16-1912

Oral Argument Requested

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOSEPH WAGGONER, MOHIT SAHNI, BARBARA STROUGO,
individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

—against—

BARCLAYS PLC, ROBERT DIAMOND, ANTONY JENKINS,
BARCLAYS CAPITAL INC., WILLIAM WHITE,

Defendants-Appellants,

CHRISTOPHER LUCAS, TUSHAR MORZARIA,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANTS-APPELLANTS SEEKING REVERSAL OF CLASS CERTIFICATION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(F)

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

ARGUMENT 6

I. PLAINTIFFS MISSTATE THE REQUIREMENTS FOR REBUTTING *BASIC* 6

A. Plaintiffs' "Virtually Insurmountable" Standard for the Price Impact Inquiry Is Contrary to Federal Rule of Evidence 301 6

B. Plaintiffs' Claim That Defendants Did Not Present Evidence to Rebut the *Basic* Presumption Is Wrong 12

C. Plaintiffs' Proposed Standard for Market Efficiency Creates an Improper Presumption That the Markets for the Securities of Large Companies Are Efficient 16

II. PLAINTIFFS MISCHARACTERIZE THEIR ALLEGATIONS TO FIT THE *AFFILIATED UTE* PRESUMPTION 20

III. PLAINTIFFS MISSTATE THE REQUIREMENTS UNDER *COMCAST* FOR ESTABLISHING A CLASSWIDE DAMAGES METHODOLOGY 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

Agostini v. *Felton*,
521 U.S. 203 (1997).....11

In re Barclays Liquidity Cross & High Frequency Trading Litig.,
126 F. Supp. 3d 342 (S.D.N.Y. 2015).....23, 24

Bell v. *Ascendant Solutions, Inc.*,
422 F.3d 307 (5th Cir. 2005).....17

Cammer v. *Bloom*,
711 F. Supp. 1264 (D.N.J. 1989).....*passim*

Comcast v. *Behrend*,
133 S. Ct. 1426 (2013).....*passim*

In re Credit Suisse First Boston Corp. (Lantronix, Inc.) Analyst Sec. Litig.,
250 F.R.D. 137 (S.D.N.Y. 2008).....22

Dodona I, LLC v. *Goldman, Sachs & Co.*,
296 F.R.D. 261 (S.D.N.Y. 2014).....22

Dodona I, LLC v. *Goldman, Sachs & Co.*,
847 F. Supp. 2d 624 (S.D.N.Y. 2012).....22

In re Fed. Home Loan Mortg. Corp. (Freddie Mac) Sec. Litig.,
281 F.R.D. 174 (S.D.N.Y. 2012).....17

Glickenhaus & Co. v. *Household Int'l*,
787 F.3d 408 (7th Cir. 2015).....14

Goodman v. *Genworth Fin. Wealth Mgmt., Inc.*,
300 F.R.D. 90 (E.D.N.Y. 2014).....22

Halliburton Co. v. *Erica P. John Fund, Inc.*,
134 S. Ct. 2398 (2014).....*passim*

IBEW Local 98 Pension Fund v. *Best Buy Co., Inc.*,
818 F.3d 775 (8th Cir. 2016) ....*passim*

ITC Ltd. v. *Punchgini, Inc.*,
482 F.3d 135 (2d Cir. 2007) 8, 10

Janus Capital Grp., Inc. v. *First Derivative Traders*,
564 U.S. 135 (2011)..*passim*

Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. *Regions Fin. Corp.*,
762 F.3d 1248 (11th Cir. 2014) 16

Ludlow v. *BP, P.L.C.*,
800 F.3d 674 (5th Cir. 2015) 27

McPherson v. *N.Y. City Dept. of Educ.*,
457 F.3d 211 (2d Cir. 2006) 13

Mullins Coal Co. of Va. v. *Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*,
484 U.S. 135 (1987)..8

In re N. Telecom Ltd. Sec. Litig.,
116 F. Supp. 2d 446 (S.D.N.Y. 2000) 14

In re Omnicom Grp., Inc. Sec. Litig.,
541 F. Supp. 2d 546 (S.D.N.Y. 2008) 27

Price Waterhouse v. *Hopkins*,
490 U.S. 228 (1989)..8

City of Livonia Emps.' Ret. Sys. v. *Wyeth*,
284 F.R.D. 173 (S.D.N.Y. 2012) 25

Roach v. *T.L. Cannon Corp.*,
778 F.3d 401 (2d Cir. 2015) 5, 26, 27

In re Salomon Analyst Metromedia Litig.,
544 F.3d 474 (2d Cir. 2008) 11

In re Sanofi Sec. Litig.,
2016 WL 93866 (S.D.N.Y. Jan. 6, 2016) 24

Starr ex rel. Estate of Sampson v. *Georgeson S'holder, Inc.*,
412 F.3d 103 (2d Cir. 2005) 5

St. Stephen's School v. *PricewaterhouseCoopers Accountants N.V.*,
570 F. App'x 37 (2d Cir. 2014) 19

Stoneridge Inv. Partners, LLC v. *Scientific-Atlanta*,
552 U.S. 148 (2008)....................8

Sykes v. *Mel S. Harris & Assocs. LLC,*
780 F.3d 70 (2d Cir. 2015) 28

Teamsters Local 445 Freight Div. Pension Fund v. *Bombardier Inc.*,
546 F.3d 196 (2d Cir. 2008) 4, 17, 18, 19

United States v. *Armstrong*,
517 U.S. 456 (1996)....................8

Usery v. *Turner Elkhorn Mining Co.*,
428 U.S. 1 (1976)....................11

Rules

FED. R. CIV. P. 23 ....20, 27, 28

FED. R. EVID.

