16-0450-cv

United States Court of Appeals

for the

Second Circuit

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

Petitioners,

SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, PAUL S. ATKINS, ELIZABETH COSENZA, DANIEL GALLAGHER, JOSEPH A. GRUNDFEST, PAUL G. MAHONEY, RICHARD W. PAINTER, KENNETH E. SCOTT, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Movants,

– v. –

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

Respondents.

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

OPPOSITION TO PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(F)

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TABLE OF ABBREVIATIONS AND DEFINED TERMS

ADS:	American Depositary Shares
Barclays:	Barclays PLC and Barclays Capital Inc.
DA- __:	Defendants' Appendix submitted with their Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f), filed on February 16, 2016.
Defendants:	Barclays PLC, Barclays Capital Inc., Robert Diamond, Antony Jenkins, and William White
Exchange Act:	The Securities Exchange Act of 1934
LIBOR:	London Interbank Offered Rate
MTD Order:	The Opinion and Order of the district court regarding Defendants' motion to dismiss the Amended Complaint, filed on April 24, 2015, *Strougo v. Barclays PLC*, 105 F. Supp. 3d 330 (S.D.N.Y. 2015)
Order:	The Opinion and Order of the district court regarding Plaintiffs' motion for class certification, filed on February 2, 2016, *Strougo v. Barclays PLC*, No. 14-CV-5797(SAS), 2016 WL 413108 (S.D.N.Y. Feb. 2, 2016).
Petition:	Defendants' Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f), filed on February 16, 2016.
Rule 23:	Federal Rule of Civil Procedure 23

Defendants fail to meet this Court's standard for Federal Rule of Civil Procedure 23(f) interlocutory review of the district court's Order.

I. INTRODUCTION

The Order is a textbook example of the kind of "rigorous analysis" of Rule 23's requirements envisioned by the Supreme Court. *See Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194, 185 L. Ed. 2d 308 (2013)[1]. Following substantial briefing, oral argument, and an evidentiary hearing at which the district court heard testimony from the parties' proffered experts, Judge Scheindlin issued a thorough and well-reasoned 49-page Opinion and Order granting class certification. As is clear from even a cursory review of the Order, it is supported by ample factual findings and is securely grounded in Supreme Court and Second Circuit jurisprudence. In light of that record, and particularly "taking into account the discretion the district judge possesses in implementing Rule 23, and the correspondingly deferential standard of appellate review," the Order can hardly be considered "questionable," nor does it raise any "novel legal question" of "fundamental importance" that compels immediate review. *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 140 (2d Cir. 2001).

Defendants do not acknowledge that this Court reviews district court class certification rulings for abuse of discretion – and is particularly deferential where

[1] Internal quotation marks, citations, and footnotes are omitted unless otherwise noted.

the court grants certification. *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405, 409 n.5 (2d Cir. 2015) ("Whether to certify a class is within the discretion of the district court, largely because it is the district court that has the 'inherent power to manage and control pending litigation.'") The district court was well within its discretion in granting class certification. Defendants' Petition, much like their brief in opposition to class certification, is an attempted end-run around the district court's earlier denial of their motion to dismiss. Defendants once again seek court review of already decided issues simply because they were dissatisfied with their results—this is not a permissible basis for interlocutory review under Rule 23(f) and sets a bad precedent for defendants seeking multiple bites at the same apple.

For these reasons, discussed in detail below, the Petition should be denied.

II. THE DISTRICT COURT'S CERTIFICATION ORDER

The district court carefully and thoroughly analyzed class certification pursuant to Rule 23. Following recent Supreme Court guidance, the district court held that Plaintiffs established every requirement of Rule 23(a) and 23(b)(3). Indeed, even though Defendants did not dispute that Plaintiffs satisfied the requirements of Rule 23(a), the district court conducted its own rigorous analysis and determined that these requirements were met. DA-3 ("There is no dispute that plaintiffs have satisfied these requirements, and after careful review of the record I find that each has been satisfied."). Next, after exhaustively analyzing the relevant

case law, the parties' briefing, the arguments and testimony provided at an evidentiary hearing, and weighing the opinions of the proffered experts, the district court concluded that both the *Affiliated Ute* and *Basic* presumptions of reliance applied and certified a class of allegedly defrauded Barclays' investors.

