In the Supreme Court of the United States

ERICA P. JOHN FUND, INC., PETITIONER.

v.

HALLIBURTON CO; DAVID J. LESAR, RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit correctly held, in direct conflict with the Second Circuit and district courts in seven other circuits and in conflict with the principles of *Basic v. Levinson*, 485 U.S. 224 (1988), that plaintiffs in securities fraud actions must satisfy not only the requirements set forth in *Basic* to trigger a rebuttable presumption of fraud on the market, but must also establish loss causation at class certification by a preponderance of admissible evidence without merits discovery.

2. Whether the Fifth Circuit improperly considered the merits of the underlying litigation, in violation of both *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and Federal Rule of Civil Procedure 23, when it held that a plaintiff must establish loss causation to invoke the fraud-on-the-market presumption even though reliance and loss causation are separate and distinct elements of security fraud actions and even though proof of loss causation is common to all class members.

RULES 14.1(b) AND 29.6 STATEMENTS

Pursuant to Rule 14.1(b), Petitioner states that the Erica P. John Fund, Inc. was known as Archdiocese of Milwaukee Supporting Fund, Inc. until February 11, 2009 when it changed its name. Petitioner further states that the only parties to the proceeding whose judgment is sought to be reviewed other than the individuals and entities identified in the caption are the following individual Plaintiffs:

1. Laborers National Pension Fund;
2. Plumbers and Pipefitters National Pension Fund;
3. City of Dearborn Heights Act 345 Police & Fire Retirement System;
4. John Kimble; and
5. Lt. Colonel Ben Alan Murphey.

Pursuant to Rule 29.6, Petitioner states that it has no parent corporation and no stock.

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The opinion of the court of appeals affirming the district court's denial of class certification is reported at 597 F.3d 330. The district court's opinion denying class certification is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULES AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 23 is set out in the Appendix (Pet. App.) at 141a-49a.

Section 78u-4(b)(4) of the Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. § 78u-4 *et seq.*, is entitled "Loss causation" and states: "In any private action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages."

STATEMENT

In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), this Court adopted the fraud-on-the-market theory for demonstrating reliance in securities class actions, set forth the prerequisites for invoking that presumption, and established how that presumption may be rebutted. Because it is impossible to establish reliance as to misrepresentations on a class-wide basis without such a presumption, the fraud-on-the-market presumption is essential to virtually every successful securities class action concerning misrepresentations. The United States Court of Appeals for the Fifth Circuit, alone of all the circuits, holds that complying with the requirements set forth in *Basic*, which this Court endorsed in *Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), does not suffice to invoke the fraud-on-the-market presumption. Rather, a plaintiff in the Fifth Circuit must also establish loss causation by a preponderance of the evidence, even though proof of loss causation will be common to all class members and unnecessarily implicates the merits of the underlying claim.

To establish loss causation at class certification, the Fifth Circuit requires plaintiffs not simply to allege but rather to demonstrate by a preponderance of the evidence that the defendants' misrepresentations were "designed to defraud." Pet. App. 122a [hereinafter *AMS Fund*]. The Fifth Circuit stated in an earlier case that undergirds its decision here that plaintiffs may establish loss causation at class certification without merits discovery because the necessary "'proof' is drawn

from public data and public filings." *Oscar Private Equity Invs. v. Allegiance Telecom Inc.*, 487 F.3d 261, 267 (5th Cir. 2007). That was before the Fifth Circuit further tightened the requirements for demonstrating loss causation in *AMS Fund*, effectively requiring proof of scienter and imposing a virtually unattainable standard, in derogation of this Court's repeated recognition of the importance of private securities actions to help enforce federal securities law.

No other court has followed the rule created by the Fifth Circuit, which has established an exceedingly high standard for certifying a securities class action. The Second Circuit in *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474, 483 (2d Cir. 2008), held plaintiffs need not show loss causation to invoke the fraud-on-the-market presumption, and numerous district courts in seven other circuits have also rejected the Fifth Circuit's holding. Because the district court in this case stated that it would have certified the proposed class but for the Fifth Circuit's unique rule, this case squarely raises the question of the requisite showing to invoke or rebut the fraud-on-the-market presumption, important issues that will recur repeatedly in the Fifth Circuit and in other courts as well.

The conflict between the Fifth Circuit and the Second Circuit (and district courts in other circuits) is direct, recurring, and important. Regardless of whether the Fifth Circuit or the Second Circuit rule is right, the conflict should be resolved.

A. Factual & Procedural Background

This case is a securities class action brought against the Halliburton Company ("Halliburton") and David J. Lesar, its former president and chief operating officer (collectively, "Halliburton" or "Defendants"), on behalf of all purchasers of Halliburton's common stock. The Complaint alleges that during the class period, Defendants violated §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 by deliberately falsifying Halliburton's financial results and deliberately misleading the public about its financial condition, particularly with respect to Halliburton's liability for asbestos claims and the adequacy of its asbestos reserves, the probability of collecting revenue on unapproved claims on fixed-price construction contracts, and the benefits of Halliburton's merger with Dresser Industries.

After the district court denied Halliburton's motion to dismiss the fourth amended complaint, and after the district court subsequently denied Halliburton's motion for reconsideration following this Court's ruling in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), Lead Plaintiff on September 17, 2007 filed a motion to certify a class of all persons and entities who purchased or otherwise acquired common stock of Halliburton during the class period—June 3, 1999 to December 7, 2001. On November 4, 2008, the district court denied the motion, finding that Lead Plaintiff failed to prove loss causation—a substantive element of a

securities fraud action[1]—by a preponderance of the evidence. Pet. App. 4a. The district court based its holding on the Fifth Circuit's decision in *Oscar*, 487 F.3d at 265, which held that plaintiffs must "establish loss causation in order to trigger the fraud-on-the-market presumption" of reliance. The district court said: "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." Pet. App. 4a. The district court found requiring proof of loss causation imposes an "extremely high" bar but said it had to follow Fifth Circuit law. *Id.* at 7a ("This approach to loss causation imposes an exceedingly high burden on Plaintiffs at an early stage of the litigation . . . . 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.").