301....................*passim*
1101....................11

Other Authorities

FED. R. EVID. 301 (Advisory Committee's Note).................... 10-11

PRELIMINARY STATEMENT

Plaintiffs' current theory of fraud is that Barclays made 13 statements about its dark pool that failed to disclose that Barclays was operating its dark pool in an unethical manner, thereby contradicting Barclays' statement that it was seeking to "restore" its reputation in the wake of past scandals. But Plaintiffs concede in their opposition brief ("Opposition" or "Opp."), as they must because of the evidence offered during the class certification proceedings, that the 13 misstatements were not material and did not have any impact on the price of Barclays' ADS. Moreover, Plaintiffs' expert's testimony and report demonstrate that the purported inflation in the value of Barclays' ADS that was released by the alleged corrective disclosure (*i.e.*, the June 25, 2014 announcement of the New York Attorney General's ("NYAG") lawsuit against Barclays) was created *before* the misstatements were made. Because the purported artificial inflation pre-dated Barclays' alleged fraud, the price decline in Barclays' ADS after the NYAG's announcement could never logically be used as a measurement of the price impact of Barclays' alleged fraud. Consequently, Barclays made a showing—indeed, a conclusive showing—based on the class certification evidence that Barclays' alleged fraud had no impact on the price of Barclays' ADS.

Unsurprisingly, then, Plaintiffs are forced to twist the legal standards for class certification, ignore the evidence Defendants presented before Judge

Scheindlin, and incorrectly contend that their Section 10(b) claim against Barclays is based on a viable "omissions" theory. But Plaintiffs' arguments only confirm that this Court should reverse the District Court's decision and decertify the class, or, alternatively, vacate the certification order and remand for proceedings consistent with this Court's opinion.

First, Plaintiffs contend that Judge Scheindlin correctly ruled that, to rebut the *Basic* presumption, Defendants must "prove" a lack of price impact "by a preponderance of the evidence" (SPA-44), because the *Basic* presumption is "virtually irrebuttable" and "virtually insurmountable." (Opp. at 30, 32.) But this contention proves that Judge Scheindlin's ruling is contrary to the Supreme Court's holding that "the presumption of reliance [is] rebuttable rather than conclusive," and that "defendants must be afforded an opportunity before class certification to defeat the [*Basic*] presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2408, 2417 (2014) ("*Halliburton II*").

Furthermore, Plaintiffs contend (Opp. at 38-42) that Federal Rule of Evidence 301—specifically cited in *Basic* and stating that the "burden of persuasion . . . remains on the party who had it originally"—does not apply when "a federal statute or [the Federal Rules of Evidence] provide otherwise." FED. R. EVID. 301. But Plaintiffs cite no caselaw for the proposition that the *Basic* presumption—a *judicially* created presumption supporting a now disfavored *judicially* created private right of action—constitutes a "federal statute," and ignore that the only Circuit to have considered this issue since *Halliburton II* recently held that Federal Rule of Evidence 301 does apply to the *Basic* presumption. *See IBEW Local 98 Pension Fund* v. *Best Buy Co., Inc.*, 818 F.3d 775, 782 (8th Cir. 2016).

Faced with these threshold problems, Plaintiffs simply ignore that Defendants satisfied *Halliburton II*'s rebuttal rule by making a "showing" "sever[ing] the link" between the alleged fraud and any price impact on Barclays' ADS. Plaintiffs disregard Defendants' evidence—with which Plaintiffs' expert agreed—that none of the alleged misstatements or omissions caused any material movement in the price of Barclays' ADS. This fact alone is sufficient under *Halliburton II* to shift the burden of proving price impact onto Plaintiffs. *See id.* Moreover, Plaintiffs' expert testified that the alleged artificial inflation entered Barclays' ADS price *prior* to the class period, *before* any allegedly false or misleading statements Defendants made about "restoring" Barclays' integrity.

Plaintiffs therefore resort to arguing that their case is "not comparable to 'almost all fraud cases,'" because it is based on a "price maintenance" theory (Opp. at 15, 44), purportedly allowing them to prove price impact by showing only that Barclays' ADS price declined on the alleged corrective disclosure date. But Plaintiffs ignore that they never: (i) identified any pre-class period inflation in

Barclays' ADS; (ii) disputed Defendants' expert's testimony that the Barclays' ADS price decline was consistent with that resulting from the announcement of a regulatory lawsuit against a major company (as opposed to the revelation of any fraud); or (iii) disputed that analysts were uniformly concerned only with the NYAG lawsuit, and not any fraud. Accordingly, Defendants raised sufficient evidence to shift the burden of proving price impact to Plaintiffs, and Plaintiffs failed to do so.

Second, although Plaintiffs contend that Judge Scheindlin *might* have considered direct evidence of market efficiency, Plaintiffs cannot dispute that Judge Scheindlin's order expressly states that she did *"not* consider whether [Plaintiffs] have also satisfied *Cammer* 5 by proof of an event study." (SPA-34 (emphasis added).) That ruling directly contradicts this Court's statement that, "[w]ithout the demonstration of a causal relationship" between unexpected, material information and an "immediate" price reaction, "it is difficult to presume that the market will integrate the release of material information about a security into its price." *Teamsters Local 445 Freight Div. Pension Fund* v. *Bombardier Inc.*, 546 F.3d 196, 207-08 (2d Cir. 2008). Indeed, Plaintiffs do not dispute that, by looking only at indirect evidence of market efficiency—such as whether a stock is listed on a major exchange and followed by analysts—Judge Scheindlin created a "presumption of a presumption," *i.e.*, that *Basic* automatically applies in *every* case involving large companies whose stocks trade on major exchanges.

Third, Plaintiffs never contest that the only "omissions" Plaintiffs identify are the purportedly true facts that allegedly render Defendants' statements misleading in the first place. (Opp. at 52; *see, e.g.*, JA-206, 246-47.) But this Court has stated unequivocally that the *Affiliated Ute* presumption is available only where a plaintiff alleges "primarily" omissions, and cannot be used where, as here, the claims are based on affirmative misstatements. *Starr ex rel. Estate of Sampson* v. *Georgeson S'holder, Inc.*, 412 F.3d 103, 109 n.5 (2d Cir. 2005). Contrary to Plaintiffs' contention that their claims are "unique" (Opp. at 49), if Judge Scheindlin's erroneous application of *Affiliated Ute* were affirmed, it would allow *any* plaintiff to invoke the *Affiliated Ute* presumption by merely characterizing alleged misstatements as omissions of the truth.

