No. 13-____

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

PETITION FOR A WRIT OF CERTIORARI

DAVID D. STERLING
AARON M. STREETT
Counsel of Record
BENJAMIN A. GESLISON
BAKER BOTTS L.L.P.
910 Louisiana St.
Houston, Texas 77002
(713) 229-1234
aaron.streett@bakerbotts.com

EVAN A. YOUNG
BAKER BOTTS L.L.P.
98 San Jacinto Blvd.
Austin, Texas 78701
(512) 322-2506

WM. BRADFORD REYNOLDS
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

1. Whether this Court should overrule or substantially modify the holding of *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), to the extent that it recognizes a presumption of classwide reliance derived from the fraud-on-the-market theory.

2. Whether, in a case where the plaintiff invokes the presumption of reliance to seek class certification, the defendant may rebut the presumption and prevent class certification by introducing evidence that the alleged misrepresentations did not distort the market price of its stock.

PARTIES TO THE PROCEEDINGS BELOW

Halliburton Company and David Lesar were the defendants in the district court, and the appellants in the court of appeals.

Erica P. John Fund, Inc. fka Archdiocese of Milwaukee Supporting Fund, Inc. was the plaintiff in the district court, and the appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Halliburton Company and David Lesar respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-22a), on remand from this Court, see *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179 (2011), is reported at 718 F.3d 423. The court of appeals' denial of rehearing (App., *infra*, 23a-25a), and the opinion of the district court (*id.* at 26a-31a), are unreported. The court of appeals' previous opinion (*id.* at 32a-53a) is reported at 597 F.3d 330. The district court's previous opinion (App., *infra*, 54a-99a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on April 30, 2013. The court denied rehearing *en banc* on June 11, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23 is reproduced at App., *infra*, 100a-107a.

PRELIMINARY STATEMENT

This case returns to the Court for the second time, presenting fundamental issues about the presumption of reliance created by a four-Justice majority in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). The presumption stemmed from the two-part economic theory that well-developed capital markets efficiently incorporate material information into a stock's market price and that investors, in turn, purchase stock in reliance on the market price to convey a company's true value. Under *Basic*, a putative class of investors need not prove that they actually relied in common on a misrepresentation in order to obtain class certification and prevail on the merits. Instead, they may invoke a classwide presumption of reliance based on the fiction that all investors relied on the misrepresentations when they purchased stock at a price distorted by the misrepresentations.

Basic's substitution of nascent economic theory for bedrock securities and class-action law was questionable from the start, as Justices White and O'Connor argued persuasively in dissent. Twenty-five years later, all doubt is gone; *Basic*'s theoretical framework has been subjected to withering scholarly and empirical attack. Four Justices recognized as much in *Amgen, Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013). See *id.* at 1204 (Alito, J., concurring); *id.* at 1208 n.4 (Thomas, J., joined by Scalia and Kennedy, JJ.,

dissenting). *Basic*'s naïve understanding of market efficiency and its simplistic view that market prices rationally convey information are at war with economic reality. Unsurprisingly, the lower courts struggle to apply *Basic*'s fictions to the facts of cases before them.

As troubling, *Basic*'s legal reasoning conflicts with this Court's insistence that class-action plaintiffs prove *in fact* that common issues predominate over individual ones. *Basic* concedes that individual reliance issues in fact predominate in most securities-fraud class actions, yet it creates a fictional presumption of reliance to enable collective claims. No reason—certainly not *Basic*'s embattled economic theory—justifies exempting securities class actions from the requirements of Rule 23.

Accordingly, the Court should overrule *Basic* or at least substantially modify the threshold for invoking a presumption of reliance. Plaintiffs currently obtain class certification principally by showing that a defendant's stock traded in an "efficient market"—a showing readily made for NYSE-listed stocks. But scholarly consensus now teaches that even in such well-developed markets, stock prices do not efficiently incorporate all types of information at all times. Because the presumption of reliance posits that investors rely in common on misrepresentations by relying on a market price that was distorted by the misrepresentations, plaintiffs seeking class certification should at least be required to prove that the alleged misrepresentations *actually* distorted the market price. This approach would more closely align the presumption of reliance with economic reality and with a plaintiff's burden under Rule 23 to show that common issues in fact predominate.

The decision below illustrates the anomalies that have flowed from *Basic*. The court of appeals, despite having acknowledged that no Halliburton misrepresentation affected its stock price, affirmed class certification under

Basic's presumption of classwide reliance. Although *Basic* assures that defendants may rebut the presumption of reliance by showing the absence of price distortion, 485 U.S. at 248, the court below believed that it was prohibited from considering such evidence at the class-certification stage. This Court specifically reserved that precise question in *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2187 (2011), and the decision below deepens a circuit split on it. Even if the Court is not inclined to overrule *Basic*, it should nonetheless grant certiorari to clarify that price distortion—*Basic*'s "fundamental premise," *id.* at 2186—may be rebutted at the class-certification stage.

STATEMENT

I. BACKGROUND

Respondent Erica P. John Fund, Inc. (the Fund) is lead plaintiff in this securities-fraud class action against Petitioners Halliburton Company and its CEO David Lesar. App., *infra*, 2a. The Fund alleges three categories of misrepresentations. *Id.* at 3a. These concern Halliburton's (1) potential liability in asbestos litigation; (2) accounting for revenue on fixed-price construction contracts; and (3) potential benefits of a merger with Dresser Industries. *Ibid.* The Fund contends investors lost money when Halliburton's stock price dropped following the release of negative news that touched on one of more of the categories of misrepresentations. *Ibid.*

The Fund relies upon the judicially-created action that this Court fashioned from Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and from SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. See *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341 (2005). To prevail on the merits, the Fund is required to prove the following elements: (1) a material misrepresentation (or omission); (2) scienter; (3) a connection with the purchase or sale of a se-

curity; (4) reliance; (5) economic loss; and (6) loss causation, *i.e.*, that the misrepresentation caused the alleged loss. *Id.* at 341-342.

To obtain class-action status, the Fund must also satisfy Federal Rule of Civil Procedure 23(a) and one of the Rule 23(b) requirements. The Fund sought certification under Rule 23(b)(3), which requires a plaintiff to show that "the questions of law or fact common to class members predominate over any questions affecting only individual members." The Fund was required to "affirmatively demonstrate * * * compliance" with this requirement by "prov[ing] * * * *in fact*" through "evidentiary proof" that common issues predominate. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011); *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432 (2013).

The Fund relied exclusively on this Court's opinion in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). In *Basic*, the Court recognized that under traditional principles of fraud and class certification, a securities-fraud plaintiff could rarely establish Rule 23(b)(3)'s predominance requirement. 485 U.S. at 230, 242; *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011) ("*EPJ Fund*"). For if each member of the proposed class were required to prove that he actually relied on defendant's misrepresentations in purchasing stock, "individual issues" would "overwhel[m] the common ones." *Basic*, 485 U.S. at 242.

To remedy this perceived problem, the four-Justice majority[1] declared that a putative class-action plaintiff may obtain a "rebuttable presumption" of classwide reliance by invoking the "fraud-on-the-market" theory. *Id.*

[1] Only Justices Brennan, Marshall, and Stevens joined Justice Blackmun's opinion creating the presumption of reliance. Justices White and O'Connor dissented. Chief Justice Rehnquist and Justices Scalia and Kennedy did not participate. *Basic*, 485 U.S. at 225.

at 242, 247. That theory assumes that in an efficient, well-developed market all public information about a company is known to the market and reflected in the company's stock price. *Id.* at 246. The theory further posits that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of [the market] price." *Id.* at 247. Accordingly, "if a market is shown to be efficient, courts may presume that investors who traded securities in that market relied on public, material misrepresentations regarding those securities." *Amgen, Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1192 (2013).

To trigger the presumption of reliance at the class-certification stage, the plaintiff must show that (1) the misrepresentations were made publicly; (2) the defendant's shares were traded in an efficient market; and (3) the plaintiff traded shares between the time the misrepresentations were made and the time the truth was revealed. *Id.* at 1198; *EPJ Fund*, 131 S. Ct. at 2185. These "threshold facts," *Basic*, 485 U.S. at 248, establish that the "investor presumptively relie[d] on [the] defendant's misrepresentation if that information [was] reflected in the market price of the stock at the time of the transaction." *EPJ Fund*, 131 S. Ct. at 2186 (quotation omitted).

Basic provides, however, that the defendant may "rebut the presumption of reliance" with "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." 485 U.S. at 248. As relevant here, the defendant may rebut the presumption by "show[ing] that the misrepresentation in fact did not lead to a distortion in price." *Ibid.* Such rebuttal breaks the "causal connection" because "the basis for finding that the fraud had been transmitted through [the] market price would be gone." *Ibid.* In other words, a misrepresentation that "does not affect market price

* * * cannot be relied upon indirectly by investors who, as the fraud-on-the-market theory presumes, rely on the market price's integrity." *Amgen*, 133 S. Ct. at 1195.

II. Proceedings Below

A. Initial proceedings in the district court

The Fund sought to certify a class of all purchasers of Halliburton stock between June 1999 and December 2001. At that time, the Fifth Circuit required a plaintiff to prove "loss causation" to invoke the fraud-on-the-market presumption of reliance. See *Oscar Private Equity Invs.* v. *Allegiance Telecom, Inc.*, 487 F.3d 261, 267-269 (5th Cir. 2007). "Loss causation * * * requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss." *EPJ Fund*, 131 S. Ct. at 2186.

The district court denied class certification because the Fund failed to establish loss causation. As part of its analysis, the district court observed that the Fund did "not point to *any* stock price increases resulting from positive misrepresentations." App., *infra*, 58a n.11.

B. The court of appeals' initial decision

The Fifth Circuit affirmed. It explained that to prove loss causation, the plaintiff must first show that the misrepresentations "actually moved the market." App., *infra*, 35a. For a plaintiff who relies solely on price declines following the release of negative news—as the Fund does—to make this showing, the evidence regarding the price decline must "raise an inference that the price was actually affected by earlier alleged misrepresentations." *Id.* at 37a. To raise that inference, the plaintiff must show that the price decline was caused by a "correction to a prior misleading statement." *Id.* at 36a. The court concluded that none of the misrepresentations or disclosures satisfied these tests and therefore the Fund failed to prove loss causation. *Id.* at 42a-53a.

C. This Court's opinion

This Court granted the Fund's petition for certiorari. Halliburton conceded that a plaintiff need not prove loss causation—price impact *plus* a subsequent loss caused by the fraud—to invoke *Basic*'s presumption of classwide reliance. *EPJ Fund*, 131 S. Ct. at 2186. Halliburton argued instead that it had defeated class certification simply by showing the absence of "price impact"—*i.e.*, that the alleged misrepresentation did not affect the market price of the stock in the first place. *Id.* at 2186-2187. Halliburton noted that *Basic* permits a rebuttal "show[ing] that the misrepresentation in fact did not lead to a distortion in price." 485 U.S. at 248. Thus, Halliburton contended, the lower courts properly denied certification because, in the course of their "loss causation" analysis, they concluded that the alleged misrepresentations did not affect the market price.

This Court vacated the denial of class certification, holding that a plaintiff need not show "loss causation" to invoke *Basic*'s presumption of classwide reliance. The Court explained that "[l]oss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock." *EPJ Fund*, 131 S. Ct. at 2186.

The Court reaffirmed that "[u]nder *Basic*'s fraud-on-the-market doctrine, an investor presumptively relies on a defendant's misrepresentation *if that 'information is reflected in [the] market price' of the stock* at the time of the relevant transaction." *Ibid.* (quoting *Basic*, 485 U.S. at 247) (emphasis added). While the *Basic* presumption focuses on price impact at the time of the transaction, "[l]oss causation, by contrast, requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss." *Ibid.* Consequently, an investor may have "purchased the stock at a distorted price, and thereby presumptively

relied on the misrepresentation reflected in that price," yet "not be able to prove loss causation." *Ibid.* For these reasons, the court of appeals' loss-causation rule "contravene[d] *Basic*'s fundamental premise—that an investor presumptively relies on a misrepresentation *so long as it was reflected in the market price* at the time of his transaction." *Ibid.* (emphasis added).

The Court acknowledged and summarized Halliburton's argument that it was entitled to rebut the presumption of reliance—and thereby defeat class certification—by showing an absence of "price impact." *Id.* at 2187. The Court declined to reach that issue, however, concluding only that "the Court of Appeals erred by requiring EPJ Fund to prove loss causation at the certification stage." *Ibid.* The Court "d[id] not * * * address any other question about *Basic*, its presumption, or how and when it may be rebutted." *Ibid.* The Court remanded so that Halliburton's price-impact argument could "be addressed in the first instance by the Court of Appeals." *Ibid.*

D. Proceedings on remand

1. The court of appeals remanded to the district court, see App., *infra*, 4a, which certified the class. The five-page certification order contained only one sentence implicitly rejecting Halliburton's argument that it could rebut the classwide presumption of reliance by showing the absence of price impact: "The fraud-on-the-market theory applies to this case, so proof of each individual class member's reliance is not required." *Id.* at 30a.

2. The court of appeals granted leave to appeal. Just before oral argument, this Court issued its decision in *Amgen*, 133 S. Ct. 1184, holding that plaintiffs need not establish that misrepresentations were material to gain class certification via the presumption of reliance. Four Justices in *Amgen* signaled their willingness to recon-

sider the validity of *Basic*'s presumption of reliance. 133 S. Ct. at 1204 (Alito, J., concurring); *id.* at 1208 n.4 (Thomas, J., joined by Scalia and Kennedy, JJ., dissenting).

The court of appeals affirmed the district court's order certifying the class. The court identified "[t]he pivotal question in this case [as] whether a defendant should be permitted to show the absence of price impact at the class certification stage * * * to establish that common issues among class members do not predominate and that class certification is inappropriate." App., *infra*, 5a. The court acknowledged that *Amgen* prohibited consideration of materiality at the class-certification stage "because materiality is an element of every fraud claim" and thus "[t]he absence of materiality 'ends the case for one and for all.'" *Id.* at 17a (quoting *Amgen*, 133 S. Ct. at 1196). Consequently, a decision on materiality could never cause individual questions to predominate.

The court further recounted that *Amgen* requires certain fraud-on-the-market prerequisites to be considered at class certification, including market efficiency and whether the misrepresentation was made publicly. *Id.* at 11a-12a (citing *Amgen*, 133 S. Ct. at 1198-1199). These issues are proper subjects for a class-certification inquiry because they are not Rule 10b-5 elements and thus "[a] plaintiff can fail to establish publicity [or] market efficiency * * * and therefore lose the class-wide presumption of reliance, but still establish individual reliance and prove fraud." *Id.* at 12a (citing *Amgen*, 133 S. Ct. at 1198-1199).

The court of appeals conceded that price impact is not an element of a Rule 10b-5 claim, App., *infra*, 17a, but it nonetheless held that price impact is more analogous to materiality than it is to publicity and market efficiency. The court reasoned that while price impact is not an element, "a plaintiff must nevertheless prevail on this fact in order to establish [the element of] loss causation." *Ibid.*

Thus, according to the court, "if Halliburton were to successfully rebut the fraud-on-the-market presumption by proving no price impact, the claims of all individual plaintiffs would fail because they could not establish an essential element of the fraud action." *Id.* at 18a. Because the court of appeals believed that the absence of price impact would doom all individual claims, it concluded that price impact is not relevant to common-issue predominance and therefore is off-limits at class certification. *Ibid.* Consequently, the court of appeals refused to consider "the extensive evidence of no price impact offered by Halliburton." *Id.* at 19a n.11.

3. Halliburton sought rehearing *en banc*, arguing that (1) the court erred in forbidding price-impact evidence at class certification, in conflict with the Second and Third Circuits; and (2) *Basic* v. *Levinson* should be overruled, as suggested by four Justices in *Amgen.* The court denied rehearing. App., *infra*, 23a-25a.

REASONS FOR GRANTING THE PETITION

Basic v. *Levinson* should be overruled. The *Basic* majority erred by substituting economic theory for law—and bad economic theory at that. In the years since *Basic*, scholars have roundly rejected its approach to market efficiency. Meanwhile, *Basic*'s legal framework has proven unworkable in the lower courts and inconsonant with this Court's recent decisions. Relying on an acknowledged fiction, *Basic* allows certification of internally disparate classes that would not be tolerated outside of the securities-fraud context. As a judge-made rule that generates no societal reliance interests, *Basic*'s presumption is ripe for reconsideration.

At a minimum, certiorari is warranted to resolve a circuit split regarding whether a defendant may defeat class certification by showing that alleged misrepresentations did not affect stock price. The Court specifically flagged

this question when it last reviewed this case, and the circuit split has only deepened since. The price-impact issue is especially salient here, as the court of appeals previously found that none of Halliburton's alleged misrepresentations distorted the market price of its stock.

I. THIS COURT SHOULD OVERRULE *BASIC* V. *LEVINSON*

No party in *Amgen* asked the Court to reconsider *Basic*. Four Justices nonetheless recognized that, in a case where a party does raise that argument, this Court may need to "to revisit *Basic*'s fraud-on-the-market presumption" because "[t]he *Basic* decision itself is questionable." *Amgen*, 133 S. Ct. at 1208 n.4 (Thomas, J., joined by Scalia and Kennedy, JJ., dissenting); *id.* at 1204 (Alito, J., concurring) ("reconsideration of the *Basic* presumption may be appropriate" because "more recent evidence suggests that the presumption may rest on a faulty economic premise").[2]

This case provides the opportunity to decide whether *Basic* should be overruled. It should be, because *Basic*'s central economic premise—the efficient capital markets hypothesis—has been almost universally repudiated. *Basic*'s legal reasoning is as out of step with modernity as its economic theory. Its substitution of a judicially-created presumption for the traditional element of reliance vastly expanded a judicially-created cause of action. And its use of a presumption of common reliance to facilitate class actions is in grave tension with current Rule 23 case law that requires common-issue predominance to be proven, not presumed.

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[2] Indeed, all nine Justices recognize the instability in *Basic*'s theoretical foundation. The *Amgen* majority acknowledged "modern economic research tending to show that market efficiency is not 'a binary, yes or no question,' but instead operates differently depending on the information at issue." 133 S. Ct. at 1197-1198 n.6 (citation and internal quotation marks omitted).

A. *Basic* is premised on economic theory that is now roundly rejected

In creating its presumption of reliance, *Basic* invoked "considerations of fairness, public policy, and probability, as well as judicial economy," 485 U.S. at 245, and "common sense." *Id.* at 246. It trusted in the accuracy of then-"[r]ecent empirical studies," *id.* at 246 & n.24, to engraft the efficient capital markets hypothesis into federal securities law. Under that hypothesis, "the market price of shares traded on well-developed markets reflects all publicly available information, and hence any material misrepresentations." *Id.* at 246.

At the time, those "[r]ecent" studies justified at least some confidence in the hypothesis, and the Court noted "[c]ommentators['] general[] * * * applau[se]" for lower courts' then-recent adoption of the fraud-on-the-market theory. *Id.* at 247 (citing two student notes and one law-review article). But the virtually universal conclusion after *Basic* has been that the Court prematurely adopted a nascent and unexplored theory, which has subsequently been discarded. When a decision proves "unworkable or * * * badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). There is no reason to maintain the fictional presumption of reliance where it has been shown inconsistent with the considerations of probability, common sense, and judicial economy that motivated it.

1. Academics have largely given up on *Basic*'s economic premises. Criticism began immediately, as "each formulation of the [efficient capital market hypothesis] * * * c[a]me under sustained empirical and theoretical attack." Ayres, *Back to* Basics*: Regulating How Corporations Speak to the Market*, 77 Va. L. Rev. 945, 967 (1991). The consensus built over the decades, leading a preeminent scholar to recently (and understatedly) observe that "[d]oubts about the strength and pervasive-

ness of market efficiency are much greater today than they were in the mid 1980s." Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 175 (2009).

The reason for this development is practical and empirical. *Basic* posits that a well-developed market efficiently incorporates all public information and "transmits information to the investor in the processed form of a market price," such that "the value of the stock is worth the market price." 485 U.S. at 244 (quotation omitted). This efficient-market hypothesis showed early promise, but "empirical research became more specialized and sophisticated, and evidence of potential inefficiencies began to accumulate. * * * There are now hundreds of papers documenting pricing anomalies, even for the most actively traded common stocks." Cornell, *Market Efficiency and Securities Litigation*, 6 Va. L. & Bus. Rev. 237, 243-244 (2001).

In other words, "[t]he fraud-on-the-market (FOTM) cause of action just doesn't work. At least that is the consensus view among academics respecting the primary class action vehicle under the federal securities laws." Bratton & Wachter, *The Political Economy of Fraud on the Market*, 160 U. Pa. L. Rev. 69, 72 & n.1 (2011) (describing how even the views of *Basic*'s academic proponents have evolved in recent years). The *Basic* presumption "seemed like a good idea at the time. But FOTM simply did not work in practice. The consensus to that effect is notable in itself because big-ticket causes of action tend to have squads of academic cheerleaders." *Id.* at 74.

Real-world experience has crippled the theoretical underpinnings of *Basic.* "Implicit in the notion of an efficient market—even a mechanically efficient market as courts understand the securities market to be—is the assumption that the market acts rationally." Fisher, *Does*

the Efficient Market Theory Help Us Do Justice in a Time of Madness?, 54 Emory L.J. 843, 898 (2005). But a "goodly section of academic thought now challenges" this core tenet of *Basic*, *id.* at 899, because too many recent events disprove it. "During the [1998-2001 technology] bubble, the market professionals imposed no such rationality, and in fact the market acted irrationally, with stock prices far away from fundamental values. These developments dissolved the link between the efficient market theory and the normative notions underlying 10b-5 elements." *Id.* at 847. The "economic crisis" of 2008 even further "undermine[d] 'efficient markets theory.'" Posner, *On the Receipt of the Ronald H. Coase Medal*, 12 Am. L. & Econ. Rev. 265, 278 (2010). See generally Justin Fox, *The Myth of the Rational Market: A History of Risk, Reward, and Delusion on Wall Street* (2009) (discussing the state of efficient-market theory in the wake of 2008 crisis).

Basic's efficient-market theory depends heavily on "market professionals" who "generally consider most publicly announced material statements about companies, thereby affecting stock prices." 485 U.S. at 247 n.24. But "both the caselaw and economic literature" now reflect that market makers and stock analysts do not guarantee efficiency. *Bell* v. *Ascendant Solutions, Inc.*, 422 F.3d 307, 315 & nn.16-17 (5th Cir. 2005). Courts and scholars have found that "the number of market makers [does] not marginally contribute to distinguishing between efficient and inefficient firms." Barber et al., *The Fraud-on-the-Market Theory and Indicators of Common Stock's Efficiency*, 19 J. Corp. L. 285, 307 (1994); see *Unger* v. *Amedisys, Inc.*, 401 F.3d 316, 324 (5th Cir. 2005) (collecting cases). And the Internet bubble taught that analysts are often "behaviorally biased" by conflicts of interest and thus may "contribut[e] to market *ineffi-*

ciency by statistically biasing price changes." Fisher, *supra*, at 972 (emphasis added); *id.* at 967-972.