A. The District Court Found that Plaintiffs Satisfied the *Affiliated Ute* Presumption of Reliance

The district court applied the *Affiliated Ute* presumption of reliance given that Plaintiffs' allegations that Defendants failed to disclose material information they had a duty to disclose "are the heart of this case." DA-24. The district court explained, consistent with the MTD Order, that because LX constitutes a tiny fraction of Barclays' business, a reasonable investor likely would have found the omitted misconduct far more material than the affirmative statements alleged. *Id.*

B. The District Court Found that Plaintiffs Are Entitled to the *Basic* Presumption of Reliance

The district court based its Rule 23(b)(3) finding on the fact that Defendants only challenged one of the four requisites for invoking the *Basic* presumption- market efficiency- and in so doing only challenged one out of eight factors generally considered in establishing market efficiency (conceding four out of five *Cammer* factors and all three *Krogman* factors) - known as *Cammer* 5. DA-27. Consistent with a vast body of case law, the district court rejected Defendants' assertion that Plaintiffs could not establish market efficiency without *Cammer* 5,

particularly given that event studies are typically, and more accurately, conducted across "a large swath of firms" because "when the event study is used in a litigation to examine a single firm, the chances of finding statistically significant results decrease dramatically" thus not providing a correct assessment of market efficiency. DA-30. Moreover, as the district court noted, accepting Defendants' position regarding *Cammer* 5 would obviate the need to consider any other factors at all. DA-27 (citing the Second Circuit decision in *Teamsters Local 445 Fright Division Pension Fund v. Bombardier* declining to find any particular factor dispositive, as well as other Circuit Court decisions adopting a similar approach).

The district court also held that, per *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) ("*Halliburton II")*, plaintiffs are not required to prove price impact directly to invoke the *Basic* presumption and do not need to establish loss causation to certify a class. DA-11. The district court then found, following its extensive analysis, that Plaintiffs sufficiently established market efficiency indirectly and thus direct evidence was unnecessary. DA-34.

C. The District Court Found That Defendants Did Not Rebut the *Basic* Presumption

The district court concluded that Defendants did not meet their burden of proving a lack of price impact and explained that though *Halliburton II* provides a right of rebuttal, "having this right does not mean that it is easily done." DA-36. This is particularly so given that Defendants did not present an event study or any

affirmative evidence to prove a lack of price impact. Acknowledging the price maintenance theory of Plaintiffs' case, the district court did not find merit in Defendants' criticism of Plaintiffs' expert (Dr. Zachary Nye) that he does not show a statistically significant rise in Barclays' ADS price on the alleged misrepresentation dates, because "[u]nder [plaintiff's] theory, "a material misstatement can impact a stock's value ... by improperly maintaining the existing stock price." DA-39. Therefore, the district court also rejected Defendants' argument that Plaintiffs' theory is inconsistent with the price maintenance theory finding that Plaintiffs are not required to show when inflation entered the price of Barclays ADS' (as held in *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 415 (7th Cir. 2015)) and that it is unnecessary to show a statistically significant price reaction to a misstatement prior to the start of the Class Period because "[w]hen an omission or misrepresentation prevents a non-inflated price from falling, that omission or misrepresentation introduces inflation into the stock." DA-40. Hence, given that Plaintiffs' rely on a price maintenance theory, the Court held that there was no obligation to show a statistically significant stock price increase reacting to a misstatement either before or after the Class Period.

Lastly, the district court rejected Defendants' argument that there is no price impact because other factors might have contributed to the price decline on the corrective disclosure date because Defendants did not meet their burden of

showing "by a preponderance of the evidence that the drop in the price of Barclays ADS was not caused *at least in part* by the disclosure of the fraud at LX." DA-44.