Finally, Plaintiffs fail to contest in any meaningful way that their damages model does not "measure only those damages" attributable to their theory of liability. *Comcast* v. *Behrend*, 133 S. Ct. 1426, 1433 (2013). Although Plaintiffs argue that they need not proffer a damages model for class certification, they ignore that, because they *did*, such a model must comply with *Comcast*. *See Roach* v. *T.L. Cannon Corp.*, 778 F.3d 401, 402 (2d Cir. 2015). Plaintiffs' model cannot disaggregate losses allegedly suffered from confounding factors (*e.g.*, the litigation and regulatory risk caused by the NYAG's lawsuit) from those allegedly suffered from the alleged fraud, and provides no support for Plaintiffs' theory that all class members were uniformly damaged regardless of when they purchased Barclays' ADS during the approximately three-year putative class period.

ARGUMENT

I. PLAINTIFFS MISSTATE THE REQUIREMENTS FOR REBUTTING *BASIC*.

A. Plaintiffs' "Virtually Insurmountable" Standard for the Price Impact Inquiry Is Contrary to Federal Rule of Evidence 301.

Despite *Basic*'s citation of Rule 301 and *Halliburton II*'s emphasis "that the [*Basic*] presumption of reliance [is] rebuttable rather than conclusive," and that "defendants must be afforded an opportunity before class certification to defeat the [*Basic*] presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock," 134 S. Ct. at 2408, 2417, Plaintiffs and their *amici* ask this Court to hold that the *Basic* presumption is "virtually irrebuttable" and "virtually insurmountable." (Opp. at 30, 32; Dkt. No. 108 at 10.)[1] This Court should reject this obvious incongruity.

A primary issue here is whether Judge Scheindlin erred by failing to apply Federal Rule of Evidence 301—which states that, in all "civil case[s]," the

[1] Tellingly, Plaintiffs are unable to cite controlling authority to support their argument, and consequently rely on private letters between two Justices and strained readings of concurring opinions in *Halliburton II*. (*See* Opp. at 30-32.)

burden of persuasion "remains on the party who had it originally" "unless a federal statute or [the Federal Rules of Evidence] provide otherwise"—to the *Basic* presumption. FED. R. EVID. 301. Judge Scheindlin's decision is directly contrary to the only Circuit Court decision to have directly considered this question after *Halliburton II*. In *Best Buy*, the Eighth Circuit squarely held that, pursuant to Rule 301, defendants had only the burden "to come forward with evidence showing a lack of price impact." 818 F.3d at 782. Plaintiffs do not criticize or attempt to distinguish *Best Buy*—in fact, they do not address it at all. Instead, Plaintiffs effectively contend that this Court should split with the Eighth Circuit, because a few lower courts previously have not applied Rule 301 to *Basic*. (*See* Opp. at 36-37.) Plaintiffs' arguments, however, fail to hold water.

First, Plaintiffs argue that Rule 301 is the "default rule" only for "simple presumptions," and "is not meant to apply to a [judicial] presumption created pursuant to federal statute." (Opp. at 39.) Plaintiffs and their *amici* apparently misread the language "unless a federal statute or these rules provide otherwise." (*See* Opp. at 39; Dkt. No. 102 at 3.) The *Basic* presumption, of course, was not "created by" a statute. Moreover, Plaintiffs cite no cases supporting their reading that Rule 301 does not apply to judicially created presumptions "pursuant" to a federal statute, and the few cases Plaintiffs' *amici* cite (Dkt. No. 102 at 4-8) fail to demonstrate such an exception to the rule.[2] Indeed, contrary to Plaintiffs' claims, even presumptions expressly created by statute are governed by Rule 301 unless the statute states otherwise. *See ITC Ltd.* v. *Punchgini, Inc.*, 482 F.3d 135, 147-48 (2d Cir. 2007) (applying Rule 301 to statutory presumption of abandonment based on nonuse of a trademark).

Even if Rule 301 could be negated where a court believed doing so would "effectuate" the "congressional intent" of a statutory claim (*see* Opp. at 39), Section 10(b) claims do not warrant such a deviation. Section 10(b)'s implied private right of action is "a judicial construct that Congress did not enact in the text of the relevant statutes," and "[c]oncerns with the judicial creation of a private cause of action caution against its expansion." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta*, 552 U.S. 148, 164-65 (2008); *see also Janus Capital Grp., Inc.* v. *First Derivative Traders*, 564 U.S. 135, 142-44 (2011) (recognizing the "narrow scope that [courts] must give the implied private right of action").

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[2] *See, e.g.*, *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996) (presumption must be rebutted by "clear evidence to the contrary," because the presumption is directed against the party who had the burden of persuasion originally); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 245-46 (1989) (preponderance of the evidence was required, because defendants presented "an affirmative defense" rather than a presumption); *Mullins Coal Co. of Va.* v. *Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 484 U.S. 135, 143 & n.11 (1987) (Rule 301 did not apply, because the regulation created express burdens for the presumption).

Consistent with Rule 301, *Basic* held that "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." 485 U.S. at 248. Plaintiffs attempt to stretch this language by claiming that *Basic*'s use of the phrase "any showing" was somehow intended to require defendants to rebut the *Basic* presumption by a "preponderance of the evidence." (Opp. at 29-30.) But Plaintiffs cite no cases construing "any showing" to mean proof by a preponderance of the evidence.[3]

Second, Plaintiffs protest that the application of the "any showing" standard, as required by Rule 301, would undermine *Basic* by allowing the presumption to be rebutted with "mere suggestion." (Opp. at 30.) But as Defendants' Opening Brief ("Br.") made clear (Br. at 35), the presumption is not rebutted merely by presenting "'some' rebuttal evidence, no matter how flimsy." (Opp. at 40-41.) Rather, under Second Circuit precedent, a defendant must

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[3] Similarly, Plaintiffs rely on the *Halliburton II* Court's characterization of a defendant's rebutting evidence as "direct" and "more salient" to argue that Defendants' evidence must *definitively prove* a lack of price impact. (Opp. at 31.) But the quoted language, when placed in context, simply distinguishes between the *Basic* presumption, which assumes price impact based on "indirect" proxies, and "more salient," "direct" evidence bearing on whether the price was actually impacted. *Halliburton II*, 134 S. Ct. at 2416. In any event, Barclays did definitively prove a lack of price impact. (*See infra* pp. 12-15.)