2. A central problem with *Basic* is that "efficiency is not a binary, yes or no question." Langevoort, *supra*, at 167. Asking whether or not a stock "trade[s] on an efficient market," *Basic*, 485 U.S. at 248 n.27, has almost no real meaning, because efficiency is rarely uniform even for a single stock. "A stock might trade efficiently some of the time, for some information types, but then trade inefficiently at other times, for other information types." Rapp, *Rewiring the DNA of Securities Fraud Litigation:* Amgen*'s Missed Opportunity*, 44 Loy. U. Chi. L.J. 1475, 1484 (2013). "Information that is easy to understand and is trumpeted in the business media * * * may be incorporated into market prices almost instantaneously." Stout, *The Mechanisms of Market Inefficiency*, 28 J. Corp. L. 635, 656 (2003). "But information that is 'public' but difficult to get hold of * * *, complex[,] or requires a specialist's knowledge to comprehend may takes weeks or months to be fully incorporated into prices." *Ibid.* "Indeed it may never be incorporated at all." *Ibid*. Yet *Basic* relies upon an outdated binary conception of efficiency: "[I]f a market is shown to be efficient, courts may presume" investors' reliance on *all* "public, material misrepresentations regarding those securities," *Amgen*, 133 S. Ct. at 1192, without requiring plaintiffs to first prove that the market price actually incorporated the misrepresentations alleged in the case.

Even those scholars who may favor the result in *Basic* now repudiate *Basic*'s economic premise, precisely because efficiency is far from a binary question. See, *e.g.*, Black, *Behavioral Economics and Investor Protection*, 44 Loy. U. Chi. L.J. 1493, 1500 (2013). For instance, "the market did not react to publicly available information about the impact of a breakthrough in cancer research on a corporation until the New York Times wrote about it

more than five months after the original release." *Ibid.* Similarly, Wall Street Journal reports on insider trades appear to quickly affect a stock's trading price, despite *days-earlier* disclosure of the same information by the SEC. See Chang & Suk, *Stock Prices and the Secondary Dissemination of Information*, 33 Fin. Rev. 115, 115-117 (1998). See also *In re Merck & Co. Sec. Litig.*, 432 F.3d 261, 263-271 (3d Cir. 2005) (similar example of Journal report affecting the price weeks after the information was publicly released in a complicated SEC filing). "Because the notion of information efficiency upon which the fraud-on-the-market presumption rests is crumbling under sustained academic scrutiny, the future of securities fraud class action litigation—dependent on this presumption—may be in jeopardy." Black, *supra*, at 1502.

Because *Basic* subjects litigants to "the misleading notion of binary efficiency," Cornell, *supra*, at 250, it is both under- and overinclusive. If a stock typically does not efficiently incorporate information or trades in an underdeveloped market, defendants who made specific misrepresentations that affected the stock price immediately may escape class certification and even substantial liability. See, *e.g.*, *Bell.*, 422 F.3d at 316 & n.18 (rejecting class certification because price decline following alleged corrective disclosure was insufficient to prove market efficiency); *Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 364 n.*, 368 (4th Cir. 2004) (similar). But if a stock trades on a market that is generally efficient (or at least well-developed), that mere fact says nothing about whether it was efficient with respect to a particular misrepresentation—whether the market in fact incorporated the information or not. "[T]reating market efficiency in a binary manner," unsurprisingly, "often makes case law irreconcilable with the actual behavior of the markets." Cornell, *supra*, at 255. Such a clumsy tool, based on an economic fallacy, should not retain this Court's imprimatur.

3. Scholarship and experience have borne out Justice White's prescient dissent (joined by Justice O'Connor), not the reasoning of the four Justices in the *Basic* majority:

> [T]he fraud-on-the-market theory is a mere babe. Yet today, the Court embraces this theory with the sweeping confidence usually reserved for more mature legal doctrines. In so doing, I fear that the Court's decision may have many adverse, unintended effects as it is applied and interpreted in the years to come.
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> * * *
>
> For while the economists' theories which underpin the fraud-on-the-market presumption may have the appeal of mathematical exactitude and scientific certainty, they are—in the end—nothing more than theories which may or may not prove accurate upon further consideration.

Basic, 485 U.S. at 250-251, 254.

Beyond his discomfort with adopting *any* unproven theory into law, Justice White presaged what scholars later would say. "If investors really believed that stock prices reflected a stock's 'value,' many sellers would never sell, and many buyers never buy." *Id.* at 256. Given the scholarly consensus undercutting *Basic*'s brand of efficient-market theory, the presumption should no longer be regarded as an adequate proxy for the actual reliance that fraud claims traditionally require.

At the least, the presumption should be refashioned to require affirmative proof that the market price was distorted by the particular misrepresentations at issue. It makes scant sense to certify enormous "fraud-on-the-market" class actions based on disproven notions of gen-

eral efficiency without inquiring whether the market was actually defrauded by the alleged misrepresentations.[3]

B. Because of *Basic*'s faulty foundation, federal courts have struggled to apply it, and state courts have refused to adopt it

Basic's inapt approach to market efficiency is matched by its threat to judicial efficiency. Justice White warned that "[c]onfusion and contradiction in court rulings are inevitable when traditional legal analysis is replaced with economic theorization by the federal courts." *Basic*, 485 U.S. at 252. We have seen that occur in this instance.

1. Courts have struggled to apply *Basic*. Because *Basic*'s binary approach to market efficiency is unsound and not susceptible to principled application, there has inevitably been a "high level of inconsistency in the courts regarding what makes a market sufficiently efficient to trigger the fraud-on-the-market presumption." Rapp, *supra*, at 1484.

Federal courts often use the well-known *Cammer* factors to assess market efficiency,[4] but those factors are

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[3] *EPJ Fund* hints at making price impact a threshold showing for the presumption. 131 S. Ct. at 2186 ("Under *Basic*'s fraud-on-the-market doctrine, an investor presumptively relies on a defendant's misrepresentation *if that information is reflected in [the] market price* of the stock at the time of the relevant transaction.") (emphasis added). Scholars concur. See Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 U. Pa. L. Rev. 851, 899 (1992) ("[t]he only important question is whether the price was distorted," not "determining what is or is not a truly efficient market"); Macey et al., *Lessons From Financial Economics: Materiality, Reliance, and Extending the Reach of* Basic *v.* Levinson, 77 Va. L. Rev. 1017, 1018 (1991) ("[W]hat determines whether investors were justified in relying on the integrity of the market price is not the efficiency of the relevant market but rather whether a misstatement distorted the price of the affected security.")

[4] See *Cammer* v. *Bloom*, 711 F. Supp. 1264 (D.N.J. 1989).

themselves indeterminate and frequently correlated with each other. Courts cannot help but arrive at "a massive hodgepodge of * * * outcomes." Ferillo et al., *The "Less Than" Efficient Capital Markets Hypothesis: Requiring More Proof from Plaintiffs in Fraud-on-the-Market Cases*, 78 St. John's L. Rev. 81, 102 (2004). "*Basic*'s obfuscation about the role of efficiency sent the [lower] courts off on a long journey without a particularly good compass." Langevoort, *supra*, at 167.

As Judge Scirica recently lamented, the *Basic* majority's "inject[ion] [of] nascent economic theory into legal doctrine" has, as Justice White's dissent predicted, led to "'[c]onfusion and contradiction in court rulings.'" *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 632-633 (3d Cir. 2011) (quoting *Basic*, 485 U.S. at 252). A decision that has so thoroughly "defied consistent application by the lower courts" is not worth preserving. *Payne*, 501 U.S. at 830.

2. The actions of state courts—which are not bound by *Basic*—speak as loudly as the confusion emanating from federal courts. Twelve years after *Basic* was decided, "*no state court* with the authority to consider whether *Basic* is persuasive has chosen to apply it" under state law. *Kaufman* v. *i-Stat Corp.*, 754 A.2d 1188, 1198 (N.J. 2000) (emphasis added). That is because "the persuasiveness of [*Basic*'s] intellectual underpinning, the Efficient Capital Market Hypothesis," has been found wanting. *Ibid.* State courts have concluded that "[a]s more time has passed, and there has been greater opportunity to examine and test market efficiency, the hypothesis has shown greater weakness." *Ibid.*

So far as petitioners know, no states since 2000 have bucked the uniform trend of rejecting *Basic*'s analysis. Indeed, states have continued to disavow *Basic*. See, *e.g.*, *Manzo* v. *Rite Aid Corp.*, No. Civ. A 18451-NC, 2002 WL 31926606, at *4 (Del. Ch. Dec. 19, 2002) ("plaintiff cannot rely on a presumption of reliance based on a type of

'fraud on the market' theory because the [Delaware] Supreme Court has determined that Delaware does not recognize such a claim"), aff'd, 825 A.2d 239 (Del. 2003).

C. *Basic*'s "presumption" that common issues of reliance predominate is inconsistent with this Court's recent class-certification jurisprudence

The case for overruling *Basic* goes beyond its substitution of now-discredited economic theory for the once-indispensable reliance element of a fraud claim. The application of *Basic*'s presumption of reliance to facilitate class actions coexists uncomfortably with this Court's recent, more rigorous approach to class certification.

Even before *Basic*, this Court admonished that "actual, *not presumed*, conformance with [Rule 23] remains * * * indispensable." *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 160 (1982) (emphasis added). By allowing courts to presume common reliance, the Court departed from this principle in *Basic*, and the conflict has only become starker since.

In *Wal-Mart Stores, Inc.* v. *Dukes*, for example, this Court emphasized that plaintiffs must "affirmatively demonstrate * * * compliance" with Rule 23, and thereby "prove * * * *in fact*" that common issues predominate before a district court may certify a class. 131 S. Ct. 2541, 2551 (2011). The Court reiterated these principles in *Comcast Corp.* v. *Behrend*, holding that certification is improper when proponents do not actually "satisfy" the predominance requirement with "evidentiary proof." 133 S. Ct. 1426, 1432 (2013).

In *Wal-Mart*, the Court considered "statistical evidence about pay and promotional disparities" and sociological testimony that Wal-Mart's culture "was vulnerable to gender discrimination." 131 S. Ct. at 2549 (quotation marks omitted); *id.* at 2553-2556. But the Court concluded that this evidence did not establish that Wal-Mart

in fact had a common policy of discrimination that similarly affected all class members.

Likewise, in *Comcast*, this Court held that the lower court erred in refusing to address "whether the methodology" that allegedly established predominance of common issues "'[was] a just and reasonable inference or speculative.'" *Comcast*, 133 S. Ct. at 1433. The Court rejected an analytical framework by which "*any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be." *Ibid.* The Court explained that "[s]uch a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Ibid.*

Basic's approach to class certification could not be more different. *Basic* openly acknowledges that without a "presumption" of classwide reliance, individualized issues would in fact predominate. 485 U.S. at 242. Yet it allows courts to presume predominance in the face of these facts. And the presumption is at best a "speculative" and "arbitrary" stand-in for real common reliance, not a methodology capable of demonstrating that common reliance questions in fact predominate. If expert testimony and economic models are insufficient to show that common issues truly predominate, a bare presumption that all agree is unrelated to *actual* common reliance cannot coexist with Rule 23. At the very least, *Basic*'s outdated economic theory should undergo the searching scrutiny given to the methodologies proffered to establish predominance in *Wal-Mart* and *Comcast.*[5]

Under *Basic*, putative plaintiff classes bringing Rule 10b-5 claims are given special solicitude available to no

[5] The distance from traditional Rule 23 principles is even greater still under the decision below: If courts turn a blind eye to price-impact evidence, there is no basis even to *presume* that investors commonly relied on the misrepresentation by relying on the market price.

one else—immunity from the very Rule 23 principles articulated in cases like *Wal-Mart* and *Comcast*. That shortcut was perhaps understandable when *Basic* was decided—a time when many courts did not require plaintiffs to establish "in fact" that Rule 23's requisites were satisfied. See Bone & Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1266 & n.54 (2002) (collecting cases "requiring a certification analysis focused on allegations rather than evidence"). But this anomaly should not survive after *Wal-Mart* and *Comcast.* "*[S]tare decisis* cannot possibly be controlling when * * * the decision in question has * * * [had] its underpinnings eroded * * * by subsequent decisions of this Court." *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995).

D. This case presents an ideal vehicle for the Court to reconsider *Basic*

1. The particulars of this case present an especially clear path to revisiting *Basic*.[6] It implicates a key reason that the economic basis of *Basic*'s presumption is unsound—that binary "market efficiency" of the defendant's stock is the key driver for class certification. *Of course* the "market" for Halliburton stock, which trades

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[6] In their petition for rehearing *en banc*, Petitioners argued that *Basic* should be overruled, noting the recent indication in *Amgen* that *Basic* was subject to reconsideration. Pet. for Reh'g *En Banc* 14-15 (filed May 24, 2013). Even that step was not a necessary prerequisite to this Court's review, because overruling or substantially modifying *Basic* is "not a new claim * * * but a new argument to support what has been [Petitioners'] consistent claim," namely that class certification should be denied. *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Accord *Citizens United* v. *FEC*, 558 U.S. 310, 330-331 (2010) (allowing direct challenge to this Court's precedents that petitioner had disclaimed below because it was a "new argument" in support of petitioner's consistent First Amendment "claim"). This Court retains the authority to overrule a precedent that underlies a claim rather than "assuming a premise * * * that is itself in doubt." *Id.* at 331.

heavily on the NYSE, is "efficient" under *Basic*'s binary test for market efficiency. Langevoort, *supra*, at 173 (noting that "[f]or large-cap stocks, there is seldom any debate over [efficiency]" at class certification). But, as described above, this hardly means that any *particular* misrepresentation will be efficiently incorporated into Halliburton's stock price. Indeed, the court of appeals' previous opinion found no evidence that Halliburton's alleged misrepresentations moved the market price. App., *infra*, 35a, 37a, 42a-53a. Without price impact, there is no reason to presume classwide reliance on the misrepresentations by relying on the market price, because nothing establishes that the misrepresentations *were even reflected* in that price. This case illustrates *Basic*'s misplaced trust in general market efficiency as the foundation for a presumption of reliance, and this Court should abandon it now.

At the very least, *Basic* should be modified to require plaintiffs to prove price impact in order to invoke the presumption in the first instance. This approach would be more consistent with Rule 23's requirement that plaintiffs must establish common-issue predominance. It would acknowledge the scholarly consensus that general market efficiency does not mean that all types of misrepresentations are efficiently incorporated into market price at all times. And it would refocus *Basic* on whether there is a plausible case for presumed reliance on misrepresentations via reliance on a distorted market price.

2. *Stare decisis* considerations support overruling *Basic* without further delay. "Where a decision has been questioned by Members of the Court in later decisions"—as *Basic* was questioned by four Justices in *Amgen*—"and [has] defied consistent application by the lower courts, these factors weigh in favor of reconsideration." *Pearson* v. *Callahan*, 555 U.S. 223, 235 (2009) (quotation omitted). While *stare decisis* may counsel reluctance to

revisit errant constructions of statutes, it does not weigh against correcting errant economic analysis injected into the *corpus juris* to replace traditional legal principles. Indeed, "judge made" rules do not "implicate the general presumption that legislative changes should be left to Congress" because "any change should come from this Court, not Congress." *Id.* at 233-234.

Basic is uniquely unsuited to *stare decisis* deference. *Basic* used a judicially-created presumption to expand a judicially-created cause of action. Such innovation is for Congress, not the judiciary, as this Court's more recent precedents explain. See, *e.g.*, *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-165 (2008). This was, in fact, one of Justice White's chief complaints in *Basic*. See 485 U.S. at 254, 256-257.

All of the *stare decisis* factors favor overruling. See *Montejo* v. *Louisiana*, 556 U.S. 778, 792 (2009) (listing factors). Experience has taught that *Basic*'s economic theory is unrealistic and its legal rubric unworkable. The decision was poorly reasoned, signed by only four Justices, and of relatively recent vintage. It "has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court." *Gaudin*, 515 U.S. at 521. Nor are reliance interests at stake, for *Basic* does not "serve as a guide to lawful behavior," *ibid.*, and *stare decisis* concerns are at their nadir "in cases * * * involving procedural and evidentiary rules." *Payne*, 501 U.S. at 828.

The Court should act now to "bring its opinions into agreement with experience and with facts newly ascertained." *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986) (quotation omitted).

II. THE DECISION BELOW DEEPENS A CIRCUIT SPLIT OVER WHETHER PRICE-IMPACT EVIDENCE MAY DEFEAT CLASS CERTIFICATION

The decision below precludes price-impact evidence at the class-certification stage. This contravenes both *Basic* and *Amgen.* It also deepens a circuit split.

A. Even under *Basic*, price-impact evidence belongs at the class-certification stage

Even if this Court ultimately declines to overrule or substantially modify *Basic*, certiorari is independently warranted to ensure that *Basic* at least remains tethered to its "fundamental premise—that an investor presumptively relies on a misrepresentation *so long as it was reflected in the market price* at the time of his transaction." *EPJ Fund*, 131 S. Ct. at 2186 (emphasis added). Flowing directly from that premise, *Basic* guarantees that defendants may "rebut the presumption of reliance" by "show[ing] that the misrepresentation in fact did not lead to a distortion in price." 485 U.S. at 248.

If Halliburton successfully rebutted the presumption of classwide reliance in this way, the Fund should not have obtained class certification, for the class could not presumptively rely in common on misrepresentations by purchasing at a market price unaffected by the misrepresentations. Instead, individual class members would have to prove that they actually relied on the misrepresentations despite there being no effect on price. This would ineluctably cause individual issues to predominate. Yet both lower courts forbade Halliburton from introducing price-distortion evidence at the class-certification stage—the very procedural juncture that motivated this Court's creation of the rebuttable presumption in *Basic.* See 485 U.S. at 230 ("We granted certiorari * * * to determine whether the courts below properly applied a presumption of reliance in certifying the class."); *id.* at 242.

B. *Amgen*'s rationale compels allowing price-impact evidence at certification

Amgen reaffirms that a misrepresentation that "does not affect market price * * * cannot be relied upon indirectly by investors who, as the fraud-on-the-market theory presumes, rely on the market price's integrity." 133 S. Ct. at 1195. Nonetheless, the court of appeals thought that *Amgen*'s reasoning precludes consideration of price-impact evidence at the class-certification stage. To the contrary, *Amgen* requires courts to consider the fraud-on-the-market predicates of publicity and market efficiency that, like price impact, are not "elements" of a securities-fraud claim. Logically, price-impact evidence must also be considered pre-certification.

1. In *Amgen*, the Court declined to require proof (or allow rebuttal) of "materiality" at the class-certification stage because "there is no risk whatever that a failure of proof on the common question of materiality will result in individual questions predominating."[7] 133 S. Ct. at 1196; *id.* at 1203-1204. This is so "because materiality is an essential element of a Rule 10b-5 claim." *Id.* at 1196. "[A] failure of proof on the element of materiality would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate." *Ibid.* The Court emphasized *four* more times

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[7] *Amgen*'s holding is carefully limited to materiality, a concept distinct from the price-impact issue this Court reserved in *EPJ Fund.* Materiality "is satisfied when there is a substantial likelihood that the disclosure * * * would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309, 1318 (2011) (quotation omitted). Price impact, by contrast, involves not the content of the misstatement, but whether the alleged misrepresentation distorted the stock's market price. *EPJ Fund*, 131 S. Ct. at 2187 ("'Price impact' simply refers to the effect of a misrepresentation on a stock price.").

that materiality is irrelevant to class certification because materiality is an "element" of a Rule 10b-5 claim.[8] *Id.* at 1191, 1196, 1197, 1199.

The Court contrasted materiality with other fraud-on-the-market requirements that *must* be addressed at class certification: "that the alleged misrepresentations were publicly known" and "that the stock traded in an efficient market." *Id.* at 1198. The Court explained the critical difference: "[U]nlike materiality, market efficiency and publicity are *not indispensable elements of a Rule 10b-5 claim.* Thus, where the market for a security is inefficient or the defendant's alleged misrepresentations were not aired publicly, a plaintiff cannot invoke the fraud-on-the-market presumption." *Id.* at 1199 (emphasis added). But individual plaintiffs could establish actual reliance without resort to the presumption. *Ibid.* "Individualized reliance issues would predominate in such a lawsuit. The litigation, therefore, could not be certified under Rule 23(b)(3) as a class action." *Ibid.*

2. The court of appeals erred by concluding that price impact is more analogous for Rule 23 purposes to materiality than to publicity and market efficiency. As with publicity and market efficiency, the absence of price impact would mean that "a plaintiff cannot invoke the fraud on the market presumption." *Amgen*, 133 S. Ct. at 1199; see *Basic*, 485 U.S. at 248. And, as with publicity and market efficiency, price impact is "not [an] indispensable elemen[t] of a Rule 10b-5 claim." *Amgen*, 133 S. Ct. at 1199.

[8] The Court also observed that materiality is an "objective" question that "can be proved through evidence common to the class." *Amgen*, 133 S. Ct. at 1195. This factor was not determinative because the Court recognized that other equally objective, common requirements must be considered at the class-certification stage, such as market efficiency and publicity. *Id.* at 1199.

Conceding these points, App., *infra*, 15a, 17a, the court of appeals nonetheless reasoned that price-impact evidence may not be considered at certification because a successful price-impact rebuttal would defeat the Rule 10b-5 element of loss causation. *Id.* at 17a-18a. But that does not distinguish price impact from publicity. If alleged misrepresentations are nonpublic, by definition those misrepresentations could not cause loss through a decline in the market price. See *EPJ Fund*, 131 S. Ct. at 2185 (observing that if a misrepresentation is not public, "how would the market take [the misrepresentation] into account?"). Consequently, the fact that price impact is necessary to proving loss causation in a fraud-on-the-market case cannot be the basis for excluding such evidence at class certification.

Indeed, *Amgen*'s rationale for allowing publicity evidence at certification requires permitting price-impact evidence as well. The Court explained that in a case involving non-public misrepresentations—which cannot proceed under the presumption of reliance—an individual plaintiff "can, however, attempt to establish reliance through the traditional mode of demonstrating that she was personally aware of [the defendant's] statement and engaged in a relevant transaction . . . based on that specific misrepresentation." *Amgen*, 131 S. Ct. at 1199 (quotation omitted). That statement is equally true in a case where the defendant shows that the misrepresentations did not distort the market price. Therefore, the absence of price impact—like publicity—is a proper subject for the class-certification stage.

3. Finally, the court of appeals mistakenly perceived that it had to intuit the specific "reason" for which Halliburton proffered price-impact evidence. App., *infra*, 13a-15a & n.7, 18a-19a n.10. The court based this understanding on its belief that "*Amgen* determined that defendants are not permitted to use evidence of no price

impact to rebut materiality * * * at class certification." *Id.* at 18a-19a n.10; accord *id.* at 14a. *Amgen* does not state, much less hold, any such thing. The *Amgen* defendant did not proffer price-impact evidence; it presented a "truth-on-the-market" rebuttal to show that the misrepresentations would not have been "material" to the objective investor. 133 S. Ct. at 1203. *Amgen* simply does not address whether or how price-impact data may be considered at class certification.

