No. 17-90024

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ST. LUCIE COUNTY FIRE DISTRICT FIREFIGHTERS' PENSION TRUST FUND, ET AL.,

Plaintiffs-Respondents,

v.

COBALT INTERNATIONAL ENERGY, INC., ET AL.,

Defendants-Petitioners.

ON PETITION FOR PERMISSION TO APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

PLAINTIFFS' ANSWER IN OPPOSITION TO DEFENDANTS' PETITION FOR PERMISSION TO APPEAL THE DISTRICT COURT'S JUNE 15, 2017 ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

ENTWISTLE & CAPPUCCI LLP
Andrew J. Entwistle
Vincent R. Cappucci
299 Park Avenue, 20th Floor
New York, NY 10171
Tel: (212) 894-7200

AJAMIE LLP
Thomas R. Ajamie
Pennzoil Place – South Tower
711 Louisiana, Suite 2150
Houston, TX 77002
Tel: (713) 860-1600

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
David R. Stickney
Jonathan D. Uslaner
12481 High Bluff Drive, Suite 300
San Diego, CA 92130
Tel: (858) 793-0070

Case No. 17-90024

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ST. LUCIE COUNTY FIRE DISTRICT FIREFIGHTERS' PENSION TRUST FUND, ET AL.

Plaintiffs-Respondents,

v.

COBALT INTERNATIONAL ENERGY, INC., ET AL.,

Defendants-Petitioners.

ON PETITION FOR PERMISSION TO APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

A. PLAINTIFFS-RESPONDENTS AND CLASS: GAMCO Global Gold, Natural Resources & Income Trust; GAMCO Natural Resources, Gold & Income Trust; St. Lucie County Fire District Firefighters' Pension Trust Fund; Fire and Police Retiree Health Care Fund, San Antonio; Sjunde AP-Fonden; Universal Investment

Gesellschaft m.b.H.; and all persons and entities who purchased or otherwise acquired Cobalt International Energy, Inc. securities between March 1, 2011 and November 3, 2014, inclusive, and were damaged thereby.

David R. Stickney
Jonathan D. Uslaner
Brandon Marsh
Jenny Barbosa
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
12481 High Bluff Drive, Suite 300
San Diego, CA 92130

Andrew J. Entwistle
Vincent R. Cappucci
Jonathan H. Beemer
Arthur V. Nealon
Joshua K. Porter
ENTWISTLE & CAPPUCCI LLP
299 Park Avenue, 20th Floor
New York, NY 10171

Thomas R. Ajamie
AJAMIE LLP
Pennzoil Place – South Tower
711 Louisiana, Suite 2150
Houston, TX 77002

Christopher F. Moriarty
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464

Johnston de Forest Whitman, Jr.
Naumon A. Amjed
Stuart L. Berman
Joshua Materese
KESSLER TOPAZ MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087

Gerald T. Drought
Frank B. Burney
MARTIN & DROUGHT PC
300 Convent St., Suite 2500
San Antonio, TX 78205

Robert D. Klausner
Bonni Jensen
KLAUSNER KAUFMAN JENSEN & LEVINSON
10059 Northwest 1st Court
Plantation, FL 33324

/s/ Thomas R. Ajamie
Thomas R. Ajamie
Attorney for Plaintiffs-Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

I. INTRODUCTION

Defendants' rote Petition seeking interlocutory review ignores the carefully-reasoned decision by Senior United States District Court Judge Nancy F. Atlas that analyzed over 1,600 pages of expert reports and related submissions in light of settled Supreme Court and Fifth Circuit precedent in certifying the Class here, and ignores that "interlocutory review of a class certification order is strongly disfavored, as it disrupts and delays the trial court proceedings." *Downes v. Rivera*, 2015 WL 9022001, at *1 (10th Cir. Dec. 8, 2015).

To justify an interlocutory appeal in this context, Defendants must demonstrate both that the District Court's certification of the Class rested on "a novel legal question . . . of fundamental importance to the development of the law of class actions" and that such novel question "is likely to escape effective review after entry of final judgment." *In re Sumitomo Copper Litig.*, 262 F.3d 134, 140 (2d Cir. 2001); *see also Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007). Defendants' putative "price impact" and "tracing" arguments fail on both counts.

