No. 09-1403

In the Supreme Court of the United States

ERICA P. JOHN FUND, INC., FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC., PETITIONER

v.

HALLIBURTON CO., ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

MARK D. CAHN
General Counsel
JACOB H. STILLMAN
Solicitor
MICHAEL A. CONLEY
Deputy Solicitor
BENJAMIN L. SCHIFFRIN
Senior Counsel
Securities and Exchange Commission
Washington, D.C. 20549

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
MALCOLM L. STEWART
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, in a private action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, a plaintiff who invokes the fraud-on-the-market presumption of reliance must prove loss causation in order for the suit to be maintained as a class action.

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INTEREST OF THE UNITED STATES

The United States, through the Department of Justice and the Securities and Exchange Commission (SEC), administers and enforces the federal securities laws. The question in this case is whether, in a private securities-fraud class action in which plaintiffs invoke the fraud-on-the-market theory to establish a presumption of reliance, plaintiffs must prove loss causation in order to obtain class certification. Because meritorious private securities-fraud actions are an essential supplement to criminal prosecutions and civil enforcement actions brought by the Department of Justice and the SEC, the United States has a substantial interest in this

Court's resolution of the question presented. At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful for any person "[t]o use or employ, in connection with the purchase or sale of any security * * * , any manipulative or deceptive device or contrivance in contravention of" rules promulgated by the SEC. 15 U.S.C. 78j(b). The SEC's Rule 10b-5 implements Section 10(b). As relevant here, the Rule makes it unlawful for any person, in connection with the purchase or sale of a security, "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. 240.10b-5(b).

This Court has construed Section 10(b) to provide a private right of action. See *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341 (2005) (citing cases). In order to recover in a private action under Section 10(b) and Rule 10b-5(b), a plaintiff must prove the following elements: (1) a material misrepresentation or omission by the defendant; (2) that the defendant acted with scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) the plaintiff's reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation, meaning that the defendant's misrepresentation or omission proximately caused the plaintiff's loss. *Id.* at 341-342; see, *e.g.*, *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008).

In *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), this Court addressed the manner in which plaintiffs in a private securities-fraud suit could prove reliance through evidence common among members of the class, thereby allowing class certification under Federal Rule of Civil Procedure 23. 485 U.S. at 241-248. The Court recognized that "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class" often would "prevent[] [plaintiffs] from proceeding with a class action, since individual issues then would * * * overwhelm[] the common ones." *Id.* at 242. The Court held that plaintiffs may overcome that obstacle by invoking a rebuttable presumption of reliance based on the fraud-on-the-market theory. *Id.* at 242-247.

Under that theory, the Court explained, "the market price of shares traded on well-developed markets reflects all publicly available information," including "any public material misrepresentations," and "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." *Basic*, 485 U.S. at 246-247. Because public material misrepresentations in an efficient market are reflected in the stock's price, "an investor's reliance on any public material misrepresentations * * * may be presumed for purposes of a Rule 10b-5 action." *Id*. at 247. And because evidence regarding the applicability of that presumption will generally be common to all members of a properly defined class, the case may proceed as a class action. *Id.* at 242, 248. The Court noted that a defendant may rebut the presumption of reliance through "[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." *Id.* at 248. After explaining one way in which the

fraud-on-the-market presumption might be rebutted, the Court noted that "[p]roof of that sort is a matter for trial." *Id.* at 249 n.29.

2. Petitioner is the lead plaintiff in a putative securities-fraud class action against Halliburton Co. and one of its officers (respondents in this Court). Pet. App. 113a-114a. Petitioner alleges that respondents attempted to inflate Halliburton's stock price by downplaying the company's estimated asbestos liabilities, overstating the revenue in its engineering and construction business, and overstating the benefits of its merger with Dresser Industries. *Id.* at 4a-5a, 11a. Petitioner further alleges that, after it purchased stock in Halliburton, respondents made corrective disclosures about these matters that caused Halliburton's stock price to decline. *Id.* at 5a, 11a.

Petitioner sought to certify a class of all persons who had purchased Halliburton common stock between June 3, 1999, and December 7, 2001. See Pet. App. 4a, 66a-67a. The district court denied the class-certification motion. *Id.* at 3a-55a. The court determined that "the Proposed Class satisfie[d] Federal Rule of Civil Procedure 23 as to numerosity, commonality, typicality, and adequacy of [petitioner] as a class representative," and that a class action generally "would be the superior method for adjudicating the claims of these class members." *Id.* at 3a-4a; see *id.* at 54a. The court held, however, that it could not certify the class because petitioner had failed to prove loss causation. *Id.* at 4a.

The district court explained that the Fifth Circuit had recently "tightened" the requirements for class certification by requiring "[p]laintiffs * * * [to] demonstrate loss causation in order to trigger the fraud-on-the-market presumption of class reliance." Pet. App. 6a

(citing *Oscar Private Equity Invs.* v. *Allegiance Telecom, Inc.*, 487 F.3d 261, 265 (2007) (*Oscar*)). Under the Fifth Circuit's decision in *Oscar*, the court observed, loss causation must be "established at the class certification stage by a preponderance of all admissible evidence." *Ibid.* (quoting *Oscar*, 487 F.3d at 269). The district court then reviewed the evidence in this case and concluded that petitioner had not proved loss causation. *Id.* at 11a-54a. The court stated that, but for that failure of proof, it would have certified the proposed class. *Id.* at 4a, 54a.