The court of appeals' approach transforms *Basic*'s "fundamental premise" of price distortion, *EPJ Fund*, 131 S. Ct. at 2186, into a mere conduit for proving either materiality (impermissible, according to the court of appeals) or market efficiency or publicity (permissible, one supposes). See App., *infra*, 13a-15a & n.7, 18a-19a n.10. This gets it exactly backwards: price distortion is the glue that enables common reliance on misrepresentations via reliance on the market price. Materiality, publicity, and market efficiency are merely factors that affect whether the price will be distorted by a given misrepresentation. See *Amgen*, 133 S. Ct. at 1199. Price-impact evidence is always relevant to class certification because it is the "fundamental premise" of the presumption of reliance, but unlike materiality, it is not a securities-fraud element. The court of appeals' fractured approach to determining the permissibility of price-impact evidence highlights the disarray caused by *Basic*'s presumption of reliance and its tension with core class-action principles.

C. The decision below conflicts with decisions of the Second and Third Circuits

The court of appeals held that "price impact evidence does not bear on the question of common question predominance, and is thus appropriately considered only on the merits after the class has been certified." App., *infra*, 19a. That decision deepens a circuit split over whether defendants may prevent class certification by

showing that alleged misrepresentations did not distort the market price. If the Fund had brought its lawsuit in the Second or Third Circuit, Halliburton would have been entitled to rebut the presumption of reliance at the class-certification stage with price-impact evidence.

1. In *In re Salomon Analyst Metromedia Litigation*, the Second Circuit held that a defendant is "allowed to rebut the presumption, prior to class certification, by showing * * * the absence of a price impact." 544 F.3d 474, 484 (2d Cir. 2008); *id.* at 483. The court explained that "successful rebuttal *defeats* certification by defeating the Rule 23(b)(3) predominance requirement." *Id.* at 485. Because the district court had refused to allow price-impact evidence, the Second Circuit vacated the class-certification order and remanded for consideration of whether "the market price was * * * affected by the alleged misstatements." *Id.* at 485-486.

The Third Circuit "agree[s] with the Second Circuit." *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 638 (3d Cir. 2011). That court likewise held that "a defendant's successful rebuttal demonstrating that misleading material statements or corrective disclosures did not affect the market price of the security defeats the presumption of reliance for the entire class, thereby defeating the Rule 23(b) predominance requirement." *Ibid.*[9]

The Seventh Circuit, by contrast, agrees with the decision below that price impact may not be considered at class certification. *Schleicher* v. *Wendt*, 618 F.3d 679, 685 (7th Cir. 2010). The court rejected the defendants' argument that "before certifying a class, a court must de-

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[9] *Amgen* disapproved of the Second and Third Circuits' holdings that "materiality" may be considered at class certification, 133 S. Ct. at 1194, but did not address those circuits' independent holdings that a defendant may defeat class certification by showing the absence of price impact.

termine whether false statements materially affected the price." *Ibid.* The Seventh Circuit reasoned that price impact is a "questio[n] on the merits" that could not be considered at class certification. *Ibid.*

2. Halliburton flagged this division of authority in its merits brief the first time this case reached the Court. See Br. of Resps., No. 09-1403, at 17, 29-30. The Court likewise identified the "price impact" issue but declined to address it at that time. *EPJ Fund*, 131 S. Ct. at 2187. Now that the issue is squarely presented, disagreement among the circuits should not be allowed to persist on such a central question of securities and class-action law.

This case presents a strong vehicle for resolving the split. The court of appeals' previous opinion found that the evidence did not "raise an inference that the price was actually affected by [the] alleged misrepresentations." App., *infra*, 37a, 42a-53a. The decision now under review also acknowledged "the extensive evidence of no price impact offered by Halliburton." *Id.* at 19a n.11. Consequently, the court of appeals' holding that "price impact evidence * * * is not appropriately considered at class certification," *ibid.*, was outcome-determinative. If these facts were presented in the Second or Third Circuits, the class could not have been certified.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

DAVID D. STERLING
AARON M. STREETT
Counsel of Record
BENJAMIN A. GESLISON
BAKER BOTTS L.L.P.
910 Louisiana St.
Houston, Texas 77002
(713) 229-1234
aaron.streett@bakerbotts.com

EVAN A. YOUNG
BAKER BOTTS L.L.P.
98 San Jacinto Blvd.
Austin, Texas 78701
(512) 322-2506

WM. BRADFORD REYNOLDS
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Petitioners

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APPENDIX

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 12-10544

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,

Defendant-Appellant

LORI A. RUSSO, On Behalf of Herself and All Others Similarly Situated,

Plaintiff

v.

HALLIBURTON COMPANY; DAVID J. LESAR,

Defendants-Appellants

ERNEST HACK, On Behalf of Himself and All Others Similarly Situated,

Plaintiff

v.

HALLIBURTON COMPANY; DAVID J. LESAR,

Defendants-Appellants

POLAR INVESTMENT CLUB, On Behalf Of Itself And All Others Similarly Situated,

Plaintiff

v.

HALLIBURTON COMPANY; DAVID J. LESAR,

Defendants-Appellants

(April 30, 2013)

Appeal from the United States District Court
for the Northern District of Texas

Before DAVIS, GRAVES, and HIGGINSON, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Plaintiffs-Appellees, a putative class of plaintiffs, seek to recover damages from Defendants-Appellants for securities fraud under § 10(b) of the Securities Exchange Act of 1934. The district court concluded that Defendants-Appellants were not entitled to use evidence of no market price impact to rebut the fraud-on-the-market presumption of reliance at class certification. We AFFIRM.

I.

This litigation arises out of alleged misrepresentations by the Halliburton Company and its CEO, President, and Chairman of the Board, David Lesar (collectively "Halliburton"). The Plaintiffs-Appellees, represented by the Erica P. John Fund, Inc. ("the Fund"), are a putative class of shareholders who allege that they suffered material losses as a result of these fraudulent misrepresentations between June 3, 1999, and December 7, 2001. Over

this period of time, the Fund contends that Halliburton made misrepresentations concerning three primary aspects of its operations: (1) it understated its projected liability for asbestos claims, (2) it overstated its revenues by including billings whose collections were unlikely, and (3) it exaggerated the cost savings and efficiencies Halliburton would derive from its 1998 merger with Dresser Industries. Plaintiffs allege that these misrepresentations temporarily and artificially inflated the price of Halliburton stock; when the truth was subsequently revealed, the stock price fell, causing damages to those who purchased the stock in the relevant timeframe.

In September 2007, the Fund moved to certify a class of all persons who purchased Halliburton's common stock during the class period. The district court first determined that the Fund had satisfied the Fed. R. Civ. P. 23(a) threshold class certification requirements of numerosity, commonality, typicality, and adequacy of representation. Turning to Rule 23(b)(3)'s predominance requirement, the district court conducted a limited inquiry into the plaintiffs' cause of action to determine whether common questions of law and fact predominated over questions affecting only individual plaintiffs. The court observed that "the Fifth Circuit has placed an extremely high burden on plaintiffs seeking class certification in a securities fraud case." Specifically, the court pointed to Fifth Circuit precedent requiring securities fraud plaintiffs to make a showing of *loss causation* before obtaining certification. The district court then found that plaintiffs had not established loss causation and declined to certify the class. *See Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, No. 3:02-CV-1152-M, 2008 WL 4791492 (N.D. Tex. Nov. 14, 2008) (unpublished).

On appeal, a panel of this court affirmed the district court's denial of class certification based on its conclusion that the Fund had "failed to meet this court's requirements for proving loss causation at the class certification stage." *See Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330, 344 (5th Cir. 2010) ("*AMS Fund*"). The Fund filed a petition for a writ of certiorari, which the Supreme Court granted. In *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011) ("*EPJ Fund*"),[1] a unanimous Supreme Court reversed the judgment of the Fifth Circuit, finding that this court "erred by requiring proof of loss causation for class certification." The Court then remanded the case back to this court, 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.

On remand from the Supreme Court, this court remanded the case to the district court for further proceedings. Halliburton argued to the district court that the class should still not be certified because Halliburton's class certification evidence revealed that its alleged fraud did not affect the market price of the stock; that is, its alleged misrepresentation did not cause "price impact" or "price distortion." The district court declined to consider Halliburton's evidence on the issue, finding that price impact evidence did not bear on the critical inquiry of whether common issues predominated under Rule 23(b)(3). Based on its finding that common issues predominated and that the other Rule 23 class prerequisites

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[1] Archdiocese of Milwaukee Supporting Fund, Inc. was eventually replaced by Erica P. John Fund as the named class representative. Thus, judicial decisions under both names concern the instant putative class.

were satisfied, the district court certified the class. Halliburton now appeals.

II.

We review the district court's class certification decision for abuse of discretion. *See Benavides v. Chicago Title Ins. Co.*, 636 F.3d 699, 701 (5th Cir. 2011). "Because, however, a court by definition abuses its discretion when it applies an incorrect legal standard, we review such errors de novo." *Id.* While the district court has substantial discretion to grant or deny certification, it "must conduct a rigorous analysis of the rule 23 prerequisites before certifying a class." *Id.*

III.

A.

Halliburton's primary argument on appeal is that the district court erred by not permitting Halliburton to challenge class certification with evidence that the alleged misrepresentations did not impact the price of the stock (*i.e.*, there was no price impact).

1.

The pivotal question in this case is whether a defendant should be permitted to show the absence of price impact at the class certification stage of the proceedings to establish that common issues among class members do not predominate and that class certification is inappropriate.

A potential class of securities fraud plaintiffs, like any other group seeking class certification, must satisfy the requirements of Fed. R. Civ. P. 23 in order to be certified. Rule 23 provides that a class action may be maintained if the conditions of 23(a) and (b) are met. To satisfy the criteria set forth in Rule 23(a), a plaintiff must demonstrate numerosity, commonality, typicality, and

adequacy of representation. In this case, the plaintiff must also show that common questions predominate, as provided in Rule 23(b). The parties agree that Rule 23(a)'s requirements have been met, so that the only element at issue is whether common questions predominate. Thus, if "questions of law or fact common to class members predominate over any questions affecting only individual members," then a class of purchasers of Halliburton common stock from June 3, 1999-December 7, 2001 should be certified. FED. R. CIV. P. 23(b)(3).

The private securities fraud action is based upon federal securities statutes and their implementing regulations. Section 10(b) of the Securities Exchange Act of 1934 forbids the use of any "deceptive device," in "connection with the purchase or sale of any security." 15 U.S.C. § 78j(b) (2006). The Securities and Exchange Commission's corresponding Rule 10b-5 forbids, among other things, the making of any "untrue statement of a material fact" "in connection with the purchase or sale of any security." 17 CFR § 240.10b-5 (2004). From these provisions, courts have derived a private securities fraud cause of action; to succeed at trial or summary judgment, a plaintiff is required to establish the 10b-5 action's elements: (1) a material misrepresentation, (2) scienter (deceptive intent), (3) a connection with the purchase or sale of a security, (4) reliance, (5) economic loss, and (6) loss causation. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).

The burden of establishing all the requirements of class certification likewise falls on the party seeking certification, here the Fund. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Establishing common question predominance as a prerequisite to class certification is different from the burden of proving 10b-5

fraud on the merits, although the inquiries may overlap. As the Supreme Court has stated, "[w]hether common questions of law or fact predominate in a securities fraud action often turns on the element of reliance." *EPJ Fund*, 131 S. Ct. at 2184. Because common question predominance in this context hinges on reliance, there has been considerable debate concerning what evidence relating to reliance is required or allowed at class certification. The Supreme Court has issued several decisions touching on this issue, which we now turn to for guidance.

2.

The Court in *Basic Inc. v. Levinson* first considered the difficulty inherent in establishing proof of class-wide reliance. 485 U.S. 224 (1988). As the *Basic* Court stated, "Reliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." *Id.* at 243. "The traditional (and most direct) way a plaintiff can demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction—*e.g.*, purchasing common stock—based on that specific misrepresentation." *EPJ Fund*, 131 S. Ct. at 2185. However, if this were the only way to prove reliance, it "would place an unnecessarily unrealistic evidentiary burden on the [securities fraud] plaintiff who has traded on an impersonal market." *Basic*, 485 U.S. at 245. Without some legal accommodation, the element of reliance would become a "barrier to class certification, since each of the individual investors would have to prove reliance on the alleged misrepresentation." *Dukes*, 131 S. Ct. at 2552 n.6.

As a result, the *Basic* Court adopted a legal presumption previously accepted by several circuits: the "fraud-on-the-market presumption" of reliance. The Supreme Court explained that because the market price of a secu-

rity in an efficient market will immediately incorporate any material, public representation, a purchaser who buys a security at the market price will be presumed to have relied upon the representation:

> In face-to-face transactions, the inquiry into an investor's reliance upon information is into the subjective pricing of that information by that investor. With the presence of a market, the market is interposed between seller and buyer and, ideally, transmits information to the investor in the processed form of a market price. Thus the market is performing a substantial part of the valuation process performed by the investor in a face-to-face transaction. The market is acting as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price.

Basic, 485 U.S. at 244 (quoting *In re LTV Sec. Litig.*, 88 F.R.D. 134, 143 (N.D. Tex. 1980)).

To invoke the fraud-on-the-market presumption, a plaintiff must establish the prerequisites necessary for market price incorporation of information: (1) misrepresentation publicity, (2) misrepresentation materiality, (3) market efficiency, and (4) that the plaintiff traded the shares between the time the misrepresentations were made and the time the truth was revealed. *Id.* at 248 n.27.

Basic also established that the defendant is entitled to rebut the fraud-on-the-market presumption by demonstrating certain facts that undermine its basic assumptions. "Any showing that severs the link between the misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reli-

ance." *Id.* at 248. For example, there would be no reliance if a misrepresentation was ignored because the truth was well-known to the market, or there would be no reliance by those who purchased the security after the truth had already entered the market and dissipated the effects of the fraud. *Id.* at 248-49. If the defendant could make such a showing, the market price could not be said to have incorporated—or relied upon—the misrepresentation, and "the basis for finding that the fraud had been transmitted through market price would be gone." *Id.* Similarly, if a defendant could demonstrate that a plaintiff knew about the misrepresentation but decided to purchase the stock anyway, the plaintiff would not have relied upon the integrity of the market price. *Id.* at 249. Though making clear that the fraud-on-the-market presumption could be rebutted, the Court in *Basic* did not decide the extent to which the presumption could be rebutted at class certification.

After *Basic*, the circuits eventually began to apply the fraud-on-the-market presumption inconsistently. As a result, the Supreme Court stepped in to clarify the law again in *EPJ Fund v. Halliburton*, 131 S. Ct. 2179 (2011), when the Court considered another issue in its review of an earlier decision by this court in the instant case. The specific question before the Supreme Court in *EPJ Fund* was whether proof of loss causation was required to invoke the fraud-on-the-market presumption of reliance at the class certification stage. In *AMS Fund*,[2] this court found that in order for plaintiffs to invoke the fraud-on-the-market presumption of reliance and obtain class certification, they must establish proof of loss causation; this

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[2] Recall that the case was originally brought before us as *AMS Fund*, but the plaintiff class representative was redesignated as *EPJ Fund* before Supreme Court proceedings.

requires proof that the stock price declined after the false statement is corrected and the truth is revealed.[3] Because the Fund had not established loss causation, we affirmed the district court's denial of class certification. *See AMS Fund*, 597 F.3d at 339-43.

After granting certiorari, the Supreme Court acted swiftly to correct this court's error, rejecting our position that a putative class had to establish loss causation as a predicate to invoking the fraud-on-the-market presumption of reliance at class certification: "The Court of Appeals' requirement is not justified by *Basic* or its logic. . . . Loss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock." *EPJ Fund*, 131 S. Ct. at 2186. The Court held that proof of loss causation, or a decline in stock value after revelation of the truth, is a conceptually distinct inquiry and is not necessary to establish reliance. *Id.* at 2185-86. The *EPJ Fund* Court declined, however, to address Halliburton's assertion that it was entitled to rebut the presumption at class certification for other reasons. The Court stated: "[T]he Court of Appeals erred by requiring EPJ to prove loss causation at the certification stage, . . . and [we] do not, address any other question about [the fraud-on-the-market] presumption, or how and when it may be rebutted." *Id.* at 2187.

The Supreme Court had to intervene yet a third time as courts struggled with the question of which issues a securities fraud plaintiff had to prove in order to invoke the fraud-on-the-market presumption *at class certifica-*

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[3] *See AMS Fund*, 597 F.3d at 335 ("'[W]e require plaintiffs to establish loss causation in order to trigger the fraud-on-the-market presumption.'" (quoting *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261, 265 (5th Cir. 2007))).

tion, and the corollary question of whether the defendant could present rebuttal evidence on the issues. *See Amgen Inc. v. Conn. Ret. Plans and Trust Funds.* 133 S. Ct. 1184 (2013). Although it was clear that plaintiffs must eventually establish the materiality of a misrepresentation on the merits to invoke the fraud-on-the-market presumption, the precise questions before the *Amgen* Court were whether the putative class must establish materiality at class certification to invoke the presumption; and relatedly, whether a defendant is entitled to rebut the presumption at class certification with proof of immateriality. *Id.* at 1194.

The *Amgen* Court began by emphasizing that the central issue in resolving this question was whether proof of materiality was required to satisfy Rule 23(b)(3)'s requirement of common question predominance. *Id.* at 1195. Thus, the twin issues of what a plaintiff must prove and what a defendant may rebut at class certification are resolved by the same inquiry: "[T]he pivotal inquiry is whether proof of materiality is needed to ensure that the *questions* of law or fact common to the class will 'predominate over any questions affecting only individual members' as the litigation progresses." *Id.* (quoting FED. R. CIV. P. 23(b)(3)).[4] Thus, the focus of the 23(b)(3) class certification inquiry—predominance—is not whether the plaintiffs will fail or succeed, but whether they will fail or succeed *together*. *Id.* at 1197. Although

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[4] At least this is true in cases in which the defendant's proffered rebuttal evidence concerns an issue which the court has already deemed to be not relevant to class certification. While rebuttal evidence concerning an issue which *is* relevant at class certification—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.

the other prerequisites to invoke the fraud-on-the-market presumption—purchase timing, publicity, and market efficiency—must be established at class certification, the same is not true of materiality. *Id.* at 1198-99. The Court held, "While [a putative class] certainly must prove materiality to prevail on the merits, we hold that such proof is not a prerequisite to class certification." *Id.* at 1191. The *Amgen* Court thus made clear that what is required for a plaintiff to "invoke" the fraud-on-the-market presumption on the merits is not necessarily what is required for the plaintiff to benefit from the presumption at class certification.

The Court based its determination that materiality need not be established at class certification on the answers to two crucial questions: (1) whether the question of materiality was an objective inquiry that could "be proved through evidence common to the class;" and (2) whether there was a risk that a failure of proof on the question of materiality would "result in individual questions predominating." *Id.* at 1195-96. The Court determined that because materiality is established by evidence common to all plaintiffs, and because a failure to prove materiality will cause all plaintiffs' individual claims to fail, materiality evidence was not relevant at class certification. *Id.* at 1197. In summary, the Court stated: "As to materiality, therefore, the class is entirely cohesive: It will prevail or fail in unison. In no event will the individual circumstances of particular class members bear on the inquiry." *Id.* at 1191. It is this characteristic of materiality which distinguishes it from the other fraud-on-the-market presumption's prerequisites. *Id.* at 1198-99. A plaintiff can fail to establish publicity, market efficiency, or trade timing, and therefore lose the class-wide presumption of reliance, but still establish individual reli-

ance and prove fraud. *Id.* Thus, only those issues which bear directly on the pivotal inquiry of common question predominance and the propriety of class resolution should be addressed at class certification. *Id.*

3.

We thus know from the above Supreme Court cases that in order for a 10b-5 plaintiff to invoke the fraud-on-the-market presumption of reliance on the merits, a plaintiff must establish (1) trade timing, (2) market efficiency, (3) publicity, and (4) materiality. *See id.* at 1192-93. However, the fraud-on-the-market elements that should be addressed *at class certification* are limited to those matters which bear on common question predominance and the propriety of class resolution: trade timing, market efficiency, and publicity (*but not* materiality).[5] *Id.* at 1194-99.

Halliburton frames the question before us as whether *price impact* is an issue which a defendant may address at class certification to rebut the fraud-on-the-market presumption that the stock price was affected by a misrepresentation. According to *EPJ Fund*, "'Price impact' simply refers to the effect of a misrepresentation on a stock price."[6] 131 S. Ct. at 2187. It is neither an element of 10b-5 fraud nor an element of the fraud-on-the-market theory. In fact, price impact evidence does not fit neatly

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[5] To be clear, the *Amgen* Court actually found that trade timing related not to the Rule 23(b)(3) question of common question predominance, but to the 23(a) requirements of typicality and adequacy of representation. *See* 133 S. Ct. at 1198.

[6] Price impact, or an effect of a misrepresentation on a stock price, can be established in two ways: either by showing (1) that the stock price increased following the allegedly false positive statements or (2) that there was a corresponding decrease in price following the revelation of the misleading nature of these statements. *See Greenberg v. Crossroads Systems, Inc.*, 364 F.3d 657, 662 (5th Cir. 2004).

into any one fraud issue, but is probative of materiality, statement publicity, and market efficiency, all of which are relevant in establishing the presumption of fraud-on-the-market reliance.[7] According to *Amgen*, however, only some of these matters may be considered at class certification. 133 S. Ct. at 1197-99. For example, price impact evidence relating to materiality may not be considered at class certification (because materiality does not bear on Rule 23(b)(3) common question predominance), but price impact evidence relating to market efficiency or statement publicity could be considered. *See id.* We must therefore determine at what issue Halliburton's price impact evidence is directed.

In this case, Halliburton contends that its price impact evidence is not intended to rebut materiality, market efficiency, or statement publicity—the issues which the Supreme Court has specifically addressed. Rather, Halli-

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[7] For example, evidence that a stock's price was unaffected by a misrepresentation is convincing evidence that a misrepresentation was not material. *See, e.g., In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997) ("Because the market for BCF stock was 'efficient' and because the . . . disclosure had no effect on BCF's price, it follows that the information . . . was immaterial as a matter of law."); *Miller v. Thane Int'l, Inc.*, 372 F. Supp. 2d 1198, 1209 (C.D. Cal. 2005); *see also In re Polymedica Corp Sec. Litig.*, 432 F.3d 1, 13 (1st Cir. 2005). Furthermore, if a misrepresentation is concededly material, evidence that a stock's price was still unaffected could serve as evidence that the market is not efficient or that the misrepresentation was not public, undermining the fraud-on-the-market presumption of reliance. Or as Halliburton argues in this case, proof that a stock's price was unaffected might broadly serve as evidence that the market price did not in fact transfer the effect of the misrepresentation to a purchaser, refuting the ultimate conclusion of the fraud-on-the-market presumption of reliance. Finally, as we will discuss more fully *infra*, a plaintiff cannot establish the element of loss causation without demonstrating a negative price impact resulting from the defendant's release of corrective information.

burton contends that its price impact evidence is intended only to generally rebut the fraud-on-the-market presumption of reliance without necessarily attacking one of the presumption's individual elements. More specifically, Halliburton argues that despite the proof offered in support of invoking the fraud-on-the-market presumption of reliance, its evidence shows that the price did not actually transfer the effects of the alleged fraud to a stock purchaser.

