No. 13-317

IN THE

Supreme Court of the United States

HALLIBURTON CO. AND DAVID LESAR,
Petitioners,
v.
ERICA P. JOHN FUND, INC. F/K/A ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE CIVIL PROCEDURE SCHOLARS SUPPORTING RESPONDENT

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BRIEF OF AMICI CURIAE CIVIL PROCEDURE SCHOLARS SUPPORTING RESPONDENT

INTEREST OF AMICI

Amici are law professors whose scholarship and teaching involve federal civil procedure and class actions:[1]

Stephen B. Burbank is the David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School and the author of definitive works on federal court rulemaking, interjurisdictional preclusion, litigation sanctions, international civil litigation, and judicial independence and accountability. He is co-editor of JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (2002). He was appointed by the Speaker of the U.S. House of Representatives to the National Commission on Judicial Discipline and Removal and was a principal author of the Commission's 1993 report.

Robert H. Klonoff is the Dean & Jordan D. Schnitzer Professor of Law, Lewis & Clark Law School. He is the co-author of a leading casebook on class actions, author of numerous articles on class actions, and associate reporter for the American Law Institute's project, Principles of the Law of

[1] This brief has been filed with the written consent of the parties, which filed blanket consents with the Clerk of Court. Pursuant to Rule 37.6, counsel for amici affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici or their counsel, make a monetary contribution to the preparation or submission of this brief.

Aggregate Litigation. He has personally handled more than 100 class action cases as counsel, and he has frequently served as an expert witness in class action matters.

David Marcus is a Professor of Law at the University of Arizona. He has written numerous articles on class actions and other issues in federal civil procedure, including histories of Rule 23 covering the years spanning 1938 to 1980.

Arthur R. Miller is a University Professor at New York University who teaches at the NYU School of Law and is a coauthor of the multi-volume treatise FEDERAL PRACTICE AND PROCEDURE. He has served as Reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States, as well as Reporter to the American Law Institute's Complex Litigation Project, which preceded the ALI Project on Aggregate Litigation. Professor Miller is the author of more than 40 books and numerous articles.

Tobias Barrington Wolff is Professor of Law at the University of Pennsylvania Law School. He is the author of the leading work on the operation of preclusion doctrine in class action litigation, co-author of a Civil Procedure casebook, and author of numerous other works on procedure and class actions. Professor Wolff is a member of the American Law Institute and past chair of the AALS Section on Conflict of Laws.

SUMMARY OF ARGUMENT

This Court should continue to adhere to the fraud-on-the-market presumption adopted in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Halliburton is

wrong in arguing that the presumption is inconsistent with modern class-action jurisprudence, such as *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Indeed, *Wal-Mart* discussed the presumption with approval. *See* 131 S. Ct. at 2552 n.6.

Moreover, under the Rules Enabling Act, 28 U.S.C. § 2072(b), it would be improper to use a procedural rule such as Rule 23 to abrogate or narrow the *Basic* presumption. The fraud-on-the-market presumption is a substantive doctrine of federal securities law, both derived from interpretation of the Securities Exchange Act of 1934 and supported by the federal Securities Act of 1933.

The *Basic* presumption is a way of *demonstrating* commonality and predominance – not of shirking those requirements. Thus, a securities fraud case where the plaintiffs have satisfied the preconditions for triggering the *Basic* presumption meets the *Wal-Mart* standard for proving commonality. Because prices in an open and developed market move in response to public information, all class members will be affected in the same way.

Securities fraud actions under *Basic* also follow the course charted by this Court in *Comcast*. Under *Basic*, plaintiffs use the presumption and economic evidence to prove the difference between (i) the actual market price, and (ii) the market price absent the securities law violation. This is exactly what the Court in *Comcast* instructed.

Halliburton's position is inconsistent with the settled practice of using the fraud-on-the-market

presumption to support class certification in securities fraud cases, as shown by the history of Rule 23.