3. The court of appeals affirmed. Pet. App. 111a-136a. The court recognized that, under the fraud-on-the-market theory, "it is assumed that in an efficient, well-developed market all public information about a company is known to the market and is reflected in the stock price." *Id.* at 112a. For that reason, "[w]hen a company has publicly made material misrepresentations about its business," courts "may presume that a person who buys the company's stock has relied on the false information." *Ibid.*; see *id.* at 114a.

The court of appeals held, however, that a putative class representative in a securities-fraud suit may not "take advantage of the fraud-on-the-market presumption of reliance" unless it proves loss causation. Pet. App. 115a. Relying on its prior decision in *Oscar*, the court stated that "[i]n order to obtain class certification on its claims," petitioner was required to establish, by a preponderance of the evidence, "that the corrected truth of the former falsehoods actually caused the stock price to fall and resulted in losses." *Id.* at 113a. The court made clear in particular that "it is not enough merely to show that the [stock price] declined after a statement reporting negative news." *Id.* at 116a. Rather, the court

stated, the plaintiff must show in addition that the decline in stock price was caused by the correction of the defendant's prior misstatement rather than by some other contemporaneous disclosure. *Id.* at 117a-118a. The court characterized this additional requirement as a "rigorous" one that typically "requires both expert testimony and analytical research or an event study that demonstrates a linkage between the culpable disclosure and the stock-price movement." *Id.* at 130a.

The court of appeals noted that the parties "d[id] not dispute the efficiency of the market or [petitioner's] trading activity" in this case. Pet. App. 115a. After reviewing all of the evidence, however, the court concluded that petitioner had failed to prove loss causation, and it therefore affirmed the denial of class certification. *Id.* at 123a-136a.

SUMMARY OF ARGUMENT

When the named plaintiff in a private securities-fraud class action invokes the fraud-on-the-market presumption of reliance, the plaintiff need not prove the separate element of loss causation in order to obtain class certification.

A. Federal Rule of Civil Procedure 23 sets out the requirements for certification of a case as a class action. Rule 23 required petitioner to establish, *inter alia*, that common questions of law or fact predominated over issues that affect only individual class members. In order to make that showing, petitioner invoked the fraud-on-the-market presumption and established the facts necessary to support it. The court of appeals nevertheless held that the class could not be certified because petitioner had not proved loss causation. That was error, because proof of loss causation is not needed to satisfy

any of Rule 23's requirements, and the court of appeals did not suggest that the evidence of loss causation would vary among members of the class. The court was not authorized to add prerequisites for class certification in order to diminish the burdens imposed on defendants in private securities-fraud class actions.

B. *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), does not support the Fifth Circuit's approach. In approving the fraud-on-the-market presumption of reliance, the Court in *Basic* did not suggest that it was modifying the requirements for class certification under Rule 23. Although the presumption of reliance is rebuttable, the *Basic* Court's analysis reflects an expectation that any rebuttal will occur at summary judgment or at trial, not at the outset of the case. A defendant who rebuts the presumption of reliance defeats the plaintiff's claim on the merits by preventing him from establishing an essential element of his cause of action. So long as the evidence by which the defendant seeks to rebut the presumption is likely to be common to class members generally, the possibility of a successful rebuttal does not render the case unsuitable for class treatment. In any event, this Court's decision in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), confirms that the elements of reliance and loss causation are distinct, and that the plaintiff's perceived inability to prove loss causation does not rebut the fraud-on-the-market presumption.

C. The court of appeals' approach is contrary to this Court's decision in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 162-163 (1974), which holds that the plaintiff's perceived likelihood of success on the merits is not relevant to the class-certification inquiry. The Fifth Circuit's conflation of merits and class-certification require-

ments would have been erroneous even if the court had simply incorporated into the Rule 23 analysis a merits inquiry (*e.g.*, whether the plaintiff's complaint adequately alleged a violation of Section 10(b) and Rule 10b-5) that the district court is authorized to conduct at a threshold stage of the suit. The court of appeals compounded that error by requiring the named plaintiff in a securities-fraud class-action to prove loss causation by a preponderance of the evidence in order to obtain class certification. The court of appeals thus required the district court, at the class-certification stage of a private securities-fraud suit, to conduct a much more demanding merits inquiry than the court could appropriately conduct in ruling on a motion to dismiss or for summary judgment. The court of appeals erred by requiring the plaintiff to prove a significant element of its case at a threshold stage of the litigation, without the benefit of full discovery and without consideration of its claims by a jury. The judgment below should be reversed.

ARGUMENT

A PRIVATE SECURITIES-FRAUD PLAINTIFF THAT INVOKES THE FRAUD-ON-THE-MARKET PRESUMPTION OF RELIANCE NEED NOT PROVE LOSS CAUSATION IN ORDER TO OBTAIN CLASS CERTIFICATION

A. The Court Of Appeals Erred By Considering Loss Causation At The Class-Certification Stage Without Relating That Inquiry To The Requirements Of Rule 23

1. In order to certify a case as a class action, a federal district court must determine that the proposed class satisfies the requirements imposed by Federal Rule of Civil Procedure 23. See, *e.g.*, *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010) (*Shady Grove*); *Eisen* v. *Carlisle &*

Jacquelin, 417 U.S. 156, 162-163 (1974). Under Section (a) of Rule 23, the named plaintiff must show (1) numerosity, *i.e.*, that "the class is so numerous that joinder of all members is impracticable"; (2) commonality, *i.e.*, that "there are questions of law or fact common to the class"; (3) typicality, *i.e.*, that "the claims or defenses of the representative parties are typical of the claims or defenses of the class"; and (4) adequacy of representation, *i.e.*, that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a); see, *e.g.*, *General Tel. Co. of the Sw.* v. *Falcon*, 457 U.S. 147, 156 (1982).