As the *Basic* Court stated, "Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff . . . will be sufficient to rebut the presumption of reliance." 485 U.S. at 248. We agree with Halliburton that in the absence of price impact, "the basis for finding that fraud has been transmitted through market price would be gone." *See id.* Accordingly, Halliburton's price impact evidence potentially demonstrates that despite the presence of the necessary conditions for market price incorporation of fraudulent information (fraud-on-the-market reliance), no such incorporation occurred in fact. Thus, Halliburton's price impact evidence could be used at the trial on the merits to refute the presumption of reliance.[8] *See id.*

[8] We accordingly reject the Appellants' contention that *EPJ Fund* disclaimed the relevance of price impact evidence to fraud-on-the-market reliance. In fact, the Supreme Court in *EPJ Fund* made it clear that it was not evaluating the relevance of price impact to the fraud-on-the-market theory. *See EPJ Fund*, 131 S. Ct. at 2187. Other circuits have similarly found evidence of a lack of price impact relevant to rebutting the fraud-on-the-market presumption. *See In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474,484 (2d Cir. 2008) ("[D]efendants are allowed to rebut the [fraud-on-the-market] presumption . . . by showing, for example, the absence of a price impact."); *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623,638 (3d Cir. 2011) ("In an otherwise efficient market, the failure of a corrective disclo-

at 248-49. The *Amgen* Court did not discuss whether evidence offered for this purpose could be considered at class certification, but it did set forth the proper analytical framework so that we may resolve the question.

As the *Amgen* court made clear, the "pivotal inquiry" when determining whether to consider a matter at class certification is whether resolution of the matter "is needed to ensure that the *questions* of law or fact common to the class will 'predominate over any questions affecting only individual members' as the litigation progresses." *Amgen*, 133 S. Ct. at 1195. *Amgen* held that materiality and the rebuttal of materiality were not issues to be considered at class certification because this proof depended on evidence common to all class members; moreover, the failure of plaintiffs to prevail on the issue of materiality would not cause individual issues to "overwhelm questions common to the class, for the class members' claims will have failed on their merits, thus bringing the litigation to a close." *Id.* at 1204.

Turning to the instant case, the first question we ask is whether price impact evidence is common to the class. Because price impact is simply a measure of the effect of a misrepresentation on a security's price, it is undoubtedly an objective inquiry. *See EPJ Fund*, 131 S. Ct. at 2187. As the record evidence in this case demonstrates, price impact is ordinarily established by expert evaluation of a stock's market price following a specific event and it inherently applies to everyone in the class. The first Amgen consideration therefore suggests that price impact fraud-on-the-market rebuttal evidence should not be addressed at class certification.

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sure to affect the market price may therefore serve as a rebuttal to the presumption of reliance . . . .").

The second inquiry suggested by *Amgen* is whether there is any risk that a later failure of proof on the common question of price impact will result in individual questions predominating. *See Amgen*, 133 S. Ct. at 1196. In *Amgen*, the Court found that a failure to establish materiality could not result in the continuation of any individual claims, because immateriality would be fatal to all plaintiffs' claims. *Id.* Because materiality is an element of every fraud claim, immateriality absolutely destroys both class and individual causes of action. The absence of materiality "end[s] the case for one and for all." *Id.*

Turning to the instant case, we must determine whether the failure to prove price impact will necessarily cause all plaintiffs' claims to fall together. In other words, if Halliburton successfully rebuts the fraud-on-the-market presumption with evidence of no price impact, could individual plaintiffs still proceed with their fraud claims? Halliburton contends that a failure on the part of the plaintiffs to prove price impact will not cause all claims to fail, because unlike materiality, price impact is not a required element of fraud. Thus, Halliburton argues, a plaintiff class which fails to show price impact would only lose the class-wide presumption of reliance, leaving individual plaintiffs with viable fraud claims.

We disagree. Although the 10b-5 fraud action does not expressly require proof of price impact as an element of the claim, a plaintiff must nevertheless prevail on this fact in order to establish another element on which the plaintiff does bear the burden of proof: loss causation. As the Court in *EPJ Fund* stated, "'Price impact' simply refers to the effect of a misrepresentation on a stock price." 131 S. Ct. at 2187. Price impact can be shown either by an increase in price following a fraudulent public statement or a decrease in price following a revelation of the

fraud. To successfully prove a lack of price impact, Halliburton would thus be required to demonstrate both that the stock price did not increase when the misrepresentation was announced, and that the price did not decrease when the truth was revealed. If Halliburton were to successfully show that the price did not drop when the truth was revealed, then no plaintiff could establish loss causation. *See id*. at 2185.[9] In other words, because a showing of negative price impact is required to establish loss causation, plaintiffs who cannot establish price impact cannot establish loss causation. Thus, if Halliburton were to successfully rebut the fraud-on-the-market presumption by proving no price impact, the claims of all individual plaintiffs would fail because they could not establish an essential element of the fraud action. In the words of the Amgen Court, "[T]he class members' claims will have failed on their merits, thus bringing the litigation to a close." *See Amgen*, 133 S. Ct. at 1204. Thus, the second *Amgen* consideration also leads to the conclusion that price impact fraud-on-the-market rebuttal evidence should not be addressed at class certification.[10]

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[9] ("The court determined that . . . EPJ Fund needed to prove that the decline in Halliburton's stock was 'because of the correction to a prior misleading statement' and 'that the subsequent loss could not otherwise be explained by some additional factors revealed then to the market.' This is the loss causation requirement as we have described it." (citations omitted) (citing *Dura Pharms*., 544 U.S. at 342, and *AMS Fund*, 597 F.3d at 336)).

[10] This conclusion is also buttressed by the Supreme Court's specific conclusion in *Amgen* that evidence of materiality is not an issue that should be considered at class certification. The price impact evidence considered here is both similar to and offered for much the same reason as the materiality evidence considered by the Supreme Court in *Amgen*. Many if not most plaintiffs offer proof of price impact to demonstrate that a defendant's misrepresentation affected the stock price and was material. While Halliburton insists that it is

Halliburton's only other argument is its policy-based contention that not considering evidence of price impact at class certification will enhance the "*in terrorem* power of certification," and allow plaintiffs to extort non-meritorious settlements from corporate defendants. *See Oscar*, 487 F.3d at 267. The Supreme Court rejected an identical argument in *Amgen*, pointing out that "Congress has homed in on the precise policy concerns raised" by this argument, but has selected different remedies. *See Amgen*, 133 S. Ct. at 1201.

The *Amgen* Court's analysis leads to the conclusion that price impact fraud-on-the-market rebuttal evidence should not be considered at class certification.[11] Proof of price impact is based upon common evidence, and later proof of no price impact will not result in the possibility of individual claims continuing. Accordingly, Halliburton's price impact evidence does not bear on the question of common question predominance, and is thus appropri-

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questioning reliance and not the materiality of its alleged misrepresentations, in fraud-on-the-market cases such as this, the presumption of reliance actually depends upon the misrepresentation's materiality. As a result, there is a fuzzy line between price impact evidence directed at materiality and price impact evidence broadly directed at reliance. 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.

[11] Because we hold that Halliburton's price impact evidence in this context is not appropriately considered at class certification, it is not necessary to consider Halliburton's argument that the district court erred by refusing to allow Halliburton to supplement the record on remand with additional price impact rebuttal evidence. Nor is it necessary to evaluate the extensive evidence of no price impact offered by Halliburton. *See* Joint Brief of Appellants at 35-61.

ately considered only on the merits after the class has been certified.[12]

B.

The Fund also argues that because Halliburton waived the argument it now presents by failing to initially raise it before the district court, the argument has not been preserved and we may not consider it.[13] This waiver issue is not subject to our discretion, the Fund contends, because the Supreme Court expressly limited our consideration of issues on appeal to those which Halliburton had "preserved."

When the Supreme Court remanded the instant case back to this court, it instructed us to consider Halliburton's arguments against class certification "[t]o the extent Halliburton has preserved" them. *See EPJ Fund*, 131 S. Ct. at 2187. As the Supreme Court has consistently noted, "an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Penn. R.R. Co.*, 334 U.S. 304, 306 (1948). We thus may consider Halliburton's fraud-on-the-market

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[12] As the above discussion demonstrates, we conclude that this court's position in *Oscar* and other cases requiring plaintiffs to prove price impact as a prerequisite to the fraud-on-the-market presumption and class certification is inconsistent with the Supreme Court's reasoning in *EPJ Fund* and *Amgen*. *See, e.g., Oscar*, 487 F.3d at 264-65.

[13] The Fund argues that waiver is in fact the basis of the district court's failure to discuss the legal question of whether Halliburton is entitled to rebut the fraud-on-the-market presumption of reliance at the class certification stage. Brief of Plaintiffs/Appellees at 27-28. However, support for that conclusion is not found in the district court's brief statement, "The fraud-on-the-market theory applies to this case, so proof of each individual class member's reliance is not required."

rebuttal argument only to the extent it has been preserved.

Ordinarily, "arguments not raised before the district court are waived and cannot be raised for the first time on appeal." *Martco Ltd. P'ship v. Wellons, Inc.*, 588 F.3d 864, 877 (5th Cir. 2009). The Fund insists that because Halliburton never attempted to rebut fraud-on-the-market reliance before the district court, the Supreme Court's decree prevents this court from considering the argument now. The Fund contends that Halliburton attempted to use its price impact evidence to rebut the element of loss causation but did not challenge the element of reliance; having lost on the loss causation issue before the *EPJ Fund* Court, Halliburton should not now be able to challenge the Fund's fraud-on-the-market reliance.

However, the Fund's argument ignores both the substance of Halliburton's pleadings and the state of the fraud-on-the-market theory as interpreted by this circuit before *EPJ Fund*. Although Halliburton's reliance-rebuttal argument has technically been available since *Basic*, this court had since applied a significant judicial gloss to *Basic*. In fact, our cases required defendants to use evidence of no price impact to undermine the fraud-on-the-market theory in another way—by rebutting loss causation.[14] Halliburton did not direct its evidence of no

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[14] This court has . . . tighten[ed] the requirements for plaintiffs seeking a presumption of reliance. We now require more than proof of a material misstatement; we require proof that the misstatement *actually moved* the market. That is, 'the plaintiff may recover under the fraud on the market theory if he can prove that the defendant's non-disclosure materially affected the market price of the security.' Essentially, we require plaintiffs to establish loss causation in order to trigger the fraud-on-the-market presumption.

price impact at fraud-on-the-market reliance in an effort to comply with our case law: under our pre-*EPJ Fund* framework, evidence directed at loss causation was by definition directed at fraud-on-the-market reliance. The Supreme Court has since corrected our fraud-on-the-market framework and established that loss causation is not relevant to the fraud-on-the-market presumption of reliance. *EPJ Fund*, 131 S. Ct. at 2185-86. However, we decline to penalize Halliburton for framing its evidence in the manner we instructed. It is well-settled that when the law changes in unanticipated ways during an appeal, parties are generally given an opportunity to apply the new law and present arguments relevant to the new standard. *See Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 282 (5th Cir. 1999).

IV.

For the reasons stated above, the judgment of the district court is AFFIRMED.

Oscar, 487 F.3d at 264-65 (5th Cir. 2007) (citations and brackets omitted); *see also AMS Fund*, 597 F.3d at 335.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12-10544

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,

Defendant-Appellant

LORI A. RUSSO, On Behalf of Herself and All Others Similarly Situated,

Plaintiff

v.

HALLIBURTON COMPANY; DAVID J. LESAR,

Defendants-Appellants

ERNEST HACK, On Behalf of Himself and All Others Similarly Situated,

Plaintiff

v.

HALLIBURTON COMPANY; DAVID J. LESAR,

Defendants-Appellants

POLAR INVESTMENT CLUB, On Behalf Of Itself And All Others Similarly Situated,

Plaintiff

v.

HALLIBURTON COMPANY; DAVID J. LESAR,

Defendants-Appellants

(June 11, 2013)

ON PETITION FOR REHEARING EN BANC

(Opinion 04/03/13, 5 Cir., _____, _____, F.3d _____)

Before:

DAVIS, Graves, and HIGGINSON, *Circuit Judges,*

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., ET AL.,

Lead Plaintiff

v.

HALLIBURTON COMPANY, ET AL.,

Defendants

(January 27, 2012)

ORDER

Before the Court are Plaintiffs Motion to Certify Class [Docket Entry #341] and Defendants' Alternative Motion to Supplement the Record [part of Docket Entry #468]. The Motion to Certify Class is **GRANTED** and the Alternative Motion to Supplement the Record is **DENIED** as untimely. Defendants had a sufficient opportunity to develop the record to supplement their position against class certification when the Court conducted a class certification hearing on March 28, 2008.

This case was filed in 2002 as a purported class action. The Court received briefs, evidence, and heard argument on Plaintiffs Motion to Certify Class. Following the law

in the Fifth Circuit pertaining to loss causation, this Court denied class certification [Docket Entry #444], stating that but for Fifth Circuit law on loss causation, it would certify the class. The Fifth Circuit affirmed on that same basis, but on June 6, 2011, the Supreme Court reversed the decision of the Fifth Circuit, holding that Plaintiff need not prove loss causation as a prerequisite to class certification. The Fifth Circuit remanded the case to this Court for further proceedings.

The Court has reviewed the additional briefing from the parties on the issue of class certification [Docket Entries #468 and #469] and finds that all elements for class certification under Rule 23 have been met.

Analysis

For the reasons below and those stated by the Court in its Memorandum Opinion and Order dated November 4, 2008 [Docket Entry #444] and on the record at the March 28, 2008 hearing, the Court finds that Plaintiff satisfied the class certification requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(3). The proposed class is sufficiently numerous, the members of the class have common claims, The Archdiocese of Milwaukee Supporting Fund, Inc. (AMSF) is a typical and adequate class representative, and common questions of law or fact predominate, making a class action the superior method of adjudicating the claims of the class members.

1) Numerosity

Rule 23(a)(1) requires that the class be so numerous that the joinder of all members is impracticable. Plaintiff need not demonstrate the precise number in the class to satisfy this requirement. See *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981). Lead Plaintiff estimates that there are tens, if not hun-

dreds, of thousands of class members. Defendants do not challenge certification on this ground. The Court finds that the size of the proposed class is sufficiently large to satisfy Rule 23(a)(1).

2) Commonality

Rule 23(a)(2) requires that there be questions of law or fact common to the class. "The threshold of 'commonality' is not high." *Bertulli v. Ind Ass'n of Cont'l Pilots*, 242 F.3d 290, 296-97 (5th Cir. 2001). It "does not require complete identity of legal claims among the class members"—only that they have "at least one issue whose resolution will affect all or a significant number of the putative class members." *Stewart v. Winter*, 669 F.2d 328, 335 (5th Cir. 1982). This requirement, too, is satisfied, as at least the following issues constitute common questions of law or fact: whether the Defendants violated federal securities laws; whether the Defendants omitted or misrepresented material facts; whether Defendants acted with knowledge or with reckless disregard for the truth in omitting or misrepresenting facts; and whether the market price of the Company's common stock during the proposed class period was artificially inflated due to the Defendants' omissions and/or misrepresentations. Defendants do not dispute the satisfaction of this element, and the Court finds it to be established here.

3) Typicality

Rule 23(a)(3) requires that the claims of the representative party be typical of the claims of the class, but the claims of the representative party need not be identical to those of the class. See *Philips v. Joint Legislative Comm. on Performance & Expenditure Review*, 637 F.2d 1014, 1024 (5th Cir. 1981). Typicality is satisfied when the representative plaintiffs claims arise out of the same event or course of conduct as the other class members,

and is based on the same legal theory. See *Durrett v. John Deere Co.*, 150 F.R.D. 555, 558 (N.D. Tex. 1993). The test for typicality is not extremely rigorous. See *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993).

The Court finds that the claims of the Lead Plaintiff, AMSF, are typical of those of the class members. AMSF, like all class members, allegedly suffered economic losses from its transactions in Halliburton stock. As stated at the March 2008 hearing, the Court finds that AMSF's use of money managers does not disqualify its claims from being typical of those of other class members, many of whom no doubt used advisors, brokers, and/or research in making their investments.

4) Adequacy

Rule 23(a)(4) requires a finding that the representative party will fairly and adequately protect the interests of the class. Under *Berger v. Compaq Computer Corporation*, 257 F.3d 475, 479 (5th Cir. 2001), *denying rehearing and rehearing en banc*, 279 F.3d 313 (5th Cir. 2002), to establish adequacy, a plaintiff must show that plaintiff's counsel has the zeal and competence to represent the class, and that the proposed class representative is willing and able to take an active role in controlling the litigation and protecting the absent class members. The adequacy inquiry also serves to uncover conflicts of interest between the named plaintiff and the class the plaintiff seeks to represent. *Id.* at 480.

Plaintiff's counsel has extensive experience in securities class action litigation that well qualifies them to represent the class. The Court finds that the Lead Plaintiff has demonstrated sufficient interest in prosecuting this case and is willing to take an active role in controlling the litigation and protecting absent class members, as dem-

onstrated in part by its vigor in challenging a settlement advocated by former Lead Plaintiffs and rejected by the Court, replacing counsel charged with, and later convicted of, crimes, and appealing the loss causation issue to the Fifth Circuit and Supreme Court. The Court knows of no relevant conflicts of interest between the Lead Plaintiff and other class members. The Court is not persuaded by Defendants' argument that AMSF is not an adequate representative merely because it designated an officer other than its CEO as its representative for the pursuit of this litigation.

5) Common Questions of Law or Fact Predominate

Rule 23(b)(3) requires that common questions of law or fact predominate and that a class action be superior to other methods of adjudication. Here, the issues of law or fact common to the members of the putative class predominate over questions affecting individual class members. The fraud-on-the-market theory applies to this case, so proof of each individual class member's reliance is not required. See *Basic, Inc. v. Levinson*, 485 U.S. 224, 248 (1988); see also *Krogman v. Sterritt*, 202 F.R.D. 467, 473 (N.D. Tex. 2001). Although the extent of damages suffered by each class member will vary, individual damages can be calculated. The Court concludes that common questions of law or fact predominate over that individual issue, and a class action is the superior method for adjudicating the issues alleged here. A class approach will promote judicial economy and avoid the risk of inconsistent judgments, which would exist if multiple individual suits were to be litigated. This method of adjudication is superior to individual claims.

Conclusion

Therefore, this case will proceed as a class action for all persons and entities who purchased or otherwise ac-

quired Halliburton Company's common stock between June 3, 1999, through and including December 7, 2001, excluding the individual Defendants and their families, and officers and directors of Halliburton and their families.

The Court appoints The Archdiocese of Milwaukee Supporting Fund, Inc. as Class Representative and David Boies of Boies, Schiller & Flexner LLP as Class Counsel.

SO ORDERED. /s/ Barbara M.G. Lynn

BARBARA M. G. LYNN

January 27, 2012. UNITED STATES DISTRICT JUDGE

NORTHERN DISTRICT OF TEXAS

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-11195

THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,

Plaintiff-Appellant

v.

HALLIBURTON CO; DAVID J. LESAR,

Defendants-Appellees

(February 12, 2010)

Appeal from the United States District Court
For the Northern District of Texas

Before REAVLEY, CLEMENT, and SOUTHWICK, Circuit Judges.

REAVLEY, Circuit Judge:

The Archdiocese of Milwaukee Supporting Fund, Inc. filed this putative securities fraud class action as lead plaintiff against Halliburton Company and David Lesar, the Chief Operating Officer and then CEO during the class period, alleging violations of sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Securities Exchange Commission Rule 10(b)-5. The district court denied the Plaintiff's motion for class certification under

FED. R. CIV. P. 23, and Plaintiff appeals that order. Finding no abuse of discretion by the district court, we AFFIRM the denial of class certification.

I.

This is a private securities fraud-on-the-market case. Under the fraud-on-the-market theory, it is assumed that in an efficient, well-developed market all public information about a company is known to the market and is reflected in the stock price. When a company has publicly made material misrepresentations about its business, we may presume that a person who buys the company's stock has relied on the false information. The stockholder then suffers losses if the falsity becomes known and the stock price declines. *See Basic Inc. v. Levinson.*[1] It is the response of the market to the correction that proves the effect of the false information and measures the plaintiff stockholder's loss.

Plaintiff here claims that Halliburton made false statements about three areas of its business: (1) Halliburton's potential liability in asbestos litigation, (2) Halliburton's accounting of revenue in its engineering and construction business, and (3) the benefits to Halliburton of a merger with Dresser Industries. It contends that investors lost money when Halliburton issued subsequent disclosures correcting the false statements and the market declined following the negative news. In order to obtain class certification on its claims, Plaintiff was required to prove loss causation, i.e., that the corrected truth of the former falsehoods actually caused the stock price to fall and resulted in the losses.[2]

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[1] 485 U.S. 224, 246–47, 108 S. Ct. 978, 991–92 (1988).

[2] Plaintiff contends that our precedent, specifically the requirement of *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*,

The district court denied class certification because it found that Plaintiff failed to prove this causal relationship. We review the district court's certification decision for an abuse of discretion, but we review de novo the legal standards employed by the district court. *Fener v. Operating Eng'rs Constr. Indus. & Miscellaneous Pension Fund (Local 66)*.[3] Plaintiff contends that the district court applied an erroneous standard for loss causation and required it to prove more than is required under law. Our review of the district court's order and the evidence leads us to conclude, however, that the district court fully understood loss causation under our precedent and correctly applied the legal standard. As we explain, the district court's decision was well supported and was not an abuse of discretion.

II.

Before discussing the Plaintiff's specific allegations against Halliburton, we first set forth the appropriate framework for a private securities fraud case and consider the district court's application of that framework. A securities fraud claim under § 10(b) of the Securities Exchange Act and Rule 10b-5 requires a plaintiff to show (1) a material misrepresentation (or omission); (2) scienter; (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation.

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487 F.3d 261, 269 (5th Cir. 2007), that class plaintiffs prove loss causation at the class certification stage, is contrary to Supreme Court and sister circuit precedent. Plaintiff may not assail *Oscar* as wrongly decided, as we are bound by the panel decision. *See Soc'y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1211 (5th Cir. 1991) ("In this circuit, one panel may not overrule the decision, right or wrong, of a prior panel in the absence of an intervening contrary or superseding decision by the court en banc or the Supreme Court.").

[3] 579 F.3d 401, 406 (5th Cir. 2009).

Dura Pharms., Inc. v. Broudo.[4] In the case of a putative class, a plaintiff may create a rebuttable presumption of reliance under the fraud-on-the-market theory by showing "that (1) the defendant made public material misrepresentations, (2) the defendant's shares were traded in an efficient market, and (3) the plaintiffs traded shares between the time the misrepresentations were made and the time the truth was revealed." *Greenberg v. Crossroads Sys., Inc*.[5] A defendant may rebut the presumption "by '[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at fair market price [.]'"[6]

Here, the parties contest only the alleged misrepresentations and do not dispute the efficiency of the market or Plaintiff's trading activity. In order to take advantage of the fraud-on-the-market presumption of reliance, Plaintiff must prove that the complained-of misrepresentation or omission "materially affected the market price of the security." *Alaska Elec. Pension Fund v. Flowserve Corp.*[7] In other words, Plaintiff must show that an alleged misstatement "actually moved the market."[8] Thus, "we require plaintiffs to establish loss causation in order to trigger the fraud-on-the-market presumption."[9] And we require this showing "at the class certification stage by a preponderance of all admissible evidence."[10]

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[4] 544 U.S. 336, 341–42, 125 S. Ct. 1627, 1631 (2005).