"produce enough evidence substantiating the presumed fact's absence to withstand a motion for summary judgment or judgment as a matter of law on the issue." (Br. at 35); *see also ITC*, 482 F.3d at 149 ("[P]roffered evidence is 'sufficient' to rebut a presumption as long as the evidence could support a reasonable jury finding of 'the nonexistence of the presumed fact.'"). As demonstrated below (*see infra* pp. 12-15), Defendants have made such a showing here.

Third, Plaintiffs and their *amici* contend that it is "inconceivable" that "the Supreme Court intended" for the burden of persuasion to remain with a plaintiff even after a defendant has met its burden of production. (Opp. at 40-41; *see also* Dkt. No. 102 at 24-25.)[4] But this argument misses the point entirely. Rule 301 expressly states Congress' intent that the burden of persuasion "remains on the party who had it originally" for *all* presumptions in civil cases, unless a statute or rule of evidence "provide[s] otherwise." FED. R. EVID. 301; *see also* FED. R. EVID. 301 (Advisory Committee's Note) ("The rule governs presumptions in civil cases generally."). Rule 301 is binding on federal courts and not subject to

4 Plaintiffs' and their *amici*'s claim that the showing necessary to establish the *Basic* presumption is "substantial and complex" (Opp. at 40; *see also* Dkt. No. 102 at 24-25) rings entirely hollow in light of Plaintiffs' argument that market efficiency may be shown solely by indirect proxies, such as trading volume, a stock's listing on a national exchange, and wide analyst coverage. (*See* Opp. at 19-24; *infra* pp. 16-20.)

abrogation based upon purported policy concerns. *See* FED. R. EVID. 1101(a); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 33-34 (1976).[5]

Fourth, Plaintiffs appear to argue that, by not specifically citing Rule 301, *Halliburton II* effectively abrogated the rule in Section 10(b) cases. But the Supreme Court's decision not to mention Rule 301 in *Halliburton II* obviously does not mean that the Court implicitly rejected its application in this context. *See Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) (cautioning that courts should not "conclude that [the Supreme Court's] more recent cases have, by implication, overruled an earlier precedent").[6]

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[5] Plaintiffs claim that this Court implicitly rejected the application of Rule 301 in *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474, 483 (2d Cir. 2008). (Opp. at 34.) But, consistent with the Supreme Court's "any showing" standard, *Salomon* merely holds that defendants must "show[]" a lack of price impact—*i.e.*, must satisfy *Basic*'s burden of *production* of rebuttal evidence—not that defendants bear the ultimate burden of *persuasion*.

[6] Plaintiffs and their *amici* bizarrely contend that *Basic*'s citation of the Advisory Committee Notes for Rule 301 somehow evidence the Court's rejection of that rule. (S*ee* Opp. at 41-42; Dkt. No. 102 at 14-16.) But the notes they cite describe a proposal for Rule 301 that was expressly rejected by Congress, *see* FED. R. EVID. 301 (Advisory Committee's Note) ("[T]he Rule proposed by the Court, whereby a presumption permanently alters the burden of persuasion . . . lends too great a force to presumptions."), in favor of a version designed "to make clear that while evidence of facts giving rise to a presumption shifts the burden of coming forward with evidence to rebut or meet the presumption, it does *not shift the burden of persuasion*." *Id*. (emphasis added).

B. Plaintiffs' Claim That Defendants Did Not Present Evidence to Rebut the *Basic* Presumption Is Wrong.

Tacitly recognizing that Judge Scheindlin erred by not applying Rule 301, Plaintiffs argue that Defendants failed to "proffer any evidence at all" to rebut the *Basic* presumption, because Defendants did not "develop[] a market model" or create their own event study. (Opp. at 42-43 (emphasis omitted).) Plaintiffs are flat wrong.

First, Plaintiffs ignore the extensive evidence Defendants presented, including Defendants' expert's testimony proving that Plaintiffs' regression analysis demonstrated that the alleged misstatements had no statistically significant impact on the price of Barclays' ADS. (*See* Br. at 37.)[7] Moreover, Defendants demonstrated that Plaintiffs' expert's opinion forecloses Plaintiffs' theory of the case. In explaining why the price of Barclays' ADS did not significantly react to the alleged misstatements, Plaintiffs' expert opined that the purported price inflation entered Barclays' ADS prior to the beginning of the class period. (Br. at 21; JA-663.) But, as Judge Scheindlin's April 2015 Order recognized (*see* JA-172 (holding that "the Complaint adequately alleges materiality" because "Barclays had staked its 'long-term performance' on restoring its integrity")), it was

[7] Where, as here, evidence from a plaintiff's "own expert" establishes a lack of price impact, a defendant may rely on that evidence to rebut the *Basic* presumption. *Best Buy*, 818 F.3d at 782-83.

Barclays' pledge to reform after the June 2012 LIBOR settlement that potentially rendered the alleged misstatements regarding LX material. (*See* Br. at 38; JA-1031.)[8] Consequently, Plaintiffs' expert's own testimony established that the alleged inflation in the price of Barclays' ADS that was purportedly released upon the filing of the NYAG's lawsuit could not have been caused by Barclays' alleged fraud, because the artificial inflation came into the ADS *before* the fraud began. This evidence is more than sufficient under *Halliburton II* and *Best Buy* to shift the burden of demonstrating price impact back to Plaintiffs. *See McPherson* v. *N.Y. City Dept. of Educ.*, 457 F.3d 211, 215 (2d Cir. 2006) (presumption of discrimination "evaporates" when rebutted, and plaintiff must prove pretext by a preponderance).