This Court should reject Halliburton's proposals (i) that plaintiffs should be required to prove "price impact" at the certification stage – i.e., to show that the defendant's alleged misrepresentations affected the market price – or (ii) that a defendant should be able to rebut the presumption at certification by showing the absence of price impact. Both proposals conflict with the holdings in *Amgen Inc. v. Conn. Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013), and *Erica P. John Fund v. Halliburton Co.*, 131 S. Ct. 2179 (2011) ("*Halliburton I*"), that materiality and loss causation, respectively, are merits issues rather than questions for the certification stage. The "price impact" showing that Halliburton demands falls into the category of materiality, loss causation, or both.

Halliburton's position also ignores the need for discovery, in many cases, to isolate the price impact attributable to the defendant's misrepresentations. Discovery is often needed to respond to defendants' assertions that factors apart from the alleged fraud, including market-wide factors and unrelated company-specific news, were the real reasons for the movement in the company's stock price. Requiring plaintiffs to prove price impact at certification would either force them to address an intensely factual issue prior to the completion of fact and expert

discovery or cause the court to delay the certification decision until that discovery had been completed.[2]

The judgment below should be affirmed.

ARGUMENT

I. The Fraud-On-The-Market Presumption Is Consistent With Modern Class Action Jurisprudence.

Halliburton argues that *Basic* is at odds with the Court's recent Rule 23 jurisprudence, such as *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), because those cases require plaintiffs to "prove" predominance rather than to "presume" it. Pet. Br. 25-27. That argument is flawed for several reasons. In fact, it would be a radical expansion of *Wal-Mart* and *Comcast* to adopt Halliburton's arguments.

A. The Presumption Arises From Substantive Securities Law.

First, under the Rules Enabling Act, 28 U.S.C. § 2072(b), it would be improper to use a procedural rule such as Rule 23 to abrogate or narrow the *Basic* presumption. "The Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart*, 131 S. Ct. at 2561

[2] "[T]he more class certification procedure is assimilated to trial procedure, the more discovery courts will have to permit before ruling on certification." Stephen B. Burbank, *International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?*, 33 U. PA. J. INT'L L. 663, 668 (2012).

(quoting 28 U.S.C. § 2072(b)); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (same).

The *Basic* presumption is not a mere procedural device. Rather, "fraud on the market is a substantive doctrine of federal securities-fraud law." *Amgen*, 133 S. Ct. at 1193. The presumption is grounded in the federal Securities Act of 1933 and the Securities Exchange Act of 1934. In *Basic*, this Court explained that, in drafting the Exchange Act, "Congress expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance on the integrity of those markets." 485 U.S. at 246. The Court cited the legislative history of the Act, *id.*, and opined that "[t]he presumption of reliance employed in this case is consistent with, and, by facilitating Rule 10b-5 litigation, supports, the congressional policy embodied in the 1934 Act." *Id.* at 245.

In fact, the Ninth Circuit (in a decision twice cited with approval by this Court) opined that the fraud-on-the-market presumption was consistent with the Rules Enabling Act precisely because it was derived from the federal securities laws. *See Blackie v. Barrack*, 524 F.2d 891, 908 (9th Cir. 1975) (cited in *Amgen*, 133 S. Ct. at 1193, and *Basic*, 485 U.S. at 245); *see also Tucker v. Arthur Andersen & Co.*, 67 F.R.D. 468, 480 (S.D.N.Y. 1975) (making the same point as to the Rules Enabling Act).

The substantive nature of the presumption is confirmed by the fact that it is not limited to class actions. It applies outside the Rule 23 context as

well, in individual actions under Rule 10b-5.[3] The presumption is not limited to the certification stage and applies throughout trial. *See Wal-Mart*, 131 S. Ct. at 2552 n.6.

Because the *Basic* presumption is substantive in nature, the Rules Enabling Act provides that Rule 23 cannot be used to modify or eliminate it.

B. The *Basic* Presumption Is Consistent With *Wal-Mart* and *Comcast*.

There is a further flaw in Halliburton's argument: The *Basic* presumption is not a way of *avoiding* a proof requirement. It is a way of *satisfying* the reliance element of the private right of action under Section 10(b) of the Securities Exchange Act of 1934. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).