[5] 364 F.3d 657, 661 (5th Cir. 2004).

[6] *Id.* at 66 1–62 (quoting *Basic*, 485 U.S. at 248, 108 S. Ct. at 992).

[7] 572 F.3d 221, 228 (5th Cir. 2009) (quotation and citation omitted).

[8] *Oscar*, 487 F.3d at 265.

[9] *Id.*

[10] *Id.* at 269. Although Plaintiff *must* establish loss causation at the certification stage, the court *may* examine the issue at a variety of

The district court explicitly recognized the need for Plaintiff to establish a causal link between the alleged falsehoods and its losses in order to invoke the fraud-on-the market presumption. *See Nathenson v. Zonagen, Inc.*[11] The court also correctly recognized that the causal connection between an allegedly false statement and the price of a stock may be proved either by an increase in stock price immediately following the release of positive information, or by showing negative movement in the stock price after release of the alleged "truth" of the earlier falsehood.[12] Plaintiff here relies only on stock price decreases following allegedly corrective disclosures by Halliburton.

That being the case, the district court correctly noted that Plaintiff has an added burden because it is not enough merely to show that the market declined after a statement reporting negative news.[13] We must bear in mind that the main concern when addressing the fraud-on-the-market presumption of reliance is whether allegedly false statements actually inflated the company's stock price.[14] By relying on a decline in price following a corrective disclosure as proof of causation, a plaintiff need prove that its loss resulted directly *because* of the correction to a prior misleading statement; otherwise

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stages during the course of the litigation. *See Fener*, 579 F.3d at 407 ("A court can examine loss causation at the pleadings stage, the class certification stage, on summary judgment, or at trial.") (footnotes omitted).

[11] 267 F.3d 400, 413 (5th Cir. 2001) (Loss causation is "a direct causal link between the misstatement and the claimant's economic loss.") (internal quotation marks and citation omitted).

[12] *See Greenberg*, 364 F.3d at 665.

[13] *See id*. (holding that plaintiffs must do more than "simply offer[] evidence of any decrease in price following the release of negative information").

[14] *Id.*

there would be no inference raised that the original, allegedly false statement caused an inflation in the price to begin with.[15] In other words, the decline in price following a corrective disclosure must raise an inference that the price was actually affected by earlier alleged misrepresentations.[16] We therefore require plaintiffs to show that a loss occurred from the decline in stock price because the truth "'ma[de] its way into the marketplace,'" rather than for some other reason, such as "a result of 'changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions,' or other factors independent of the fraud."[17] Similarly, if a company releases multiple items of negative information on the same day, the plaintiff must establish a reasonable likelihood that a subsequent decline in stock price is due to the revelation of the truth of the earlier misstatement rather than to the release of the unrelated negative information.[18] In this way, the plaintiff must satisfy the court that its loss likely resulted from the specific correction of the fraud and not because of some independent reason. A subsequent disclosure that does not correct and reveal the truth of the previously misleading statement is insufficient to establish loss causation.[19]

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[15] *Id.*

[16] *See Nathenson*, 267 F.3d at 415 (stating that "where the facts properly considered by the district court reflect that the information in question did not affect the price of the stock then the district court may properly deny fraud-on-the-market based recovery").

[17] *Flowserve*, 572 F.3d at 229 (quoting *Dura*, 544 U.S. at 342–43, 125 S. Ct. at 1627).

[18] *Greenberg*, 364 F.3d at 665.

[19] *See Flowserve*, 572 F. 3d at 230 (holding that "to establish loss causation this disclosed information must reflect part of the 'relevant truth'–the truth obscured by the fraudulent statements").

Causation therefore requires the Plaintiff to demonstrate the joinder between an earlier false or deceptive statement, for which the defendant was responsible, and a subsequent corrective disclosure that reveals the truth of the matter, and that the subsequent loss could not otherwise be explained by some additional factors revealed then to the market.[20] This requirement that the corrective disclosure reveal something about the deceptive nature of the original false statement is consistent with liability in a securities fraud action, where it is those who affirmatively misrepresent a material fact affecting the stock price that are held responsible for losses.[21]

It is also necessary "that the earlier positive misrepresentation not be confirmatory."[22] Confirmatory information is already known to the market and, having been previously digested by the market, will not affect the stock price.[23]

After surveying our precedent, the district court correctly summed up Plaintiff's burden in this case by stat-

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[20] *See Greenberg*, 364 F.3d at 662 (noting that loss causation may be proved from a "decrease in price following the revelation of the misleading nature of these [prior] statements") (discussing *Nathenson*, 267 F.3d at 414); *id.* at 665 ("To raise an inference through a decline in stock price that an earlier false, positive statement actually affected a stock's price, the plaintiffs must show that the false statement causing the increase was related to the statement causing the decrease.").

[21] *See Dura*, 544 U.S. at 344, 125 S. Ct. at 1632–33 (noting that in private securities fraud actions, which have common-law roots, "a person who '*misrepresents* the financial condition of a corporation in order to sell its stock' becomes liable to a relying purchaser 'for the loss' the purchaser sustains 'when the facts . . . become generally known' and 'as a result' share value 'depreciate[s].'") (quoting RESTATEMENT (SECOND) OF TORTS §548A cmt. b) (emphasis added).

[22] *Greenberg*, 364 F.3d at 666.

[23] *Id.*

ing that because Plaintiff presented no evidence that a false, non-confirmatory positive statement caused a positive effect on the stock price, Plaintiff would have to show "(1) that an alleged corrective disclosure causing the decrease in price is *related to* the false, non-confirmatory positive statement made earlier, and (2) that it is *more probable than not* that it was this related corrective disclosure, and not any other unrelated negative statement, that caused the stock price decline."[24] This was the correct standard.[25]

III.

Plaintiff argues that the district court misapplied our precedent, however, because it incorrectly required Plaintiff to prove actual fraud at the class certification stage. Plaintiff asserts that this requirement runs afoul of our recent decision in *Flowserve*.[26] We do not agree with the Plaintiff's reading of *Flowserve* or its characterization of the district court's opinion.

In *Flowserve*, certain alleged misstatements by the defendant concerned projected earnings guidance released in October 2001 for the company's fiscal year 2002. The

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[24] *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, No. 3:02-CV-1152, 2008 WL 4791492, at *3 (N.D. Tex. Nov. 4, 2008) (emphasis in original) (internal quotation marks and citation omitted).

[25] The district court's statement of the Plaintiff's burden was nearly identical to the standard we announced in *Greenberg*. *See Greenberg*, 364 F.3d at 666 (stating that plaintiffs must prove "(1) that the negative 'truthful' information causing the decrease in price is related to an allegedly false, non-confirmatory positive statement made earlier and (2) that it is more probable than not that it was this negative statement, and not other unrelated negative statements, that caused a significant amount of the decline").

[26] *See Flowserve*, 572 F.3d at 230 (rejecting as incorrect defendant's theory that "a fraud causes a loss only if the loss follows a corrective statement that specifically reveals the fraud").

subsequent alleged corrective disclosures were downward revisions to the earnings guidance released in July and September 2002. The defendant argued that the standard for loss causation required plaintiffs to show a "fact-for-fact" disclosure that fully corrected prior misstatements, which had not occurred in either of the alleged corrective disclosures.[27] We rejected that approach, but we also insisted that plaintiffs need to show more than that a subsequent disclosure reveals the defendant's true financial condition.[28] We held that the disclosure "must reflect part of the 'relevant truth'–the truth obscured by the fraudulent statements."[29] The *Flowserve* court found erroneous the district court's belief that the defendant's revised earnings guidance in July and September 2002 was not relevant to any prior alleged misrepresentations, and we therefore reversed the district court's denial of class certification.[30]

But *Flowserve* did not eliminate the requirement at class certification that plaintiffs must prove the corrective disclosure shows the misleading or deceptive nature of the prior positive statements.[31] We have previously explained that the "relevant truth" necessary in an alleged corrective disclosure is such that "the truth disclosed must simply make the existence of the actionable fraud more probable than it would be without that alleged fact (taken as true)." *Lormand v. US Unwired, Inc.*[32] When confronted with allegedly false financial predictions and estimates, the district court must decide whether the corrective disclosure more probably than not

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[27] *Id.* at 229.
[28] *Id.* at 230.
[29] *Id.*
[30] *Id.* at 231.
[31] *See Greenberg*, 364 F.3d at 662.
[32] 565 F.3d 228, 256 n.20 (5th Cir. 2009).

shows that the original estimates or predictions were designed to defraud. As we held in *Flowserve*, "[i]f [Plaintiff] cannot prove by a preponderance of the evidence that the market learned more than that [Defendant's] earnings guidance was lower and so its business seemed less valuable, it cannot establish that its loss was caused by [Defendant's] misstatements . . . ."[33] Thus, the truth revealed by the corrective disclosure must show that the defendant more likely than not misled or deceived the market with earnings misstatements that inflated the stock price and are actionable. Otherwise, the misstatements would do little more than "touch upon" the alleged loss rather than cause the loss.[34]

We are satisfied that the district court here understood the need for the corrective disclosures to reveal the actionable truth about prior misstatements.[35] The district court correctly stated that "[i]mportantly, it is the misrepresentations themselves, not the corrective disclosures, which form the basis of a valid securities fraud claim. . . . Unless actionable statements, which were later corrected, are identified, Plaintiffs cannot establish loss causation."[36] The court went on to conclude that Plaintiff

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[33] *Flowserve*, 572 F.3d at 232.

[34] *See Dura*, 544 U.S. at 343, 125 S. Ct. at 1632 (holding that it is insufficient for a misrepresentation to merely "touch upon" a later economic loss because "[t]o 'touch upon' a loss is not to *cause* a loss").

[35] Plaintiff challenges statements in the district court's decision that Plaintiff had not identified a disclosure specifically revealing fraud. We recognize that a plaintiff need not prove at the class certification stage intentional fraud by the defendant. *See Flowserve*, 572 F.3d at 230. But reading the entirety of the *Flowserve* opinion, we conclude that a plaintiff still must prove that the defendant is responsible for the error of the misrepresentation. We read the district court's decision to say no more.

[36] *Archdiocese of Milwaukee Supporting Fund*, 2008 WL 4791492, at *5.

largely failed to identify disclosures that had a *corrective* effect linked to a specific misrepresentation, as opposed to simply a *negative* effect, and that many of the alleged corrective disclosures constituted confirmatory information. We therefore conclude that the district court did not apply an incorrect legal standard, and we turn to the specific statements and corrective disclosures alleged in Plaintiff's complaint.

IV.

Plaintiff contends that it has identified specific misrepresentations by Halliburton and linked those misrepresentations to partial corrective disclosures. It asserts that the allegations of its complaint together with the report of its expert, Jane Nettesheim, demonstrated that those disclosures are related to the misrepresentations and proximately caused its losses. Upon examining the alleged corrective disclosures and the evidence, we remain unpersuaded.

Plaintiff relies on three general categories of alleged misstatements by Halliburton made during a class period of June 3, 1999, to December 7, 2001. The first category of statements concerns Halliburton's exposure to liability in asbestos litigation and the company's stated reserves for such litigation. The allegedly corrective statements were made in press releases and SEC filings on June 28, 2001, August 9, 2001, October 30, 2001, and December 4–7, 2001.

Halliburton's asbestos liability derived from its 1998 merger with Dresser Industries and from a former subsidiary of Dresser known as Harbison-Walker Refractories Company. As of May 2001, Halliburton reported that its reserves were approximately $30 million to cover asbestos-related liability. On June 28, 2001, Halliburton reported in a press release that Harbison-Walker had

asked Halliburton to provide financial assistance for asbestos claims that Harbison-Walker had previously agreed to assume when it spun off from Dresser in 1992. The release reported that this was a new development, as Harbison-Walker had previously reaffirmed its responsibility for those claims. Halliburton reported in the press release that in response it would need to increase its asbestos reserves by $50 million to $60 million, after tax. On August 9, 2001, Halliburton filed a Form 10-Q with the SEC reporting that its asbestos reserves were $124 million. On October 30, 2001, Halliburton announced in a press release that a Mississippi jury had returned a plaintiff's verdict in an asbestos suit on October 26, 2001, for which Halliburton was responsible for $21.3 million. Then on December 4 and 7, 2001, Halliburton reported in a SEC filing and press release additional judgments against Dresser in other asbestos cases. Halliburton's stock price declined following each of these statements. Plaintiff contends that the filings and press releases related directly to and corrected Halliburton's previous misrepresentations that its asbestos reserves were adequate. We find no merit to this contention.

The June 28, 2001, press release does not correct any specific misrepresentation by revealing a previously obscured truth.[37] Nowhere in the release is there any mention of prior asbestos reserve estimates, and Plaintiff makes no argument that Halliburton made prior statements about exposure from claims related to Harbison-Walker.[38] At most, the release relates to prior estimates

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[37] *See Flowserve*, 572 F.3d at 230.

[38] *See Greenberg*, 364 F.3d at 667 (holding that an allegedly corrective disclosure was not related to prior allegedly false reports on the speed of new routers where the disclosure "makes no reference to increased router speed"); *id.* at 668 (holding that an alleged corrective disclosure reporting problems with third quarter earnings was

that asbestos reserve levels were adequate generally, but it does not correct a specific prior alleged misstatement.[39] Just as merely lowering earnings estimates does not reveal that a defendant previously misrepresented those estimates, merely raising the asbestos reserves does not show that those prior reserve estimates were intentionally misleading—the market must learn more than that Halliburton's business was potentially less valuable because of erroneous estimates of asbestos liability.[40] We agree with the district court that the situation could be different if Plaintiff had alleged that Halliburton previously stated it was including Harbison-Walker claims in its asbestos reserve estimates but actually did not do so, or if Halliburton had previously stated it had no exposure from Harbison-Walker claims and that it would not cover them, when in fact that was not true. Instead, Plaintiff asks us to draw an inference that the June 28, 2001 press release corrected prior allegedly false estimates of asbestos reserves merely because those reserves changed. But a company is allowed to be proven wrong in its estimates, and we can discern no indication from the June 28, 2001 press release that Halliburton's prior asbestos reserve estimates were misleading or deceptive.[41] It fol-

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not related to prior statements about first or second quarter earnings where the disclosure made "no reference at all" to the first and second quarters).

[39] *See, e.g., Nathenson*, 267 F.3d at 419 (rejecting as inadequate plaintiff's allegations that "suffer[ed] from a lack of required specificity . . . in pin-pointing the particular misleading statement (other than general statements that the Phase III results were 'positive')").

[40] *See Flowserve*, 572 F.3d at 232.

[41] *See id.* at 232 ("*Flowserve* was free to be wrong in its October 2001 earnings guidance and even for such error to cause investors loss when it was revealed in July and September 2002—so long as Flowserve did not commit fraud. Only if Flowserve's October 2001

lows that the June 28, 2001 press release was not an actionable corrective disclosure.

The same is true for the August 9, October 30, and December 4–7, 2001 SEC filings and press releases. Although Halliburton reported a much larger reserve for the asbestos litigation on August 9, this information was actually confirmatory because Halliburton had previously reported that it would need to increase its reserves by an additional amount of approximately $60 million, *after tax*. The August 9, 2001 Form 10-Q reported, consistent with Halliburton's prior statements, that the company "recorded as discontinued operations . . . an accrual of $92 million ($60 million, after tax)."

The announcements of various jury verdicts were also not actionable corrections. As noted by the district court, Halliburton actually repeated in a series of public filings the warning about "the uncertainties of litigation and the possibility that a series of adverse court rulings could materially impact the expected resolution of asbestos claims." We are not moved by Plaintiff's suggestion that these warnings, which appeared in at least five of Halliburton's 10-K and 10-Q filings, constituted mere boilerplate disclaimers of the risks associated with litigation.[42]

Neither the announcement of the Mississippi verdict nor the verdicts in other states demonstrated that Halliburton's previous estimates of asbestos liability obscured the relevant truth about the asbestos estimates.[43] While

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guidance (or another alleged misstatement) was fraudulent would any loss it caused Alaska be actionable.").

[42] *See Rubinstein v. Collins*, 20 F.3d 160, 167–68 (5th Cir. 1994) (while not dispositive per se, cautionary language is relevant to materiality of predictive statements as basis for securities fraud claim).

[43] Plaintiff contends that the disclosure of the Mississippi verdict exposed the falsity of estimates of asbestos liability in part because one

Plaintiff cites news reports about the asbestos verdicts and has shown that Halliburton's stock price reacted to the negative news, a decline in price following negative news does not prove loss causation.[44] We see in the evidence concerning the asbestos litigation a pattern of Halliburton keeping the market abreast of asbestos developments as they occurred and its necessary adjustments to the litigation reserves. We think this undermines any conclusion that the asbestos-related statements corrected prior misrepresentations or that the company acted with deception.

V.

We reach a similar conclusion with respect to the second and third group of alleged public misrepresentations by Halliburton. These alleged misrepresentations concern the benefits to Halliburton of its merger with Dresser Industries, and the company's accounting of revenue from cost-overruns on fixed-price construction and engineering contracts (so-called unapproved claims). The alleged corrective disclosures occurred on October 4, 1999, January 5, 2000, October 24, 2000, and December 21, 2000.

Halliburton announced on October 4, 1999, that it was selling its interest in two Dresser joint ventures and that

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analyst wrote that "[t]his jury award sets new precedents; the size of the award is enormous." However, rather than show that Halliburton's previous statements obscured the truth about asbestos exposure, this analyst's statement appears to confirm the unexpected nature of a precedent-setting jury verdict. The district court noted that another analyst, cited in the report of Plaintiff's expert, also supported the perception by the market that the verdict was a surprise rather than a revelation of a falsehood. That analyst stated, "[w]e expect a vigorous defense by [Halliburton] and remain optimistic that the asbestos liability will remain under control."

[44] *See Greenberg*, 364 F.3d at 665.

it expected its third quarter earnings to be less than previously expected, due in part to lower than expected profits from joint ventures and other business units of the Dresser group. On January 5, 2000, two analysts reduced their earnings estimates for Halliburton after discussions with company executives. According to Plaintiff, the October announcement and the analyst reports exposed the inaccuracy of Halliburton's previous positive statements about merging with Dresser, particularly statements in July and September 1999 that Halliburton expected annualized cost savings of $500 million from the merger.

Even if it were possible to say that the prior statements were more than erroneous expectations, both the October 4, 1999 announcement and the analyst reports contained multiple pieces of negative news. This required Plaintiff to "demonstrate that there is a reasonable likelihood that the cause of the decline in price is due to the revelation of the truth and not the release of the unrelated negative information."[45] This showing of loss causation is a "rigorous process" and requires both expert testimony and analytical research or an event study that demonstrates a linkage between the *culpable* disclosure and the stock-price movement.[46]

Plaintiff's expert failed to do this. The October 4, 1999 announcement reported that the Dresser Equipment Group was experiencing lower than expected profits; that there had been a decline in the downstream engineering and construction business segment; and that the earnings

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[45] *Greenberg*, 364 F.3d at 665.

[46] *Fener*, 579 F.3d at 410–11; *see also Oscar*, 487 F.3d at 271 ("[T]he plaintiffs must, in order to establish loss causation at this stage, offer some empirically-based showing that the corrective disclosure was more than just present at the scene.").

of the energy services group would be flat or only slightly higher because of low spending levels by energy industry customers. As a result of these items, the release then reported lower guidance on Halliburton's third quarter earnings per share. Nettesheim indicated in her expert report that the decline in Halliburton's stock price following the October 4, 1999 release was due to the reduction in the earnings guidance and recognized that the lower guidance in turn was based on more than one factor. When questioned about the report, however, Nettesheim testified that she did not perform any statistical or econometrical analyses of the three different pieces of information in the release because she was not asked to do so. Nettesheim's report indicated that her conclusions were based on statements from "news commentary and analysts." We have characterized such evidence as merely "well-informed speculation."[47]

Similarly, the January 2000 analyst reports indicated that the earnings estimate was reduced because of "less powerful synergies from the Dresser merger" *and* because of reduced expectations for offshore construction and a reduced growth estimate for oilfield spending. Although she recognized that the reports included nonculpable information, especially the decline in oilfield spending, Nettesheim presented no empirically-based evidence to show that news related to Dresser more

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[47] *Oscar*, 487 F.3d at 271 (rejecting as insufficient to show loss causation "the raw opinion of analysts, without supporting study of the market at issue—such as now common use of basic principles of econometrics"). Nettesheim testified in her deposition that she could have performed a more refined analysis and had done so in other cases.

probably affected the stock price than the other negative information.[48]

Plaintiff also argues generally that several alleged corrective disclosures demonstrated the falsity of former CEO Dick Cheney's statement about Dresser that "[t]he merger with Dresser Industries is now behind us" and "[t]he potential rewards to our shareholders are vast." We think, however, that this statement, appearing in a letter in Halliburton's 1999 Annual Report, is the kind of "generalized positive statement[] about a company's progress [that is] not a basis for liability."[49]

Turning to alleged misstatements about Halliburton's accounting methodology, Plaintiff contends that Halliburton improperly recorded cost-overruns in fixed-price construction contracts as revenue by misleadingly deeming the cost-overruns "probable" of collection, even if a customer had not agreed to pay the additional amount. Plaintiff argues that Halliburton revealed the falsity of its previous accounting methods when (1) it announced on October 24, 2000, that it would undertake a massive restructuring of its construction business and (2) it announced on December 21, 2000, that it would take a fourth quarter charge of $120 million as a result of the restructuring.

Plaintiff fails to show these announcements corrected any prior misleading statements and revealed deceptive practices in Halliburton's accounting assumptions. The October 24 press release does not mention fixed price contracts, unapproved claims, or the method for recogni-

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[48] *See Fener*, 579 F.3d at 409; *Greenberg*, 364 F.3d at 666.

[49] *Nathenson*, 267 F.3d at 419 (citing *Lasker v. N.Y. State Elec. & Gas Corp.*, 85 F.3d 55, 59 (2d Cir. 1996) (observing that "broad, general statements" are "precisely the type of 'puffery' that this and other circuits have consistently held to be inactionable")).

tion of revenue from such claims. Rather than revealing the truth about unapproved claims, the release attributes a large drop in the group's revenue to a decline in customer spending. Nettesheim's expert opinion that the October 24 disclosure concerned the company's booking of unapproved claims is also conclusory. She admitted in her deposition testimony that she did not match the October 24 statements to any particular prior misrepresentations by Halliburton.

Nettesheim's report shows that she relied for her conclusions on her examination of news reports and statements from analysts and the subsequent stock price movement. But the news reports Nettesheim cited discuss only problems and weak results generally in Halliburton's engineering and construction business. Nettesheim makes too great a leap in her conclusion that because analysts reduced earnings estimates based on weakness in Halliburton's construction business as a whole, the downgrades to estimates were due to Halliburton improperly recognizing revenue from unapproved claims. We see no such relationship evident in the statements.