D. The District Court Found that Individualized Damages Issues Will Not Predominate

The district court recognized that the "Second Circuit has rejected a broad reading of *Comcast*." DA-7 (citing *Roach*, 778 F.3d at 407-08). Indeed, the district court noted the Second Circuit's finding in *Roach* that *Comcast* "did not hold that proponents of class certification must rely upon a classwide damages model to demonstrate predominance. ...." and "the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification." DA-7. The district court held that Dr. Nye's proposal of using an event study and the constant dollar method to calculate damages is consistent with the theory of the case, and one that is typically used in securities class actions. The district court rejected Defendants' contention that Plaintiffs should have proffered a model to identify and disaggregate confounding information as irrelevant given that confounding information would affect all class members the same. DA-45.

E. The District Court Declined to Shorten the Class Period

The district court declined to shorten the Class Period given that Defendants' based their argument on a mischaracterization of the MTD Order. Specifically, the district court held in the Order that it had not been asked to rule on when statements became material and therefore did not do so. Further, the district court

concluded that "plaintiffs' allegations are consistent with material misrepresentations occurring prior to June 2012" with respect to Defendants' failure to disclose its misconduct regarding Barclays LX. DA-47.The district court therefore certified the Class for the August 2, 2011 to June 25, 2014 period. DA-3.

III. ARGUMENT: DEFENDANTS FAIL TO MEET THIS COURT'S STANDARD FOR RULE 23(f) INTERLOCUTORY REVIEW

Bespeaking the frailty of their Petition, Defendants seemingly admit that they cannot establish that "the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable." *Sumitomo*, 262 F.3d at 139. Rule 23(f) only applies in the unique circumstance where it is necessary to "correct errors that sound a "death-knell" to the litigation." *Weber v. U.S. Tr.*, 484 F.3d 154, 160 (2d Cir. 2007). Defendants' deafening silence on this factor is a clear admission that this simply is not the case here. Instead, Defendants claim the Order implicates a legal question about which there is a compelling need for immediate resolution. Defendants' Petition is rife with inaccuracies as to the relevant case law, the Order, and the MTD Order. The questions Defendants raise are hardly novel—they have been addressed by the Supreme Court (*e.g. Halliburton II, Comcast)* and the Second Circuit (e.g., *Roach*) previously. Indeed, Judge Scheindlin thoroughly examined and applied Supreme Court and Second Circuit precedent in the Order. The district court scrupulously

followed *Halliburton II*, *Cammer*, *Krogman*, *Comcast and Roach* in analyzing class certification under well-established standards.

A. Defendants Fail to Identify Any Legal Question Regarding Which There is a Compelling Need for Immediate Resolution Pertaining to the *Basic* Presumption of Reliance.

Defendants fall far short of demonstrating any need for review. They make no showing whatsoever that the district court's 49-page analysis did anything but apply the now well-established standards articulated in *Halliburton II* and *Basic Inc. v. Levinson*, 485 U.S. 224, 241 (1988). Significantly, while Defendants state that there is an intra-circuit split within this Circuit that requires resolution by this Court, they have failed to identify precisely what that split is, only vaguely citing to *In re Fed. Home Loan Mortg. Corp. (Freddie Mac) Sec. Litig.*, 281 F.R.D. 174 (S.D.N.Y. 2012). Yet the district court did not disagree with the *Freddie Mac* Court's holding. It correctly noted that *Freddie Mac* pre-dated *Halliburton II* and that, in any event, in contrast to the securities at issue here, the preferred shares at issue there were "a limited series of preferred shares, which are traded in patterns significantly different from the trading patterns typical of common shares." Thus, Defendants have failed to identify any intra-Circuit split requiring resolution.

1. Defendants Mischaracterize The District Court's Market Efficiency Analysis

In holding that Barclays ADS traded in an efficient market during the Class Period, the district court did not change the definition of market efficiency nor did

it rule that *Halliburton II* "redefined the concept of an efficient market for purposes of the *Basic* presumption."[2] Pet. at 14-15. The district court accurately explained that the Supreme Court "*clarified*" in *Halliburton II* that "the *Basic* court did not adopt any particular theory of market efficiency. Instead, the *Basic* presumption is based "on the fairly modest premise that 'market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices."" DA-29. Indeed, the district court repeatedly quoted Supreme Court jurisprudence. None of the case law Defendants cite disputes this long held (and now reconfirmed) view of the Supreme Court.