In *Basic*, this Court expressly rejected the argument that the presumption was improper because it avoided the need for a plaintiff to prove reliance. *See* 485 U.S. at 243 ("Petitioners and their

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[3] *See, e.g.*, *Black v. Finantra Capital, Inc.*, 418 F.3d 203, 209 (2d Cir. 2005) (applying *Basic* presumption in suit brought by individual plaintiff); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 568 F. Supp. 2d 349, 358-59 (S.D.N.Y. 2008) (same); *Argent Classic Convertible Arbitrage Fund L.P. v. Rite Aid Corp.*, 315 F. Supp. 2d 666, 676-77 (E.D. Pa. 2004) (same). *See also* Stephen B. Burbank, *The Costs of Complexity (Book Review)*, 85 MICH. L. REV. 1463, 1472 (1987) ("[In *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975)] we see a court use a presumption to reallocate burdens, thereby overcoming a major obstacle to class certification, and respond to a charge of overreaching by announcing that the presumption is available in individual actions.").

amici complain that the fraud-on-the-market theory effectively eliminates the requirement that a plaintiff asserting a claim under Rule 10b-5 prove reliance."). This Court explained that the presumption enables plaintiffs to "establish" the requisite "causal nexus" "indirectly." *Id.* at 245 (internal quotation marks and citation omitted).

Parties in many situations use presumptions and other legal rules to help them satisfy their burdens of proof. As the *Basic* Court explained, "[p]resumptions typically serve to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult." *Id.* at 245.

On this basis, Justice White, joined in a dissenting opinion by Justice O'Connor, explained that "there are portions of the Court's fraud-on-the-market holding with which I am in agreement," including its decision not to dispense with "reliance" completely and its decision to make the presumption rebuttable. *Id.* at 251 (dissenting opinion).

Accordingly, the fraud-on-the-market presumption is perfectly consistent with *Wal-Mart*, *Comcast*, and other recent Rule 23 decisions. In fact, this Court in *Wal-Mart* endorsed *Basic* and explained that, without the presumption, "each of the individual investors would have to prove reliance on the alleged misrepresentation," a burden that "would often be an insuperable barrier to class certification." *Wal-Mart*, 131 S. Ct. at 2551 n.6. The Court added that the presumption is a solution to obstacles that plaintiffs would otherwise face at the certification stage:

> But the problem dissipates if the plaintiffs can establish the applicability of the so-called "fraud on the market" presumption, which says that all traders who purchase stock in an efficient market are presumed to have relied on the accuracy of a company's public statements. To invoke this presumption, the plaintiffs seeking 23(b)(3) certification must prove that their shares were traded on an efficient market . . . .

Id. In short, *Wal-Mart* saw no conflict between the fraud-on-the-market presumption and Rule 23 – quite the contrary.

Accordingly, the dictates of *Wal-Mart* are plainly met. *Wal-Mart* held that the particular evidence presented by members of a putative class did not actually show that the company operated under a general policy of discrimination. The commonality requirement could not be met, because there was no common question capable of class-wide resolution, for purposes of Title VII. 131 S. Ct. at 2553-56. As *Wal-Mart* explained, the "common contention" "must be of such a nature that it is capable of classwide resolution" – i.e., that the "theory can be proved on a classwide basis." *Id.* at 2551, 2555.[4]

A securities fraud case where the plaintiffs have satisfied the preconditions for triggering the *Basic*

[4] For an argument that *Wal-Mart's* Rule 23(a)(2) holding is best viewed as specific to substantive Title VII law, see Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1028 (2013) ("the commonality holding in *Dukes* is at base a statement of Title VII policy").

presumption meets this standard. Because prices in an open and developed market move in response to public information, all class members will be affected in the same way. The common issue absent in *Wal-Mart* is thus present here.

The dictates of *Comcast* are also met. In *Comcast*, this Court held that a plaintiff's damages model in an antitrust case fell short of establishing that damages could be measured class-wide. In particular, the Court found that the model could not identify the differences between high prices in general and high prices attributable to the specific antitrust violation identified by plaintiffs (known as "overbuilder competition"). *See* 133 S. Ct. at 1433-35. "If the theory does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* at 1433. "Calculations need not be exact, but at the class certification stage (as at trial), any model supporting a 'plaintiff's damages case must be consistent with its liability case . . . .'" *Id.* (citation omitted).

