relating to asbestos?

A. That's not my understanding.

Q. Was it your understanding or is it your understanding that one of the misrepresentations that plaintiffs rely on is that Halliburton asserted in July of 2001 that the reserves, as added to by Halliburton at that time, represented their best judgment as to the potential exposure that Halliburton faced from asbestos?

MR. STERLING: Objection. Form of the question.

MR. RONQUILLO: Same objection.

A. That's my understanding that the claim was that was their best judgment for the pending claims.

Q. Is it your understanding that that's what the plaintiffs are alleging?

[121] A. Yes. And that's how the reserves were set, were based on the expected value, projected value of pending claims.

Q. And did you actually personally review what Halliburton said about asbestos exposure in its reserves?

A. In their filings? Yes, I did.

Q. And in their conference calls with analysts?

A. Yes. I tried to look at all statements regarding asbestos throughout the alleged class period that was in the market, as well as what the company said.

Q. Let me ask you to look at page 121, paragraph 177 of the complaint. This references a July 26, 2001 UBS Warburg analyst report.

Do you see that?

A. Yes.

Q. Did you look at that analyst report among the analyst reports you looked at?

A. I believe I did look at that.

Q. At the last three lines in the paragraph relate to a statement Mr. Lesar

* * * *

APPENDIX B — EXCERPT OF LETTER FROM BAKER BOTTS L.L.P. TO THE CLERK, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED MARCH 4, 2013

BAKER BOTTS L.L.P. [LETTERHEAD]

[1] March 4, 2013

063718.0675

BY E-FILING

Mr. Lyle W. Cayce
Clerk, U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Re: Letter Brief in No. 12-10544; *Erica P. John Fund, Inc. v. Halliburton Co.* (set for oral argument on March 6, 2013 before Davis, Graves, and Higginson, JJ.)

Dear Mr. Cayce:

The above-captioned case is set for oral argument on March 6, 2013 before Judges Davis, Graves, and Higginson. The panel directed the parties to file letter briefs of no more than seven pages addressing the Supreme Court's decision in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, No. 11-1085, 2013 WL 691001 (Feb. 27, 2013) (attached).

Appendix B

SUMMARY

The Supreme Court's rationale in *Amgen* confirms Halliburton's argument that a defendant must be allowed to rebut the fraud-on-the-market presumption, at the class-certification stage, with evidence that the alleged misrepresentations did not distort the market price. *Amgen* held that a plaintiff need not prove materiality in order to obtain class certification under the fraud-on-the-market theory, nor may a defendant defeat class certification by offering evidence that the alleged misrepresentations were not material. Materiality and price distortion are distinct concepts. The Supreme Court has expressly reserved the issue whether a defendant may rebut the presumption at the class-certification stage by showing the absence of market-price distortion, *see Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2186-87 (2011) ("*EPJ Fund*"), and its opinion in *Amgen* likewise did not address that issue.

The Court's reasoning in *Amgen* shows why price distortion—unlike materiality—must be considered at the class-certification stage. The Court declined to consider proof of materiality at class certification because materiality is an *element* of a Rule 10b-5 claim. Thus, if the alleged misrepresentation is immaterial, no plaintiff can ever succeed on an individual claim. Materiality, therefore, is not part of a plaintiff's Rule 23(b)(3) burden to show that common issues predominate because the absence of materiality will cause *all* individual plaintiffs' claims to fail as a matter of law.

Appendix B

* * *

. . . . . .

> [6] Materiality thus differs from the market-efficiency and publicity predicates *in this critical respect*: While the failure of common, classwide proof on the issues of market efficiency and publicity leaves open the prospect of individualized proof of reliance, the failure of common proof on the issue of materiality ends the case for the class and for all individuals alleged to compose the class.

Id. at **10-11 (emphasis added) (citations omitted). The Court concluded that "[b]ecause a failure of proof on the issue of materiality, unlike the issues of market efficiency and publicity, does not give rise to any prospect of individual questions overwhelming common ones, materiality need not be proved prior to Rule 23(b)(3) class certification." *Id.* at *11.

Finally, the Court reasoned that rebuttal evidence pertaining to materiality is irrelevant to class certification for the same reason that a plaintiff is not required to prove materiality in order to obtain certification. "[J]ust as a plaintiff class's inability to prove materiality creates no risk that individual questions will predominate, so even a definitive rebuttal on the issue of materiality would not undermine the predominance of questions common to the class." *Id.* at *15. The Court explained that *Basic* had considered the precise type of materiality evidence

proffered by Amgen and held that "proof of that sort was a matter for trial" or summary judgment. *Id.* at *15 & n.11. Consequently, the Court concluded that the district court "correctly reserved consideration of Amgen's rebuttal evidence for summary judgment or trial." *Id.*

B. It is undisputed that a defendant may rebut the presumption of reliance by showing that the alleged misrepresentations did not distort the market price. *See Basic*, 485 U.S. at 248. The question here is whether such evidence, when presented, must be considered at the class-certification stage. Because price distortion is in all critical respects analogous to market-efficiency and publicity—and different from materiality—*Amgen*'s rationale dictates that courts must consider rebuttal evidence pertaining to price distortion at the class-certification stage.