Second, Defendants' expert demonstrated that the decline in the Barclays' ADS price on June 26, 2014 was likely caused by the market's reaction to the NYAG lawsuit, rather than the revelation of any alleged fraud. Consistent with studies—and Plaintiffs' expert's testimony (*see* JA-968-69)—recognizing that regulatory actions have an impact on the price of a company's stock independent

8 Plaintiffs argue that Judge Scheindlin did not rule that statements before the June 2012 LIBOR settlement were immaterial (Opp. at 46), but Defendants have clearly shown that Judge Scheindlin expressly relied on Barclays' "efforts to restore its reputation" after June 2012 in finding the alleged misstatements material. (JA-172; *see also* Br. at 38-39.) Indeed, this was the sole basis for Judge Scheindlin's holding on materiality, given that the relevant business was quantitatively immaterial. (JA-171-72.)

of the alleged underlying conduct, Defendants' expert analyzed securities analyst reports and found that the fall in Barclays' price was attributed to concerns about the NYAG's regulatory action itself, and not Barclays' alleged conduct. (*See* Br. at 40; JA-612-13.)

Recognizing that Barclays' evidence is sufficient under *Halliburton II* to show a lack of price impact, Plaintiffs resort to a theory of "price maintenance," *i.e.*, that the misrepresentations did not cause an increase in Barclays' ADS price, but rather "maintained" the price, which allegedly would have declined had Barclays disclosed that it was not acting with integrity while operating its dark pool. (*See* JA-546-47; JA-663; JA-680.) But Plaintiffs' "price maintenance" theory does not overcome Defendants' rebuttal showing, because Plaintiffs' "*theory* provide[s] no *evidence* that refute[s] defendants' overwhelming evidence of no price impact." *Best Buy*, 818 F.3d at 783 (emphasis added). Indeed, as shown above, even if price maintenance were a viable theory, it is foreclosed by the fact that Defendants have put forth evidence severing the link between the decline in Barclays' ADS price and the alleged fraud. *See In re N. Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d 446, 461 (S.D.N.Y. 2000).[9]

[9] Plaintiffs rely on *Glickenhaus & Co.* v. *Household International*, 787 F.3d 408 (7th Cir. 2015), for the proposition that Plaintiffs are not "required to show when inflation entered the price of Barclays ADS to invoke a price maintenance theory." (Opp. at 46.) But "Defendants' direct, more salient evidence showing
(footnote continued)

In fact, Plaintiffs concede that the alleged affirmative misstatements were "immaterial." (*See* Opp. at 49 ("[I]t is the omitted facts of unethical conduct that a reasonable investor would have found material, not [Barclays'] affirmative misstatements[.]"); *id.* at 50 ("Barclays' ADS investors would have found the omitted facts material (but not the affirmative statements) . . .").) This concession itself forecloses Plaintiffs' reliance on the *Basic* presumption, which requires Plaintiffs to show that the alleged misrepresentations were material. *See Halliburton II*, 134 S. Ct. at 2408 (citing *Basic*, 485 U.S. at 248 n.27). Plaintiffs' notion that somehow the alleged misstatements, or the truth omitted by them, become actionable because the statements were untrue was expressly rejected by the Supreme Court in *Basic*, which overruled the Sixth Circuit's holding that information "becomes material by virtue of [a] statement denying [its] existence." *Basic*, 485 U.S. at 237.

(footnote continued)
that the alleged misrepresentation did not actually affect the stock's market price," *Halliburton II*, 134 S. Ct. at 2416, certainly overcomes Plaintiffs' mere suggestion of what might have been without any evidentiary support. Plaintiffs ask this Court to hold that—instead of simply asking Plaintiffs to indicate when they believe that the price of Barclays' ADS was inflated—Defendants must evaluate the entire trading history of the security to prove that there is no point at which the price might have been impacted by the alleged misstatements. Such an approach is both impractical and contrary to the law, and it should be rejected by this Court.

C. Plaintiffs' Proposed Standard for Market Efficiency Creates an Improper Presumption That the Markets for the Securities of Large Companies Are Efficient.

In stark contrast to the "virtually insurmountable" standard that Plaintiffs advocate for Defendants to rebut the *Basic* presumption (*see supra* pp. 6-11), Plaintiffs contend that, to establish market efficiency, they need only demonstrate the presence of a few factors that might promote efficiency, unless Defendants can show some "reason to doubt the efficiency of the market." (Opp. at 23.) That is not the law. Indeed, the indirect factors on which Plaintiffs rely and which Judge Scheindlin held are sufficient to establish market efficiency (*see* SPA-32-33)—*i.e.*, high trading volume, significant analyst coverage, presence of market makers, ability to file an S-3 registration statement, large market capitalization, small bid-ask spread, and high proportion of shares in public hands (*see* SPA-14-15)—are present for virtually *all* large, publicly traded companies.

Thus, the standard Judge Scheindlin applied—which expressly requires no direct evidence of efficiency under *Cammer* 5 (*see* SPA 32-33 (holding that "indirect evidence of market efficiency . . . will typically be sufficient to satisfy the *Basic* presumption"))—effectively creates a presumption that the market is efficient for the securities of *all* large companies. Courts have routinely rejected such simplified efficiency tests that rely only on the presence of indirect factors. *See, e.g.*, *Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund* v. *Regions*

Fin. Corp., 762 F.3d 1248, 1257 (11th Cir. 2014); *Bell* v. *Ascendant Solutions, Inc.*, 422 F.3d 307, 313 (5th Cir. 2005); *Cammer* v. *Bloom*, 711 F. Supp. 1264, 1281 (D.N.J. 1989).[10]

Plaintiffs' strained attempt to cite cases in support of this novel and erroneous standard demonstrates the lack of authority supporting it. Plaintiffs cite only another decision from Judge Scheindlin and a few out-of-circuit district court opinions. (Opp. at 20.) On the other hand, Plaintiffs ignore this Court's statement that, "[w]ithout the demonstration of a causal relationship" between unexpected and material information and "an immediate response" in the price of a security, "it is difficult to presume that the market will integrate the release of material information about a security into its price." *Bombardier*, 546 F.3d at 207; *see also In re Fed. Home Loan Mortg. Corp. (Freddie Mac) Sec. Litig.*, 281 F.R.D. 174, 182 (S.D.N.Y. 2012) (indirect evidence "cannot substitute for evidence of a cause-and-effect relationship between unexpected news and market price").[11] Indeed,

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[10] Plaintiffs also attempt to rehabilitate Judge Scheindlin's class certification order by arguing that her analysis included additional indirect *Cammer* and *Krogman* factors not named in the order. (Opp. at 22-23.) Again, however, these additional factors also exist for virtually *all* large publicly traded companies. (*See supra* p. 16.)