On an interlocutory appeal, the Fifth Circuit affirmed the denial of class certification. *Id.* at 122a. While the court did not endorse *Oscar*, it stated it was bound by the decision: "Plaintiff contends that our precedent, specifically the requirement of *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 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

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[1] *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).

Oscar as wrongly decided, as we are bound by the panel decision." *Id.* at 113a n.2.[2] Citing *Oscar*, the court held that plaintiff had to show an actual effect on the stock price. "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." *Id.* at 113a; *see also id.* at 115a ("Plaintiff must show that an alleged misstatement 'actually moved the market.'"). This burden is justified because "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." *Id.* at 116a.

The Fifth Circuit further held that in a case such as this one in which the plaintiff seeks to establish loss causation through the effect of a corrective disclosure on the stock price, "plaintiffs must prove the corrective disclosure shows the misleading or deceptive nature of the prior positive statements." *Id.* at 121a. Thus, "[w]hen confronted with allegedly false financial predictions and estimates [at class certification], the district court must decide whether the corrective disclosure more probably than not shows that the original estimates or predictions were designed to defraud." *Id.* at 122a. The court explained, "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

[2] Certiorari was not sought in *Oscar*.

inflated the stock price and are actionable." *Id.* The Fifth Circuit affirmed the district court's ruling because it "conclude[d] that Plaintiff ha[d] failed to meet this court's requirements for proving loss causation at the class certification stage." *Id.* at 136a.[3]

B. The History of the Fifth Circuit's Requirement of Proof of Loss Causation at Class Certification

In *Oscar*, the Fifth Circuit announced a new and unprecedented requirement for plaintiffs seeking class certification in securities actions. The Fifth Circuit held that a named plaintiff must establish loss causation by "a preponderance of all admissible evidence" in order to benefit from the fraud-on-the-market presumption of reliance, *id.* at 269: "Essentially, we require plaintiffs to establish loss causation in order to trigger the fraud-on-the-market presumption." *Id.* at 265 (footnotes omitted).

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[3] The Fifth Circuit held that Lead Plaintiff failed to establish loss causation as to defendants' statement regarding asbestos liability, Pet. App. 124a-29a, their accounting for revenue on unapproved claims, *id.* at 132a-36a, and their projections regarding the benefits of Halliburton's merger with Dresser, *id.* at 129a-32a. The sole basis for the court's ruling was its holding that Lead Plaintiff failed to establish loss causation, and the various, alleged deficiencies the court discussed all concern loss causation. For instance, the Fifth Circuit stated Lead Plaintiff failed to disaggregate the effect of culpable and non-culpable negative news, *see id.* at 134a ("failed to differentiate" impact of "non-culpable" news from "any allegedly culpable information"), but such disaggregation is only necessary to prove loss causation.

The Fifth Circuit claimed its holding was consistent with *Basic*, stating:

> We have observed that *Basic* "allows each of the circuits room to develop its own fraud-on-the-market rules." This court has used this room-in *Finkel*, *Abell*, *Nathenson*, and *Greenberg* to tighten 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.

Id. at 264-65. *Basic*, however, does not state that the courts of appeals are free to develop their own approach, and no circuit other than the Fifth Circuit has developed its own fraud-on-the-market rules.

In *Oscar*, the Fifth Circuit noted its concern regarding the "power of the fraud on the market doctrine," which, the court states, facilitates an "extraordinary aggregation of claims." *Id.* at 266-67. The court said it could not "ignore the *in terrorem* power of certification, continuing to abide the practice of withholding until 'trial' a merit inquiry central to the certification decision, and failing to insist upon a greater showing of loss causation to sustain certification." *Id.* at 267.[4]

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[4] At oral argument in this case, Judge Reavley, author of the court's *AMS Fund* opinion, said to plaintiff's counsel: "You understand how class certifications are unpopular with this Circuit?" In a subsequent exchange, Judge Reavley said: "Well, we did away with Rule 23 virtually." Transcript of Oral Argument, *available at* http://www.ca5.uscourts.gov/

Doctrinally, the court explained its requirement that plaintiffs must establish loss causation at class certification this way:

> The assumption that every material misrepresentation will move a stock in an efficient market is unfounded, at least as market efficiency is presently measured. There are two additional explanations, besides immateriality, for why a misrepresentation might fail to effect the stock price, both relevant to classwide reliance. First, it might be that even though the market for the defendant's shares has been demonstrated efficient by the usual indicia, the market is actually inefficient with respect to the particular type of information conveyed by the material misrepresentation, *i.e.* analysts and market makers do poorly at digesting line-count information. Thus our approach gives effect to information-type inefficiencies, recognizing that "the market price of a security will not be uniformly efficient as to all types of information." A second possible explanation for a misrepresentation's failure to move the market is that the market was strong-form efficient with respect to that type of information, i.e., due to insider trading, the restated line count was reflected by the stock price well before the 4Q01

OralArgRecordings/08/08-11195_12-1-2009.wma, at 1:58 and 2:17.

> corrective disclosure. Both explanations resist application of the semi-strong efficient-market hypothesis, the theory on which the presumption of classwide reliance depends. This court honors both theory and precedent in requiring plaintiffs to demonstrate loss causation before triggering the presumption of reliance.

Id. at 269-70. The court cited no evidence that the relevant market in that case was inefficient or strong-form efficient. Based on a theoretical possibility of a limitation on the efficient market doctrine, the Fifth Circuit radically altered the requirements for invoking the fraud-on-the-market presumption. Instead of stating that a defendant could rebut the presumption by presenting evidence that the market in question was inefficient or strong-form efficient, the court required plaintiffs to establish loss causation, an element of a securities action that is distinct from reliance (or the efficiency of the market) and therefore does not impact the fraud-on-the-market analysis.

The court found that loss causation could be demonstrated at class certification because "[l]ittle discovery from defendants is demanded by the fraud-on-the-market regimen. Its 'proof' is drawn from public data and public filings . . . ." *Id.* at 267. The standard enunciated in *Oscar* turned on whether the corrective disclosure was "related" to the prior misstatement. *Id.* at 266 (To establish loss causation, a plaintiff must prove "(1) that the negative 'truthful' information causing the decrease in price [was] 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." (quoting *Greenberg v. Crossroad Sys., Inc.*, 364 F.3d 657, 666 (5th Cir. 2004))).