Finally, we find no loss causation evident from the December 21, 2000 announcement, which indicated that the $120 million fourth quarter charge would include $25 million for reorganization costs, leaving approximately $95 million for project specific matters.[50] As with other al-

[50] Plaintiff's contention is that the $25 million is attributed to problems with the Dresser integration, and that this disclosure provided corrective information about Halliburton's prior false representations about the merger. Nettesheim conceded in her report, however, that the $25 million disclosure "does not appear to have been a surprise or a concern" to the market because some charge was already expected due to prior announcements. This portion of the De-

leged corrective disclosures, the December 21 announcement included clearly non-culpable negative information. For example, the release informed the market about "the poor near term market outlook for the downstream engineering and construction business," which Halliburton attributed to a "consolidating customer base, difficult relationships with certain customers, and some financially stressed competitors and a fiercely competitive environment." The negative information constituted non-culpable changes in market conditions and the competitive environment that Halliburton faced, which Plaintiff's expert failed to differentiate from any allegedly culpable information.

The market recognized that Halliburton's business faced general economic difficulties and industry-wide pressures. One reporting service, CIBC World Markets, noted the following after the December 21 release:

> The customer base for [engineering and construction] is consolidating and financially pressured competitors have intensified competition and pricing in the marketplace. As a result, HAL is restructuring its company into two operating segments . . . Labor disturbances in Venezuela and West Africa caused significant costs to be incurred on several large fixed-fee E&C contracts. . . . General industry-wide issues are also impacting the E&C business. Despite high oil and natural gas prices, spending for engineering and construction projects remains depressed. The difficult operating environment has forced some of Halliburton's E&C competition to cut prices and increase competitiveness.

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cember release was therefore confirmatory information and was not an actionable corrective disclosure. *See Greenberg*, 364 F.3d at 666.

We think the consolidating customer base, increased competition, and other "industry-wide issues," like depressed customer spending, are the kind of economic circumstances and industry-specific facts that are not actionable and must be proven by Plaintiff to have played a much lesser role in the stock price movement than alleged culpable disclosures.[51]

Nettesheim's conclusion that the December 21 disclosure related to cost-overruns in construction projects was based on news commentary. But the commentary shows reaction only to "the entire bundle of negative information," including the general downturn in Halliburton's construction business. By failing to provide empirical data to account for other negative news in the disclosure that was also part of the problem with Halliburton's engineering and construction business (e.g., increased labor costs, consolidated customer base, fiercely competitive environment), Nettesheim failed to provide the necessary linkage between the change in stock price and the *allegedly culpable* information (cost-overruns). Plaintiff therefore seeks to prove loss causation from the December 21 release by improperly relying only on evidence of a decrease in stock price following the negative disclosure of a fourth quarter charge.[52] Plaintiff has failed to prove loss causation with respect to the December 21, 2000 disclosure.

VI.

After reviewing the alleged misrepresentations and corrective disclosures, we conclude that Plaintiff has failed to meet this court's requirements for proving loss causation at the class certification stage. Therefore, the

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[51] *See Flowserve*, 572 F.3d at 229.

[52] *See Greenberg*, 364 F.3d at 665.

district court's judgment denying the Plaintiff's motion for class certification is AFFIRMED.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

THE ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., ET AL.,
Lead Plaintiff

v.

HALLIBURTON COMPANY, ET AL.,
Defendants

(November 4, 2008)

MEMORANDUM OPINION AND ORDER

Before the Court is the Plaintiffs' Motion to Certify Class [Docket Entry #34 1]. The Court held a hearing on this Motion on March 21, 2008, and approved The Archdiocese of Milwaukee Supporting Fund, Inc. ("AMS") as Class Representative.[1] The Court also noted the parties' agreement, and finds independently, that the Proposed Class satisfies Federal Rule of Civil Procedure 23 as to numerosity, commonality, typicality, and adequacy of AMS as a class representative. The parties did not dispute, and the Court also finds, that but for the sin-

[1] The Court did not approve Plaintiff Ben Alan Murphey as a Class Representative.

gle issue discussed below, a class action would be the superior method for adjudicating the claims of these class members.

The sole issue in dispute is the application of the requirement that, in a securities fraud class action, loss causation must be proven at the class certification stage.[2] Absent this requirement, the Court would certify the class. However, having considered the parties' extensive briefing, oral argument, and the applicable law, the Court is of the opinion that Plaintiffs have not demonstrated loss causation as to any of their claims. For that reason, Plaintiffs' Motion to Certify is **DENIED**.

BACKGROUND

Plaintiffs' Fourth Consolidated Amended Complaint ("Complaint") against Defendant Halliburton Company, et al ("Halliburton"), alleges misrepresentations with respect to three issues: (1) the expense of asbestos litigation; (2) changes to the accounting methodology used by Halliburton and their effect on earnings; and (3) the benefits of Halliburton's merger with Dresser Industries ("Dresser"). The class period is June 3, 1999 to December 7, 2001. Plaintiffs allege that during this period Halliburton, under the guidance of Dick Cheney (CEO until July 2000) and David Lesar (CEO since July 2000), downplayed the company's estimated asbestos liabilities, falsified earnings statements, and overstated the benefits of a merger with Dresser, in an effort to inflate Halliburton's stock price.

Plaintiffs point to eight specific disclosures, accompanied by a drop in Halliburton's stock price, as evidence of the inflationary effects of alleged misrepresentations on

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[2] *See Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 269 (5th Cir. 2007).

Halliburton's stock price. Plaintiffs rely on an expert witness, Jane Nettesheim ("Nettesheim"), who prepared a statistical model of Halliburton's stock price during the class period. Nettesheim asserts that each of these eight disclosures resulted in a company-specific decline in the stock price that cannot be attributed to general market trends or other external factors. Halliburton argues that Nettesheim's model is inadequate to satisfy the requirements for loss causation in the Fifth Circuit. The parties do not dispute that there was an efficient market in this case.

LEGAL STANDARD REGARDING LOSS CAUSATION

To establish a securities claim under Securities and Exchange Commission ("SEC") Rule 10b-5, a plaintiff must establish six elements: (1) a material misrepresentation or omission; (2) scienter; (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation, "i.e., a causal connection between the material misrepresentation and the loss."[3] In class action securities cases such as this one, plaintiffs can satisfy the reliance requirement through the fraud-on-the-market theory.

The fraud-on-the-market theory presumes that in an open and developed securities market, a company's stock price is determined by all available material information. Thus, buyers or sellers can be defrauded even if they cannot prove they personally relied on the alleged misstatements.[4] In *Greenberg v. Crossroads Systems, Inc.*,

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[3] *See Ind. Elec. Workers' Pension Trust Fund IBEW, et al, v. Shaw Group Inc.,* et al, 537 F.3d 527, 532 (5th Cir. 2008) (citations omitted); *Dura Pharm., Inc. v. Broudo,* 544 U.S. 336, 341-42 (2005) (citations omitted).

[4] *Basic Inc. v. Levinson*, 485 U.S. 224, 241-42 (1988) (citation omitted).

the Fifth Circuit held that class-wide reliance is rebuttably presumed where: "(1) the defendant made public material misrepresentations, (2) the defendant's shares were traded in an efficient market, and (3) the plaintiffs traded shares between the time the misrepresentations were made and the time the truth was revealed."[5]

The Fifth Circuit recently tightened the first *Greenberg* requirement by requiring "proof that the [defendant's] misstatement *actually moved* the market."[6] As a result, Plaintiffs in this case must demonstrate loss causation in order to trigger the fraud-on-the-market presumption of class reliance.[7] The Fifth Circuit requires loss causation to be "established at the class certification stage by a preponderance of all admissible evidence."[8] The Court must make an empirical judgment on loss causation "drawing largely from publicly available data thereby leaving minimal need for discovery."[9]

This approach to loss causation imposes an exceedingly high burden on Plaintiffs at an early stage of the litigation, but the Fifth Circuit determined that such a high burden was justified because of "the *in terrorem* power of class certification, the extraordinary leverage bestowed upon plaintiffs with certification and the due process rights of the parties."[10] This Court is bound to follow the Fifth Circuit's precedent, but notes that the bar is now extremely high for all plaintiffs seeking class certification in securities litigation.

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[5] 364 F.3d 657, 661 (5th Cir. 2004).

[6] *Oscar*, 487 F.3d at 265.

[7] *Id.*

[8] *Id.* at 269.

[9] *Ryan v. Flowserve Corp.*, 245 F.R.D. 560, 569 (N.D. Tex. 2007) (Boyle, J.) (citing *Oscar*, 487 F.3d at 267).

[10] *Id.* (citing *Oscar*, 487 F.3d at 266-67 ("class certification creates insurmountable pressure on defendants to settle")).

Plaintiffs can show that an alleged misrepresentation actually affected the market in one of two ways: (1) demonstrating an increase in the stock price after the release of false positive news; or (2) demonstrating a decrease in price following a corrective disclosure.[11] Confirmatory statements, or information already known to the market, are deemed not to actually affect the stock price, because an efficient market does not respond to information already known.[12] An efficient securities market fully responds to new information the first time it is made public, so misrepresentations cannot be actionable unless they are non-confirmatory, and complete corrective disclosures will only affect the stock price when they are first made.

The burden on claimants like Plaintiffs is further enhanced by the requirement that when relying on a *decline* in the company's stock price to prove that the price had been inflated by false positive information, they "must show that the false statement causing the increase was related to the statement causing the decrease."[13] This burden is derived from the theory of proximate loss—plaintiffs must show that the loss resulting from the corrective disclosure is proximately derived from the earlier misrepresentation. The absence of such a requirement would "bring about harm of the very sort the

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[11] *Nathenson v. Zonagen*, 267 F.3d 400, 418-19 (5th Cir. 2001). Here, Plaintiffs rely only on the second method of proving stock price inflation—showing the stock price decreased following alleged corrective disclosures. They do not point to *any* stock price increases resulting from positive misrepresentations.

[12] *Flowserve*, 245 F.R.D. at 568 (citing *Nathenson*, 267 F.3d at 419); *Greenberg*, 364 F.3d at 665-66 ("confirmatory information has already been digested by the market and will not cause a change in stock price").

[13] *Greenberg*, 364 F.3d at 665.

statutes seek to avoid" and would "tend to transform a private securities action into a partial downside insurance policy."[14]

When a company makes corrective disclosures and combines them with a discussion of unrelated negative information, plaintiffs must also "demonstrate that there is a reasonable likelihood that the cause of the decline in price is due to the revelation of the truth and not the release of the unrelated negative information."[15] Although at the class certification stage plaintiffs need not quantify the portion of loss that resulted from the false information rather than the unrelated disclosure, or prove that "some percentage of the drop was attributable to the corrective [portion of the] disclosure—the plaintiffs must, in order to establish loss causation at this stage, offer some empirically-based showing that the corrective disclosure was more than just present at the scene."[16]

Expert analysis can provide evidence to support the causation requirement, but it is not sufficient to carry plaintiffs' burden "without reference to any post-mortem data [the experts] have reviewed or conducted."[17] However, in some cases it may be so evident that a stock decline is driven by a particular corrective disclosure that no empirical analysis would be necessary to disaggregate the effect of the corrective disclosure from other unrelated disclosures.[18] For example, in *Greenberg*, the Fifth Circuit compared information about company earnings to "news of temporary interoperability problems," and concluded that:

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[14] *Dura Pharm., Inc.*, 544 U.S. at 347.
[15] *Greenberg*, 364 F.3d at 665.
[16] *Oscar*, 487 F.3d at 271.
[17] *Id.*
[18] *See Greenberg*, 364 F.3d at 669.

> [U]nlike the news of temporary interoperability problems, we are persuaded the news that a company's revenue will be 66% below estimates satisfies the plaintiffs [sic] burden. News that a company's earnings will be two-thirds short of analysts [sic] estimates is the type of negative information most likely to cause a sharp decline in stock price.[19]

As a result, even though the "plaintiffs offer[ed] no evidence or analysis tending to show that the drop in price following the [corrective disclosure] was likely caused by the negative financial news" the court found "that [the defendant's] statements. . . may form the basis for the plaintiffs [sic] fraud-on-the-market claim."[20]

In *Flowserve*, Judge Boyle clarified the plaintiffs' burden at the class certification phase:

> Plaintiffs who seek class status by showing collective reliance through the fraud-on-market presumption must show that the defendant made public, material misstatements, that the stocks traded in an efficient market, and that the stock price was actually affected by the purported fraud. To show that a stock price was actually affected, plaintiffs must show that false, non-confirmatory positive statements caused a positive effect on the stock price. Alternatively, plaintiffs must show: (1) that an alleged corrective disclosure causing the decrease in price is *related to* the false, non-confirmatory positive statement made earlier, and (2) that it is *more probable than not* that it was this related corrective disclosure, and not any

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[19] *Id.*
[20] *Id.*

> other unrelated negative statement, that caused the stock price decline.[21]

Because the Plaintiffs in this case have presented no evidence of false, non-confirmatory positive statements causing a *positive* effect on the stock price, it is this second, alternative burden that Plaintiffs must meet.

ANALYSIS

Plaintiffs claim that Halliburton made material misrepresentations, and then later made corrective disclosures with respect to three different issues: first, that Halliburton knowingly minimized its prospective liabilities from asbestos litigation to maintain its attractiveness to investors; second, that Halliburton employed fraudulent accounting practices to overstate its revenue; and third, that Halliburton executives made false statements about the anticipated success of Halliburton's merger with Dresser, to inflate the price of Halliburton' s stock.

I. Asbestos Liabilities

Plaintiffs allege that Halliburton "intentionally concealed and affirmatively misrepresented the true significance of Halliburton's exposure to asbestos liabilities in Halliburton's financial statements, [SEC] [sic] filings, press releases and communications with analysts and investors." Plaintiffs point to four separate statements they claim are corrective disclosures, each addressed in greater detail below. First, on June 28, 2001, Halliburton disclosed that Harbison-Walker,[22] a former subsidiary of Halliburton's new subsidiary (Dresser), had requested financial assistance from Halliburton to cover potential losses from asbestos lawsuits. David Lesar and Gary Morris, Halliburton's Executive Vice President and Chief

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[21] *Flowserve*, 245 F.R.D. at 569 (emphasis added).

[22] Harbison-Walker Refractories Company.

Financial Officer through August of 2001, stated during a conference call with analysts that as a result, the "worst case scenario" would be a net exposure of $50 to $60 million in asbestos liabilities, a considerable increase over the previous month's estimate of $30 million. On June 28, 2001, Halliburton increased its asbestos reserves by $30 million to include this "worst case scenario," for total reserves of $60 million.

Second, Plaintiffs point to a Form 10-Q filed by Halliburton with the SEC on August 9, 2001, in which it further increased its asbestos liability reserves to $124 million in response to the request for assistance from Harbison-Walker. Third, on October 30, 2001, Halliburton issued a press release announcing a $150 million jury verdict in an asbestos lawsuit, for which Halliburton would be responsible for $21.3 million. Fourth, on December 7, 2001, Halliburton issued a press release detailing the recent asbestos verdicts returned against it. Nettesheim asserts that each of these disclosures was accompanied by a company-specific, statistically significant decline in Halliburton's stock price, and therefore proves loss causation.

The Court concludes that Plaintiffs' arguments with respect to the asbestos issue are legally insufficient to establish loss causation. Defendants correctly argue that Plaintiffs' expert must link the alleged corrective disclosures with prior actionable misrepresentations in order to establish loss causation.[23] Here, Plaintiffs do not actually link *any* alleged misrepresentations with the four asbestos disclosures. Instead, Plaintiffs claim that the aggregate of Halliburton's SEC filings, financial statements, press releases, and conferences with analysts arti-

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[23] *See Greenberg*, 364 F.3d at 666.

ficially inflated the value of Halliburton's stock price. Plaintiffs then argue that each of the four disclosures corrected some of the inflation caused by the aggregate of Halliburton's prior statements. However, this "fraud in the aggregate" argument simply fails to satisfy the Fifth Circuit's loss causation requirements.

In *Greenberg*, the court identified five distinct actionable statements regarding the interoperability of the defendant's routers that directly correlated with alleged corrective disclosures.[24] Here, Plaintiffs cite four "partial" corrective disclosures and argue that each disclosure led to a partial market correction of the aggregate inflation in Halliburton's stock price. Plaintiffs do not identify specific statements that were revealed to be fraudulent by these corrective disclosures. Importantly, it is the misrepresentations themselves, not the corrective disclosures, which form the basis of a valid securities fraud claim.

Prior to the class period, Halliburton had in fact made significantly lower asbestos liability estimates in a number of its public filings. Plaintiffs point to these prior financial statements as creating an inflated stock price, without either identifying particular statements revealed to be fraudulent or eliminating confirmatory statements from the analysis.[25] Unless actionable statements, which were later corrected, are identified, Plaintiffs cannot establish loss causation.

However, even if the Court were to accept Plaintiffs' generalized approach as satisfying the initial requirements of loss causation, Plaintiffs' specific arguments

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[24] *Id.*

[25] *See Flowserve*, 245 F.R.D. at 568 (citing *Nathenson*, 267 F.3d at 419).

with respect to each of the four alleged corrective disclosures are also insufficient to meet the loss causation burden.

A. June 28, 2001 Partial Corrective Disclosure

To establish an inflated stock price, Plaintiffs rely on those portions of Halliburton's SEC filings from 1999 to 2001, which reported the company's reserves for asbestos liabilities. Halliburton's latest SEC filing prior to the June 28, 2001 disclosure, filed in May 2001, reported liability reserves totaling $30 million and stated that Halliburton had reserved sufficient funds for its estimated asbestos liabilities. However, in June 2001, Harbison-Walker asked Halliburton for financial assistance with potential asbestos claims.[26] Plaintiffs cite a conference call with analysts on June 28, 2001, where "Lesar and Morris stated that the 'worst case scenario' would be exposure, after insurance, of $50 to $60 million—not the $30 million that they had reported to be 'adequate' the previous month." Nettesheim opines that the drop in Halli-

[26] Harbison-Walker asked Halliburton for financial assistance with its potential asbestos claims, which Harbison-Walker assumed in 1992 as part of its spin-off from Dresser. Dresser agreed to handle asbestos claims filed prior to the spin-off, and Harbison-Walker agreed to handle asbestos claims filed afterward. Dresser and Harbison-Walker agreed that Harbison-Walker could access Dresser's historical insurance coverage for the asbestos-related liabilities it assumed. The companies were, in effect, co-insured, so Halliburton had a direct interest in how Harbison-Walker's claims were resolved. If Harbison-Walker exhausted the insurance available to protect Dresser/Halliburton, or if Dresser was named as a party to a lawsuit along with Harbison-Walker and Harbison-Walker was unable to fund the claims, then Halliburton would be responsible for these claims. Understandably, Halliburton stated to analysts that it had a "substantial interest" in resolving the asbestos claims against Harbison-Walker.

burton's stock price following this alleged corrective disclosure establishes loss causation because the disclosure "related to Halliburton's misstatements—specifically misstatements concerning the significance of Halliburton's exposure to asbestos liabilities."

However, the disclosure does not "specifically reveal[]" any misrepresentation or fraud in Halliburton's prior asbestos estimates.[27] In *Greenberg*, the company's corrective disclosure about the interoperability of its routers "specifically revealed" that the prior representations about interoperability were incorrect.[28] Here, Plaintiffs do not allege, or prove, that Halliburton's prior asbestos liability estimates were revealed by the June 28 disclosure to be fraudulent or even incorrect. In fact, it is just as likely that Halliburton revised its estimated asbestos liability figures based on newly acquired information about the Harbison-Walker situation. Halliburton is correct in arguing that "[t]here is no allegation in the Fourth Complaint—and certainly no evidence—that Harbison-Walker required Dresser's assistance prior to this disclosure."

In *Flowserve*, Judge Boyle granted summary judgment for the defendants because the alleged corrective disclosures did not "disclose the truth about the alleged misrepresentations at the center of Plaintiffs' claims."[29] Judge Boyle found that lowering the company's earnings estimates did not show that Flowserve had previously misstated its financials or misrepresented its internal controls.[30] Likewise, adjusting Halliburton's estimated asbestos liability (especially in the context of Harbison-

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[27] *See Greenberg*, 364 F.3d at 666.
[28] *Id.*
[29] *Flowserve*, 245 F.R.D. at 578.
[30] *Id.* at 579.

Walker's recent request for financial assistance) does not constitute evidence that Halliburton previously fraudulently misrepresented its asbestos liability estimates. Without citing an actionable prior misrepresentation, Plaintiffs cannot meet the requirements of loss causation.[31]

Quite simply, countless external factors can cause a company to incur a loss, fail to meet earnings forecasts, or adjust liability estimates—each of which will very likely affect the company's stock price. However, Plaintiffs cannot establish loss causation by simply speculating that fraud caused the loss.[32] Plaintiffs must provide actual evidence of an unlawful scheme which inflated the stock price.[33] The corrective disclosure cited by the Plaintiffs does not reveal that Halliburton made an initial false statement about its asbestos liability. This flaw is apparent from Nettesheim's report, which states that "the stock price decline on June 29 was caused by information [provided on June 28] that partially corrected *investors' erroneous assessments* [of] Halliburton's asbestos liability." Plaintiffs' own expert failed to opine that the June 28 disclosure corrected intentionally *fraudulent information* produced by Halliburton regarding its asbestos liability.

The circumstances would be different if it were alleged, for example, that Halliburton previously stated that it was including Harbison-Walker's asbestos exposure in its liability estimates but in fact was not, or that Halliburton had no exposure to the Harbison-Walker claims and had agreed never to cover them, when in fact it had made such an agreement. In contrast, Plaintiffs seek a finding

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[31] *See Greenberg*, 364 F.3d at 661.
[32] *See Oscar*, 487 F.3d at 271.
[33] *See Flowserve*, 245 F.R.D. at 579.

of loss causation based on speculation, a step Fifth Circuit precedent bars this Court from taking.[34] In short, Plaintiffs have not established loss causation with respect to the first disclosure.

B. August 9, 2001 Partial Corrective Disclosure

Similarly, Plaintiffs cannot establish loss causation with respect to the August 9, 2001 partial corrective disclosure. On August 9, 2001, Halliburton filed a Form 10-Q with the SEC, revealing that its accrued liability reserves had been increased from $64 million, as disclosed in its June 28, 2001 disclosure, to $124 million. Plaintiffs argue that the increase in Halliburton' s reserves to $124 million, in response to Harbison-Walker's request for assistance, contradicted Halliburton's earlier statement on July 25, 2001 that it would be "'prudent to accrue $60 million" to cover "potential exposure" for asbestos litigation after Harbison-Walker asked Halliburton for financial assistance with potential asbestos claims.[35]

Plaintiffs cannot establish loss causation with respect to the August 9, 2001 disclosure because they have not shown that the disclosure had a *corrective* effect, as op-

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[34] *See Oscar*, 487 F.3d at 271.