[11] Plaintiffs, and Judge Scheindlin's decision, rely heavily on *Halliburton II* to argue that no direct evidence of market efficiency should be required because the "modest premise" behind the *Basic* presumption does not require that information be incorporated into a security's price immediately. (Opp. at 18.) That reliance is misplaced. *Halliburton II assumed* that plaintiffs' "[e]vidence of price impact will

(footnote continued)

Plaintiffs' own expert testified that *Cammer* 5 is the only "direct test of market efficiency," and that the other factors only "test characteristics that you would expect to be associated with an efficient market." (JA-648.)

Implicitly recognizing the importance of *Cammer* 5 and Judge Scheindlin's erroneous failure to consider it, Plaintiffs puzzlingly claim that Judge Scheindlin actually evaluated their *Cammer* 5 evidence. (*See* Opp. at 24.) This argument, however, is foreclosed by Judge Scheindlin's own words: "I . . . *do not consider* whether [Plaintiffs] have also satisfied *Cammer* 5 by proof of an event study." (SPA-34 (emphasis added).)[12]

Plaintiffs seek to render Judge Scheindlin's error harmless by incorrectly asserting that Defendants only "quibble" with Dr. Nye's methodologies, but not his conclusions, under *Cammer* 5. (Opp. at 25.) To the

(footnote continued)
be before the court at the certification stage," 134 S. Ct. at 2417, and that it would include "event studies," *id*. at 2415. Thus, Plaintiffs' and Judge Scheindlin's view of the evidence necessary to establish market efficiency is contrary to *Halliburton II*'s own guidance.

[12] Plaintiffs argue that "Defendants' position regarding *Cammer* 5 would obviate the need to consider any other factors." (Opp. at 6.) Plaintiffs are wrong. *Cammer* 5, like all factors courts consider when evaluating market efficiency, is not dispositive of the inquiry. But because it is the "essence of an efficient market," *Bombardier*, 546 F.3d at 207, plaintiffs should, at a minimum, be required to show some evidence of a cause-and-effect relationship between unexpected material news and the price of the security. That other indirect factors are also useful for evaluating efficiency cannot excuse omitting the only source of direct evidence of efficiency where it is available.

contrary, Defendants have made clear that Dr. Nye based his event study on subjective, inconsistent, and scientifically unsound methods that have in turn produced inaccurate and unreliable conclusions. (*See* Br. at 23-24; JA-573-75 (subjective and inconsistent method for interpreting news); JA-587-90 (failed to consider all value-relevant news and treated news inconsistently).) Moreover, Plaintiffs' argument that Defendants' failure to demonstrate inefficiency "bespeaks [a] concession regarding the efficiency of the market" (Opp. at 25) is way off base; it is *Plaintiffs'* burden to *prove* market efficiency, not *Defendants'* burden to *disprove* it. *See Bombardier*, 546 F.3d at 210. Thus, Defendants properly demonstrated that Plaintiffs' evidence of market efficiency was not reliable and therefore could not establish efficiency.

Finally, Plaintiffs suggest that this Court should take up the District Court's role and evaluate for itself the event study performed by Dr. Nye. (*See* Opp. at 25-28). But Judge Scheindlin's failure to consider *Cammer* 5 cannot be remedied by an attempt to reargue the merits of Dr. Nye's event study on appeal. *See St. Stephen's School* v. *PricewaterhouseCoopers Accountants N.V.*, 570 F. App'x 37, 39 (2d Cir. 2014) ("[A] district court must provide sufficient factual findings on Rule 23 requirements . . . to demonstrate compliance with the law in deciding to certify.").[13] Despite Plaintiffs' confidence that "the same result would ensue" on remand, ensuring that the District Court properly applied the requirements of Rule 23 before certifying the class is hardly a "waste [of] judicial resources." (Opp. at 26.)

II. PLAINTIFFS MISCHARACTERIZE THEIR ALLEGATIONS TO FIT THE *AFFILIATED UTE* PRESUMPTION.

In support of their *Affiliated Ute* argument—which comprised a single paragraph in their briefing before the District Court (JA-298)—Plaintiffs simply regurgitate Judge Scheindlin's statement that "a case could be made that it is the material omissions, not the affirmative statements, that are the heart of this case." (SPA-23-24; *see* Opp. at 49.) Plaintiffs claim, without citation to the record, that "the SAC's allegations and prior orders of the District Court" establish that their claims sound in alleged omissions, not misrepresentations. (Opp. at 49.) Plaintiffs further argue that their case is "unique" and should be treated differently than the

[13] Furthermore, Plaintiffs improperly seek to bolster Dr. Nye's expert report with documents that are not in the record and were not before the District Court at the class certification hearing. (*See* Opp. at 26-27 (citing "[a] recent NERA study" showing that "only 37.5% of earnings surprises result in statistically significant returns" for S&P 500 companies).) Ironically, the fact that only 37.5% of earnings surprises for S&P 500 companies result in statistically significant returns further demonstrates that there is no basis to assume market efficiency for the stocks of large, publicly traded companies. *See Halliburtion II*, 134 S. Ct. at 2421 (Thomas, J., concurring) ("As it turns out, even 'well-developed' markets (like the New York Stock Exchange) do not uniformly incorporate information into market prices at high speed.").

scores of previous securities fraud cases decided in this Circuit because only the alleged omissions, and *not* the alleged misrepresentations, are material. (Opp. at 49; *id.* at 15 (Plaintiffs' case is "not comparable to 'almost all fraud cases'").) Plaintiffs further assert that Defendants had a "duty to disclose their misconduct" because Barclays had previously been "marred by a series of unprecedented scandals," was a "large bank[]" during the "2008 financial crisis," and supposedly had a "continued penchant for dishonesty." (Opp. at 1, 15, 52.) Plaintiffs' arguments are without merit, for a variety of reasons.