In the *AMS Fund* case, the Fifth Circuit imposed a much stiffer standard, holding that "plaintiffs must prove the corrective disclosure shows *the misleading or deceptive nature of the prior positive statements*" and that "the corrective disclosure more probably than not shows that the original estimates or predictions were *designed to defraud.*" Pet. App. 121a-22a (emphasis added). The Fifth Circuit failed to explain how it is possible for plaintiffs—without merits discovery—to make by such an evidentiary showing, which effectively requires proof of scienter.[5]

[5] In *Alaska Electrical Pension Fund v. Flowserve Corp.*, 572 F.3d 221 (5th Cir. 2009), the court addressed "the definition of relevant corrective information for purposes of assessing loss causation." *Id.* The opinion was authored by Justice O'Connor, sitting by designation pursuant to 28 U.S.C. § 294(a). The correctness of *Oscar*'s holding was not before the court and in any event, the panel was bound by *Oscar*. The court rejected the contention that "a fraud causes a loss only if the loss follows a corrective statement that specifically reveals the fraud." *Id.* at 230. The *AMS Fund* decision, handed down after *Alaska Electrical Pension Fund*, set a considerably more demanding test.

REASONS FOR GRANTING THE PETITION

A. This Court Should Grant Certiorari Because the Fifth Circuit's Holding in *AMS Fund* Directly Conflicts with the Second Circuit and Lower Courts in Seven Other Circuits, Conflicts with the Principles of *Basic v. Levinson*, and Sets an Extremely High and Erroneous Standard

The Fifth Circuit's holding improperly imposes a substantial and unprecedented burden on plaintiffs—demonstrating loss causation at class certification. The Fifth Circuit's holding has been squarely rejected by the Second Circuit and by district courts in seven other circuits as a misreading of *Basic*. The Fifth Circuit's holding, which establishes an exceedingly high bar and in *AMS Fund*, a virtually unattainable bar, further conflicts with the principles of *Basic* by eviscerating *Basic*'s rebuttable presumption of reliance in favor of plaintiffs who demonstrate that the stock in question trades on an efficient market.

i. This Court Should Grant Certiorari to Resolve a Circuit Split Between the Second and Fifth Circuits and to Provide Guidance for the District Courts in Other Circuits that Have Repeatedly Had to Address the Correctness of the Fifth Circuit's Holding

In *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474 (2d Cir. 2008), the Second Circuit held that plaintiffs in securities class actions need not show that an alleged misrepresentation actually moved the market in order to invoke the fraud-on-the-market presumption. *Id.* at 483 ("[P]laintiffs do not bear the burden of showing an impact on price."). This holding directly conflicts with the holding in *AMS Fund* where the court declared: "Plaintiff must show that an alleged misstatement 'actually moved the market.' Thus, 'we require plaintiffs to establish loss causation in order to trigger the fraud-on-the-market presumption.'" Pet. App. 115a (quoting *Oscar*, 487 F.3d at 265); *see In re Am. Int'l Group, Inc. Sec. Litig.*, 265 F.R.D. 157, 181 (S.D.N.Y. 2010) (*Salomon* expressly rejects *Oscar*); *In re Boston Scientific Corp. Sec. Litig.*, 604 F. Supp.2d 275, 285-86 (D. Mass. 2009) (same).

In *Salomon*, the Second Circuit addressed "whether plaintiffs alleging securities fraud against analysts must make a heightened evidentiary showing in order to benefit from the fraud-on-the-market presumption of *Basic Inc. v. Levinson*." 544 F.3d at 476. Defendants argued that "the district court erred by not placing the burden on plaintiffs to prove that the alleged misrepresentations 'moved the market,' i.e., had a measurable effect on the stock price." *Id.* at 482. Defendants also argued that the concept of 'materiality' in *Basic*, which plaintiffs much demonstrate for the fraud-on-the-market presumption to apply, refers to a 'material affect on the market price.'" *Id.*

The court rejected defendants' argument as "a misreading of *Basic*," *id.* at 482, and held that the requirements outlined in *Basic* are "all that is needed to warrant the presumption," *id.* at 481. According to the court, "[t]he point of *Basic* is that an effect on market price is *presumed* based on the materiality of the information and a well-developed market's ability to readily incorporate that information into the price of securities." *Id.* Thus, "the burden of showing that there was no price impact is properly placed on defendants at the rebuttal stage." *Id.*[6] If plaintiffs need not establish loss causation at class certification against third parties such as analysts, *a fortiori* they do not have to make such a showing against a company or its executives.[7]

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[6] The *Salomon* court added that "[t]he law guards against a flood of frivolous or vexatious lawsuits against third-party speakers because," among other things, "defendants are allowed to rebut the presumption, prior to class certification, by showing, for example, the absence of a price impact." *Id.* at 484. The court remanded the case so defendants could present their rebuttal arguments. *Id.* at 485-86 (citing *Oscar*, 487 F.3d at 270). Unlike in the Fifth Circuit, the burden of *disproving* price impact at class certification would be on *defendants*.

[7] In *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 39 (2d Cir. 2009), decided after *Salomon*, the court was asked "to reject the approach taken by the Fifth Circuit Court of Appeals in *Oscar* . . . ." Without mentioning *Salomon*, the court held that issue was not properly before it, but cited approvingly the district court cases in the Second Circuit rejecting *Oscar*. *Id.* at 39. The court noted those cases analyzed "proof of loss causation in the context of the Rule 23(b)(3) predominance requirement" and said "the cases cited from this Circuit represent the position that a plaintiff is entitled to a presumption of reliance at the certification stage" under the fraud-on-the-market presumption in *Basic* without

The Fifth Circuit's requirement is also in considerable tension with the principles of the other circuits because those courts do not require proof of loss causation to invoke the fraud-on-the-market presumption. *See, e.g., In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 7 (1st Cir. 2005) ("Before an investor can be presumed to have relied upon the integrity of the market price, . . . the market must be 'efficient'."); *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999) ("[T]he presumption of reliance is available only when a plaintiff alleges that a defendant made material representations or omissions concerning a security that is actively traded in an 'efficient market,' thereby establishing a 'fraud on the market.'"); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1419 n.8 (3d Cir. 1997) ("[I]n order to avail themselves of the fraud on the market theory . . . plaintiffs have to allege that the stock in question traded on an open and efficient market.").