First, the trilogy of Supreme Court cases—*Halliburton, Amgen*, and *Halliburton II*—shows that even the enormous amount of lipstick defendants put on their loss-causation and tracing arguments does not make them novel or appropriate for interlocutory consideration. Put another way, calling a loss-causation argument

a "price-impact" argument does not make it any less a loss-causation argument with "no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory." *Erica P. John Fund, Inc. v. Halliburton Co.* ("*Halliburton I*"), 563 U.S. 804, 813-14 (2011). Nor does it change the fact that such questions of loss causation and tracing, if anything, present questions common to the entire Class and support class certification. *See id.* at 812-13. The Supreme Court reinforced this holding in *Amgen*, reiterating that investors seeking class certification need not prove the elements of their claim at the class-certification stage, including falsity, materiality, or loss causation. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 133 S. Ct. 1184, 1196 (2013). Likewise, in *Halliburton II*, the Supreme Court made clear that, while a defendant may rebut the fraud-on-the-market presumption by showing there is a complete absence of any price impact—a showing Judge Atlas specifically found Defendants failed to make—courts are not permitted to consider issues of loss causation at the class-certification stage. *Halliburton Co. v. Erica P. John Fund, Inc.* ("*Halliburton II*"), 134 S. Ct. 2398, 2416-17 (2014).

Following the Supreme Court's decision in *Halliburton I* and its progeny, this Court also addressed and rejected the same loss causation argument that Defendants attempt to ascribe novelty to here—concluding it was neither novel nor incapable of resolution at a later stage in the proceedings. *Ludlow v. BP, P.L.C.*, 800 F.3d 674,

687 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1824 (2016). In *Ludlow*, this Court reviewed the district court's finding that "Plaintiffs' characterization of certain days as corrective events, even if erroneous, does not prevent class certification." *In re BP P.L.C. Sec. Litig.*, 2014 WL 2112823, at *6 (S.D. Tex. May 20, 2014). This Court agreed with the district court that "[a]ddressing the corrective events question" at the class-certification stage would be improper and inconsistent with the Supreme Court's directions:

> Addressing the corrective events question at the class certification stage raises two problems. First, it is in tension with *Halliburton I*'s holding that no proof of loss causation is required at the class certification stage. . . . Second, in *Amgen*, the Court made clear that questions "common to the class" need not be proved at the class certification stage, so long as they are capable of common resolution. Here, the question of whether certain corrective disclosures are linked to the alleged misrepresentations in question is undeniably common to the class, and is "susceptible of a class-wide answer."

Ludlow, 800 F.3d at 687-88. *Ludlow* shows that Judge Atlas correctly concluded that the purportedly "novel" questions of "price impact" and "tracing" that Defendants claim require immediate review are not novel, are not properly considered at class certification, and are in any event issues common to the Class. Defendants' Petition should therefore be denied in its entirety.

II. PROCEDURAL BACKGROUND

On May 1, 2015, Plaintiffs filed their Complaint alleging violations of (i) Sections 10(b) and 20(a) of the Exchange Act, and (ii) Sections 11, 12(a), and 15 of the Securities Act. ECF No. 72. Plaintiffs filed an Amended Complaint on March 15, 2017, adding a claim for insider trading against certain Defendants under Section 20A of the Exchange Act. ECF No. 200 ("Operative Complaint"). The Operative Complaint alleges that Defendants made material misstatements and omissions in Cobalt's Class Period SEC filings and securities offering materials concerning, among other things, (i) the ownership of Cobalt's business partners in Angola—*i.e.*, Nazaki Oil & Gaz, S.A. ("Nazaki") and Alper Oil, Limitada ("Alper")—by Angolan government officials, and (ii) the lack of oil in Cobalt's Lontra and Loengo wells in Angola.

A. Defendants' Motions To Dismiss

On June 30, 2015, Defendants filed motions to dismiss the original Complaint, which the District Court largely denied on January 19, 2016. ECF Nos. 81-87, 108. As Judge Atlas explained in denying Defendants' motions to dismiss, the Complaint properly alleged that Cobalt and its executives "misrepresented their knowledge that Angolan government officials owned Nazaki and Alper," as well as "their knowledge regarding the Lontra and Loengo wells." ECF No. 108 at 10-11. Specifically, the District Court found Plaintiffs properly alleged Cobalt and its top

executives refuted any knowledge that their Angolan partners were owned by Angolan government officials when they had facts to the contrary. *Id.*; *see also* ECF No. 200 at ¶¶ 71-82. Judge Atlas also found the Complaint stated a claim that Cobalt and its executives misrepresented the Lontra and Loengo wells as being "large [and] oil focused" with millions in oil barrel potential while knowing that "Lontra was primarily gas, to which Cobalt had no rights, and that there 'was not even a remote chance' of success in the Loengo well." ECF No. 108 at 11-12.