First, as Defendants have shown (Br. at 45-49), *Affiliated Ute* is available only in cases "involving primarily" omissions, where "no positive statements exist" and "reliance as a practical matter is impossible to prove." (Br. at 45-46.) Indeed, Plaintiffs concede that *Affiliated Ute* is limited to such cases. (Opp. at 48 n.20.) Nowhere do Plaintiffs explain how their Amended Complaint—which alleges 13 purported affirmative misstatements—involves "primarily" omissions. Quite the opposite: as Defendants have shown, Plaintiffs do not allege any "independent omission" at all. Rather, the purported "omissions" are nothing more than the "flip side" of the alleged misstatements—that is, the information that allegedly rendered Defendants' misstatements false or misleading in the first place. (Br. at 47.)

Indeed, the Opposition itself begins by explaining the importance of the alleged affirmative misstatements, undermining Plaintiffs' claim that their claims are built on omissions. (*See* Opp. at 2 ("Barclays touted LX as a safe trading venue 'built on transparency[.]' . . . Barclays also touted its Liquidity Profiling tool . . ."). This alone forecloses application of the *Affiliated Ute* presumption. *See Goodman* v. *Genworth Fin. Wealth Mgmt., Inc.*, 300 F.R.D. 90, 104-06 (E.D.N.Y. 2014); *In re Credit Suisse First Boston Corp. (Lantronix, Inc.) Analyst Sec. Litig.*, 250 F.R.D. 137, 143-44 (S.D.N.Y. 2008).

Second, despite their claim that "mountains of case law" support their position (Opp. at 48 n.20), Plaintiffs fail to cite a single case from this Court (or *any* Circuit Court) applying *Affiliated Ute* in the manner they propose. Nor do Plaintiffs explain why this Court should not follow the numerous cases Defendants cited rejecting the application of *Affiliated Ute* under these circumstances. (*See* Br. at 48.) Rather, Plaintiffs cite only *Dodona I, LLC* v. *Goldman, Sachs & Co.*, 296 F.R.D. 261 (S.D.N.Y. 2014)—a non-binding district court case—to support their position. (Opp. at 49.) But, as that court recognized, the plaintiffs' claims there were expressly "based on omissions," and those plaintiffs, unlike Plaintiffs here, did not allege that *any* affirmative misrepresentations were false on their own. *Dodona I*, 296 F.R.D. at 269-70; *see also Dodona I, LLC* v. *Goldman, Sachs & Co.*, 847 F. Supp. 2d 624, 645-46 (S.D.N.Y. 2012).

Third, Plaintiffs have utterly failed to distinguish Judge Furman's decision in *In re Barclays Liquidity Cross & High Frequency Trading Litigation*, 126 F. Supp. 3d 342 (S.D.N.Y. 2015) ("*Barclays LX*"), which rejected the application of *Affiliated Ute* to Barclays' alleged fraud concerning the dark pool. Although Plaintiffs argue that *Barclays LX* "has no application here" because (i) it was decided on a motion to dismiss, (ii) the *Barclays LX* plaintiffs were clients who traded in LX, not Barclays' ADS investors, and (iii) the *Barclays LX* plaintiffs did not proffer Plaintiffs' theory of fraud that "the omitted facts [were] material . . . given their impact on the Company's reputation and integrity" (Opp. at 50-51), these are distinctions without a difference. The allegations in *Barclays LX* were nearly identical to Plaintiffs' allegations here (*see* Br. at 49 n.24), and Judge Furman expressly concluded that the plaintiffs there could not prove reliance through the *Affiliated Ute* presumption, because plaintiffs' "theory of liability is based primarily, if not entirely, on Barclays's alleged misrepresentations, with any omissions playing only a minor role in exacerbating the misrepresentations' effect." 126 F. Supp. 3d at 365; *see also id.* at 366 ("If a misrepresentation claim could be reframed as an omission claim merely by alleging that a defendant 'did nothing to dispel' its own misrepresentation, then the limitation of the *Affiliated Ute* presumption to omissions alone would be meaningless indeed.").[14]

Fourth, even if this Court ignored Plaintiffs' allegations of numerous affirmative misstatements, Plaintiffs fail entirely to explain what "duty to disclose" Defendants owed them—a necessary predicate for applying the *Affiliated Ute* presumption. Plaintiffs argue that Defendants had a "duty to speak fully and truthfully" once they spoke about the dark pool—specifically, that Defendants had a duty to disclose omitted "facts about transparency and the way they operated the dark pool," and that these omitted facts "obscured Barclays' continued penchant for dishonesty." (Opp. at 52.) But Plaintiffs again make apparent their unprecedented position that Defendants were obligated to disclose their own alleged wrongdoing because it implicated Barclays' "reputation and integrity." (Opp. at 15 ("Defendants held an undeniable duty to disclose their misconduct."); *id.* at 51-52.)[15] As Defendants have demonstrated (Br. at 49-51), this rule

[14] Whether the *Barclays LX* plaintiffs alleged that the omissions were "material . . . given their impact on the Company's reputation and integrity" (Opp. at 50-51) is thus irrelevant to the *Affiliated Ute* analysis. Judge Furman's decision in *Barclays LX* was not based on the materiality of the purported omissions.

[15] Plaintiffs do not seek to rely on *In re Sanofi Sec. Litig.*, 2016 WL 93866 (S.D.N.Y. Jan. 6, 2016), the one case Judge Scheindlin cited to support a duty of disclosure. (*See* SPA-25.) As Defendants explained in their Opening Brief, *Sanofi* is inapplicable to this case. (*See* Br. at 50-51.)

contravenes clear authority from this Circuit holding that no such duty of disclosure exists.[16]

Finally, were this Court to affirm Judge Scheindlin's *Affiliated Ute* holding, it would nullify the reliance element entirely, as securities class action plaintiffs could simply recharacterize their alleged misstatement claims as "omissions" of those facts that rendered the misstatements false in the first place. (*See* Br. at 48.) In particular, under Plaintiffs' view, *any* company that ever had a prior "scandal" that then later committed *any* wrongdoing would somehow have a duty to disclose that wrongdoing whenever it said *anything* about its business. This Court should not grant Plaintiffs' request to rewrite these presumptions of reliance by affirming Judge Scheindlin's novel holding.