Moreover, every district court outside of the Fifth Circuit that has expressly addressed the holding in *Oscar* has declined to adopt it.[8] *Oscar* has

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demonstrating loss causation, "an issue that is not before us here." *Id.*

[8] The only possible exception is no longer good law. *In re Credit Suisse First Boston Corp. (Lantronix, Inc.) Analyst Sec. Litig.*, 250 F.R.D. 137 (S.D.N.Y. 2008), has been referenced by a few courts as implicitly adopting *Oscar*. *See, e.g., In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 281 (S.D.N.Y. 2008); *Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 185 (S.D.N.Y. 2008). The *Lantronix* opinion was issued prior to the Second Circuit's

already been rejected, disagreed with, distinguished, or not followed by district courts in the First,[9] Second,[10] Fourth,[11] Sixth,[12] Seventh,[13] Ninth,[14]

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opinion in *Salomon*, 544 F.3d 474, and, insofar as it conflicts with *Salomon*, is no longer good law.

[9] *See, e.g., In re Boston Scientific*, 604 F. Supp.2d at 287 (proof of loss causation is "more properly addressed on summary judgment or at trial"); *In re Credit Suisse-AOL Sec. Litig.*, 253 F.R.D. 17, 30 (D. Mass. 2008) ("Defendants' arguments regarding market impact . . . do not address the purposes of Rule 23. To engage with them here would drag the Court into an unwieldy trial on the merits.") (citations and quotations omitted).

[10] *See, e.g., Darquea v. Jarden Corp.*, No. 06 Civ. 722(CLB), 2008 WL 622811, at *4 (S.D.N.Y. Mar. 6, 2008) (*Oscar* "is limited to the Fifth Circuit."). *Wagner v. Barrick Gold Corp.*, 251 F.R.D. 112, 118-19 (S.D.N.Y. 2008) (to trigger the fraud-on-the-market presumption, plaintiffs need not prove loss causation at the class certification stage); *In re Omnicom Group, Inc. Sec. Litig.*, No. 02 Civ. 4483(RCC), 2007 WL 1280640, at *8 (S.D.N.Y. Apr. 30, 2007) (rejecting loss causation challenge to predominance as "an attempt to litigate class certification on the merits of the action").

[11] *See, e.g., In re The Mills Corp. Sec. Litig.*, 257 F.R.D. 101, 108 (E.D. Va. 2009) ("[R]equiring a factual showing of loss causation at class certification would be—to borrow a cliché—putting the cart before the horse."); *In re Red Hat, Inc. Sec. Litig.*, 261 F.R.D. 83, 93-94 (E.D.N.C. 2009) ("This court joins those courts and declines to add another element to the plaintiff's burden of establishing the fraud-on-the-market presumption.").

[12] *See, e.g., Ross v. Abercrombie & Fitch Co.*, 257 F.R.D. 435, 454 (S.D. Ohio 2009) ("Defendants contend that the Court must determine loss causation at [class certification] in order to decide if Plaintiff can rely on the fraud on the market theory to satisfy the predominance requirement. The Court disagrees." (citation omitted)).

Tenth,[15] and Eleventh[16] circuits. *See, e.g., Conn. Ret. Plans & Trust Funds v. Amgen, Inc.*, No. CV 07-2536 PSG (PLAx), 2009 WL 2633743, at *11 (C.D. Cal. Aug. 12, 2009) (*Oscar's* "interpretation is actually contradicted by *Basic*".); *In re HealthSouth Corp. Sec. Litig.*, 257 F.R.D. 260, 283 (N.D. Ala. 2009) ("[T]he *Oscar* case has never been followed in the Eleventh Circuit and this court will not be the first to adopt it."); *Schleicher*, 2009 WL 761157, at *12 ("*Oscar Private Equity* runs contrary to Supreme Court and Seventh Circuit precedents that are controlling for this court."); *Lapin*, 254 F.R.D. at 186 ("*Oscar* should be rejected as a misreading of *Basic*."). The numerous lower court opinions concerning the Fifth Circuit rule show that this issue

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[13] *See, e.g., Schleicher v. Wendt*, No. 1:02-cv-1332-DFH-TAB, 2009 WL 761157, at *11-12 (S.D. Ind. Mar. 20, 2009).

[14] *See, e.g., In re LDK Solar Sec. Litig.*, 255 F.R.D. 519, 530-31 (N.D. Cal. 2009) (*Oscar* "is in no small amount of tension with the Supreme Court's decision in *Basic v. Levinson.*"); *In re Micron Techs., Inc. Sec. Litig.*, 247 F.R.D. 627, 634 (D. Idaho 2007) ("It is unlikely that [*Oscar*] would be adopted in this Circuit because it misreads *Basic*.").

[15] *See, e.g., In re Nature's Sunshine Prod's. Inc. Sec. Litig.*, 251 F.R.D. 656, 665 (D. Utah 2008) ("Oscar appears to be in conflict with Supreme Court and Tenth Circuit precedent which warn against determining the merits at the class certification stage.").

[16] *See, e.g., In re Netbank, Inc. Sec. Litig.*, 259 F.R.D. 656, 676 n.14 (N.D. Ga. 2009) (declining to be first court in Eleventh Circuit to follow *Oscar*).

has percolated throughout the lower courts and is ripe for, and in need of, review by this Court.[17]

ii. This Court Should Grant Certiorari to Resolve the Conflict Between the Fifth Circuit's Holding and the Principles of *Basic*

The Fifth Circuit holding in *AMS Fund* (and *Oscar* conflicts with this Court's ruling in *Basic* in several ways. That is why other courts have described *Oscar* as inconsistent with *Basic* and declined to follow it.

a. The Fifth Circuit's Holding Improperly Imposes an Additional Requirement Beyond Those Established by This Court in *Basic* for Plaintiffs Who Seek to Invoke