Securities fraud actions under *Basic* follow precisely the course charted by this Court in *Comcast*. Under *Basic*, plaintiffs use the presumption and economic evidence to prove the difference between (i) the actual market price, and (ii) the market price absent the securities law violation. This is exactly what the Court in *Comcast* instructed. Indeed, under *Dura*, a plaintiff is not permitted to proceed merely under an "inflated purchase price" theory but rather is entitled to recover only "those economic losses that misrepresentations actually cause." 544 U.S. at 345.

Thus, neither *Wal-Mart* and *Comcast* supports Halliburton here.

II. Rule 23 Was Adopted To Facilitate Securities-Law Class Actions.

Halliburton's position is inconsistent with the settled practice of using the fraud-on-the-market ("FOTM") presumption to support class certification in securities fraud cases. As this Court noted, "nearly every court that ha[d] considered the proposition" prior to the decision in *Basic* had adopted the FOTM presumption. 485 U.S. at 247.

The history of Rule 23 shows that it was intended "to encourage more frequent use of class actions." *See* Charles Alan Wright, Arthur M. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d § 1752 at 18 (3d ed. 2005) ("Wright & Miller"). Shortly after the original Rule 23's promulgation in 1938, influential commentators noted the potential for class actions under the securities laws. *See, e.g.*, Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 984-87 (1941).[5]

The first recognition of a private right of action came in *Kardon v. Nat'l Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946), *see Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 n.10 (1982). Class actions soon followed. As an example, a securities

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[5] This article has had wide influence. *See, e.g.*, *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 n.12 (1974); *Snyder v. Harris*, 394 U.S. 332, 351 n.15 (1969); *Dickinson v. Burnham*, 197 F.2d 973, 981 n.4 (2d Cir. 1952) (Clark, J.)

fraud class action was certified in *Speed v. Transamerica Corp.*, 99 F. Supp. 808, 833 (D. Del. 1951), in the wake of *Kardon*.

Throughout the period from 1938-1966, courts routinely approved the use of Rule 23 in cases grounded upon fraud or a common course of misrepresentation. For example, in *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), this Court reversed the Third Circuit's holding that relief was limited to damages only, sustaining the district court's equitable "power to make effective the right of recovery" where "petitioners' bill states a cause of action tested by the customary rules governing suits of this character" and a defendant "is threatened with many law suits." *Id.* at 287-88. On remand, the Third Circuit opined that, "if a corporation engaged in the sale of stock by fraudulent means to a number of individuals, under rule 23(a)(2) they might join together as parties plaintiff in one action to avoid a multiplicity of suits." *Pennsylvania Co. for Ins. On Lives v. Deckert*, 123 F. 2d 979, 983 (3d Cir. 1941).[6]

"[M]odern class action practice emerged in the 1966 revision of Rule 23." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 (1990). At the time of the Rule's 1966 revision, the importance of Rule 23 to the enforcement of the securities laws was already clear.

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[6] *See also Escott v. Barchris Constr. Corp.*, 340 F.2d 731, 733 (2d Cir. 1964); *Amen v. Black*, 234 F.2d 12, 16 (10th Cir. 1956); *Zahn v. Transamerica Corp.*, 162 F.2d 36, 49-50 (2d Cir. 1947); *Oppenheimer v. F.J. Young & Co.*, 144 F.2d 387, 390 (2d Cir. 1944); *York v. Guar. Trust Co.*, 143 F.2d 503, 528 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945).