The named plaintiff must also establish that the suit falls within one of three categories of class actions described in Section (b) of Rule 23. See, *e.g.*, *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 614 (1997). Under Section (b), a class action may be maintained if (1) prosecuting separate actions would risk adversely affecting class members or the opposing party; (2) "the party opposing the class has acted or refused to act on grounds that apply generally to the class" and "final injunctive relief or corresponding declaratory relief is appropriate" on a class-wide basis; or (3) "questions of law or fact common to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b).

It is the named plaintiff's burden to establish that the proposed class meets the requirements set out in Rule 23. See, *e.g.*, *Amchem*, 521 U.S. at 613-614; see also 5 *Moore's Federal Practice* § 23.83, at 23-383 (3d ed.

2010).[1] If the named plaintiff makes that showing, then class certification is appropriate. *Shady Grove*, 130 S. Ct. at 1437.

2. In this case, the district court found—and the parties agree—that the proposed class satisfies the four prerequisites set out in Section (a) of Rule 23. See Pet. App. 3a. The parties' dispute centers on whether class certification is warranted under Section (b) of the rule.

Petitioner sought class treatment under Section (b)(3), on the ground that common questions of law or fact predominate over questions that affect only individual class members, so that a class action is the superior method for adjudicating the parties' dispute. J.A. 146a-148a (motion for class certification); see Fed. R. Civ. P. 23(b)(3). Petitioner has alleged that respondents made material misstatements that inflated Halliburton's stock price, and that respondents subsequently made corrective disclosures that caused the stock price to decline, causing economic loss to the members of the class (*i.e.*, persons who had purchased Halliburton stock between the initial misstatements and the later corrections). Pet. App. 4a-5a, 11a; see Fourth Consolidated Amended Compl. ¶¶ 295-301. In order to establish that common questions predominate on the element of reliance, petitioner invoked the fraud-on-the-market presumption. See Pet. App. 5a-6a.

Under the fraud-on-the-market doctrine, "reliance is presumed when the statements at issue become public"

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[1] The courts that have addressed the question have held that facts relevant to whether the Rule 23 requirements have been met must be established by a preponderance of the evidence. See Pet. App. 115a; *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008); *Teamsters Local 445 Freight Div. Pension Fund* v. *Bombardier, Inc.*, 546 F.3d 196, 202 (2d Cir. 2008).

because it is presumed that relevant "public information is reflected in the market price of the security." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008); see *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). To invoke that presumption at the class-certification stage, petitioner was required to show that respondents' alleged misrepresentations were made publicly, that the company's shares were traded in an efficient market, and that the plaintiff traded shares between the time the misrepresentations were made and the time the truth was revealed. *Id.* at 241-242; see, *e.g.*, *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 17 (1st Cir. 2005). Once petitioner established those facts, the district court could appropriately presume that petitioner and all similarly situated investors could satisfy the reliance element of their securities-fraud cause of action. See *Basic*, 485 U.S. at 247. The presumption of reliance makes the element of reliance subject to common proof. That is true even if the presumption is ultimately rebutted at trial and the plaintiffs are therefore unable to prove the reliance element of their claim on the merits.

To be sure, proof of those facts necessary to invoke the fraud-on-the-market presumption did not establish that respondents' statements were actually false, that respondents had acted with the requisite scienter, or that petitioner or any unnamed class member had suffered economic loss as a result. Neither respondents nor the court of appeals, however, has identified any reason to suppose that proof as to those additional elements of petitioner's cause of action will vary meaningfully among the members of the putative class. By satisfying the prerequisites to the fraud-on-the-market presumption, petitioners showed that the reliance element

is subject to common proof as well, so that "common questions predominate[] over individual questions, as required by Federal Rules of Civil Procedure 23(a)(2) and (b)(3)." *Basic*, 485 U.S. at 242.

3. In holding that petitioner was required to prove loss causation in order to obtain class certification, the court of appeals relied on its prior decision in *Oscar Private Equity Invs.* v. *Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007). In *Oscar*, members of the proposed plaintiff class alleged that they had purchased a telecommunications company's stock at a price that had been inflated due to the company's material misstatements about its business, and that they had suffered losses when the company later made corrective disclosures. *Id.* at 262-264. The court in *Oscar* correctly recognized that the plaintiff class could rely on the fraud-on-the-market doctrine "to presume that each class member has satisfied the reliance element of their 10b-5 claim," so that common questions of reliance would predominate. *Id.* at 264. The court concluded, however, that "*Basic* allows each of the circuits room to develop its own fraud-on-the-market rules," and the court exercised that purported discretion by requiring plaintiffs to "establish loss causation in order to trigger the fraud-on-the-market presumption." *Id.* at 264-265 (internal quotation marks omitted); see *id.* at 269. "In order to obtain class certification" under that approach, petitioner "was required to prove * * * that the corrected truth of the former falsehoods actually caused the stock price to fall and resulted in losses." Pet. App. 113a.

The court of appeals had no authority to impose a prerequisite to class certification that is untethered to the requirements of Rule 23. If the requirements set out in Rule 23 are satisfied, the case may proceed as a

class action. That is clear from the text of Rule 23, which states that "[a] class action may be maintained if Rule 23(a) is satisfied and if" the proposed class fits within one of the three categories described in Rule 23(b). Fed. R. Civ. P. 23(b). The Court recently confirmed that this language "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove*, 130 S. Ct. at 1437.