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[17] The fact that this case reached the Fifth Circuit on an interlocutory appeal under Fed. R. Civ. P. 23(f) does not weigh against granting the petition. It is not premature to hear an appeal in this case, which has been stayed virtually since the district court denied class certification. *See* Pet. App. 1a, 109a, 137a, 139a. The parties agree that denial of class certification is, as a practical matter, likely dispositive of this action. *Compare id.* at 77a-78a *with id* at 105a-06a. Moreover, the key issue presented by this petition – whether loss causation must be demonstrated at class certification – is a purely legal one. Finally, the district court could not alter its ruling even if it wished insofar as the Fifth Circuit has affirmed its order denying class certification.

the Fraud-on-the-Market Presumption

In *Basic*, this Court adopted the fraud-on-the-market theory, holding that courts may presume class-wide reliance provided plaintiffs establish that the stock in question trades on an efficient market and that they bought or sold the stock during the relevant interval. 485 U.S. at 248. The Court adopted the test used by the Sixth Circuit, which required a plaintiff to allege and prove:

> (1) that the defendant made public misrepresentations; (2) that the misrepresentations were material; (3) that the shares were traded on an efficient market; (4) that the misrepresentations would induce a reasonable, relying investor to misjudge the value of the shares; and (5) 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.[18] Plaintiffs who satisfied those requirements were entitled to invoke the fraud-on-the-market presumption.

The Fifth Circuit's holding improperly conflates the fraud-on-the-market presumption—a presumption that establishes reliance on a class-wide basis—with the requirements for establishing

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[18] The Court held that given its decision "regarding the definition of materiality . . . elements (2) and (4) may collapse into one." *Id.*

loss causation, *i.e.*, proximate cause. In so doing, the Fifth Circuit imposes a substantial burden beyond that required by *Basic*, and in violation of *Basic*. *See Oscar*, 487 F.3d at 278 (Dennis, J., dissenting) ("In essence, the majority's revised standard both incorrectly deprives plaintiffs of the benefit of the fraud-on-the-market presumption of reliance afforded them by *Basic* and inexplicably requires them to prove the separate element of loss causation at the class certification stage."). The Fifth Circuit ruling also conflicts with this Court's decision in *Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 761 (2008), where the Court cited approvingly the *Basic* test when facing the issue of whether the fraud-on-the-market presumption applied to the conduct of non-issuers without indicating plaintiffs also had to demonstrate loss causation to invoke the presumption. 552 U.S. at 159 ("[U]nder the fraud-on-the-market doctrine, reliance is presumed when the statements at issue become public" because "public information is reflected in the market price of the security."). While the Court ultimately concluded that the presumption did not apply, it did so because defendants' "deceptive acts were not communicated to the public," as required by *Basic*. *Id.*

The Fifth Circuit's requirement that plaintiffs must establish loss causation is flawed because whether plaintiffs can establish proximate cause (loss causation) is analytically distinct from whether they can establish reliance, based on the integrity of

the market price.[19] Although the fraud-on-the-market presumption and loss causation are linked in some ways at a general conceptual level—both concern causation (one transaction causation and the other proximate causation)—they are nonetheless separate and distinct requirements of a securities fraud claim. *See Dura Pharms., Inc.*, 544 U.S. at 341-42.

The Fifth Circuit's approach is further flawed because whether a particular misstatement moved the stock price has no bearing on class certification since that question will necessarily be common to all members of the proposed class, provided the fraud-on-the-market presumption applies. In such instances, loss causation will either exist for the whole class, or for no one. The sole purpose for the fraud on the market presumption is to enable courts "to conclude that common questions of fact or law predominate[ ] over particular questions pertaining to individual plaintiffs." *See Basic*, 485 U.S. at 228. Tellingly, the Fifth Circuit does not contend in *AMS Fund* that either loss causation or reliance requires an individual class-member-by-class-member inquiry and so cannot be established through common evidence.

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[19] Loss causation is not relevant to establish materiality because materiality depends on whether there is "[a] substantial likelihood that" the false or misleading statement "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic*, 485 U.S. at 231-32.

AMS Fund is not the first Fifth Circuit case to conflate loss causation and the fraud-on-the-market theory of reliance. Rather, *AMS Fund* relies on *Oscar*, which, in turn, relies on two earlier Fifth Circuit cases, *Nathenson v. Zonagen, Inc.*, 267 F.3d 400 (5th Cir. 2001), and *Greenberg v. Crossroads Systems, Inc.*, 364 F.3d 657, 661 (5th Cir. 2004). In *Nathenson*, the court held that "in cases depending on the fraud-on-the-market theory, . . . the complained of misrepresentation or omission [must] have actually affected the market price of the stock." 267 F.3d at 415. *Nathenson* was decided on a motion to dismiss, and since the court found that the complaint itself demonstrated that the alleged misstatements did not affect the market price of the stock, the Fifth Circuit affirmed the trial court's dismissal of the complaint. *Id.* at 426. The court's conflation of the fraud-on-the-market theory and loss causation was harmless because the plaintiff had to plead both to survive a motion to dismiss. Here, of course, Lead Plaintiff has already prevailed on a motion to dismiss.

Similarly, in *Greenberg*, the Fifth Circuit held that:

> plaintiffs cannot trigger the presumption of reliance by simply offering evidence of any decrease in price following the release of negative information. Such evidence does not raise an inference that the stock's price was actually affected by an earlier release of positive information. 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.

364 F.3d at 665. *Greenberg* was decided at summary judgment. Thus, while *Greenberg* requires showing loss causation to establish the presumption of reliance, the error is again harmless because at summary judgment, the plaintiffs had to make a prima facie case of reliance and loss causation sufficient to raise a triable issue of fact.

The Fifth Circuit's error here is not harmless. By requiring proof of loss causation, without merits discovery and with a higher required standard of proof than at summary judgment (preponderance of the evidence compared to a prima facie case), the Fifth Circuit has imposed an exceedingly stiff burden on plaintiffs at a point in the litigation where the burden is particularly not appropriate. The court in *AMS Fund* sought to justify this increased burden, saying: "[T]he main concern when addressing the fraud-on-the-market presumption of reliance is whether allegedly false statements actually inflated the company's stock price." Pet. App. 116a. But that is a question of loss causation, not fraud on the market. For the latter, the question is whether the stock incorporates material information, not how that information affects the stock price. In imposing such a requirement, the Fifth Circuit ensures that in some meritorious class actions, courts will improperly deny class certification because some plaintiffs will be unable to establish loss causation without merits discovery.