In 1964, one court of appeals expressed a widely shared view when it quoted Professor Loss's leading treatise on Securities Regulation: "'the ultimate effectiveness of the federal remedies' in this area 'may depend in large measure on the applicability of the class action device.'"[7]

Similarly, the U.S. Securities and Exchange Commission ("SEC") explained "[t]hat the availability of the representative suit for class actions on behalf of investors similarly situated . . . has contributed substantially to the feasibility of prosecution by investors of causes of actions based on violations of the federal securities laws."[8] The SEC urged courts not to interpret the revised Rule "to impose unwarranted obstacles" to securities class actions."[9]

Hence, the Advisory Committee drafted Rule 23(b)(3) with securities fraud cases firmly in mind. The Advisory Committee Note to the 1966 amendments cites "a fraud perpetrated on numerous persons by the use of similar misrepresentations" as "an appealing situation for a class action," even if the case includes individual issues with respect to injury

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[7] *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913 (9th Cir. 1964) (quoting 3 Louis Loss, *Securities Regulation* 1819-20 (2d ed. 1961)).

[8] Memorandum of Securities and Exchange Commission With Respect to Amendments to Rule 23 of the Federal Rules of Civil Procedure, at 2, 4 (May 7, 1965), *in* Records of the U.S. Judicial Conference, *microfilmed at* Cong. Inf. Serv., CI-7010-77.

[9] *Id.*

and damages suffered.[10] The Advisory Committee Note referred to securities cases.[11] Citing the Note, this Court properly noted in *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997), that predominance "is a test readily met" in cases alleging securities fraud.[12] *See also* Wright & Miller, *supra*, § 1781 (noting securities fraud class actions).

In his widely cited article on the amended rule, Committee reporter Professor Benjamin Kaplan confirmed that "[t]he Advisory Committee forecast that cases of fraudulent misrepresentation or antitrust violations would be likely, although not by any means sure candidates for class treatment under

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[10] *See* Fed. R. Civ. P. 23(b)(3), Advisory Committee Note to 1966 Amendment, 39 F.R.D. 69, 103 (1966).

[11] *Id.* (citing *Oppenheimer v. F.J. Young & Co., Inc.*, 144 F.2d 387 (2d Cir.1944), and *Miller v. National City Bank of N.Y.*, 166 F.2d 723 (2d Cir.1948)).

[12] The Advisory Committee Note acknowledged that, "although having some common core, a fraud case may be unsuited for treatment as a class action if there was a material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed." Fed. R. Civ. P. 23(b)(3), Advisory Committee Note to 1966 Amendment, 39 F.R.D. 69, 103 (1966). At the time of the revision, this was understood to mean that common issues might not predominate where the defendant's oral communications varied significantly from one class member to the next. *E.g.*, *Morris v. Burchard*, 51 F.R.D. 530, 533-35 (S.D.N.Y. 1971); *but cf. Fischer v. Kletz*, 41 F.R.D. 377, 382-83 (S.D.N.Y. 1966) (certifying a securities fraud class under Rule 23(b)(3) even though the defendant made different statements at different times, and the class members made purchases based on different representations).

subdivision (b)(3)."[13] He cited *York v. Guaranty Trust Co. of N.Y.*, 143 F.2d 503 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945), as "illustrative" of the proper use of Rule 23(b)(3). There, the Second Circuit allowed class proceedings in a suit by noteholders, even though the plaintiffs could not rule out the possibility that evidence of causation might differ from one class member to another.[14]

In the wake of the 1966 revisions, the SEC took the position that private class actions were essential to the vindication of the securities laws. In one case, the SEC filed an amicus brief explaining that "the activities of the Securities and Exchange Commission do not eliminate the need for class-action procedure in private actions based on violations of the federal securities laws."[15] The SEC added that "[b]ecause of budgetary limitations and alternative demands on available manpower, the Commission cannot fully investigate or take action

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[13] Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 393 (1967). For examples of the Court's citations to Professor Kaplan's article, see *Ortiz*, U.S. at 833, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613-14 (1997), *Phillips Petroleum v. Shutts*, 472 U.S. 797, 809 & 813 n.4 (1985), and *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 356 n.21 (1978).

[14] *York v. Guar. Trust Co.*, 143 F.2d 503, 528 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945).