Judge Atlas also rejected many of the same arguments Defendants raised in opposing class certification and in this Petition, finding that "the factfinder could reasonably infer that it is more probable than not that the corrective disclosures caused at least a substantial portion of [Cobalt's stock] price decline." *Id.* at 17. The District Court specifically noted Cobalt's stock price declined by more than 21% when it admitted on December 1, 2013, that Lontra was primarily a gas-producing well. *Id*. at 16; *see also* ECF No. 200 at ¶¶ 202-03, 323. Judge Atlas further acknowledged that Cobalt's stock price fell by more than 11% when Cobalt revealed on August 5, 2014, that the SEC had elevated its investigation into Nazaki's ownership by issuing a Wells Notice to the Company. ECF No. 108 at 16-17; *see also* ECF No. 200 at ¶¶ 119, 206-07. The Court similarly noted Cobalt's stock price declined 11.5% after it announced on November 4, 2014, that Loengo was a "dry well." ECF No. 108 at 17; *see also* ECF No. 200 at ¶¶ 209-11, 336.

Defendants asked the District Court to certify the January 19, 2016 motion to dismiss order for interlocutory review, which Judge Atlas correctly denied, explaining that the order raised no "novel" or "unsettled" issues. ECF No. 125.

B. Defendants' Motion To Dismiss The Section 20A Claim

On January 30, 2017, Plaintiffs sought leave to amend their Complaint against the financial institutions that had founded Cobalt (the "Controlling Entity Defendants"). ECF No. 191. The Controlling Entity Defendants received approximately $4 billion of insider sale proceeds based on their Cobalt stock sales while in possession of material non-public information concerning Nazaki's Angolan government ownership and the lack of oil in the Loengo well. ECF No. 200 at ¶¶ 289-338. These Defendants unsuccessfully opposed the amendment and unsuccessfully moved to dismiss the Section 20A claims. In denying Defendants' motion to dismiss the Section 20A claims, Judge Atlas found that Plaintiffs properly alleged Defendants "sold Cobalt stock while in possession of material, undisclosed information regarding the ownership of Nazaki and the likelihood that drilling for oil in Loengo would be unsuccessful." ECF No. 243 at 9.

C. Class Certification

On November 2, 2016, Plaintiffs filed their Motion for Class Certification and Appointment of Class Representative and Class Counsel ("Motion for Class Certification"). ECF No. 163. In support of Plaintiffs' Motion for Class

Certification, Plaintiffs submitted the expert report of Michael L. Hartzmark, Ph.D., a highly-qualified economist and former professor at the University of Michigan. Dr. Hartzmark conducted a traditional economic event study, which demonstrated the efficiency of the market for Cobalt securities, and statistically significant price declines immediately following each of the alleged corrective disclosures. ECF No. 165-1 at 44.

The record also included evidentiary material from depositions taken by the parties, including that of Dr. Hartzmark and Plaintiffs' examination of Lucy P. Allen, M. Phil., Defendants' proffered expert. Plaintiffs' Motion for Class Certification was fully briefed and submitted to the District Court on May 26, 2017. ECF No. 239.

On June 15, 2017, Judge Atlas issued a twenty-page decision granting Plaintiffs' Motion for Class Certification. ECF No. 244. The District Court carefully considered the voluminous record—which included over 1,600 pages of expert reports and documentary evidence—and addressed each element of Rule 23(a) and Rule 23(b)(3). *Id.* at 5-18. Judge Atlas's class-certification rulings were made in the context of the conclusions detailed in her decision on Defendants' first motion to dismiss, holding that the ultimate trier of fact could reasonably infer at least a portion of the Cobalt stock price declines was caused by Defendants'

misconduct. Her findings and conclusions also reflect detailed citations to applicable Supreme Court and Fifth Circuit precedents. *See generally id*.

In particular, applying the well-settled approach described in *Basic Inc. v. Levinson*, 485 U.S. 224, 241-49 (1988), Judge Atlas weighed the experts' opinions on "market efficiency" and concluded that Plaintiffs had shown by a preponderance of the evidence that the market for Cobalt's securities was efficient during the Class Period and, accordingly, the "fraud-on-the-market" presumption applies. ECF No. 244 at 13-14. Next, adhering to the settled approach outlined in *Halliburton I*, the District Court noted the undisputed 11% and 21% Cobalt stock price declines following each of the respective corrective disclosures, and determined that Defendants failed to rebut the fraud-on-the-market presumption with evidence of an "absence of price impact." *Id.* at 12-16. Specifically, Judge Atlas found Defendants failed to present "evidence . . . 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 15-16.

The District Court then considered, and rejected, Defendants' remaining arguments. First, as Judge Atlas explained, Defendants' "statute-of-repose" defense presents a *common* question that, if anything, supports class certification. ECF No. 244 at 17-18. The District Court likewise found that Defendants' speculative concerns about potential difficulties in "tracing" shares to particular stock offerings

did not predominate or outweigh the common issues and benefits of proceeding on a class-wide basis, rather than through thousands of individual actions. *Id.* at 11-12. Accordingly, the District Court certified the Class.