This is especially true where the court requires a corrective disclosure that "more probably than not shows that the original estimates or predictions were designed to defraud." *Id.* at 122a. As this Court recently explained in determining whether a securities fraud complaint was timely filed, evidence that a defendant acted with scienter is quite different from evidence that the defendant made a false statement, and so may require additional discovery:

> We recognize that certain statements are such that, to show them false is normally to show scienter as well. It is unlikely, for example, that someone would falsely say "I am not married" without being aware of the fact that his statement is false. Where § 10(b) is at issue, however, the relation of factual falsity and state of mind is more context specific. An incorrect prediction about a firm's future earnings, by itself, does not automatically tell us whether the speaker deliberately lied or just made an innocent (and therefore nonactionable) error. Hence, the statute may require "discovery" of scienter-related facts beyond the facts that show a statement (or omission) to be materially false or misleading.

Merck & Co, Inc. v. Reynolds, No. 08-905, 2010 WL 1655827, at *13 (Apr. 27, 2010). The Fifth Circuit fails to explain how plaintiffs at class certification, without merits discovery, can provide proof of scienter—*e.g.*, that defendants' "estimates or

predictions were designed to defraud"—other than in the exceedingly rare case where defendant makes a confession. *See* Pet. App. 122a. Needless to say, such confessions will likely be rare because company executives always have an incentive to put the best spin on the news and to avoid criticizing their own prior conduct.

The impact of such a requirement is readily apparent in this case. For instance, the Fifth Circuit held that Halliburton's June 28, 2001 announcement that Dresser Industries' former subsidiary, Harbison-Walker Refractories Company, had sought financial assistance to pay its pending asbestos claims was not a corrective disclosure because the June 28, 2001 announcement did not indicate that Halliburton *knew* of Harbison-Walker's financial difficulties prior to the announcement. *Id.* at 125a-27a. It did not matter that the Lead Plaintiff had alleged in the complaint that Defendants knew throughout the class period that Harbison-Walker would need Halliburton's financial assistance to pay its own asbestos claims. *See* USCA5 4575. Thus, absent a confession by Halliburton, the only way to "prove" the June 28, 2001 corrective disclosure "shows the misleading or deceptive nature" of Halliburton's prior announcements would be to establish that Halliburton knew but failed to disclose prior to June 28, 2001 that it would ultimately bear financial responsibility for claims against Harbison-Walker. It is not possible for plaintiff to do that without merits discovery.[20]

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[20] In *AMS Fund*, the Fifth Circuit said in a footnote, "We recognize that a plaintiff need not prove at the class

b. The Fifth Circuit's Holding Improperly Shifts the Burden of Proof for the Fraud-on-the-Market Presumption Established in *Basic*

In *Basic*, this Court articulated several reasons for its adoption of the fraud-on-the-market presumption. First, the Court held that presumptions are useful when "direct proof" is "difficult", adding that "[r]equiring a plaintiff to show a speculative state of facts, *i.e.*, how he would have acted if omitted material information had been disclosed, or if the misrepresentation had not been made, would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market." *Id.* at 245 (citations omitted). Second, the Court found presumptions are useful "for allocating the burdens of proof between parties" and explained that the presumption furthered Congress's intent in enacting the 1934 Act: "The presumption of reliance employed in this case is consistent with, and, by facilitating rule 10b-5 litigation, supports, the congressional policy embodied in the 1934 Act. In

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certification stage intentional fraud by the defendant." Pet. App. 123a n.35. But in concluding that the Lead Plaintiff had not established loss causation, the court effectively required Lead Plaintiff to prove scienter. *See, e.g.*, *id.* at 126a (did not show "prior reserve estimates were intentionally misleading"); *id.* at 126a-27a ("no indication [prior estimates] were misleading or deceptive"; *id.* at 129a ("undermines any conclusion . . . the company acted with deception"); *id* at 132a ("Plaintiff fails to show these announcements . . . revealed deceptive practices in Halliburton's accounting assumptions.").

drafting that Act, Congress expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance on the integrity of those markets." *Id.* at 245-46. Third, the Court said that the presumption is "supported by common sense and probability", noting that "[r]ecent empirical studies have tended to confirm Congress' premise that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.* at 246.

The Fifth Circuit's requirement of proof of loss causation is inconsistent with—and undermines—not only the presumption that the Court adopted, but also its stated reasons for doing so. First, while the Court adopted the presumption to ease an "unrealistic evidentiary burden," *id.* at 245, the Fifth Circuit has imposed an additional and stiff evidentiary burden. Moreover, this newly imposed burden is unrelated to the burden at issue in *Basic*—requiring a plaintiff to show "how he would have acted had the material information been disclosed," *id.*—and so is improper. The Fifth Circuit's rule is also inconsistent with the Court's second stated reason for the presumption—congressional policy as embodied in the 1934 Act—because it imposes an additional and unnecessary hurdle before an investor may successfully bring a 10b-5 class action in reliance on the integrity of the market. Finally, the Fifth Circuit's requirement is inconsistent with the Court's third reason because proof or absence of loss causation neither confirms nor negates the presumption that "the market price of shares traded

on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.* at 246.

The Fifth Circuit's reasoning is further at odds with this Court's reasoning. The Fifth Circuit was concerned about a theoretical possibility that the market for a given security might be inefficient or strong-form efficient with respect to a particular type of information, but this Court, as the Second Circuit declared, "stated that the presumption was justified, not by scientific certainty, but by considerations of fairness, probability, judicial economy, congressional policy, and common sense." *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 483 (2d Cir. 2008).

The Fifth Circuit's holding turns the presumption in *Basic* from something meant to *assist* a plaintiff into a nearly unscalable hurdle to class certification. While the Fifth Circuit attempted to anticipate and respond to the argument that it was improperly negating the presumption established by *Basic*, the court's logic is fundamentally unsound. The *Oscar* court held that it was not "improperly shift[ing] the burden, from a defendant's right of rebuttal to a plaintiff's burden of proof" because, "[a]s a matter of practice, the oft-chosen defensive move is to make '*any* showing that severs the link' between the misrepresentation and the plaintiff's loss; to do so rebuts on arrival the plaintiff's fraud-on-the-market theory." 487 F.3d at 265. The court quoted language specifying that the fraud-on-the-market presumption is rebuttable, *see*

Basic, 485 U.S. at 248, but the court's reliance on this language is flawed.