[15] *Dolgow v. Anderson*, 43 F.R.D. 472, 482-83 (E.D.N.Y. 1968), *rev'd*, 438 F.2d 825 (2d Cir. 1970) (quoting title).

in every case of possible violation."[16] The SEC concluded:

> Since the enforcement activities of this Commission do not serve to make whole investors who have been injured by a fraudulent course of business and since it is economically impracticable in many instances for investors individually to pursue available remedies, the representative action appears to provide the most meaningful method by which their claims may be pursued and the Congressional policy favoring such remedies may be vindicated.[17]

In addition, the federal courts largely followed the Advisory Committee's intentions and granted class certification in securities fraud cases. For example, in a 1968 securities action, the Tenth Circuit opined that "the new rule is designed to expand the situations in which a class action is appropriate" and to "favor . . . the maintenance of the class action."[18] As the Ninth Circuit opined in *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975) (cited in *Amgen*, 133 S. Ct. at 1193, and *Basic*, 485 U.S. at 245): "Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course

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[16] *Id.* at 483.

[17] *Id.* at 483-84.

[18] *Esplin v. Hirschi*, 402 F.2d 94, 99-100 (10th Cir. 1968); *see also Green v. Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968) (quoting *Esplin*).

of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions." 524 F.2d at 902.

Subsequently, of course, this Court has repeatedly approved the *Basic* presumption in the class action context. *See Amgen*, 133 S. Ct. at 1193; *Wal-Mart*, 131 S. Ct. at 2552 n.6; *Halliburton I*, 131 S. Ct. at 2186; *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 159 (2008); *Dura,* 544 U.S. at 342-43.

III. Requiring Plaintiffs To Prove Price Impact At The Certification Stage Would Be Inappropriate.

As a back-up position, Halliburton argues that this Court should require plaintiffs to prove "price impact" or "price distortion" at the certification stage – i.e., to show that the defendant's alleged misrepresentations affected the market price. Pet. Br. 37-39. Alternatively, Halliburton argues that a defendant should be able to rebut the presumption by showing the absence of price impact. *Id*. at 49-55; *see also* Amici Br. of Law Professors in Support of Petrs. at 24-34.

Both proposals conflict with the holdings in *Amgen*, 133 S. Ct. 1184 (2013), and *Halliburton I*, 131 S. Ct. 2179 (2011), that materiality and loss causation, respectively, are merits issues rather than questions for the certification stage. Price impact can generally be viewed as a subset either of materiality or loss causation.

Requiring plaintiffs to prove price distortion at the certification stage would effectively require them to prove materiality, in conflict with the holding in

Amgen. "In the context of an 'efficient' market, the concept of materiality translates into information that alters the price of the firm's stock," because whether information is viewed as "material" by a reasonable investor will depend on its impact on a company's stock price. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997) (per Alito, J.), for example, the court opined that where a "disclosure had no effect" on a company's stock price, "it follows that the information . . . was immaterial as a matter of law." *Id.*; *see also Nelson v. Hodowal*, 512 F.3d 347, 350 (7th Cir. 2008) ("information that, when revealed, has no effect on a stock's price is not 'material' to investors' decisions" (citing *Eckstein v. Balcor Film Investors,* 8 F.3d 1121, 1130 (7th Cir. 1993)); *Oran v. Stafford*, 226 F.3d 275, 282 (3d Cir. 2000) (Alito, J.) ("[T]he materiality of disclosed information may be measured post hoc by looking to the movement, in the period immediately following disclosure, of the price of the firm's stock.") (internal quotation marks and citation omitted).

Halliburton's proposal is also foreclosed by the holding in *Halliburton I* that loss causation need not be shown at the certification stage. Where a plaintiff alleges that false statements maintained, rather than artificially increased, a company's stock price, the most common way to establish price impact would be to show that the stock price suffered a significant decline in response to the corrective disclosures. *See, e.g.*, *Schleicher v. Wendt*, 618 F.3d 679, 683-84 (7th Cir. 2010) (Easterbrook, J.). Such a showing is the same thing as loss causation. As explained by the Law Professor Amici supporting Halliburton, "cases in which no market movement can be discerned through current economic methods

would likely ultimately fail at the merits stage under *Dura* for lack of demonstrable damages." Amici Br. of Law Professors in Support of Petrs. at 31. *Dura* is a loss causation case, and under *Halliburton I*, plaintiffs are not required to show loss causation at the certification stage