On June 29, 2017, Defendants filed their Petition requesting immediate, interlocutory review of Judge Atlas's Order, arguing only that the Order raises "novel" issues.

III. STANDARD OF REVIEW

"As a general matter, interlocutory review of a class certification order is strongly disfavored, as it disrupts and delays the trial court proceedings." *Downes*, 2015 WL 9022001, at *1. A grant of review under Rule 23(f) "should be a rare occurrence," *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 955 (9th Cir. 2005), and "the standards of Rule 23(f) will rarely be met," *Sumitomo*, 262 F.3d at 140. "[I]ssues that would result at most in a modification of a certification order or whose ultimate resolution will depend on further factual development will be unlikely candidates for Rule 23(f) appeal." *Id.*

IV. THE PETITION DOES NOT RAISE NOVEL OR UNSETTLED QUESTIONS OF LAW

Interlocutory review of a district court's certification decision is inappropriate unless such decision rests on "a novel legal question . . . of fundamental importance to the development of the law of class actions and it is likely to escape effective

review after entry of final judgment." *Sumitomo*, 262 F.3d at 140; *see also Regents of Univ. of Cal.*, 482 F.3d at 379.

Mere "areas of ambiguity in the law of class actions that are relevant to [petitioner's] case" are insufficient to warrant interlocutory appeal under Rule 23(f), and the petitioner must demonstrate that the resolution of the unsettled issue is "likely to evade end-of-the-case review." *In re Johnson*, 760 F.3d 66, 71-72 (D.C. Cir. 2014). Limiting interlocutory review in such manner prevents "the needless erosion of the final judgment rule and the policy values it ensures, including efficiency and deference." *Sumitomo*, 262 F.3d at 140.

The District Court's well-reasoned application of controlling law does not raise any "novel" issues or "unsettled" legal questions that necessitate immediate appellate review.

A. The Supreme Court And The Fifth Circuit Have Already Answered Defendants' "Novel" Question

It is settled that questions of loss causation—including whether an alleged corrective disclosure is "corrective"—are irrelevant to the Rule 23 inquiry and are to be addressed at summary judgment and trial. Defendants have failed to identify a single decision from any court that has ever found after the Supreme Court's decision, almost six years ago in *Halliburton I*, that it is proper at the class certification stage for a district court to determine whether an alleged corrective disclosure was, in fact, "corrective." Meanwhile, as discussed below, the Supreme

Court, the Fifth Circuit, and district courts around the country have unanimously held that such a loss-causation inquiry is inappropriate at the class-certification stage.

In its seminal *Halliburton I* decision, the Supreme Court made clear that questions of loss causation, including whether a corrective disclosure is truly "corrective," are not relevant to the Rule 23 inquiry. The Supreme Court considered an order denying class certification, in which the district court undertook a review of "the alleged misrepresentations and corrective disclosures" and, based on that review, denied class certification. *Halliburton I,* 563 U.S. at 808. The Supreme Court reversed, holding that "[l]oss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory." *Id.* at 813. Rather, "[l]oss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock." *Id.* at 812. The Supreme Court further explained that questions of loss causation present common questions to the entire class and support class certification. *See id.* at 812-13.

The Supreme Court reinforced this holding in its subsequent decisions, including *Amgen* and *Halliburton II*. As the Supreme Court reiterated in *Amgen*, investors seeking class certification do not need to prove the elements of their claim at the class-certification stage, including falsity, materiality, or loss causation.

133 S. Ct. at 1196. Likewise, in *Halliburton II*, the Supreme Court made clear that, while a Defendant may rebut the fraud-on-the-market presumption when there is a complete absence of any price impact, courts are not permitted to consider issues of loss causation at the class-certification stage. 134 S. Ct. at 2416-17.

Following *Halliburton I* and its progeny, this Court addressed and rejected the same loss-causation argument that Defendants claim presented "novel" questions to the District Court. *Ludlow*, 800 F.3d at 687-88. As this Court explained in *Ludlow*, "[a]ddressing the corrective events question at the class certification stage" runs afoul of "*Halliburton I*'s holding that no proof of loss causation is required at the class certification stage," as well as the Supreme Court's holding in *Amgen*, which "made clear that questions 'common to the class' need not be proved at the class certification stage, so long as they are capable of common resolution." *Id*.