First, even if *Basic*'s presumption were a bubble bursting one—that is, if it dissolves in the face of any contrary evidence[21]— defendants still bear the initial burden of presenting contrary evidence. By requiring plaintiffs to prove loss causation without first requiring evidence from defendants to rebut the presumption, the Fifth Circuit has improperly lifted that burden. Second, the presumption is not a bubble bursting one but can be rebutted only by evidence that "severs" the basis for the presumption.[22] Third, a key footnote in *Basic* indicates the proper timing for any rebuttal is at trial, stating "[p]roof of that sort is a matter for trial, throughout which the District Court retains the authority to amend the certification order as may be appropriate." *Id.* at 248 n.29; *see In re PolyMedica Corp. Securities Litigation*, 432 F.3d 1, 7 n. 10 (1st Cir. 2005) ("defendant may still rebut this presumption at trial"); *Conn. Ret. Plans & Trust Funds v. Amgen, Inc.*, No. CV 07-2536 PSG (PLAx),

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[21] *See United States v. Zavala*, 443 F.3d 1165, 1169 (9th Cir. 2006); BLACK'S LAW DICTIONARY 211 (8th ed. 2004) ("bursting bubble theory" as "[t]he principle that a presumption disappears once the presumed facts have been contradicted by credible evidence").

[22] *Basic* show the presumption is not a bubble bursting one: "*Any 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 (emphasis added).

2009 WL 2633743, at *12 (C.D. Cal. Aug. 12, 2009) ("While defendants are entitled to rebut that presumption, that issue is appropriate for resolution only after discovery."); *In re Micron Techs., Inc. Sec. Litig.*, 247 F.R.D. 627, 634 (D. Idaho 2007) (same).

Fourth, even if rebuttable at class certification, the presumption can be rebutted only by evidence that the stock does not trade in an efficient market or that the plaintiff did not rely on the price of the stock. The examples provided by the Court in *Basic* all concern a showing that the information at issue was already known to the market[23] or that the plaintiff did not rely upon the market price.[24] None of the Court's examples indicate a plaintiff must demonstrate loss causation to invoke the fraud-on-the-market presumption of

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[23] The Court gave two examples to illustrate that possibility: (1) "if petitioners could show that the 'market makers' were privy to the truth about the merger discussions here with Combustion, and thus that the market price would not have been affected by their misrepresentations," or (2) "if, despite petitioners' allegedly fraudulent attempt to manipulate market price, news of the merger discussions credibly entered the market and dissipated the effects of the misstatements." 485 U.S. at 248-249.

[24] The Court illustrated that possibility with the following examples: "a plaintiff who believed that Basic's statements were false and that Basic was indeed engaged in merger discussions, and who consequently believed that Basic stock was artificially underpriced, but sold his shares nevertheless because of other unrelated concerns, e.g., potential antitrust problems, or political pressures to divest from shares of certain businesses, could not be said to have relied on the integrity of a price he knew had been manipulated." 485 U.S. at 249.

reliance, and it would be surprising if that were the case, because reliance and loss causation are distinct elements of a 10b-5 cause of action. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).[25] The Fifth Circuit, however, erroneously and enormously expanded the type of information relevant to determining whether the presumption has been established or rebutted. In *AMS Fund*, for instance, the Fifth Circuit held that in the case of simultaneously released culpable and non-culpable news, plaintiffs bear the burden of disaggregating the effect of those respective disclosures and showing that the culpable disclosure had a substantial effect on the stock price. Pet. App. 117a-18a.[26] While that requirement is appropriate for establishing loss causation, it has no bearing on whether the market is efficient and so whether the fraud-on-the-market presumption should apply.

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[25] The requirement for loss causation is codified in the PSLRA. *See* 15 U.S.C. § 78u-4(b)(4).

[26] By requiring plaintiffs to make this showing at class certification, the Fifth Circuit incents unscrupulous defendants to release culpable negative news on the same day as significant non-culpable negative news, rendering it difficult for plaintiffs to disaggregate the effects of negative news. "Such a loophole thwarts the legislative purpose of full disclosure by allowing corporations a way to escape legal accountability for inaccurate statements and material omissions." Tad E. Thompson, Recent Development, *Messin' with Texas: How the Fifth Circuit's Decision in Oscar Private Equity Misinterprets the Fraud-On-the-Market Theory*, 86 N.C.L. REV. 1086, 1096 (2008).

iii. The Issue Is Important, Ripe, and Recurring and the Fifth Circuit's Standard Is Wrong

This Court's decision in *Basic* establishes the fraud on the market theory of reliance. The Fifth Circuit's erroneous distortion of *Basic* affects all securities fraud class action cases in the Fifth Circuit and will continue to repeatedly arise in cases outside the Fifth Circuit as defendants seek to invoke the Fifth Circuit rule regarding loss causation as a basis for opposing class certification. Not only is this a recurring issue, it is also an important one because the Fifth Circuit's loss causation rule, especially as set forth in *AMS Fund*, is likely to largely negate private security class actions in the Fifth Circuit in contravention of federal policy that relies on private actions to help ensure adequate enforcement of the securities laws. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) ("This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)."); *Dura Pharms.*, 544 U.S. at 345 ("The securities statutes seek to maintain public confidence in the marketplace. They do so by deterring fraud, in part, through the availability of private securities fraud actions." (citation omitted)). This development, rendering private securities litigation in the Fifth Circuit a near nullity, is especially troubling because the recent market crisis underscores the importance of

having private security actions complement sometimes inconsistent governmental actions to enforce the securities laws. [27]

The decision in *AMS* Fund is also troubling because it will lead to erroneous decisions *not* to certify a class in cases where, with full discovery, plaintiffs *would* be able to establish loss causation. *See supra* pp. 23-25.