Defendants' Petition, rife with hyperbole, incorrectly states that "the district court's holding allows a plaintiff to satisfy the *Basic* presumption merely by demonstrating that it purchased the stock of a large, publicly traded company." Pet. at 15. What the district court actually said is that:

> [I]ndirect evidence of market efficiency—***including***[3] that a stock trades in high volumes on a large national market and is followed by a large number of analysts—will ***typically***[4] be sufficient to satisfy the *Basic* presumption on class certification. In such cases there is no need to demonstrate efficiency through a direct test, such as an event study. ***Of course, if there is reason to doubt the efficiency of the market, as when the additional Cammer factors do not weigh heavily in favor of market efficiency (or when defendants' evidence***

[2] Defendants did not cite to any Second Circuit precedent supporting their position that the standard for market efficiency is reviewed *de novo.* However, even if this were the standard, Defendants arguments fail.
[3] The district court's said "including," not "exclusively."
[4] The district court said "typically," not "always."

> ***weighs against market efficiency), a plaintiff may have to present direct evidence to establish market efficiency.***

DA-32. Here, there was no "reason to doubt the efficiency of the market" necessitating utilization of a direct test. Having assessed ***all*** of the indirect evidence (all four indirect *Cammer* factors and all three *Krogman* factors—not just the national exchange listing or analyst coverage as Defendants erroneously suggest) which overwhelmingly demonstrated the efficiency of the market for Barclays' ADS during the Class Period—a point Defendants conceded (DA-34), having relied on Circuit Court precedent (including Second Circuit precedent) regarding how to test for market efficiency (DA-27 fn. 86, 87), and having conducted a thorough evaluation of the pitfalls involved in relying predominantly on event studies[5] (DA-30-33), the district court properly held:

> ***Having considered the parties' arguments and evidence***, ***including*** that Barclays ADS trades on the NYSE at high volumes with heavy analyst coverage, I conclude that plaintiffs have established market efficiency indirectly and therefore do not consider whether they have also satisfied *Cammer* 5 by proof of an event study.

DA-34. (emphasis supplied). Defendants have thus failed to make any showing of a legal question regarding market efficiency requiring immediate resolution. Indeed, given the overwhelming size of Barclays and extensive analyst coverage on the Company, and that there was no inhibition to trading Barclays' securities

[5] An event study is the most common methodology used when conducting a direct test of market efficiency under *Cammer* 5.

during the Class Period, Defendants did not even deign to argue that Barclays traded in an inefficient market. In the face of such overwhelming evidence of efficiency and the absence of any contrary evidence, it unsurprising that the district court found the market for Barclays ADS efficient during the Class Period.

2. The District Court Applied the Correct Standard in Finding That Defendants Failed to Rebut the *Basic* Presumption.

Defendants' arguments regarding Federal Rule of Evidence 301 reveal no error and provide no reason for review. Rule 301 merely provides that the "rule does not shift the burden of persuasion." However, *Halliburton II* leaves no question that the burden of persuasion with regard to lack of price impact ***is upon defendants***, requiring that defendants ***show*** the absence of price impact in order to rebut the presumption: "*Basic* … affords defendants an opportunity to rebut the presumption by ***showing***, among other things, that the particular misrepresentation at issue did not affect the stock's market price." *Halliburton Co.*, 134 S. Ct. at 2414 (emphasis supplied). Reflecting upon the burden of persuasion in her concurring opinion, Justice Ginsburg noted that "the Court recognizes that it is incumbent upon the defendant to ***show*** the absence of price impact." *Id.* at 2417 (emphasis supplied). *See also In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 483 (2d Cir. 2008) ("[T]he burden of showing that there was ***no*** price impact is properly placed on defendants at the rebuttal stage.") (emphasis in original); *Aranaz v. Catalyst Pharm. Partners Inc.*, 302 F.R.D. 657, 673 (S.D. Fla. 2014);