[35] On July 25, 2001, Halliburton held a conference call for analysts and money managers, where Lesar stated: "As we've previously reported in a press release on June 28, in a response [sic] to a request from Harbison-Walker for assistance to fund settlements of asbestos claims that Harbison had assumed at the time they were spun-off from Dresser Industries, we went in and took a look at the situation. . . Based on our analysis of Harbison's claims at this point in time and our concern that they may not be able to perform under their obligations, however, we thought it was prudent to accrue $60 million after-tax against the gain on the discontinued operations which, we believe, in our best judgment, is the potential exposure we have for this asbestos litigation. . . "

posed to simply a *negative* effect, on the stock price.[36] If the release of negative information to the market "does not disclose the scheme [to drive up stock prices]," then the information "cannot correct the artificial inflation caused by the scheme."[37] The Court is "unwilling to infer loss causation" from mere speculation of fraud.[38]

The sudden and substantial increase in Halliburton's asbestos liability reserves is the *sine qua non* of Plaintiffs' allegation; however, there is nothing in the August 9 disclosure to suggest that Halliburton or Lesar were lying about the company's prior analysis of Harbison-Walker's asbestos liabilities. Rather, Plaintiffs point to the substantial difference between the two numbers and ask the Court to bridge the gap with an inference of fraud. While the Court recognizes that there was a significant increase in the amount of asbestos liability reserves which occurred over a very short period of time, it cannot speculate about Halliburton's motivation behind suddenly increasing the reserves, and is in fact barred from doing so by applicable precedent. Plaintiffs have not demonstrated that the August 9 disclosure *revealed a scheme* to inflate stock prices, as opposed to merely revealing a change in circumstances.[39] The Court will not infer fraud where there is no evidence of a scheme to inflate the stock price.[40]

In *Flowserve*, Judge Boyle did not certify a class, and granted summary judgment in favor of the defendants,

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[36] *See Flowserve*, 245 F.R.D. at 579 (citing *In re Initial Pub. Offering Sec. Litig.*, 339 F. Supp. 2d 261, 266 (S.D.N.Y. 2005)).
[37] *Id.*
[38] *See Oscar*, 487 F.3d at 271.
[39] *See Greenberg*, 364 F.3d at 665 ("plaintiffs cannot trigger the presumption of reliance by simply offering evidence of any decrease in price following the release of negative information").
[40] *See Flowserve*, 245 F.R.D. at 579.

because the alleged corrective disclosures did not "disclose the truth about the alleged misrepresentations at the center of Plaintiffs' claims."[41] There, releases that corrected previous earnings estimates did not establish that the company had either misstated its previous financial statements or misrepresented its internal controls.[42] Likewise, the mere existence of SEC filings that alter previous asbestos liability estimates cannot establish that the company misstated its previous asbestos liability estimates or misrepresented its potential asbestos liability.

While it is within the realm of possibility that Halliburton executives deliberately understated the company's asbestos liability a mere two weeks before doubling the reserve, Plaintiffs offer no disclosure that actually "*reveal[s]*" any such improper behavior to the market.[43] Plaintiffs' argument is, at best, "well-informed speculation."[44] Although the loss causation requirements imposed by the Fifth Circuit are significant, that is the law which this Court must follow, and it bars certification of the class with respect to the second disclosure.

C. October 30, 2001 Partial Corrective Disclosure

Plaintiffs similarly cannot establish loss causation with respect to the October 30, 2001 disclosure. After the market closed on that day, "Halliburton announced that on October 26, 2001, a jury in Mississippi found Dresser (through Harbison-Walker) liable in two of six asbestos cases for total compensatory damages of $21.3 million."[45]

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[41] *Id.* at 578.
[42] *Id.* at 579.
[43] *See Greenberg*, 364 F.3d at 665 (emphasis added).
[44] *See Oscar*, 487 F.3d at 271.
[45] No judgment on the verdict had been entered against Halliburton as of that date. Plaintiffs provide conflicting information regarding

Plaintiffs claim that "[t]he stock price declines on October 31 and November 1, 2001 were caused by information that partially corrected investors' erroneous assessments [of] Halliburton's asbestos liability."

This allegation focuses on the timing of the disclosure of a number of sizeable asbestos verdicts for which Halliburton was responsible. On September 12, 2001, a Texas jury returned a $130 million verdict against Halliburton and its co-defendants in an asbestos lawsuit.[46] On Octo-

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this asbestos verdict, first stating that a *Mississippi jury* returned the verdict in the Complaint, and later stating that a "*second Texas jury*" returned this verdict in its reply brief. However, this discrepancy is not significant to the Court's loss causation inquiry.

[46] Plaintiffs also provide inconsistent information about this asbestos verdict. First, Plaintiffs claim in the Complaint that asbestos claims *relating to Harbison-Walker* led to the September 12 verdict, but Plaintiffs also allege in the Complaint that "a jury returned a $130 million verdict *against Halliburton* and a co-defendant for five asbestos plaintiffs" (emphasis added), and again in their reply brief state that "*Halliburton* learned that a jury had returned a $130 million verdict *against it*" (emphasis added). Plaintiffs also initially allege only one "co-defendant" but later in the Complaint assert that the verdict was rendered against multiple "co-defendants." Finally, Plaintiffs allege that the Texas jury returned a *$130 million* verdict against Halliburton and a co-defendant for five asbestos plaintiffs, but later point to analysts' knowledge of the Texas jury award of *$65 million* in compensatory and punitive damages to five plaintiffs (and Nettesheim in fact refers to the fact that "a Texas District Court had entered a judgment against Dresser on a $65 million jury verdict rendered in September 2001"). These discrepancies could be important, given that Plaintiffs rely on Lesar's statement that "there have been no adverse developments at all with respect to the *Harbison-Walker* situation" (emphasis added) as a prior misstatement, and do not specifically allege that the September jury verdict was in fact a Harbison-Walker claim. However, assuming that the September verdict arose from a *Harbison-Walker claim* (and Halliburton does in fact state that the Texas court entered judgment "against Dresser"), the Plaintiffs still fail to meet the requirements of loss causation, as explained in greater detail below.

ber 26, 2001, a Mississippi jury returned an adverse asbestos verdict of $150 million, $21.3 million of which was Halliburton' s responsibility. Plaintiffs cite a press release issued by Halliburton on October 30, 2001, which discussed only the October verdict, as a corrective disclosure. Plaintiffs claim generally that Halliburton executives artificially inflated its stock price by making positive statements to analysts regarding Halliburton's estimated asbestos liabilities, and by failing to disclose the entire truth about the asbestos verdicts. Plaintiffs identify one statement that could qualify as a misrepresentation: on October 23, 2001, after the September verdict was returned, Lesar stated that "there have been no adverse developments at all with respect to the Harbison-Walker situation."

However, the Court cannot certify a class based on the October 30 disclosure because it lacks one necessary element: the corrective disclosure must reveal to the marketplace the truth behind the alleged misrepresentation.[47] The October 30 disclosure does not reveal to the market the truth of the alleged misrepresentation of October 23, because the correction does not reference the September verdict. If any misrepresentation occurred on October 23, it necessarily went to the failure to disclose the September verdict, because the October verdict had not yet been returned. But only the October verdict, not the September verdict, was revealed in the October 30, 2001 disclosure.

The requirement that there be a corrective disclosure of the alleged misrepresentation is not a mere triviality. To establish a presumption of reliance, the Plaintiffs must show that the misrepresentation actually moved the

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[47] *See Greenberg*, 364 F.3d at 661.

market.[48] Such a showing may be made by Plaintiffs (1) showing an increase in stock price following the alleged misrepresentation, or (2) showing a decrease in the stock price following a corrective disclosure.[49] Without a corrective disclosure regarding the September verdict, the *only* verdict the alleged misrepresentation could relate to, Plaintiffs cannot show that the stock price declined as a result of a *corrective* disclosure.[50]

Plaintiffs argue that the October 30, 2001 disclosure in fact related to the September verdict, because it demonstrated that Halliburton's anticipated asbestos liabilities were higher than generally reported. Plaintiffs argue that Lesar's statement on October 23 falsely suggested to the marketplace that Halliburton's prospective asbestos liabilities were under control, while the subsequent disclosure of the October verdict proved they were not. However, Halliburton's previous warning in its Form 10-K filings that a series of high asbestos verdicts remained a possibility directly contradicts this theory.[51]

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[48] *See Oscar*, 487 F.3d at 265.

[49] *Flowserve*, 245 F.R.D. at 568 (citing *Nathenson*, 267 F.3d at 418-19). The Plaintiffs have not alleged an increase in stock price following any of the alleged misrepresentations, and therefore only the second mode of proving the misrepresentation actually moved the market is available to them.

[50] *See id*. There are two ways for the Plaintiffs to satisfy the *Oscar* requirement that the misrepresentation actually moved the market, and only one requires the existence of a corrective disclosure. If Nettesheim's model demonstrated an increase in Halliburton's stock price following Lesar's statement, one could argue that a corrective disclosure was not required. However, because Plaintiffs rely only on the decline in the stock price, this avenue is closed.

[51] For example, in Halliburton's 1999 Form 10-K filing with the SEC, it stated in the "Notes to Annual Financial Statements" section that "We *recognize the uncertainties of litigation and the possibility that a series of adverse court rulings could materially impact the ex-*

Plaintiffs do not satisfy *Greenberg's* requirement of demonstrating that Halliburton made a misrepresentation that moved the market, which was related to the later correction.[52] Lesar stated that "there have been no adverse developments," not "there *will* be no adverse developments." Plaintiffs do not present opinions, much less any that reference "post-mortem data," to suggest that the market perceived the October 30, 2001 disclosure as having a *corrective* effect after any earlier *fraudulent* statement by Lesar.[53] Plaintiffs ignore the distinction between negative and corrective disclosures.[54] A negative disclosure does not necessarily have a corrective effect on the stock price.

Although Nettesheim concludes that the October 30, 2001 announcement had a negative effect on the stock price, she does not show that the resulting decline in the stock price was proximately caused by a prior misstatement. In fact, Nettesheim cites to the opinion of an A.G. Edwards analyst, who stated "[w]e expect a vigorous defense by [Halliburton's] [sic] and remain optimistic that the asbestos liability will remain under control." Thus, the market perception of the disclosure of the recent verdict was not that Halliburton fraudulently concealed its potential asbestos liabilities, but that the verdict was a surprising event against which Halliburton would vigor-

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pected resolution of asbestos related claims. However, based on our historical experience with similar claims, the time elapsed since Dresser and its former divisions or subsidiaries discontinued sale of products containing asbestos, and our understanding of the facts and circumstances that give rise to such claims, we believe that the pending asbestos claims will be resolved without material effect on our financial position or results of operations" (emphasis added).

[52] *Greenberg*, 364 F.3d at 661.

[53] *See Oscar*, 487 F.3d at 271.

[54] *See Flowserve*, 245 F.R.D. at 579.

ously defend. The market did not perceive the revelation of the verdict as evidence of prior fraud. As a result, the October 30 disclosure does not satisfy the requirements of loss causation.

In *Flowserve*, the plaintiffs argued that the "true financial condition" of the company was not accurately reflected by the company's prior earnings estimates.[55] Likewise, Plaintiffs argue that Lesar's statement suggested that Halliburton's asbestos liabilities were under control, which was not an accurate reflection of the "true asbestos condition" of the company. In *Flowserve*, the plaintiffs argued that subsequent financial statements demonstrated the company's "true financial condition;" here, Plaintiffs argue that subsequent asbestos verdicts revealed that Halliburton's true asbestos condition was not under control. The court rejected the argument in *Flowserve*, and this Court similarly rejects the argument here.[56]

For yet another reason, the October 30, 2001 disclosure is insufficient to establish loss causation: Plaintiffs have not separated the negative effect of the *new* information—the recent October verdict— from any corrective effect flowing from the revelation of increased *existing* asbestos exposure, if the corrective disclosure in fact related to Lesar's failure to reveal the September verdict. In short, Plaintiffs have not demonstrated loss causation as to the third asbestos disclosure.

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[55] *Id.* at 573.

[56] *See id.* at 574 ("the 'true financial condition' theory, if accepted, threatens to undermine the objective of securities law and disregards precedent").

D. December 4-7, 2001 Partial Corrective Disclosures

From December 4 through December 7, Halliburton disclosed a number of recent adverse asbestos jury verdicts in its Form 8-K SEC filings. On December 4, Halliburton filed a Form 8-K with the SEC, in which it disclosed that a Texas district court entered a judgment against Halliburton/Dresser on a jury verdict rendered in September 2001.[57] This filing also disclosed that the same district court entered three additional judgments against Dresser in favor of 100 other asbestos plaintiffs, for an aggregate amount of $35.7 million, due to a an "alleged breach of a purported settlement agreement." Then, on December 7, 2001, Halliburton issued a press release detailing the recent asbestos verdicts rendered against it.[58]

Plaintiffs argue that the decline in Halliburton's stock price on December 4, 5, and 7 demonstrates loss causation because Halliburton intentionally minimized the market's perception of its asbestos liabilities. However, Nettesheim's report appears to treat only the December 7 filing as a corrective disclosure, stating "[t] he cause of the large decline in Halliburton's stock price on December 7 was directly related to the disclosure regarding its asbestos exposure and subsequent market assessments

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[57] *See supra* footnote 46.

[58] Plaintiffs' Complaint and reply brief each identify a "release detailing all the recent asbestos verdicts" issued by Halliburton on December 7, 2001 as the corrective disclosure. However, Nettesheim's report only refers to a Form 8-K filed by Halliburton on December 7, 2001, disclosing a $30 million verdict rendered by a Maryland jury on December 5, 2001, in favor of five plaintiffs and against Halliburton/Dresser, as the corrective disclosure. For the purposes of its loss causation analysis, the Court will refer to both of these disclosures collectively as the December 7 disclosure.

at [sic] to the possible financial consequences to the Company of that asbestos exposure." Further, Plaintiffs' reply brief, while briefly noting the December 4 filing, only attempts to link the December 7 disclosure to prior representations that Halliburton's asbestos reserves were "adequate," "prudent," and "conservative." As a result, the Court will treat only the December 7 disclosure as an alleged corrective disclosure. However, even assuming that Plaintiffs properly alleged that the December 4 filing also qualified as a corrective disclosure, the Plaintiffs' loss causation argument must still fail.

With respect to the December 4 filing, Nettesheim's report states that "this [September] verdict was known to the public before December 4. . . an analyst for Salomon Smith Barney referred to this verdict in his November 9, 2001 report." Plaintiffs' Complaint also admits that "a few analysts did find out about the large Texas verdict," and cites to the same Salomon Smith Barney report. Information already known to the market cannot actually affect the stock price because an efficient market will not respond to information that is already known.[59] As a result, the December 4 filing does not meet the loss causation requirements with respect to revelation of the September verdict. Additionally, the information about the judgment entered due to Dresser's breach of a purported settlement agreement qualifies as nothing more than new negative information, rather than a corrective disclosure, because there are no identifiable prior statements relating to any such settlement agreement.

Further, Plaintiffs cannot establish loss causation with respect to the December 4 disclosure because they have not shown that the filing had a *corrective* effect, as op-

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[59] *See id.* at 568.

posed to simply a *negative* effect, on the stock price.[60] If the release of negative information to the market "does not disclose the scheme [to drive up stock prices]," then the information "cannot correct the artificial inflation caused by the scheme."[61] Halliburton correctly argues that disclosures relating to asbestos verdicts, especially those revealed within days of judgment being entered, "merely confirmed the Company's previous and repeated warnings that a series of such results 'could materially impact' its expectations regarding resolutions of its asbestos claims." As previously stated, the Fifth Circuit is "unwilling to infer loss causation" from mere speculation of fraud.[62]

Nettesheim opines that "the Company released several pieces of negative news, all of which were concerning the asbestos claims," but does not allege that this information had a corrective effect on the stock price. The Court cannot simply speculate about previous fraudulent statements that may or may not have inflated the stock price, and that were allegedly later corrected by this December 4 disclosure. The Plaintiffs must prove that the disclosure actually revealed to the market prior fraud.[63]

The only identifiable misstatement that could relate to the December 4 disclosure, even though not even identified by Plaintiffs with respect to the December 4 filing, would be Lesar's statement on October 23, 2001, that there had been no "adverse developments" with respect to the Harbison-Walker situation, which ignored the September verdict that had been rendered. But the Decem-

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[60] *See id.* at 579 (citing *In re Initial Pub. Offering Sec. Litig.*, 339 F. Supp. 2d 261, 266 (S.D.N.Y. 2005)).
[61] *Id.*
[62] *Oscar*, 487 F.3d at 271.
[63] *See Greenberg*, 364 F.3d at 666.

ber 4 disclosure actually provides a justification for the delay in announcing the September verdict: while the jury returned its verdict in September 2001, the Court did not enter judgment against Halliburton/Dresser until November 29, 2001. The verdict was revealed a few days later in the December 4 filing. As a result, the December 4 filing reveals nothing fraudulent to the market, and the Plaintiffs have failed to demonstrate loss causation with respect to the December 4 filing.

With respect to the December 7 disclosure, Plaintiffs again fail to distinguish between the negative and corrective effects of the disclosure.[64] To establish loss causation, Plaintiffs must show that it was "more probable than not" that the decline in stock price was caused by the corrective portion of the disclosure, rather than the new information.[65] For example, in *Greenberg*, the corrective disclosure regarding the interoperability of routers also stated the company had lost one of its biggest customers.[66] The plaintiffs in *Greenberg* failed to establish loss causation because they did not demonstrate that the decline in stock price was caused by the disclosure regarding interoperability, rather than the loss of a major customer.[67]

There are two distinct components driving the decline in stock price following the December 7, 2001 disclosure: the corrective effect resulting from the alleged prior minimization of asbestos liabilities; and the negative effect following the announcement of a new asbestos verdict, rendered on December 5. Plaintiffs must demonstrate that it was "more probable than not" that the sub-

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[64] *See id.* at 665.
[65] *See id.*; *see also Flowserve*, 245 F.R.D. at 569.
[66] *Greenberg*, 364 F.3d at 666-67.
[67] *Id.* at 667.

sequent decline in stock price was caused by a *correction* of a prior inflated value, rather than constituting a normal market response to a sizeable adverse verdict.[68]

The December 7, 2001 disclosure references the recent December verdict, which was *new* negative information, unrelated to previous disclosures, and also negative information about the September verdict, which was already known to the market.[69] Plaintiffs make no effort to distinguish any *corrective* effects from the effects of new negative information. With respect to mixed disclosures, the plaintiff's burden is heightened—Plaintiffs must separate actual corrective effects from effects of new negative events.[70] Here, Plaintiffs merely point to a decline in Halliburton's stock price following the mixed disclosure and then presume loss causation. The Fifth Circuit has made clear that this is insufficient to carry the Plaintiffs' burden at the class certification phase.[71]

Plaintiffs argue that the December 7, 2001 disclosure corrects Halliburton's previous representations of its estimated asbestos liabilities as "manageable" and "a nuisance."[72] However, construing an adjustment of potential liability as inherently fraudulent would discourage companies from addressing changed conditions, for fear of

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[68] *See id.* at 666.

[69] As stated above, Halliburton filed a Form 8-K with the SEC on December 4 disclosing the jury verdict rendered against Dresser in September 2001. Plaintiffs also admit that "this verdict was known to the public before December 4. . . an analyst for Salomon Smith Barney referred to this verdict in his November 9, 2001 report."

[70] *Greenberg*, 364 F.3d at 666.

[71] *Id.*

[72] For example, on September 4, 2001, Lesar stated that Halliburton "takes our exposure seriously," but that it sees asbestos claims against the company as a "manageable problem."

exposing themselves to securities fraud lawsuits.[73] Even though Halliburton had previously warned investors that its asbestos reserves could possibly be affected by a series of high verdicts, Plaintiffs argue that Halliburton's disclosure of these new asbestos verdicts shows that the company's previous estimates were fraudulent. As noted earlier, the Court will not infer fraud where there is no evidence of a scheme to inflate the stock price.[74] Plaintiffs do not cite any analyst reports or other information indicating that the market perceived the December 7, 2001 disclosure as revealing fraud, rather than just delivering bad news. Without any evidence of a fraudulent scheme, Plaintiffs' mere "well-informed speculation" is, again, insufficient to establish loss causation.[75]

Plaintiffs have failed to establish loss causation with respect to any of the four disclosures relating to asbestos liabilities. Therefore, the Court cannot certify a class with respect to the asbestos claims.

II. Accounting Methodology

With respect to the accounting claims, Plaintiffs argue that Halliburton changed its accounting methodology sometime in late 1997 or early 1998, inflating its balance sheet by recognizing as revenue claims for cost overruns that had a low probability of collection. Plaintiffs claim that these actions were accompanied by changes to the language of Halliburton's financial statements, which did not comply with the requirements of generally accepted

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[73] *See Flowserve*, 245 F.R.D. at 577 (rejecting plaintiff's argument on the grounds that "in practical terms, if any corporate defendant ever files a restatement, it will virtually guarantee investors the ability to recoup for any loss").

[74] *Id.* at 579.

[75] *Oscar*, 487 F.3d at 271.

accounting principles, because the reasons for and impact of the changes were not adequately disclosed.

Plaintiffs allege in the Complaint that over a period of at least five years, dating back to 1993, "Halliburton had consistently represented that all '*anticipated' losses on contracts were provided for currently* and that revenues represented by cost overrun/change order charges, i.e., Unapproved Claims, *were recognized only when the customer had agreed to pay the Unapproved Claim*."[76] Plaintiffs argue this means that:

> [B]efore an Unapproved Claim was resolved, the Company recorded losses caused by project cost overruns or unpaid Unapproved Claims. According to the company's stated accounting practice, only after the claim *was resolved with an agreement to pay* would the Company recognize revenue on the claim as an offset against the project's cost overruns.[77]

Plaintiffs claim that in late 1997 to early 1998, Halliburton secretly began to include in revenue amounts that customers had *not* agreed to pay, where Plaintiffs claim the likelihood of collection was "dubious," to offset and conceal cost overruns and unpaid Unapproved Claims, and to pad profit margins. Plaintiffs argue that as a result Halliburton's financial statements, which stated that claims were included as revenue only "when collection is deemed probable," in fact contained amounts not likely to be collected, thereby overstating Halliburton's revenue and artificially inflating its stock price.

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[76] Emphasis in original.

[77] Plaintiff's Fourth Amended Complaint, P. 137 (emphasis in original).

Plaintiffs cite Halliburton's statement, from a press release issued December 21, 2000, that it was taking a $120 million charge in the fourth quarter of 2000 as the requisite corrective disclosure. Plaintiffs argue that this fourth quarter charge was the manifestation of Halliburton's previous inclusion in revenue of claims with a low probability of collection. The statement itself attributed $95 million of the expected $120 million loss to uncollectable cost overrun claims. It attributed the uncollectable cost overruns to labor disturbances in Venezuela and West Africa, and also mentioned that cost overruns on seven other projects had not been resolved in Halliburton's favor, as was originally anticipated.

The first major flaw in Plaintiffs' argument is that Plaintiffs fail to identify specific misrepresentations "that are capable of moving the market."[78] Nettesheim simply did not identify any specific misrepresentations that correlate to the December 21, 2000 disclosure.[79] Nettesheim merely contends that the disclosure caused a company-specific decline in Halliburton's stock price that was unrelated to industry or market conditions. While *Nathenson* held that a plaintiff may rely on a decline in the stock price following a corrective disclosure to establish loss causation, *Greenberg* clarified that a plaintiff must still show the existence of earlier misrepresentations that actually moved the market.[80] Thus, when relying on a decline in stock price, Plaintiffs must still relate the disclosure causing the fall to an earlier misrepresentation that was corrected by the disclosure. Plaintiffs have identified no such earlier misrepresentation.