Under the *Amgen* framework, price-distortion evidence is central to whether a plaintiff can satisfy its burden to show that common questions predominate over individual ones, as required by Rule 23(b)(3). Indeed, throughout the entire *Amgen* analysis recounted above, one could substitute the words "price distortion" for the words "publicity and market efficiency" without changing the meaning of the Court's opinion.

Price distortion, unlike materiality and loss causation—which are off limits at class certification—is not an "indispensable element" of a Rule 10b-5 claim. *Amgen*, 2013 WL 691001, at *4 (listing elements); *EPJ Fund*, 131 S. Ct. at 2187 ("[L]oss causation is a familiar and

distinct concept in securities law; it is not price impact."). Instead, price distortion—like market efficiency and publicity—is principally relevant to whether an alleged misrepresentation has been transmitted through the market price, such that the class can be said to have relied on [7] the misrepresentation by relying on the market price. It makes perfect sense to group price distortion with publicity and market efficiency.

Because price distortion is not an essential element of a Rule 10b-5 claim, a successful rebuttal showing on price distortion would not automatically "end the case for one and for all" as a matter of law. *Amgen*, 2013 WL 691001, at *8. A price-distortion rebuttal would simply eliminate one *means* of proving the reliance element—the presumption of classwide reliance on a distorted market price. *See id.* at **10-11 (same for absence of publicity and market efficiency). A plaintiff who cannot show reliance via market-price distortion could still prevail by showing that "she was personally aware of the defendant's statement and engaged in a relevant transaction . . . based on that specific misrepresentation." *Id.* (internal quotation marks omitted) (same for absence of publicity and market efficiency). Such a plaintiff is identically situated to a plaintiff who cannot prove the public character of the misrepresentation—and therefore necessarily cannot show that the misrepresentation affected the market price. *See EP Medsystems, Inc. v. EchoCath, Inc.*, 235 F.3d 865, 871 (3d Cir. 2000) (plaintiff sufficiently alleged a 10b-5 claim against a publicly traded company even though it "d[id] not base its claim on public misrepresentations or omissions that affected the price of the stock"). The

Court declared that such a plaintiff could nonetheless bring an individual claim by showing actual reliance on the misrepresentation. *Amgen*, 2013 WL 691001, at *10.

What the Court in *Amgen* said about materiality simply cannot be said of price distortion—that "[a] failure of proof on the issue . . . establishes as a matter of law that the plaintiff cannot prevail on the merits of her Rule 10b-5 claim." *Id.* at *11; *see also id.* at *8 (Without proof of materiality, "*no claim would remain* in which individual reliance issues would predominate.") (emphasis added).

Unlike with materiality, in the absence of price distortion there is at least some possibility that individual plaintiffs could prove actual, as opposed to presumed, reliance on alleged misrepresentations. The absence of price distortion "leaves open the prospect of individualized proof of reliance" but defeats a class-wide claim. *Id.* at *11. Though individual claims may remain, the absence of price distortion defeats Rule 23(b)(3) certification for precisely the same reasons that the absence of market efficiency and publicity does.

As Halliburton has explained in its prior briefing, once the Fund established the necessary class-certification requisites of publicity and market efficiency (as it did here), Halliburton bore the initial rebuttal burden to make "any showing" severing the link between the misrepresentation and the market price. Halliburton made such a rebuttal by demonstrating the absence of price distortion. Therefore, under Federal Rule of Evidence 301, the Fund had the ultimate burden of proving that

the alleged misrepresentations in fact distorted the market price. Because the Fund failed to prove that any of Halliburton's alleged misrepresentations distorted the market price, individual issues of reliance predominate over common ones. For this reason, the Fund has failed to carry its burden under Rule 23(b)(3), and the class must be decertified.

[8] Sincerely,

/s/ Aaron M. Streett
Robb L. Voyles
Jessica B. Pulliam
John B. Lawrence
BAKER BOTTS L.L.P.
2001 Ross Avenue, Suite 600
Dallas, Texas 75201
(214) 953-6500
(214) 953-6503 (fax)

David D. Sterling
Aaron M. Streett
Benjamin A. Geslison
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002
(713) 229-1234
(713) 229-1522 (fax)

Counsel for Appellant Halliburton Co.