McIntire v. China MediaExpress Holdings, Inc., 38 F. Supp. 3d 415, 434 (S.D.N.Y. 2014). In light of the above authority, there can be doubt that to rebut *Basic's* presumption, Defendants' must ***prove*** a lack of price impact by the alleged misrepresentation or omission. As in all civil litigation, the District Court correctly noted that the burden of proof is preponderance of the evidence. *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1136 (7th Cir. 2015). Yet irrespective of the proper standard of proof, once again Defendants did not even attempt to offer ***any*** affirmative proof via event study or otherwise, to carry their burden. Indeed, Defendants find themselves in the penultimate catch-22 by complaining that the district court did not require an event study to prove market efficiency but providing no event study to rebut the *Basic* presumption of price impact.

Thus, the district court did not shift any burden of persuasion here. Instead, it applied the burdens of persuasion exactly as Supreme Court precedent requires. DA-34. The Order expressly acknowledged that under *Halliburton II*, there may be cases where "the plaintiff has carried its burden to prove market efficiency, but that the evidence shows no price impact with respect to the specific misrepresentation challenged in the suit." DA-35 (quoting hypothetical from *Halliburton II*). However, it correctly held that this was not such a case.

The district court noted that Defendants had not shown a lack of price impact because they failed to demonstrate a lack of price maintenance by the

misrepresentations at issue. DA-36 (noting, among other things, that Defendants failed to provide a regression model or event study to support their assertions). Instead, Defendants ask this Court to adopt a standard whereby whenever a plaintiff's case is premised on a price maintenance theory, defendants could easily make a showing of a lack of price impact simply by showing that the stock price did not move on any of the alleged misstatement days. Defendants' nonsensical argument would remove any possibility for a plaintiff advancing a price maintenance theory to successfully invoke the fraud on the market presumption and would therefore effectively eradicate class certification in those instances.

Yet, *Halliburton II* itself allowed for a price maintenance theory of market inflation, noting that "*Basic* itself 'made clear that the [fraud-on-the-market] presumption . . . could be rebutted by appropriate evidence,' including evidence that the asserted misrepresentation (***or its correction***) did not affect the market price of the defendant's stock." *Halliburton Co.*, 134 S. Ct. at 2414 (emphasis added); *see also Glickenhaus & Co.,* 787 F.3d at 415, reh'g denied (July 1, 2015)("the movement of a stock price immediately after a false statement often tells us very little about how much inflation the false statement caused."). Thus, the district court did not err – and certainly did not create the need for immediate appellate review – by agreeing that "the fact that there was no stock price increase when the statements were made does not suggest a lack of price impact." (DA-44);

see also IBEW Local 98 Pension Fund v. Best Buy Co., Inc., No. 11-429 (DWF/FLN), 2014 WL 4746195 at *6 (D. Minn. Aug. 6, 2014); *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC,* 310 F.R.D. 69, 95 (S.D.N.Y. 2015). The district court was well within its discretion in following *Halliburton II* and other courts that have held that price impact can be demonstrated by a stock price decline once the truth comes out, particularly when, as here, "the misstatements simply served to maintain an already inflated stock price."

Nor does Defendants' argument find any support in the Supreme Court's statement that "any showing that severs the link between the alleged misrepresentation and the price received (or paid) by the plaintiff will be sufficient to rebut the presumption of reliance…" Pet. at 4, 11. Defendants suggest that *Halliburton II*'s "any showing" language is inconsistent with the district court's application of the preponderance of the evidence standard. Not so. As explained further below, because Defendants here have not ***shown*** the ***lack*** of price impact by reference to an event study or other affirmative evidence, they have simply failed to meet *Halliburton's* standard. Instead, Defendants argue that ***any*** admissible evidence that would indicate a lack of efficiency would suffice to rebut the *Basic* presumption. Pet. at 11. The *Basic* presumption would be of little utility indeed if it could be rebutted as a matter of law by the proffer of ***any*** contravening

evidence, no matter how frail. In any event, as demonstrated below, Defendants have failed to meet even the lightened standard they now advocate.