In a footnote, Defendants contend that *Ludlow* is inapplicable because "it dealt with loss causation, not price impact." Pet. at 16 n.3. Defendants are wrong. The *Ludlow* Court specifically addressed Defendants' arguments "about the 'fit' between the corrective event and the misstatements," and determined that "the tightness of that fit is a question common to the class, for which *Amgen* did not require proof at the certification stage." *Ludlow*, 800 F.3d at 688. The Court concluded "that the district court did not err in refusing to resolve concerns about the inclusion of certain corrective events at the class certification stage." *Id.*

Moreover, there is no confusion or disagreement in this Circuit, or in any other Circuit, as to the answer to Defendants' purportedly "novel" corrective-disclosure question. Courts in this Circuit, and in every other Circuit, agree that whether an alleged corrective disclosure actually corrects a prior misstatement is a loss-causation issue irrelevant to class certification.[1] Meanwhile, Defendants have not identified a single court post-*Halliburton I* that has assessed the "correctiveness" of corrective disclosures at class certification.

Instead of addressing the pertinent authority, Defendants assert that the Court should grant their Petition because the Court previously—almost two years ago—granted a petition on this issue. But there has been no confusion in this Circuit or anywhere else over the past two years. Rather, courts have uniformly held that,

---

[1] *See, e.g.*, *Marcus v. J.C. Penney Co., Inc.*, 2017 WL 907996, at *2-3 (E.D. Tex. Mar. 8, 2017) ("the class certification stage is not the proper procedural stage for a court to determine as a matter of law whether the relevant disclosures were actually corrective"); *Burges v. Bancorpsouth, Inc.*, 2017 WL 2772122, at *10 (M.D. Tenn. June 26, 2017) (explaining that the issue of whether a "decline in stock price after the corrective disclosure likely reflects other factors besides the corrective disclosure" is a loss causation issue that is not appropriate for class certification); *Thorpe v. Walter Inv. Mgmt. Corp.*, 2016 WL 4006661, at *14 (S.D. Fla. Mar. 16, 2016) (a defendant may not rebut the *Basic* presumption with merits-based evidence that theBalleged corrective disclosures are not in fact corrective of a prior misstatement); *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, 260 (N.D. Tex. 2015) ("[b]ased on the Supreme Court's discussion in *Halliburton I, Amgen*, and *Halliburton II*, . . . class certification is not the proper procedural stage for the Court to determine, as a matter of law, whether the relevant disclosures were corrective").

consistent with Supreme Court precedent and *Ludlow*, the issue Defendants raise here is one of loss causation and may not be addressed at class certification. In accepting that petition two years ago, Justice Dennis explained he did so "reluctantly" and with the recognition that "the Supreme Court's precedent and [the Fifth Circuit] case law support[ed] the district court's holding" that the question of whether a corrective disclosure is truly "corrective" presents a common question that, if anything, supports class certification. *Erica P. John Fund, Inc. v. Halliburton Co.*, 2015 WL 10714013, at *1 (5th Cir. Nov. 4, 2015). Justice Dennis further explained that, "[a]s to the corrective nature of the disclosure, . . . '[i]n no event will the individual circumstances of particular class members bear on the inquiry.'" *Id.* at *2 (quoting *Amgen*, 568 U.S. 455, 133 S. Ct. at 1191).[2]

In an effort to manufacture a "novel" question, Defendants point to this Court's 2010 decision in *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.* ("*AMSF I*"), 597 F.3d 330 (5th Cir. 2010), *vacated & remanded by*

[2] Defendants also reference *Marcus v. J.C. Penney Co.*, No. 17-90008, Doc. 00513964558 (5th Cir. Apr. 24, 2017). However, unlike here, that case involved the additional issue of the potential unsettled area of law regarding whether, in attempting to rebut the *Basic* presumption, a defendant bears the burden of production or persuasion. *See Marcus v. J.C. Penney Co., Inc.*, 2016 WL 8604331, at *11-12 n.1 (E.D. Tex. Aug. 29, 2016) (report and recommendation regarding class certification, discussing opinions regarding a defendant's rebuttal burden). That issue is not before the Court here.

Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804 (2011). According to Defendants, *AMSF I* supposedly supports their view that courts should evaluate corrective disclosures at the class-certification stage. But *AMSF I* is the very loss-causation decision the Supreme Court reversed in *Halliburton I*. And as *Halliburton I* and its progeny make clear, whether an alleged corrective disclosure actually corrects a prior misstatement is a substantive loss-causation issue "common to the class" that is capable of class-wide resolution, which need not be resolved at the class-certification stage. *See Amgen*, 133 S. Ct. at 1197; *see also Ludlow*, 800 F.3d at 688 ("[T]he question of whether certain corrective disclosures are linked to the alleged misrepresentations in question is undeniably common to the class, and is 'susceptible of a class-wide answer.'") (quoting *Amgen*, 133 S. Ct. at 1196).