Contrary to the suggestions of respondents (Supp. Br. in Opp. 5) and the Fifth Circuit (*Oscar*, 487 F.3d at 264), nothing in *Basic* gives lower courts "room" to fashion their own standards for certifying securities-fraud class actions. To be sure, the Court in *Basic* noted, as a practical benefit of the fraud-on-the-market presumption, that the presumption would facilitate class actions by allowing reliance to be proved through evidence common to all members of the class. See 485 U.S. at 242. The Court thus recognized that the proper application of Rule 23(b)(3), which requires that common questions of law or fact "predominate over any questions affecting only individual [class] members," Fed. R. Civ. P. 23(b)(3), will depend in part on the type of evidence needed to prove a particular element of a plaintiff's claim. That recognition in no way suggests that a lower court can deviate from the terms of Rule 23, either by certifying a class when the rule's requirements have not been satisfied, or by imposing additional prerequisites to class certification beyond those stated in the rule itself.

The Fifth Circuit in *Oscar* stated that "a district court's [class] certification order often bestows upon plaintiffs extraordinary leverage, and its bite should dictate the process that precedes it." 487 F.3d at 267.

The court's assessment of the burdens that class actions entail, however, does not authorize it to impose requirements above and beyond those specified in Rule 23. Rule 23 sets out "requirements the[] [courts] are bound to enforce." *Amchem*, 521 U.S. at 620; see *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 861 (1999) (courts "are not free to alter" Rule 23); *East Tex. Motor Freight Sys., Inc.* v. *Rodriguez*, 431 U.S. 395, 405 (1977) ("careful attention to the requirements of [Rule] 23 remains * * * indispensable"). The "Federal Rules take effect after an extensive deliberative process involving many reviewers"—including the Rules Advisory Committee, public commenters, the Judicial Conference, this Court, and Congress—and "[c]ourts are not free to amend a rule outside th[at] process." *Amchem*, 521 U.S. at 620-622. The task for a lower court in ruling on a class-certification request is to apply Rule 23 according to its terms, not to devise requirements that the court deems commensurate to the burdens that class certification would place upon the defendant.

Meritorious private securities-fraud actions are "an essential supplement to criminal prosecutions and civil enforcement actions." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). The responsibility for addressing any concerns about abusive or meritless claims rests with Congress, rather than the courts. Indeed, Congress has already taken steps to address such concerns. In the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, Congress responded to perceived abuses in private securities-fraud actions by, *inter alia*, establishing procedures for the appointment of lead plaintiffs and lead counsel in suits brought as class actions, 15 U.S.C. 78u-4(a)(3); imposing heightened pleading requirements,

15 U.S.C. 78u-4(b)(1)-(2); mandating an automatic stay of discovery pending resolution of a motion to dismiss, 15 U.S.C. 78u-4(b)(3)(B); creating a safe-harbor for forward-looking statements, 15 U.S.C. 78u-5; authorizing sanctions for abusive litigation, 15 U.S.C. 78u-4(c); and establishing limitations on recoverable damages and attorney's fees, 15 U.S.C. 78u-4(a)(6) and (e). See *Tellabs*, 551 U.S. at 319-322.

Three years later, Congress enacted the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227, to prevent plaintiffs in private securities-fraud actions from proceeding under state law in order to avoid the requirements of the PSLRA. See *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 80-83 (2006). Particularly because Congress has recently adjusted the procedural and substantive standards for private securities-fraud suits, including through provisions (see 15 U.S.C. 78u-4(a)) specifically directed at class actions, the Fifth Circuit was not authorized "to make its own further adjustments by reinterpreting Rule 23 to make likely success on the merits essential to class certification in securities-fraud suits." *Schleicher* v. *Wendt*, 618 F.3d 679, 686 (7th Cir. 2010).

B. Nothing In *Basic* Or The Fraud-On-The-Market Theory Supports The Fifth Circuit's Requirement That Plaintiffs Must Prove Loss Causation At The Class-Certification Stage

In defending the court of appeals' approach, respondents contend that "[l]oss causation * * * is central to the presumption of reliance" as described in *Basic* (Br. in Opp. 23; see Supp. Br. in Opp. 6-8), and that the defendant's ability to rebut the presumption of reliance makes it appropriate to place on petitioner the burden of prov-

ing loss causation at the class-certification stage (Br. in Opp. 9-11; Supp. Br. in Opp. 8-11). Neither of those propositions is correct.

1. The Fifth Circuit in *Oscar* stated that placing the burden on plaintiffs to prove loss causation at the class-certification stage was consistent with the *Basic* Court's recognition that a defendant may rebut the presumption of reliance. 467 F.3d at 265. The Court in *Basic* did not state, however, that a defendant may rebut the presumption of reliance at the class-certification stage. To the contrary, the Court's only discussion of when that rebuttal could occur strongly indicates that such an inquiry is a matter for summary judgment or trial. After explaining that the fraud-on-the-market presumption might be rebutted by proof that information had "credibly entered the market and dissipated the effects of the misstatements" on the stock's price, the Court acknowledged a potential "incongruity between the assumption that Basic shares are traded on a well-developed, efficient, and information-hungry market, and the allegation that such a market could remain misinformed, and its valuation of Basic shares depressed, for 14 months, on the basis of the three public statements." 485 U.S. at 249 & n.29. The Court stated that "[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 249 n.29.