Halliburton's proposals also ignore the need for discovery, in many cases, to show price impact attributable to a defendant's misrepresentations. Defendants frequently respond to 10b-5 actions by arguing that the company's stock price moved due to factors apart from the alleged fraud, such as market-wide factors and unrelated company-specific news. To disprove such defenses and show that the fraud led to the stock price reaction, plaintiffs are often required to develop facts that can be found only in defendants' internal documents or elicited at depositions of company officers or investor relations officials. (Public companies typically employ large investor relations departments that specifically track the movements in the company's stock price and often document the reasons for that movement in emails and internal reports.) Facts set forth in documents maintained by investor relations departments are often essential to disaggregating the reasons for a stock price's movement on a given day. Such documents (and related testimony) need to be analyzed by experts for each side, who in turn would have to be deposed. Given the fact-intensive nature of these issues, they can only be resolved on a fully developed record. Requiring plaintiffs to prove price impact at certification would either compel them to address an intensely factual question prior to the completion of discovery or cause the court to

postpone the certification decision until the completion of discovery.

A good example of the need for discovery is the securities litigation against Bank of America (BofA) stemming from its merger with Merrill Lynch (Merrill). *See In re Bank of Am. Corp. Sec., Deriv., & ERISA Litig*, 281 F.R.D. 134 (S.D.N.Y. 2012) (certifying class). Plaintiffs alleged that BofA violated the securities laws by failing to disclose, prior to the shareholder vote on the merger, that Merrill was suffering catastrophic losses. Plaintiffs contended that a statistically significant stock decline in BofA's stock price on January 13, 2009 was caused by information "leaking" into the market (*see Dura*, 544 U.S. at 342 (positing example of leakage)) concerning BofA's need for a federal bailout to enable it to complete the Merrill acquisition. Defendants argued that there was no public announcement concerning the merger or BofA's or Merrill's financial condition on January 13. On that basis, defendants denied that the stock price decline on that day could be attributed to the alleged fraud.

In discovery, plaintiffs obtained internal BofA documents and testimony from senior BofA executives directly refuting defendants' contention and demonstrating that the January 13 decline was attributable to the alleged fraud. Among other things, plaintiffs obtained an email sent by BofA's Vice President of Investor Relations to senior BofA officers on January 13, 2009, which addressed the cause of the decline. In the email, the Vice President of Investor Relations stated that BofA's stock price was collapsing because investors had interpreted a speech given that morning by Chairman Ben

Bernanke to mean that BofA required a capital injection – even though the speech did not mention either BofA or Merrill: "Assumption from investors is [Chairman Bernanke] is talking about us in this section [of his speech]…. According to the Citi traders, it is making large investors and traders extremely nervous and driving volumes well up on our stock."[19] Based on this internal email, plaintiff's expert was able to opine that the January 13, 2009 stock price decline was caused by market leakage concerning BofA's need for a capital infusion – an opinion that could not have been proffered without discovery of this critical document. *See also In re Motorola Sec. Litig.*, 505 F. Supp. 2d 501, 511-12 & n.14 (N.D. Ill. 2007) (relying on emails obtained in discovery to disaggregate causes of stock price decline on February 23, 2001, and to show that vast majority of decline was attributable to fraud).

In general, courts widely recognize that extensive fact and expert discovery are critical to identifying the cause of a stock price movement. *See, e.g.*, *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713, 729-30 (11th Cir. 2012) ("To support a finding that Bancorp's misstatements were a substantial factor in bringing about its losses, therefore, State–Boston had to present evidence that would give a jury some indication, however rough, of how much of the decline in Bancorp's stock price resulted not from the fraud but from the general

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[19] *See* Plaintiffs' Omnibus Opposition To Defendants' Motions For Summary Judgment, *In re Bank of Am. Corp. Sec., Deriv., & ERISA Litig.*, No. 09 MD 2058 (PKC) (S.D.N.Y.), at 34 (filed June 29, 2012).

downturn in the Florida real estate market—the risk of which Bancorp is not alleged to have concealed.").

For all these reasons, plaintiffs should not be required to prove "price impact" at the certification stage, prior to the completion of factual and expert discovery.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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