Appendix B

/s/ Donald E. Godwin (w/ perm.)
GODWIN RONQUILLO PC
Donald E. Godwin
Renaissance Tower
1201 Elm Street, Suite 1700
Dallas, Texas 75270
(214) 939-4400
(214) 760-7332 (fax)

R. Alan York
4 Houston Center
1331 Lamar Street, Suite 1665
Houston, Texas 77010
(713) 595-8300
(713) 425-7594 (fax)

Counsel for Appellant David Lesar

APPENDIX C — EXCERPT OF APPELLANTS' PETITION FOR REHEARING *EN BANC*, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MAY 24, 2013

Case No. 12-10544

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ERICA P. JOHN FUND, INCORPORATED,
formerly known as Archdiocese of Milwaukee
Supporting Fund, Inc., *On Behalf of Itself and*
All Others Similarly Situated,

Plaintiff-Appellee

v.

HALLIBURTON COMPANY AND DAVID LESAR,

Defendants-Appellants

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
No. 3:02-CV-1152-M (Lynn, J.)

APPELLANTS' PETITION FOR REHEARING *EN BANC*

Appendix C

GODWIN LEWIS PC
Donald E. Godwin
Renaissance Tower
1201 Elm Street, Suite 1700
Dallas, Texas 75270
(214) 939-4400
(214) 760-7332 (fax)

R. Alan York
4 Houston Center
1331 Lamar Street, Suite 1665
Houston, Texas 77010
(713) 595-8300
(713) 425-7594 (fax)

Counsel for Appellant David Lesar

BAKER BOTTS L.L.P.
Robb L. Voyles
Jessica B. Pulliam
John B. Lawrence
2001 Ross Avenue, Suite 600
Dallas, Texas 75201
(214) 953-6500
(214) 953-6503 (fax)

David D. Sterling
Aaron M. Streett
Benjamin A. Geslison
910 Louisiana Street
Houston, Texas 77002
(713) 229-1234
(713) 229-1522 (fax)

Counsel for Appellant Halliburton

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[14] . . . the contrary. *Schleicher v. Wendt*, 618 F.3d 679, 687-88 (7th Cir. 2010).[5]

A case of this importance—that is on remand from the Supreme Court; that interprets a recent Supreme Court opinion; that purports to overrule circuit precedent; and that implicates a circuit split—warrants the full court's review.

IV. *Basic*'s presumption of reliance should be overruled.

In *Amgen*, four Justices signaled a willingness to revisit *Basic*'s core holding that plaintiffs may invoke a presumption of reliance under the fraud-on-the-market theory. *See* 133 S. Ct. at 1204 (Alito, J., concurring); *id.* at 1208 n.4 (Thomas, J., dissenting). As Justice Alito noted, "more recent evidence suggests that the [*Basic*]

5. The Supreme Court disapproved of the Second and Third circuits' requirement that plaintiffs prove materiality to obtain class certification, *Amgen*, 133 S. Ct. at 1194, but did not address those circuits' separate holdings that a defendant may defeat class certification by showing the absence of price impact.

presumption may rest on a faulty economic premise." *Id*. at 1204. Moreover, allowing plaintiffs to obtain class certification based upon a "presumption" of classwide reliance is at war with the Court's recent holding that plaintiffs must "prove . . . *in fact*" that common issues predominate in order to obtain class certification. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The *Basic* presumption's conflict with modern class-certification principles is cast in especially sharp relief by the panel's holding, which renders [15] *Basic*'s "fundamental premise" irrebuttable at the class-certification stage.[6] A fictional "presumption" of common reliance, which is largely immune from challenge at the class-certification stage, cannot coexist alongside *Wal-Mart*'s insistence that "[a] party seeking class certification must affirmatively demonstrate his compliance with [Rule 23]." *See id*.

Similarly, *Basic* features a judicially created presumption layered onto a judicially created cause of action, when more recent doctrine favors leaving such innovation to Congress. *See, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-65 (2008). Finally, *stare decisis* concerns are at their nadir "in cases such as the present one involving procedural and evidentiary rules." *Payne v. Tenn.*, 501 U.S. 808, 828 (1991). *Basic*'s presumption of classwide reliance is ripe for reconsideration in this case.

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6. *See EPJ Fund*, 131 S. Ct. at 2186 (referring to "*Basic*'s fundamental premise—that an investor presumptively relies on a misrepresentation *so long as it was reflected in the market price*").

Appendix C

CONCLUSION

The Court should grant the petition for rehearing *en banc.*