That analysis suggests that, if the evidence ultimately demonstrates that the distortive effect of a defendant's misstatements was cured as of a particular date, a class-certification order may be amended to exclude class members who purchased or sold shares after that date. But it does not suggest that a district court should make factual determinations regarding price dis-

tortion as part of its initial class-certification inquiry. To the contrary, the Court stated that "[p]roof of that sort is a matter for trial." *Basic*, 485 U.S. at 249 n.29.

Thus, nothing in *Basic* modifies the settled rule that a court ruling on a class-certification request may consider the merits of the named plaintiff's claims only to the extent relevant to the criteria set forth in Rule 23. To be sure, if the defendant seeks to rebut the fraud-on-the-market presumption, the finder of fact may ultimately be required to determine whether actual market distortion occurred. But so long as the market-distortion inquiry turns on factual or legal issues that are common to the members of the putative class, class certification is appropriate regardless of the perceived likelihood at that early stage that the plaintiffs will be able to establish reliance on the merits. See *Schleicher*, 618 F.3d at 685; pp. 22-24, *infra*.

2. The fact that *Basic*'s fraud-on-the-market presumption is rebuttable does not logically imply that all evidence offered to rebut it will be germane to class certification. The fraud-on-the-market presumption speaks to the type of proof that will establish an essential element of a private plaintiff's securities-fraud claim. The presumption significantly facilitates the certification of private securities-fraud suits as class actions, since it greatly increases the likelihood that the reliance element can be proved through evidence common to all class members. Nevertheless, the effect of a successful rebuttal is to defeat the plaintiff's suit on the merits, not to render it unsuitable for class treatment.

For purposes of Rule 23, a defendant's attempt to rebut the fraud-on-the-market presumption is no different from an effort to contest any other element of the plaintiff's claim, or to establish an affirmative defense.

To the extent that the defendant's anticipated efforts to rebut the presumption bear on the Rule 23 analysis, the pertinent question is not whether those efforts are likely to be successful, but whether the district court's resolution of the issue can be expected to turn on proof that is common to class members generally. If a defendant seeks to rebut the fraud-on-the-market presumption through evidence that is likely to vary substantially from plaintiff to plaintiff, the prospect of such individualized proof may bear on the district court's determination whether "questions of law or fact common to class members predominate." Fed. R. Civ. P. 23(b)(3); see *Schleicher*, 618 F.3d at 685 ("If something about 'the merits' also shows that individual questions predominate over common ones, then certification may be inappropriate."). But so long as the relevant determinations "affect[] investors in common" and therefore "can be made on a class-wide basis," a court may not deny class certification based on its view that the defendant will ultimately prevail. *Id.* at 687; see, *e.g.*, *In re Initial Pub. Offering Sec. Litig.*, 260 F.R.D. 81, 106 n.214 (S.D.N.Y. 2009).

In neither *Oscar* nor in this case did the Fifth Circuit suggest that the loss-causation inquiry would vary from plaintiff to plaintiff in a way that would prevent common issues from predominating. Here, the determination whether respondents' eventual disclosures caused the price of Halliburton stock to drop will be the same for every class member. Indeed, respondents acknowledge that in this case, "loss causation stands or falls on a classwide basis." Supp. Br. in Opp. 9. Thus, even if evidence suggesting the absence of loss causation were properly viewed as rebutting the presumption of reliance, respondents' efforts to contest the loss-causation

issue would provide no basis for denying class certification.[2]

3. The Court stated in *Basic* that a *defendant* "may rebut proof of the elements giving rise to the presumption, or show that the misrepresentation in fact did not lead to a distortion of price or that an individual plaintiff traded or would have traded despite his knowing the statement was false." 485 U.S. at 248. All of the examples the Court provided involved showings that a *defendant* could make. *Id.* at 248-249. See, *e.g.*, *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 483 (2d Cir. 2008) ("Under *Basic*, * * * the burden of showing that there was no price impact is properly placed on defendants at the rebuttal stage.").[3] Thus, even if a de-

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[2] In both *Oscar* and this case, the clear thrust of the court of appeals' analyses was that proof of loss causation was lacking with respect to *all* members of the class. If that conclusion were treated as dispositive, it would logically imply that petitioners' suit cannot proceed either as a class action or as an individual suit, since loss causation is an essential element of petitioner's own claim. As respondents have emphasized, however, the court of appeals' decision "d[id] not finally resolve the * * * dispute" (Br. in Opp. 16) because petitioner remains free to pursue its individual claim. In allowing the individual suit to go forward, the court of appeals presumably recognized that, notwithstanding petitioner's purported failure to establish loss causation by a preponderance of the evidence at a threshold stage of the litigation, petitioner may still be able to prove that element of its claim to a reasonable jury's satisfaction after discovery and trial. See pp. 25-28, *infra*. The solution the Fifth Circuit devised—*i.e.*, denying class certification based on a judicial finding that loss causation had not been proved, while implicitly recognizing that the loss-causation issue would remain open in petitioner's individual suit—has no basis either in Rule 23 or in this Court's precedents.

[3] Although the Second Circuit correctly recognized that defendants bear the burden of rebutting the fraud-on-the-market presumption, the court erred in stating that a district court "must permit defendants to

fendant could defeat class certification at the outset by rebutting the fraud-on-the-market presumption of reliance, a class plaintiff could not properly be required to prove loss causation at that threshold stage of the suit.