B. This Court Should Resolve the Conflict Between the Requirements for Class Certification Under Federal Rule of Civil Procedure 23 and *Eisen* on the One Hand and the Fifth Circuit Rule on the Other Hand

Under Federal Rule of Civil Procedure 23(a), plaintiffs must demonstrate that they satisfy the prerequisites for class certification—numerosity, commonality, typicality and adequacy. Plaintiffs must also satisfy one of the requirements of FED. R. CIV. P. 23(b). In damage actions, plaintiffs must

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[27] As one commentator stated:

> The result of an opinion like *Oscar*, which significantly raised the bar for class certification, will effectively eliminate any potential for recovery for those investors whose stake in the corporation was insubstantial. Such an outcome stands contrary to one of the principal justifications for class action litigation—enabling suits where the individual class members cannot maintain actions individually—and is detrimental to public policy.

Thompson, *supra* note 26, at 1101 (footnotes omitted).

demonstrate that "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." Pet. App. 142a. Provided these requirements are met, the class should be certified.

In the Fifth Circuit alone, plaintiffs must satisfy an additional requirement; they must also demonstrate loss causation. That additional requirement violates Rule 23, which is binding on all federal courts. *Cf. Stone Container Corp. v. United States*, 229 F.3d 1345, 1354 (Fed. Cir. 2000) ("Because '[a]ll laws in conflict with [the Federal Rules of Civil Procedure] shall be of no further force or effect after such rules have taken effect,' 28 U.S.C. § 2072(b), the Federal Rules of Civil Procedure, like the Federal Rules of Criminal procedure [sic], are 'as binding as any federal statute.'"). In imposing an added requirement that the Fifth Circuit admits entails a "merit inquiry," *Oscar*, 487 F.3d at 267, the Fifth Circuit ruling also conflicts with the principles of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), where the Court declared: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."

The Fifth Circuit claims that determining whether plaintiffs have demonstrated loss causation by a preponderance of the admissible evidence is "a merit inquiry central to the certification decision,"

Oscar, 487 F.3d at 267, but the court fails to justify its holding. If demonstrating loss causation is indeed "central to the certification decision," *id.*, it is curious that no court other than the Fifth Circuit, including this Court in *Basic* and *Stoneridge*, has had the acumen to detect that linkage. Numerous courts embraced a form of the fraud-on-the-market presumption before it was adopted by this Court in *Basic*, but none held that it was necessary to establish loss causation in order to invoke it. Nor has any court outside the Fifth Circuit so held since the Court issued its ruling in *Basic* over twenty years ago or after this Court's ruling in *Dura* in 2005. In fact, the Fifth Circuit itself analyzed the requisite showing necessary to trigger the fraud on the market presumption following this Court's decision in *Dura*, and its holding did not require proof of loss causation. *See, e.g.*, *Bell v. Ascendent Solutions, Inc.*, 422 F.3d 307, 311-12 (5th Cir. 2005) (plaintiffs seeking to take advantage of the presumption of class-wide reliance permitted under the fraud-on-the-market theory must make a preliminary showing of market efficiency at class certification).[28] And, of course, no court outside the Fifth Circuit has chosen to follow *Oscar*.

The Fifth Circuit's current requirement that plaintiffs establish loss causation conflicts with

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[28] The *Oscar* Court attempts to justify its holding in part by citing the 2003 change in Rule 23, which required the determination whether to certify a class to be made "at an early practicable time," instead of "as soon as practicable." *See Oscar*, 487 F.3d at 267. That change does not justify imposing a burden not inherent in a proper analysis under Rule 23.

Eisen and Federal Rule of Civil Procedure 23 because demonstrating loss causation is not necessary for class certification, as demonstrated by the uniform practice of all federal courts outside the Fifth Circuit. While *Eisen* was initially misconstrued to prohibit delving into the merits of the underlying claims at class certification under any circumstances, courts have since properly interpreted *Eisen* to prohibit examination of the merits of the underlying claim except insofar as necessary to determine whether the prerequisites for certification under Rule 23 have been met. *See Dukes v. Wal-Mart Stores, Inc.*, Nos. 04-16688, 04-16720, 2010 WL 1644259, at * 9 n.7 (9th Cir. Apr. 26, 2010) (en banc); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316-317 (3d Cir. 2008); *In re Initial Public Sec. Offerings Litig.*, 471 F.3d 24, 41 (2d Cir. 2006); *see also* FED. R. CIV. P. 23(c)(1)(A) advisory committee's note (2003 amendments) ("an evaluation of the probable outcome on the merits is not properly part of the certification decision").[29]

Yet, in *AMS Fund* (and *Oscar*), the Fifth Circuit has done precisely what *Eisen* and Rule 23 prohibit—entering into a "merit inquiry" unrelated to the requirements of Rule 23—which effectively

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[29] Several appellate courts hold that plaintiff must establish the prerequisites for class certification by as preponderance of the evidence. *See Teamsters Local 445 Freight Division Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 202 (2d Cir.2008); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 320. Unlike the Fifth Circuit, however, they apply that standard only to Rule 23 prerequisites.

"requir[es] mini-trials on the merits of cases at the class certification stage." *Oscar*, 487 F.3d at 272 (Dennis, J., dissenting); *see also In re The Mills Corp. Sec. Litig.*, 257 F.R.D. 101, 108 (E.D. Va. 2009) ("Requiring a plaintiff to 'prove' loss causation at class certification risks converting class certification into a hearing on the merits."); *In re LDK Solar Sec. Litig.*, 255 F.R.D. 519, 530 (N.D. Cal. 2009) (*Oscar* "essentially injects what is fundamentally a merits inquiry into the class-certification inquiry through the back door: it requires the *plaintiff* to *prove* loss causation in order to avail itself of the benefit of the fraud-on-the-market presumption"); *Schleicher v. Wendt*, No. 1:02-cv-1332-DFH-TAB, 2009 WL 761157, at *12 (S.D. Ind. Mar. 20, 2009) ("The *Oscar Private Equity* court's problem with loss causation was a class-wide problem and it is not the court's job to ascertain the merit of that element of the claim at the class certification stage."); *In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 280 (S.D.N.Y. 2008) ("Loss Causation . . . relates to the merits of Plaintiffs' case and Defendants have not sufficiently established how Loss Causation is related to any necessary element of Rule 23."). Indeed, by requiring proof of loss causation and, effectively, scienter at class certification, the Fifth Circuit has essentially required plaintiffs to prove almost their entire case in order to achieve class certification.

CONCLUSION

The petition for a writ of certiorari should be granted.

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