3. Defendants Have Failed to Show a Lack of Price Impact Under Any Standard.

Defendants criticize the district court for not considering "a single piece of evidence" when the reality is that ***Defendants did not proffer "a single piece of evidence" to rebut price impact***. As the district court recognized, unlike defendants in *Halliburton*, Defendants' purported expert here (Dr. Christopher James) had not "developed a market model and performed an event study to determine whether there was statistically significant price movement on the dates of the alleged misrepresentations and corrective disclosures." *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251 (N.D. Tex. 2015).[6]

Instead, Defendants advanced unsupported ***theories*** in an attempt to rebut price impact. First, Defendants concede that Dr. James' testimony rebutting price impact is based on "the Court's ruling that none of Defendants' alleged misstatements were material prior to Barclays' June 2012 statements about restoring its integrity after its settlement concerning LIBOR..." Pet. at 12-13. This self-serving mischaracterization of the MTD Order (Pet. at 8, 13) hardly qualifies as the actual proof *Halliburton II* requires. Indeed, as the district court confirmed in its Order, *it made no such ruling on materiality*. DA-47. ("the parties did not ask

[6] Dr. James does not mention the phrase "price impact" a single time in his report.

the Court to consider when statements became material, and I did not make any finding regarding this issue"). In fact, the MTD Order does not mention the LIBOR settlement announcement at all much less tie the materiality of any alleged misstatements to it. DA-83-126. In any event, Plaintiffs are not required to identify the point in time at which inflation entered Barclays ADS price. *See Glickenhaus & Co.,* 787 F.3d at 418, *reh'g denied* (July 1, 2015).

Defendants' next assertion, that they "presented evidence" that Barclays ADS price plummeted upon the corrective disclosure because of reasons other than the alleged fraud, is also false. Pet. at 13. As the district court noted, "[a]gain, [defendants] do not offer their own regression analysis to show that the price drop on the corrective disclosure date was not due to the alleged fraud." DA-42. Instead, Defendants offer a baseless ***hypothesis*** that the price decline resulted from investor concerns over regulatory scrutiny and litigation risk, which Defendants illogically deem unrelated to the fraudulent conduct alleged in this case, even though it is the very subject of the regulatory scrutiny and litigation risk to which they refer. Pet. at 13. Indeed, Plaintiffs allege that these concerns over regulatory scrutiny and litigation risk directly resulted from Defendants' undisclosed misconduct, therefore the share price decline resulting therefrom are recoverable by the Class. Defendants' ***arguments*** hardly rise to the level of proof required by *Halliburton II* to rebut *Basic's* presumption.

Regardless, citing *Halliburton I*, the district court correctly held that "Plaintiffs, of course, were under absolutely no duty to establish that the decline in price was "because of the correction to a prior misleading statement and that the subsequent loss could not otherwise be explained by some additional factors revealed then to the market." DA-43.

Thus, while they quibble with the district court over the proper standard for establishing a lack of price impact, Defendants fail to acknowledge that they've utterly failed to show lack of price impact under even the lax standard they propose. The district court therefore did not abuse its discretion in ruling, after a review of the briefing and a full evidentiary hearing, that Defendants did not meet their burden to show a lack of price impact to rebut the *Basic* presumption.

B. Defendants Fail to Identify Any Legal Question Regarding Which There is a Compelling Need for Immediate Resolution Pertaining to the *Affiliated Ute* Presumption of Reliance.