4. Contrary to the Fifth Circuit's suggestion in *Oscar*, see 487 F.3d at 269-270, a plaintiff's inability to prove loss causation does not prove that the defendant's alleged misstatements had no initial impact on the price of the relevant security. When the Court in *Basic* explained how a defendant could "rebut the presumption of reliance," 485 U.S. at 248-249, it did not mention loss causation. Instead, the Court stated that the defendant could rebut the presumption by "sever[ing] 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." *Id.* at 248. The Court's reference to the "price received (or paid) by the plaintiff" reflects the Court's focus on the initial transaction, not on subsequent events that might (or might not) cause the plaintiff to suffer an economic loss.

As this Court's decision in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 341 (2005) (*Dura*), makes clear, reliance and loss causation are distinct elements of a securities-fraud claim. In *Dura*, the Court held that a plaintiff does not adequately allege loss causation simply by alleging that he purchased stock at an inflated price due to a defendant's misrepresentation or omission. *Id.* at 342-346. The Court explained that an investor who buys stock at an inflated price suffers no immediate loss because "the inflated purchase payment is offset by ownership of a share that *at that instant* pos-

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present their rebuttal arguments before certifying a class." *In re Salomon Analyst Metromedia Litig.*, 544 F.3d at 485 (internal quotation marks omitted). See pp. 17-19, *supra*.

sesses equivalent value." *Id.* at 342. While acknowledging the existence of a "logical link between the inflated share purchase price and any later economic loss," the Court characterized that connection as "not invariably strong" because the purchaser's subsequent sale of the shares at a lower price "may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, [or] new industry-specific or firm-specific facts, conditions, or other events." *Id.* at 343.

Respondents contend (Supp. Br. in Opp. 6) that the recognized distinction between reliance and loss causation is irrelevant here because "the absence of *either one* of these elements destroys the fraud-on-the-market presumption." That is incorrect. To be sure, a plaintiff must ultimately establish both reliance and loss causation in order to *prevail* in a securities-fraud suit. But while the plaintiff's failure to prove loss causation precludes any recovery, it does not rebut the fraud-on-the-market presumption or otherwise demonstrate that the plaintiff did not rely on any material misstatement.

The gravamen of the fraud-on-the-market theory is that, because "the market price of shares traded on well-developed markets reflects all publicly available information," any public material misstatements bearing on the stock's value will presumptively affect the amount that any investor pays for shares during the period that the market is misled. *Basic*, 485 U.S. at 246; see *id.* at 242-243, 246-247. The existence of market distortion, however, does not mean that such investors will ultimately suffer any economic loss. Even if a misrepresentation inflates the purchase price, if "the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any

loss." *Dura*, 544 U.S. at 342. If the purchaser "sells later after the truth makes its way into the marketplace * * * even at a lower price, that lower price may reflect, not the earlier misrepresentation, but" other factors. *Id*. at 342-343. See *Schleicher*, 618 F.3d at 686-687 (providing additional example in which the absence of loss causation as to certain members of a putative class does not disprove that the price of the stock had been distorted by the company's misrepresentations). Respondents are therefore wrong in contending (Supp. Br. in Opp. 6) that a plaintiff's inability to prove loss causation "destroys the fraud-on-the-market presumption."

C. The Court Of Appeals Erred In Treating Petitioner's Perceived Likelihood Of Success On The Merits As Relevant To The Class-Certification Inquiry, And The Court Compounded Its Error By Requiring Petitioner To Prove Loss Causation By A Preponderance Of The Evidence At The Class-Certification Stage

1. In *Eisen* v. *Carlisle & Jacquelin*, *supra*, the Court considered whether Rule 23 allows a district court to consider the merits of a plaintiff's claims "as part of the determination whether a suit may be maintained as a class action." 417 U.S. at 177-179. In *Eisen*, the district court had conducted a "preliminary hearing on the merits" to determine whether the plaintiff or the defendants should bear the cost of notice to the class. *Id.* at 168. Because the district court concluded that the plaintiff was more likely than not to prevail at trial, the court imposed the cost of notice on the defendants. *Ibid.* This Court disapproved that approach, "find[ing] 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." *Id.* at 177.

The Court explained that, at the class-certification stage, "the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen*, 417 U.S. at 178 (quoting *Miller* v. *Mackey Int'l, Inc.*, 452 F.2d 424, 427 (5th Cir. 1971)). The Court noted that Rule 23 specifies the prerequisites to certification of a case as a class action, *id.* at 162-163, and it found nothing in the rule that allows a court to condition class certification on likely success on the merits, *id.* at 177. Accordingly, the Court held that the merits of the plaintiff's claims may be considered at the class-certification stage only when necessary to determine whether the proposed plaintiff class meets the requirements of Rule 23. See *id.* at 177-178; see also Fed. R. Civ. P. 23(c)(1) advisory committee's note (2003) (Amendment) ("an evaluation of the probable outcome on the merits is not properly part of the certification decision").