Defendants' reliance on *Greenberg v. Crossroads Systems, Inc.*, 364 F.3d 657 (5th Cir. 2004) and *In re Moody's Corp. Securities Litigation*, 274 F.R.D. 480 (S.D.N.Y. 2011), are also misplaced. First, both decisions predate the Supreme Court's decisions in *Halliburton I*, *Amgen*, and *Halliburton II*. Moreover, *Greenberg* was decided at the summary-judgment stage—not the class-certification stage. *Greenberg*, 364 F.3d at 659. Likewise, in *Moody's*, the district court relied on *In re Omnicom Group Inc. Securities Litigation*, 597 F.3d 501 (2d Cir. 2010), a summary-judgment opinion, to support its substantive analysis of the alleged corrective disclosure. *Moody's*, 274 F.R.D. at 487-88. Thus, even "[c]ourts that

anticipated *Halliburton II*'s allowance of price-impact rebuttals" (Pet. at 12) recognized that evaluation of whether an alleged corrective statement in fact corrected a prior misstatement is a merits-based, loss-causation inquiry to be addressed at summary judgment or trial, and not at the class-certification stage. *See Ludlow*, 800 F.3d at 687. These prior decisions do not raise any "novel" issue or conflict in any way with this Court's later decision in *Ludlow*.

B. The District Court's Articulation Of The Relevant Standard Does Not Raise Any Novel Issues

Judge Atlas quoted and applied the correct (and well-settled) standard regarding a defendant's ability to rebut the *Basic* presumption. ECF No. 244 at 15. As the Court explained, "the presumption can be rebutted by evidence presented by the defendant 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*. (quoting *Halliburton II*, 134 S. Ct. at 2408). With the benefit of Dr. Hartzmark's report establishing statistically significant price drops following each alleged corrective disclosure (*i.e*., April 15, 2012: 11% decline; December 1, 2013: 21% decline; August 5, 2014: 11% decline; and November 4, 2014: 11% decline), Judge Atlas considered and rejected Defendants' contention that they rebutted the *Basic* presumption with their expert's competing opinion that attempted to undermine Dr. Hartzmark's analysis. *Id.* at 15-16; *see also* ECF No. 165-1 at 7. Indeed, the District Court recognized that the opinion of Defendants' expert was

largely undermined by her own deposition testimony. ECF No. 244 at 14 ("Defendants' own expert was unwilling or unable to state that the market for Cobalt Notes was not efficient.").

In their Petition, Defendants ignore the District Court's recitation of the correct legal standard and holding that "Defendants have not demonstrated that there was no price impact from the challenged disclosures and have failed to rebut the fraud-on-the-market presumption." ECF No. 244 at 16. Rather, Defendants isolate and wrench from context the District Court's additional, indisputably-correct, observation that "Defendants do not provide an alternate explanation for these significant declines in the Cobalt stock price," and pretend that the District Court imposed such a requirement for all cases. *Id.* Rather, the language upon which Defendants seize reflects nothing more than the District Court's view of the respective weight of the parties' evidence—precisely what is required of a court evaluating a motion for class certification under Rule 23.

Under *Halliburton II*, a defendant may offer evidence in opposition to class certification that rebuts the *Basic* presumption of price impact including, for example, by providing an expert analysis showing that a price drop associated with a corrective event is not statistically significant. *Halliburton II*, 134 S. Ct. at 2405; *see also Strougo v. Barclays PLC*, 312 F.R.D. 307, 324-25 (S.D.N.Y. 2016). Defendants and their proffered expert here, however, did not perform such an

independent analysis, but instead attempted to criticize Dr. Hartzmark's analysis of these issues. *See*, *e.g.*, ECF No. 206 at 19-20.

Consistent with *Halliburton II*, courts have routinely recognized that Defendants cannot prevail in rebutting the fraud-on-the-market presumption where, as here, they do not provide evidence of an absence of statistically significant price declines following the corrective disclosures. *See*, *e.g.*, *Strougo*, 312 F.R.D. at 326 (finding defendants failed to establish a lack of price impact where they did "not offer their own regression analysis to show that the price drop on the corrective disclosure date was not due to the alleged fraud"); *In re Goldman Sachs Grp., Inc. Sec. Litig.*, 2015 WL 5613150, at *7 (S.D.N.Y. Sept. 24, 2015) (finding defendants failed to establish a lack of price impact where they did not "demonstrate that no part of the decline was caused by the corrective disclosure"). Judge Atlas's decision is sound, supported by the evidentiary record, including the expert opinions and event studies of a trained economist, and does not raise any "novel" issues—let alone, one necessitating a disruptive and disfavored immediate appellate review.