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[78] *See Flowserve*, 245 F.R.D. at 571.
[79] *See Greenberg*, 364 F.3d at 666.
[80] *Id.*; *Nathenson*, 267 F.3d at 418-19.

Along with failing to identify an earlier misrepresentation, Plaintiffs have commingled evidence of inflation of the stock price during the class period with impermissible evidence of inflation of the stock price prior to the class period. Specifically, any alleged misrepresentations made by Halliburton that may have actually moved the market could have occurred before the class period. If Halliburton changed its accounting practices in late 1997, as Plaintiffs contend, then the financial statements in late 1997 and 1998 would have inflated the stock price if they included in revenue claims not likely collectable. The class period in this case commences on June 3, 1999. Without accounting for possible inflation prior to the class period, any later financial statements reasserting the accounting methodology are at least partially and unquantifiably confirmatory in nature.[81] Confirmatory statements cannot support a showing of loss causation. Plaintiffs do not address the possibility that inflation in the stock price would have occurred, at least in part, before the beginning of the class period.

Plaintiffs attempt to meet the *Greenberg* requirement of pinpointing earlier misrepresentations that "actually moved the market" by citing language found in one of Halliburton's financial statements, and then repeated in later financial statements. The language of these financial statements is addressed in greater detail below. However, Plaintiffs fail to distinguish between confirmatory and non-confirmatory statements within these documents. The only alleged misrepresentation during the class period cited by Plaintiffs comes from Halliburton's 1999 Annual Report, issued in early April 2000:

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[81] *See Greenberg*, 364 F.3d at 665-66.

> All known or anticipated losses on contracts are provided for currently. Claims and change orders which are in the process of being negotiated with customers for extra work or changes in the scope of work are included in revenue when collection is *deemed probable*.

This passage cannot form the basis for an actionable misrepresentation for a number of reasons.

In *Flowserve*, Judge Boyle rejected "re-publications of financial statements, earnings projections, and confirmation of debt covenant compliance" as actionable statements capable of moving the market, because such material is confirmatory in nature.[82] Here, the republication of Halliburton's accounting methodology in its financial statements is similarly confirmatory.[83] Halliburton's 1998 Annual Report identically stated that "[a]ll known or anticipated losses on contracts are provided for currently." The 1998 Annual Report was filed on March 23, 1999—more than two months before the beginning of the class period. The alleged inflationary effects caused by the "all known or anticipated losses" language therefore occurred before the class period.

Plaintiffs do not allege that specific losses on contracts were incurred between the 1998 and 1999 annual reports, so that the 1999 report was somehow materially different from the first. The market will not "double-count" information it already knows.[84] Plaintiffs make no effort to distinguish between the confirmatory language and other non-confirmatory language in the 1999 Annual Report,

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[82] *See Flowserve*, 245 F.R.D. at 571.
[83] *See Greenberg*, 364 F.3d at 665-66.
[84] *Flowserve*, 245 F.R.D. at 568.

which precludes a finding of loss causation attributable to the language regarding current provision for losses.

Comparing the plain language of the 1999 Annual Report with the language of the 1998 Annual Report reveals that one additional sentence was added to the 1999 filing. The 1999 filing states that "[c]laims and change orders which are in the process of being negotiated with customers, for extra work or changes in the scope of work are included in revenue when collection is deemed probable," immediately after the "known or anticipated losses" language appears. However, Plaintiffs have not explained why this "deemed probable" language is not substantively encompassed within the previous confirmatory statement about "known or anticipated losses." Instead, Plaintiffs merely argue that as early as July 1999, "significant cost overruns and unapproved claims. . . were undermining Halliburton's earnings," without distinguishing the content and effect of the new language in the 1999 Annual Report from the "known or anticipated losses" language found in the earlier financial statements.

Therefore, Plaintiffs' position runs afoul of *Greenberg's* requirements in two respects. First, Plaintiffs fail to identify any specific misrepresentation that allegedly inflated the stock price beginning in July 1999. Instead, Plaintiffs offer only a conclusory statement that such inflation occurred. In doing so, Plaintiffs attempt to prove loss causation without ever showing that the company made material misrepresentations that affected the market, like those present in *Greenberg*.[85] It is insufficient to establish loss causation simply by proving that the stock

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[85] *Greenberg*, 364 F.3d at 661.

price declined after negative news, like that of a fourth quarter charge, was released.

Second, confirmatory positive statements do not actually affect the market.[86] The class period began on June 3, 1999. Plaintiffs allege that Halliburton's stock price was inflated in July 1999, without identifying a specific cause for that inflation. Any inflation could likely have been caused by an alleged misrepresentation made before the class period. To establish loss causation, Plaintiffs must cite actual misrepresentations made *during* the class period that were not confirmatory.[87]

Even if the Court were to look only at the 1999 Annual Report, the *only* alleged falsehood cited by Plaintiffs is in the fine print about accounting practices which had appeared in a prior financial statement, that "[a]ll known or anticipated losses on contracts are provided for currently." That is a "classic example[s] of confirmatory information."[88] Here, nothing in the record explains in what manner the language in the 1999 Annual Report is materially different from statements in any of Halliburton's previous financial statements with regards to misrepresenting Halliburton's accounting practices. The additional language in the 1999 Annual Report does not significantly alter the nature of the assurances found in the 1998 Annual Report, or in other prior financial statements. The comparison is analogous to false public announcements about the interoperability of routers that were present in *Greenberg*.[89]

Plaintiffs have not shown loss causation for a third critical reason: the alleged corrective disclosure on De-

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[86] *Id.* at 665-66.
[87] *See id.*
[88] *Flowserve*, 245 F.R.D. at 571.
[89] *See Greenberg*, 364 F.3d at 660.

cember 21 does not "specifically reveal" to the market any misrepresentation or fraud that may have appeared in Halliburton's prior financial statements.[90] On December 21, 2000, Halliburton issued a press release stating that $95 million of its $120 million fourth quarter loss was attributable to cost overruns. In *Flowserve*, Judge Boyle rejected the plaintiffs' argument that a failure to meet earnings forecasts rendered previous statements about historical financials internal auditing controls fraudulent.[91] While it is possible for the fraud to be revealed to the market indirectly, the plaintiff must make such a showing in the loss causation analysis.[92]

Halliburton's loss in the fourth quarter of 2000 does not establish loss causation without proof of a revelation of fraud by Halliburton or an indirect revelation of fraud to the market.[93] Halliburton's disclosure does not *directly* reveal a fraud; the disclosure reiterates that Halliburton had believed that collection of the cost overruns was probable and states that external factors, such as labor unrest in Venezuela and Africa, had contributed to the losses.

Where fraud is revealed to the market *indirectly*, plaintiffs must show that the market recognized a relationship between the disclosure and the indirectly-revealed fraud.[94] In this case, the Plaintiffs must demonstrate that the market recognized a relationship between the December 21, 2000 disclosure of the $120 million fourth quarter charge, attributed to cost overruns and labor unrest, and the 1999 Annual Report that stated:

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[90] *See id.* at 666.

[91] *Flowserve*, 245 F.R.D. at 578-79.

[92] *Id.* at 579.

[93] *See id.* at 578-79.

[94] *Id.*

> All known or anticipated losses on contracts are provided for currently. Claims and change orders which are in the process of being negotiated with customers for extra work or changes in the scope of work are included in revenue when collection is deemed probable.

Plaintiffs make no such showing here. There is no evidence that the market perceived a relationship between this fourth quarter charge and the new language in the 1999 Annual Report. Plaintiffs offer no evidence that Halliburton did not believe it was complying with proper accounting practices, nor do Plaintiffs contend that the market recognized such evidence and linked it to the December 21, 2000 disclosure, or to the 1999 Annual Report. Plaintiffs merely ask the Court to infer fraud from Halliburton's substantial fourth quarter charge.[95] This the Court cannot do.

The Plaintiffs' argument is simply a nuanced version of the "true financial condition" argument that Judge Boyle rejected in *Flowserve*.[96] Plaintiffs argue that Halliburton's financial statements, in the aggregate, misrepresented the true financial condition of the company and that the announcement of a fourth quarter loss served as a corrective disclosure of the company's true financial health. However, Plaintiffs cannot establish loss causation merely by pointing to lower financial projections and then concluding without proof that Halliburton's previous revenue statements were fraudulent. The burden of proving loss causation cannot be satisfied with such "well-informed speculation."[97]

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[95] *See Oscar*, 487 F.3d at 271.
[96] *Flowserve*, 245 F.R.D. at 573.
[97] *Oscar*, 487 F.3d at 271.

The Fifth Circuit has made plain that securities fraud suits are not an "insurance policy for investors," whereby Plaintiffs can simply "surmise[] what the market knew. . . with the benefit of hindsight and from the comfort of a litigation armchair."[98] In light of the failure of Plaintiffs to satisfy their burden on loss causation, class certification is denied with respect to the accounting methodology claim.

III. The Dresser Merger

Plaintiffs argue that in early 1998, Halliburton misstated the benefits of its acquisition of Dresser Industries, in order to inflate the price of Halliburton stock. Plaintiffs cite four disclosures as correcting the inflation caused by the alleged misstatements regarding Dresser, each addressed in greater detail below. First, on October 4, 1999, "Halliburton unexpectedly warned that its 1999 third-quarter earnings would be less than the previous estimates," caused in part by the lower than expected profits from the Dresser business units. Second, on January 5, 2000, two investment analysts lowered their estimates of Halliburton's annual earnings for 2000 and 2001, caused in part by "less powerful synergies from the Dresser merger." Third, on October 24, 2000, Halliburton CEO Lesar told analysts in a conference call that Halliburton planned a massive restructuring in light of operational problems and management inefficiencies caused by the Dresser merger. Fourth, Halliburton officially unveiled the restructuring plan on December 21, 2000, the same day it announced that it expected to incur a $120 million dollar charge in the fourth quarter of 2000, $95 million of which was attributed to accounting claims adjustments. The remaining $25 million in losses was at-

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[98] *Id.* at 574.

tributed to the costs of reorganization after the Dresser merger.

A. October 4, 1999 Disclosure

Plaintiffs have not established loss causation with respect to the October 4, 1999 disclosure because the underlying alleged misrepresentations are confirmatory and thus not actionable.[99] Plaintiffs point to statements made on July 22, 1999, and September 13, 1999, in which Halliburton executives estimated annualized savings of $500 million from the Dresser merger, as misrepresentations that actually moved the market.

Defendants correctly argue that these alleged misrepresentations were confirmatory, and thus not actionable, because on March 1, 1999, prior to the class period, Halliburton stated that: "[c]osts from the merger and the downturn in activity should yield over $500 million by the end of 1999. . ." An efficient market will not "double-count" the effects of a confirmatory positive statement, and inflate the stock price twice.[100] Plaintiffs argue that the March 1999 statement does not render the later statements confirmatory because it encompassed the Dresser integration as well as a "downturn," and thus did not *solely* address the Dresser merger.

The Court is not persuaded that the March 1999 statement and the later alleged misrepresentations about the Dresser merger are materially different such that the market would respond to the later statements about saving $500 million after it already responded to the March 1999 statement. Plaintiffs have provided no evidence that the content of the March 1999 statement would have caused the market to respond twice to the same informa-

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[99] *See Greenberg*, 364 F.3d at 665-66.
[100] *Flowserve*, 245 F.R.D. at 568.

tion about cost savings, just because it also noted a "downturn" when identifying the source of the $500 million savings. Thus, Plaintiffs cannot establish loss causation with respect to this issue because the actionable misrepresentations are confirmatory in nature.

Also, while Plaintiffs argue that attributing the savings to the Dresser merger alone somehow changed the market's perception of the Dresser merger, the alleged corrective disclosure also reveals nothing *fraudulent* about the statements.[101] Nettesheim states in her report that "[t]his is an instance where the Company released negative news, which concerned the lack of benefits arising from the Dresser merger." However, the mere release of negative information is simply not enough to prove that the previous positive statements were fraudulent. Plaintiffs cannot establish loss causation by speculating about fraud. A failure to meet earnings estimates does not show to the market the existence of a fraudulent scheme.[102] Since there is no evidence supporting an inference of fraud, and because the alleged misrepresentations were confirmatory in nature, the Court will not certify the class based on the October 4, 1999 disclosure.

B. January 5, 2000 Corrective Disclosure

The Court rejects class certification with respect to this disclosure because Plaintiffs again fail to show loss causation. Plaintiffs rely on two analysts' reduction of Halliburton's earnings estimates on January 5, 2000, in alleging loss causation for the stock decline that occurred that particular day. Plaintiffs allege that "[l]ooking behind the analysts' conclusions to the underlying data, Ms.

[101] *See Greenberg*, 364 F.3d at 666.

[102] *Flowserve*, 245 F.R.D. at 579 (distinguishing such statements as negative rather than corrective disclosures).

Nettesheim concluded that 'a significant portion of the stock price decline on January 5, 2000 was caused by information that partially corrected investors' erroneous assessments of the profitability of overseas construction projects and the benefits of the Dresser merger." Plaintiffs rely on the "July and September misrepresentations" which this Court in its earlier analysis found to be confirmatory and thus not actionable. Plaintiffs point to no misrepresentations in particular following the October 4, 1999 disclosure. Halliburton correctly argues that "[t]he first step is to isolate the alleged actionable, non-confirmatory misstatements." However, in this case Plaintiffs argue that the analysts' downgrading of Halliburton stock amounts to a new corrective disclosure without identifying any actionable misrepresentation.

Plaintiffs rely on the reports of two analysts: Carol Lau of Brown Brothers Harriman & Co., and K. Simpson of Merrill Lynch. K. Simpson attributed his downward adjustment to "reduced expectations for offshore construction results, a reduced growth estimate for oilfield spending outside North America, and less powerful synergies from the Dresser merger than. . . envisioned." Plaintiffs cite no statements by Lau explaining her adjustment, and rely only on the existence of the adjustment as evidence of a corrective disclosure.[103]

Plaintiffs fail to establish loss causation with respect to this "disclosure." First, Plaintiffs fail to cite any action-

[103] Nettesheim alludes to a "partial disclosure related to the Company's booking of unapproved claims on fixed-price contracts and the lack of benefits realized from the Dresser merger as revealed in a conversation with analyst Carol Lau," but cites no source for or further information about this alleged conversation. The Court cannot establish a specific alleged misrepresentation or corrective disclosure without more.

able misrepresentation that correlates to it.[104] Plaintiffs cannot establish loss causation without such a showing. Instead, Plaintiffs rely on the same confirmatory statements that were supposedly corrected by the October 4, 1999 disclosure. However, Plaintiffs cannot establish loss causation by citing confirmatory information. Just as Plaintiffs' argument fails with respect to the October 4, 1999 disclosure, it also fails here.

Additionally, Plaintiffs do not cite any public release as correcting a misrepresentation, but rather point only to the analysts' adjusting their own earlier estimates of Halliburton's earnings. The Court cannot determine whether this "disclosure" specifically revealed a fraudulent scheme because Plaintiffs provided limited evidence about why these analysts changed their forecasts, and no evidence that the market perceived these adjustments as evidence of prior fraud.[105]

In *Oscar*, the court rejected the plaintiffs' approach of relying solely on analysts' opinions to show that a specific disclosure corrected a prior misrepresentation.[106] The *Oscar* court required that the plaintiffs' expert make some sort of "empirically-based showing that the corrective disclosure was more than just present at the scene."[107] Plaintiffs argue that in this case the two analysts' adjustments of their financial estimates prove that there must have been a corrective disclosure somewhere.

Plaintiffs offer no evidence of a fraudulent scheme, as required by *Oscar*. Plaintiffs cannot even claim to have the "well-informed speculation" which the court rejected

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[104] *See Greenberg*, 364 F.3d at 666.
[105] *See id.*
[106] *Oscar*, 487 F.3d at 261.
[107] *Id.*

in *Oscar*.[108] In *Oscar*, the plaintiffs also relied solely on analyst opinions, but the analyst commentary in *Oscar* at least provided concrete examples of disclosures that could potentially be perceived as corrective by the market.[109]

Plaintiffs simply speculate that Simpson's earnings adjustment was due to the Dresser merger. Although Simpson mentioned the Dresser merger as one of three reasons for his adjustment, Plaintiffs make no effort to distinguish between the Dresser issue and the two other reasons for the adjustment.[110] Nettesheim concedes that she did not distinguish between the effects of Simpson's concerns regarding oilfield spending and those regarding the Dresser merger. Furthermore, Nettesheim admits, "I do not have Simpson's breakout of his reduction of 2000 and 2001 earnings estimates between the segments. . ." As a result, Nettesheim failed to differentiate between not only the stated reasons for the rating cut, but also failed to account for long-term versus short-term adjustments to the earnings estimates in her analysis. This approach falls well short of *Oscar's* requirement that the Plaintiffs' expert make an empirically-based showing that the corrective disclosure was more than just present at the scene.[111]

The *Oscar* court's admonition that the class certification decision "bears due-process concerns for. . . [the] defendants" is especially pertinent here.[112] There, the court explained, "an empirical inquiry into loss causation better

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[108] *Id.*

[109] *Id.* at 270 (the analysts revealed that the company adjusted the line count between billing and order management platforms).

[110] *See Greenberg*, 364 F.3d at 666.

[111] *See Oscar*, 487 F.3d at 261.

[112] *Id.* at 271.

addresses these [due process] concerns than an impenetrable finding akin to a reasonable man assessment. And analyst speculation about materiality, while better informed than a layman, more closely resembles the latter."[113] This Court cannot simply infer loss causation without, at the very least "reference to. . . post-mortem data [the analysts] have reviewed or conducted" to support the determination, in this case, that Simpson's earnings adjustment was due to the Dresser merger. To hold otherwise would result in exactly the type of "impenetrable finding" the Fifth Circuit has warned against.

Simply put, Plaintiffs' burden of identifying corrective disclosures is not satisfied by citing the mere existence of an earnings adjustment by outside analysts. Analysts unaffiliated with Halliburton could have previously overestimated Halliburton's performance, and then a subsequent modification would certainly not qualify as a corrective disclosure. Once more, Plaintiffs attempt to trigger the presumption of reliance by simply offering evidence of a decrease in price following the release of negative information,[114] without citing any actionable misrepresentation or disclosure by Halliburton. Plaintiffs' reliance on the decline in Halliburton's stock price after analysts reduced their forecasts does not establish loss causation.

C. October 24, 2000 Corrective Disclosures

Plaintiffs have not established loss causation with respect to the October 24, 2000 disclosure. Unlike the prior disclosure, Plaintiffs satisfy the *Greenberg* requirement by identifying what they allege to be a prior misstate-

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[113] *Id.*

[114] *See Greenberg*, 364 F.3d at 665.

ment.[115] Plaintiffs cite a letter from Dick Cheney included in the 1999 Annual Report, released in April 2000, which told investors that "[t]he merger with Dresser Industries is now behind us. The potential rewards to our shareholders are vast." Then on October 24, 2000, Lesar stated that Halliburton planned to restructure its construction operations due to operational problems, management inefficiencies, and excessive costs related to the Dresser merger.

However, Plaintiffs fail to establish loss causation because nothing in the alleged corrective disclosure "specifically reveal[s]" to the market any fraudulent scheme.[116] Cheney's statement that the Dresser merger was "behind us" is not proven fraudulent based only on the fact that Halliburton restructured its construction operations six months later. Just as a failure to meet earnings expectations does not reveal misstatements in previous financial documents, a failure to meet business expectations will not reveal that prior optimistic expectations were *fraudulent*. Indeed, it is entirely possible that six months after the announcement of the completion of the Dresser acquisition, Halliburton executives realized that the business units were not functioning as well as anticipated. The burden falls on Plaintiffs to show that Lesar's statement communicated to the market that Cheney's previous statement about the Dresser merger was fraudulent, in order to prove loss causation. Because Plaintiffs fail to make such a showing, they have not established loss causation with respect to the October 24, 2000 disclosure.

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[115] *See id.* at 666.
[116] *Id.*

D. December 21, 2000 Disclosure

Plaintiffs allege that Halliburton's official unveiling of its Dresser restructuring plan on December 21, 2000, the same day it announced that it expected to incur a $120 million dollar charge in the fourth quarter of 2000, constitutes an actionable corrective disclosure. The disclosure blamed $95 million of the loss on cost overruns on fixed-price contracts, leaving $25 million attributable to the expected costs of the Dresser reorganization.

Plaintiffs have not established loss causation with respect to this disclosure. The announcement of the expected costs of reorganization did not "specifically reveal[]" to the market any fraudulent scheme.[117] The announcement of the loss attributable to restructuring is entirely consistent with Halliburton's October 24, 2000 statement that it planned to restructure. Despite Plaintiffs' claim that Halliburton "again surprised the market," Nettesheim recognized that the announcement "does not appear to have been a surprise or a concern to analysts as some charge was expected after the Company announced the restructuring plan in its third quarter earnings conference call."

The market will not "double-count" the negative effects of a restructuring plan that had already been made public. Plaintiffs do not argue that the formal announcement of the plan further changed the market's perception of Halliburton or that the expected cost of the restructuring had previously been fraudulently misrepresented. Any inflation in the value of Halliburton's stock price caused by Cheney's alleged misrepresentation would have been removed by the initial disclosure of the planned restructuring in October 2000.

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[117] *See Greenberg*, 364 F.3d at 666.

Additionally, the expected cost of the restructuring qualifies as a *negative*, as opposed to a *corrective* disclosure. The release of negative information to the market does not necessarily have a corrective effect. The information about the cost of restructuring did not *correct* any previously released information; it was simply negative information relating to the costs of the Dresser merger. In fact, this information actually comported with and elaborated upon Halliburton's prior disclosure that it planned to restructure the Dresser business units.

Because the announcement of the costs of restructuring confirmed the market's prior knowledge that Halliburton was planning to restructure, this announcement cannot support a finding of loss causation. Any corrective effect upon the price of Halliburton stock would have occurred with the disclosure on October 24, 2000, not with the formal confirmation two months later. Therefore, the Court will not certify a class with respect to the December 21, 2000 disclosure.

CONCLUSION

Plaintiffs have failed to establish loss causation with respect to any of the three issues in this lawsuit. For that reason, the Court will not certify the class. The Court reiterates that the Fifth Circuit has placed an extremely high burden on plaintiffs seeking class certification in a securities fraud case. Even though the Court finds that all other elements required for class certification under Rule 23 have been met in this case, it is unable to certify the class because of Plaintiffs failure to meet this stringent loss causation requirement.

SO ORDERED.

Signed this 4th day of November, 2008.

/s/ Barbara M.G. Lynn

BARBARA M.G. LYNN
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

APPENDIX

FEDERAL RULE OF CIVIL PROCEDURE 23: CLASS ACTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) Certification Order.

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

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

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

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue

repetition or complication in presenting evidence or argument;

(B) require – to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a

proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant

seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as pro-vided in Rule 54(d)(2)(D).