To be sure, the class-certification question may "involve[] considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Falcon*, 457 U.S. at 160 (internal quotation marks omitted). The determination whether "questions of law or fact common to class members predominate," Fed. R. Civ. P. 23(b)(3), may require analysis of the elements of the plaintiff's claims and the manner in which those elements would ordinarily be proved. See *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 317; *Shook* v. *Board of County Comm'rs of El Paso County*, 543 F.3d 597, 612 (10th Cir. 2008); see also, *e.g.*, *Falcon*, 457 U.S. at 155-160 (conducting such an analysis). In *Basic*, for

example, the Court's holding that the securities-fraud claims were amenable to class treatment rested in part on its antecedent determination that the reliance element could be proved through the fraud-on-the-market presumption. See 485 U.S. at 242-250; pp. 10-11, *supra*. But the possibility of "overlap between a Rule 23 requirement and a merits issue" does not mean that the district court may treat likelihood of success on the merits as a prerequisite for class certification. *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006). So long as a plaintiff demonstrates that common questions predominate over questions that affect only individual class members (and that the suit meets the other requirements in Rule 23), he is "entitl[ed] * * * to pursue his claim as a class action." *Shady Grove*, 130 S. Ct. at 1437.

2. The court below, relying on *Oscar*, held that a plaintiff in a putative securities-fraud class action is required to prove loss causation "at the class certification stage by a preponderance of all admissible evidence." Pet. App. 115a (quoting *Oscar*, 487 F.3d at 269). The court required that showing even though the parties "did not dispute" the facts giving rise to the fraud-on-the-market presumption (the efficiency of the market and petitioner's trading activity). *Ibid.* The court of appeals further held that, even when the price of the relevant securities is shown to have fallen soon after the defendant's prior misstatements were corrected, the plaintiff must prove at the class-certification stage that the price drop was caused by the corrective statement rather than by some other contemporaneous disclosure. *Id.* at 117a-118a.

The burden that rule imposes is a heavy one. Because petitioner alleged that respondents had made

false statements followed by corrective disclosures that resulted in losses to the class members, the court required petitioner to show that respondents' alleged corrective disclosures were "*related* to the false, non-confirmatory positive statement made earlier" and "that it is *more probable than not* that it was this related corrective disclosure, and not any other unrelated negative statement, that caused the stock price decline." Pet. App. 119a-120a (internal quotation marks omitted); see *Oscar*, 487 F.3d at 265, 270. In the court's view, such a showing generally "requires both expert testimony and analytical research or an event study that demonstrates a linkage between the culpable disclosure and the stock-price movement." Pet. App. 130a; see *Oscar*, 487 F.3d at 270-271. The court then conducted a thorough merits analysis, addressing each alleged misstatement and corrective disclosure in turn before concluding that petitioner had failed to prove that the class losses were likely caused by respondents' corrective disclosures. Pet. App. 123a-136a.

3. Respondents contend that the Fifth Circuit's approach has no substantive impact on the outcome of the lawsuit and that this case presents "only the procedural question whether certain meritless class actions should be certified." Supp. Br. in Opp. 5. That assertion might have force if the district court had denied class certification on the ground that petitioner's *complaint* did not sufficiently *allege* a violation of Section 10(b) and Rule 10b-5. Although such an approach would be analytically wrong, see *Eisen*, 417 U.S. at 178 (explaining that, under Rule 23, "the question is not whether the plaintiff or plaintiffs have stated a cause of action"), the likely practical consequences of such an error would be slight, since a district court in ruling on a motion to dismiss can

assess the adequacy of a plaintiff's allegations at a threshold stage of the case. If a district court concludes that a plaintiff's allegations are legally insufficient, and if that assessment of the complaint is otherwise sound, an erroneous effort to incorporate that analysis into the class-certification inquiry is unlikely to change the ultimate disposition of the case.

The error committed by the Fifth Circuit in *Oscar* and in this case, by contrast, has real practical significance. The court of appeals did not simply shoehorn a motion-to-dismiss inquiry into the class-certification analysis, but instead required petitioner to prove an essential element of its case at a threshold stage of the litigation. The error in that approach went far beyond simply placing the wrong label on an inquiry that the district court was in substance permitted to undertake. By requiring such proof at the class-certification stage, and by directing the district court to determine whether that burden had been discharged, the court of appeals improperly preempted the merits inquiries that occur at summary judgment and at trial. For two principal reasons, that error creates a significant danger that class certification will be denied in cases where the plaintiff class could ultimately prevail.

First, the *Oscar* rule requires plaintiffs to prove an essential element of their case before they have had an adequate opportunity to adduce the evidence required for such a showing. The lengthy analyses of loss causation performed by the courts below in this case attest to the fact that full consideration of loss causation is a detailed and complex inquiry. Under Rule 23, however, class certification is to be decided "[a]t an early practicable time after a person sues or is sued as a class representative." Fed. R. Civ. P. 23(c)(1). At that point, dis-

covery may not be complete, or even substantially underway.[4] The *Oscar* court suggested that discovery was not necessary to prove loss causation because "[i]ts 'proof' is drawn from public data and public filings." 487 F.3d at 267. That suggestion is belied, however, by the court's rejection of the expert testimony presented in that case and its explanation that "plaintiffs must do more" by providing an "empirically-based showing" as to the cause of the plaintiff's loss. *Id.* at 270-271.