C. The District Court's Decision On Tracing Does Not Raise Any Novel Issues

The District Court correctly found that tracing common stock purchases to the defective January 4, 2011 Cobalt registration statement "does not preclude class certification" under Rule 23. ECF No. 244 at 12. This finding presents no "novel" or unsettled question of law warranting immediate appellate review. And, contrary

to Defendants' assertion, the District Court did not "fail[] to analyze traceability issues," or ignore the requirement that Plaintiffs trace their stock purchases to the registration statement to assert claims under Section 11 of the Securities Act. *See id*. at 11 (explaining that '"only those who can trace their shares to the allegedly misleading registration statement' can recover on a Section 11 claim.").[3]

Rather, the District Court properly determined that any such tracing inquiry is a merits issue that need not be considered at the class-certification stage. ECF No. 244 at 11-12. This finding is not contrary to any authority in this Circuit, and is fully supported by well-settled case law in other jurisdictions. *See*, *e.g*., *Wallace v. IntraLinks*, 302 F.R.D. 310, 319 (S.D.N.Y. 2014) ("tracing is a merits issue that the court need not consider at the class certification stage"); *In re Smart Techs., Inc. S'holder Litig.*, 295 F.R.D. 50, 61 (S.D.N.Y. 2013) (same); *United Food & Commercial Workers Union v. Chesapeake Energy Corp*., 281 F.R.D. 641, 657 (W.D. Okla. 2012) (same); *Schwartz v. Celestial Seasonings, Inc.*, 178 F.R.D. 545, 557 (D. Colo. 1998) (same).

---

[3] The District Court's ruling is also consistent with *Krim v. pcOrder.com*, 402 F.3d 489 (5th Cir. 2005). *Krim* addressed the threshold issue of lead plaintiffs' Section 11 standing, not predominance under Rule 23(b)(3). But Judge Atlas found "Plaintiffs adequately allege that they purchased their shares from the Underwriter Defendants in the public offerings, rather than on a secondary market." *See* ECF No. 108 at 28. Defendants cannot contest Plaintiffs' standing to assert Section 11 claims based on Cobalt's stock offerings.

Nor did the District Court's ruling "ignore[]" the decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), as Defendants contend. *Comcast*, which the District Court specifically cited in its decision, was an antitrust case that did not address tracing or the certification of Section 11 claims. While *Comcast* notes that legal and factual issues may be considered in the Rule 23 analysis, the Supreme Court has made clear that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen*, 133 S. Ct. at 1194-95. Indeed, Defendants cite no Circuit authority *requiring* district courts to assess tracing in order to find that common questions predominate for Section 11 class claims. If anything, the opposite is true. *See Wallace*, 302 F.R.D. at 319 (post-*Comcast* decision holding tracing for Section 11 claim is a merits issue not to be considered at class certification); *see also In re Deepwater Horizon*, 739 F.3d 790, 805-06 (5th Cir. 2014) (citing *Amgen*, rejecting "an evidentiary inquiry into the Article III standing of absent class members during class certification").

Simply put, tracing is by its nature a merits issue common to all Section 11 claims that is properly resolved at a later stage of the proceedings. It does not predominate over the core common questions of whether Defendants' stock offering materials contained untrue statements or omissions of material fact in violation of Section 11. Determining Defendants' liability for these material misstatements and omissions is subject to common proof, and will apply to all Section 11 Class

members equally. Thus, the predominance of these common questions is sufficient, standing alone, to support the District Court's certification of the Section 11 stock Class. *See Amgen*, 133 S. Ct. at 1199. Because tracing presents no novel or unsettled question of law, immediate appellate review is unwarranted.[4]

V. CONCLUSION

For the foregoing reasons, Defendants' Petition should be denied.

Dated: July 10, 2017

Respectfully submitted,

AJAMIE LLP

By: */s/ Thomas R. Ajamie*
Thomas R. Ajamie

[4] Likewise, the statute of repose argument conditionally presented by Defendants raises no novel or unsettled issue of law that justifies immediate appellate review. The Supreme Court's decision in *California Public Employees' Retirement System v. ANZ Securities, Inc.* ("*CalPERS*"), 2017 WL 2722415 (U.S. June 26, 2017) has no bearing on this case. *CalPERS* found only that the Securities Act statute of repose is not tolled for an *individual* opt-out suit filed *after* the repose period has expired. *See id*. at *4 ("Whether [a] later, separate suit was also timely is the controlling question."). It did not address whether the Securities Act statute of repose bars Rule 23 certification of a timely filed class action—the issue decided by the District Court here. The District Court has correctly determined that the Securities Act claims are not barred by the three-year statute of repose, and it previously rejected Defendants' efforts to seek interlocutory review of this issue, which they now improperly bootstrap to this Rule 23(f) Petition. *See*, *e.g.*, ECF No. 108 at 23 (finding that "[b]ecause [Plaintiff] St. Lucie had standing to sue based on the January 2011 Registration Statement, it had standing to assert class-based claims for all purchasers of securities pursuant to that Registration Statement," including the February 2012 offering, and timely filed those claims on behalf of the Class) (emphasis added); ECF No. 125 at 13-14 (denying interlocutory appeal of timeliness of Securities Act claims). Defendants' erroneous contention otherwise provides no basis to review the District Court's class certification ruling.