III. PLAINTIFFS MISSTATE THE REQUIREMENTS UNDER *COMCAST* FOR ESTABLISHING A CLASSWIDE DAMAGES METHODOLOGY.

Finally, Plaintiffs' arguments do not support the District Court's erroneous conclusion that their proposed damages model satisfies *Comcast*.[17] At

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[16] Plaintiffs' assertion that Defendants are "re-litigat[ing] th[e] issue" of Defendants' alleged duty to disclose is perplexing. (Opp. at 51.) Judge Scheindlin's April 2015 Order did not address either an alleged "duty to disclose" or Plaintiffs' purported omission claims, and thus did not "reject" Defendants' "same argument" on that point. (*Id.*) Plaintiffs' reliance on *City of Livonia Emps.' Ret. Sys.* v. *Wyeth*, 284 F.R.D. 173 (S.D.N.Y. 2012)—where the district court explicitly found a duty to disclose at the motion to dismiss stage—is, accordingly, inapt. (*See* Opp. at 51.)

the class certification stage, Defendants proffered robust evidence—including the report and testimony of Defendants' expert—and identified numerous deficiencies in Plaintiffs' "general economic framework" of classwide damages. (*See* Br. at 54-56.) These deficiencies included that Plaintiffs' model: (i) failed to assess how inflation may have varied over the course of the putative class period due to new alleged misstatements or as a result of changes in the regulatory environment, and (ii) failed to demonstrate how non-actionable confounding factors (such as the mere announcement of a regulatory action) could be disaggregated from recoverable losses. (*See id.*) Plaintiffs do not seriously dispute these deficiencies.[18] Rather, Plaintiffs and their *amici* conclusorily suggest that the "entire drop" resulted from "one overarching fraud," but fail to cite anything in the record, or any case law, to support that claim. (Opp. at 54-55; Dkt. No. 106 at 5-

(footnote continued)

[17] Although Plaintiffs contend that *Comcast* requires nothing more than "minimal scrutiny" (*see* Opp. at 52), *Comcast* itself noted that a court's analysis of a plaintiff's damages model for this purpose must be "rigorous." 133 S. Ct. at 1432-33; *see also Roach*, 778 F.3d at 407.

[18] Plaintiffs' claim that Defendants "misleadingly fail to tell this Court" that the Liquidity Profiling service was offered in August 2011 (Opp. at 54 n.22)—a position Plaintiffs take for the first time on appeal—is flatly contradicted by the record. Plaintiffs' own complaint and evidence presented at the class certification proceedings clearly establish that Liquidity Profiling was "[i]ntroduced in January 2012." (JA-246; JA-720.)

6.)[19] Plaintiffs' argument assumes that the entire price decline, no matter the cause, is recoverable—despite case law explicitly stating that "confounding factors" (such as concerns about potential fines) must be "disaggregat[ed]." *In re Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 554 (S.D.N.Y. 2008), *aff'd*, 597 F.3d 501 (2d Cir. 2010).[20] Plaintiffs' model is thus entirely inconsistent with *Comcast*, which requires that a classwide damages model "measure only those damages" related to Plaintiffs' theory of liability. 133 S. Ct. at 1433.[21] Plaintiffs' alternative arguments likewise fail.

First, although Plaintiffs cite *Roach* for the proposition that a classwide damages model is "not required" at the class certification stage (Opp. at 53), they ignore entirely *Roach*'s holding that "a model for determining classwide damages relied upon to certify a class under Rule 23(b)(3) must actually measure damages that result from the class's asserted theory of injury." 778 F.3d at 407;

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19 For example, Plaintiffs argue that the constant dollar method to calculate damages is "typically employed in securities class actions." (Opp. 54.) That a method is "typically" used in securities class actions, of course, does not mean that it is an appropriate measure of damages *in this case*.

20 Indeed, Plaintiffs' *amici* acknowledge that such confounding factors must be disaggregated. (*See* Dkt. No. 106 at 9 (recognizing that a model must eliminate "stock reactions" related to "government lawsuits or regulatory actions").)

21 Although Plaintiffs' *amicus* cites *Ludlow* v. *BP, P.L.C.*, 800 F.3d 674 (5th Cir. 2015), in support of Plaintiffs' argument (Dkt. No. 106 at 5 n.9), that case actually supports *Defendants'* position—unlike plaintiffs' expert in *Ludlow*, Dr. Nye does not even purport to offer the "ability" for the "removal of corrective events later found to not 'correct' the misrepresentations." *Id.* at 689; (*see* JA-347-48).

see also Comcast, 133 S. Ct. at 1433. In other words, where a plaintiff *decides* to put forth a damages model to establish predominance, that model *must fit* with the plaintiff's theory of liability. Were that not the case, "any method of measurement [would be] acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be." *Comcast*, 133 S. Ct. at 1433.

Second, Plaintiffs once again improperly seek to shift the burden to Defendants to prove why damages "*cannot* be proven by means of common evidence." (Opp. at 52 (emphasis added); *see id.* at 55.) But in moving for class certification, it is *Plaintiffs'* burden to establish that common issues predominate over individualized issues. Plaintiffs have failed entirely to satisfy that burden here, seeking effectively, once again, to "reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Comcast*, 133 S. Ct. at 1433.

Third, Plaintiffs and their *amici* are wrong to dismiss Defendants' arguments as impermissibly raising issues of "loss causation" and damages calculations. (Opp. at 52, 56-57; Dkt. No. 106 at 4-5.) Defendants make no such argument—rather, Defendants simply ask this Court to ensure that Plaintiffs' proposed methodology is appropriately tailored to their theory of liability, so that they do not "identif[y] damages that are not the result of the wrong." *Sykes* v. *Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 82 (2d Cir. 2015). Indeed, the *Comcast* Court itself rejected a similar argument, noting that a class certification order "requir[es] a determination that Rule 23 is satisfied, *even when that requires inquiry into the merits of the claim*." 133 S. Ct. at 1433 (emphasis added).

CONCLUSION

For the foregoing reasons, as well as those set forth in Defendants' Opening Brief, this Court should reverse the certification order and decertify the class, or, in the alternative, vacate the certification order and remand for proceedings consistent with the Court's opinion.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 6,967 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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Dated: September 12, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September 2016, I caused true and accurate copies of the foregoing Brief to be served electronically via ECF, upon the following counsel:

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