Next in their long line of hyperbolic arguments, Defendants incorrectly state that the district court applied *Affliated Ute* "in a manner that would make it applicable to almost all fraud cases." Pet. at 17. To the contrary. The district court properly held, consistent with its MTD Order, that "it is the material omissions, not the affirmative statements, that are the heart of this case." DA-23; *see also* DA-98 - 100. The district court explained (an explanation conveniently left out of the Petition) that because LX only accounted for a small fraction of Barclays'

business, it is the omitted facts of illegal and unethical conduct that a reasonable investor would have found material to its investment decision, a scenario unique to the facts of this case. *Id.; See also Dodona I, LLC v. Goldman, Sachs & Co.,* 296 F.R.D. 261, 270 (S.D.N.Y. 2014) (applying the *Affiliated Ute* presumption in a case involving both affirmative misstatements and omissions because "the theory behind the *Affiliated Ute* presumption ... is not undermined simply because a defendant makes misstatements at the same time it omits material information.")

C. Defendants Fail to Identify Any Legal Question Regarding Which There is a Compelling Need for Immediate Resolution Pertaining to *Comcast.*

There is no compelling legal issue to resolve with regard to *Comcast*'s application in private securities fraud cases. This Court has already clarified the standard and rejected the broad reading sought by Defendants. *See Roach*, 778 F.3d at 407. Indeed, Defendants acknowledge that *Roach* does not require Plaintiffs to "proffer a classwide model of damages to demonstrate predominance." If so, Defendants should have no complaint regarding any perceived deficiencies of said model as such a model is admittedly not required at this stage. Yet, Defendants nevertheless advance the absurdity that having proffered a model, it must be consistent with the alleged theory of liability or class certification is unwarranted. Defendants advance no support in this Circuit for such a proposition.

Regardless, the Court properly held that Plaintiffs' damages model aligned

with their theory of liability. *Id.* Specifically, having identified Plaintiffs' theory of the case-- that Defendants' false statements regarding LX artificially maintained its stock price, and that this inflation was removed following the June 26, 2014 corrective disclosure as reflected in the price drop that same day, the court then reviewed Dr. Nye's proposal of using an event study and the constant dollar method to calculate damages (typically employed in securities class actions). DA-45. The court then held that Plaintiffs' "proposed methodology fits their theory of the case and individualized damages issues will not predominate." DA-45.

Defendants' argument that Plaintiffs' model is not able to disaggregate damages from various alleged misstatements and disclosures is inappropriate at this stage. Particularly, Defendants argue that Dr. Nye's report failed to account for the fact that the degree of price inflation ***might*** have varied during the Class Period and the misstatements regarding protection from predatory traders ***might*** state a different theory of fraud than the misstatements regarding inappropriate order routing to Barclays' dark pool. Once again, Defendants substitute ***theory*** for ***proof***. Defendants have offered no proof that inflation varied during the Class Period. Moreover, contrary to Defendants' mischaracterizations, Plaintiffs allege one overarching fraud—that Defendants failed to disclose they consistently engaged in unethical conduct to the detriment of LX customers. The proposed damages model need only comport with *Plaintiffs'* theory of damages—not

Defendants' theory. Perhaps the greatest failure in Defendants' argument is that the issues they raise would not defeat predominance "because it would affect all class members in the same manner." (DA-45) Indeed, nothing in *Comcast* detracts from the fundamental principle underpinning both *Halliburton* and *Amgen* that in a class certification motion, the court must distinguish between issues that can be proven by means of common evidence or involve individualized proof, and issues that simply resolve the entire case on the merits. In the securities context, it is difficult to imagine how the measurement of damages could or would be made on an individualized basis, as damages are determined by changes in the market price, a price common to all potential class members. *See, e.g., In re Groupon, Inc. Sec. Litig.,* 2014 WL 5245387, at *2 (N.D. Ill. Sept. 23, 2014) (explaining that "*Comcast* was an antitrust class action brought by subscribers against the cable company and is inapposite in a securities fraud class action such as this").

Given that the district court aptly applied guidance from the Supreme Court and this Court to the record facts there is no cognizable "legal question about which there is a compelling need for immediate resolution." *See Hevesi v. Citigroup Inc*., 366 F.3d 70, 77 (2d Cir. 2004) (quotations omitted).

IV. CONCLUSION

Because defendants have failed to identify any appropriate basis for interlocutory review, their Rule 23(f) Petition should be denied.

Dated: February 29, 2016
New York, New York

Respectfully submitted,

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