Second, even in cases where discovery would not meaningfully supplement the range of available evidence bearing on loss causation, the Fifth Circuit's approach improperly requires district courts to usurp the role of juries in resolving disputed loss-causation issues. In order to obtain summary judgment, a defendant must show that, viewing the evidence in the light most favorable to the plaintiff, there are no genuine issues of material fact for trial. See, *e.g.*, *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323-324 (1986); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); Fed. R. Civ. P. 56(c). Summary judgment is not appropriate if "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved

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[4] A named plaintiff's lack of access to discovery at the class-certification stage of a securities-fraud suit is particularly significant if the Fifth Circuit's opinion in this case is read to require proof of scienter as well as (or as a supposed component of) loss causation. Compare Pet. App. 123a n.35 (plaintiff need not prove "intentional fraud" at class certification) with *id.* at 121a-122a (loss-causation showing requires proof that "the corrective disclosure shows the misleading or deceptive nature of the prior positive statements" and that "original estimates or predictions were designed to defraud"). Proof that the defendant acted with scienter may be particularly difficult to adduce before discovery has taken place.

in favor of either party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Under the Fifth Circuit's approach, however, the district court must decide at the class-certification stage whether the named plaintiff has proved loss causation by a preponderance of the evidence, not simply whether a reasonable fact-finder could so conclude. Under that preponderance standard, a named plaintiff could be denied class certification even if it proffered sufficient evidence of loss causation to survive a summary judgment motion. The court of appeals' approach therefore does not simply expedite the resolution of an issue that the district court would ultimately have been required to decide in any event. Rather, it improperly denies class members in securities-fraud suits the opportunity to have loss-causation issues resolved by a jury. See *Tellabs*, 551 U.S. at 326-328 (recognizing that plaintiffs are entitled to have their securities-fraud claims decided by a jury once a sufficient initial showing has been made).[5]

4. A central theme of respondents' submissions is that class-action plaintiffs should be required to prove loss causation at the class-certification stage in order to avoid certification of meritless actions. Br. in Opp. 8-9, 23-25; Supp. Br. in Opp. 2, 4, 5, 9, 11. Other procedural mechanisms (*e.g.*, motions to dismiss under Federal Rule of Civil Procedure 12, or motions for summary

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[5] Respondents contend (Supp. Br. in Opp. 11) that the court of appeals' approach is "not inconsistent with either summary judgment or jury-trial principles" because a jury may revisit the issue of loss causation and reach a conclusion different from that of the district court. That argument is misconceived because the denial of class certification effectively precludes the claims of unnamed class members from being presented to a jury.

judgment under Rule 56), however, are specifically designed to avoid needlessly protracted litigation of meritless claims. The prerequisites to class certification under Rule 23 are not intended as additional checks on meritless suits, but instead address the distinct question whether disputed merits issues can appropriately be resolved on a classwide basis. See *Schleicher*, 618 F.3d at 685 (explaining that consideration of the merits is "limited to those aspects of the merits that affect the decisions essential under Rule 23"); *id.* at 686 ("Rule 23 allows certification of classes that are fated to lose as well as classes that are sure to win."). Use of Rule 23 as an additional merits screen is particularly inappropriate in the securities-fraud context, where Congress has recently addressed the burdens imposed by private suits, including through certain provisions directed specifically at class actions, without requiring plaintiffs to prove an element of their claims as a prerequisite to class certification. See pp. 14-15, *supra*.

If, after discovery, petitioners cannot adduce evidence from which a reasonable jury could infer that respondents' misstatements caused economic loss to the plaintiff class, respondents will be entitled to summary judgment. Alternatively, if it becomes apparent that some class members cannot recover (*e.g.*, because the evidence shows that the relevant facts were made known to the market before those class members purchased their shares), then the district court may modify the class-certification order. See *Schleicher*, 618 F.3d at 686-687; see also *Falcon*, 457 U.S. at 160 ("Even after a certification order is entered, the judge remains free to modify it in light of subsequent developments in the litigation."). It puts "the cart before the horse," however, to insist that plaintiffs prove that the defendant's fraud

caused their losses before any class can be certified. *Schleicher*, 618 F.3d at 687.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General

MARK D. CAHN
General Counsel
JACOB H. STILLMAN
Solicitor
MICHAEL A. CONLEY
Deputy Solicitor
BENJAMIN L. SCHIFFRIN
Senior Counsel
Securities and Exchange Commission

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APPENDIX

1. 15 U.S.C. 78j provides, in pertinent part:

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * * * *

2. 15 U.S.C. 78u-4 provides, in pertinent part:

Private securities litigation

* * * * *

(b) Requirements for securities fraud actions

(1) Misleading statements and omissions

In any private action arising under this chapter in which the plaintiff alleges that the defendant—

(A) made an untrue statement of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

(2) Required state of mind

In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

(3) Motion to dismiss; stay of discovery

(A) Dismissal for failure to meet pleading requirements

In any private action arising under this chapter, the court shall, on the motion of any defendant, dismiss the complaint if the requirements of paragraphs (1) and (2) are not met.

(B) Stay of discovery

In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(C) Preservation of evidence

(i) In general

During the pendency of any stay of discovery pursuant to this paragraph, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

(ii) Sanction for willful violation

A party aggrieved by the willful failure of an opposing party to comply with clause (i) may apply to the court for an order awarding appropriate sanctions.

(D) Circumvention of stay of discovery

Upon a proper showing, a court may stay discovery proceedings in any private action in a State

court, as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this paragraph.

(4) Loss causation

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.

* * * * *

3. 17 C.F.R. 240.10b-5 provides, in pertinent part:

Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

* * * * *

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading

* * * * *

4. Federal Rule Civil Procedure Rule 23 provides, in pertinent part:

Class Actions

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

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

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

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

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

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

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

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

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

impede their ability to protect their interests;

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

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

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

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

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

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

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

(1) ***Certification Order.***

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

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

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

(2) ***Notice.***

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

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

(i) the nature of the action;

(ii) the definition of the class certified;

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

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

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

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

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

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

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

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

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

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

* * * * *