Attorney-in-Charge
(Texas Bar No. 00952400)
Pennzoil Place - South Tower
711 Louisiana, Suite 2150
Houston, TX 77002
Telephone: (713) 860-1600
Facsimile: (713) 860-1699
E-mail: tajamie@ajamie.com

Liaison Counsel for the Class

ENTWISTLE & CAPPUCCI LLP
Andrew J. Entwistle
(Texas Bar No. 24038131)
Vincent R. Cappucci
Arthur V. Nealon
Jonathan H. Beemer
Joshua K. Porter
299 Park Avenue, 20th Floor
New York, NY 10171
Telephone: 212-894-7200
Facsimile: 212-894-7272
E-mail: aentwistle@entwistle-law.com
E-mail: vcappucci@entwistle-law.com
E-mail: jbeemer@entwistle-law.com

Counsel for Class Representatives GAMCO Global Gold, Natural Resources & Income Trust and GAMCO Natural Resources, Gold & Income Trust and Co-Lead Counsel for the Class

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
David R. Stickney
Jonathan D. Uslaner
Brandon Marsh
Jenny Barbosa
12481 High Bluff Drive, Suite 300
San Diego, CA 92030-3582
Telephone: (858) 793-0070

Facsimile: (858) 793-0323
E-mail: davids@blbglaw.com
E-mail: jonathanu@blbglaw.com
E-mail: Brandon.Marsh@blbglaw.com
E-mail: Jenny.Barbosa @blbglaw.com

Counsel for Class Representatives St. Lucie County Fire District Firefighters' Pension Trust Fund and Fire and Police Retiree Healthcare Fund, San Antonio and Co-Lead Counsel for the Class

MOTLEY RICE LLC

Christopher Moriarty
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464
Telephone: (843) 216-9245
Facsimile: (843) 216-9450
E-mail: cmoriarty@motleyrice.com

Counsel for Class Representative Universal Investment Gesellschaft m.b.H.

KESSLER TOPAZ MELTZER & CHECK, LLP

Johnston de Forest Whitman, Jr.
Naumon A. Amjed
Joshua Materese
280 King of Prussia Road
Radnor, PA 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056
E-mail: jwhitman@ktmc.com
E-mail: namjed@ktmc.com
E-mail: jmaterese@ktmc.com

Counsel for Class Representative Sjunde AP-Fonden

KLAUSNER KAUFMAN JENSEN & LEVINSON
Robert D. Klausner
Bonni Jensen
10059 Northwest 1st Court
Plantation, FL 33324
Telephone: (954) 916-1202
Facsimile: (954) 916-1232

Additional Counsel for Class Representative St. Lucie County Fire District Firefighters' Pension Trust Fund

MARTIN & DROUGHT, P.C.
Gerald T. Drought
Frank B. Burney
300 Convent St.
Bank of America Plaza, 25th Floor
San Antonio, TX 78205-3789
Telephone: (210) 227-7591
Facsimile: (210) 227-7924

Additional Counsel for Class Representative Fire and Police Retiree Health Care Fund, San Antonio

CERTIFICATE OF SERVICE

I certify that on July 10, 2017, a true and correct copy of the foregoing Plaintiffs' Answer in Opposition to Defendants' Petition for Permission to Appeal the District Court's June 15, 2017 Order Granting Plaintiffs' Motion for Class Certification was filed electronically through the CM/ECF system of the United States Court of Appeals for the Fifth Circuit. Under Fifth Circuit Rule 25.2.5, the Court's Notice of Docket Activity constitutes service on all Filing Users, including counsel of record for all parties to this appeal.

/s/ Thomas R. Ajamie
Thomas R. Ajamie
Attorney for Plaintiffs-Respondents

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This answer in opposition complies with the type-volume limitation of FED. R. APP. P. 5(c)(1) because this brief contains 5,159 words as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by FED. R. APP. P. 32(f) and Fifth Circuit Rule 5.

2. This answer in opposition complies with the typeface requirements of FED R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14pt font.

/s/ Thomas R. Ajamie
Thomas R. Ajamie
Attorney for Plaintiffs-Respondents