Case No. _________

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

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

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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. LEAD 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.

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QUESTIONS PRESENTED

(1) Whether, to rebut the presumption of reliance at the class-certification stage, a defendant in a federal securities class action

(a) may show that the disclosure preceding a stock-price decline did not correct any alleged misrepresentation, and

(b) must establish an alternative explanation for a stock price decline following an alleged corrective disclosure?

(2) Whether a district court must consider at the class-certification stage whether the need to individually trace each purchaser's stock to a challenged registration statement defeats predominance in a case under the Securities Act of 1933 ("Securities Act")?

CONDITIONAL QUESTION PRESENTED

(1) Whether a district court may certify a class for claims barred by the statute of repose, particularly given the Supreme Court's recent *California Public Employees' Retirement System v. ANZ Securities, Inc.*, No. 16-373, 2017 WL 2722415 (U.S. June 26, 2017) ("*CalPERS*") decision?[1]

[1] Since the district court issued its class certification order, the Supreme Court decided *CalPERS*, holding that the Securities Act's statute of repose is not subject to equitable tolling. That holding decisively supports Defendants' argument that a Securities Act class could not be certified because the claims of unnamed class members were barred by the statute of repose. Defendants intend to present *CalPERS* to the district court but, in an abundance of caution, also conditionally raise it here.

INTRODUCTION

This case presents a class-certification question that this Court has twice sought to resolve on Rule 23(f) review: whether a defendant in a federal securities class action may rebut the presumption of reliance at the class-certification stage by showing that a disclosure preceding a stock-price decline did not correct any alleged misrepresentation. *See Marcus v. J.C. Penney Co.*, No. 17-90008, Doc. 00513964692 (5th Cir. Apr. 24, 2017) (per curiam) (granting motion); *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 15-90038, 2015 WL 10714013, at *1 (5th Cir. Nov. 4, 2015) (per curiam) (granting motion). The Court was unable to answer that question in both instances due to the parties' settlements. Granting this petition offers the Court another opportunity to provide much-needed guidance on this important issue.

Price declines following alleged corrective disclosures were Plaintiffs' only evidence of price impact, and the district court assumed the disclosures in fact corrected the alleged misrepresentations. That ruling is inconsistent with the Supreme Court's pronouncement that "[a]ny 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." *Halliburton Co. v. Erica P. John Fund, Inc. ("Halliburton II")*, 134 S. Ct. 2398, 2414 (2014) (alterations in original) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 248 (1988)). Although the district court acknowledged this principle, it erroneously declined to evaluate whether Plaintiffs' alleged corrective disclosures were, in fact, corrective.

Because the correctiveness of a disclosure is central to whether the resulting price decline is evidence that the earlier misrepresentation had price impact, the issue cannot be ignored at class certification. *See Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co. ("AMSF I")*, 597 F.3d 330, 336 (5th Cir. 2010), *vacated on other grounds*, *Erica P. John Fund, Inc. v. Halliburton Co. ("Halliburton I")*, 563 U.S. 804 (2011) (explaining that unless the price declined "because of the correction to a prior misleading statement … there would be no inference raised that the original, allegedly false statement caused an inflation in the price to begin with"). Without a *corrective* disclosure linking a price decline to some earlier misrepresentation, there is no evidence of price impact from the misrepresentation. Simply *assuming* that all disclosures are corrective—as the district court did—deprives defendants of their price-impact rebuttal right. And it opens the floodgates to class certification based on any price decline caused by negative news.

The district court's error was amplified by its failure to recognize that multiple avenues exist for rebutting the presumption of reliance. Defendants presented evidence that none of the alleged misrepresentations had front-end price impact and that the alleged corrective disclosures were not corrective and, in some instances, were followed by a price drop that was not statistically significant or that was due to other negative news as opposed to the disclosure. Rather than analyze this evidence, the district court summarily—and incorrectly—held that Defendants failed to rebut the presumption solely because they "d[id] not provide an alternate explanation for the[] significant declines in Cobalt's stock price," App. 1 at 16, without citing any authority for that novel proposition.

This Court's guidance on what evidence may be used to rebut price impact at the class certification stage is sorely needed. In this and any pending or future case, that guidance will enable defendants to avoid the injustice of defending a massive class action premised on disclosures that were not even corrective or where defendants presented other evidence "sever[ing] the link between the alleged misrepresentation and … the price received (or paid) by the plaintiff." *Halliburton II*, 134 S. Ct. at 2415-16 (ellipsis in original) (quoting *Basic*, 485 U.S. at 248).

This Court's guidance is also needed on other important, recurring legal issues under the Securities Act, including whether the need to individually trace each class member's stock to an allegedly defective registration statement for a Securities Act claim must be considered at the class certification stage. The district court erroneously dismissed as a "merits issue" Defendants' argument that the traceability requirement will defeat predominance for the class as proposed. In so doing, the court failed to analyze controlling Fifth Circuit and Supreme Court precedent.

STATEMENT OF FACTS

This class action consists of an amalgam of claims under the Securities Exchange Act of 1934 (the "Exchange Act") and the Securities Act arising from alleged misrepresentations concerning unrelated subjects—compliance with the Foreign Corrupt Practices Act ("FCPA") and the oil-producing potential of two exploratory wells being drilled in a new frontier play that proved to be less productive than initial estimates—and the purported effects of those statements on the prices of Cobalt stock and two different Cobalt notes. The Exchange Act claims cover all of the challenged conduct, occupied the bulk of the class-certification briefing, and are a major focus of the case. The Securities Act claims encompass purchases traceable to three stock offerings and two bond offerings and similarly challenge both FCPA and well-related statements.

In their class-certification briefing, the parties hotly disputed the propriety of challenging correctiveness at class certification and whether the disclosures were in fact corrective. Rather than engage these arguments, the district court disposed of the issue with a three-sentence footnote:

> In connection with their argument regarding the absence of price impact, Defendants argue also that several of Cobalt's statements at issue are incorrectly characterized as corrective disclosures. Defendants' arguments about whether the disclosures were actually

> corrective has [sic] no bearing on the predominance inquiry for class certification. *See Marcus v. J.C. Penney Co., Inc.*, 2016 WL 8604331, *8 (E.D. Tex. Aug. 29, 2016) (citing *Amgen*, 133 S. Ct. at 1203). Resolution of the dispute regarding whether the statements were corrective "is an issue that is common to all members of the class and thus does not defeat predominance." *Id.*

App. 1 at 16 n.2.

The court then went even further, concluding that Defendants were required to present alternative explanations for stock price declines following alleged corrective disclosures to rebut the *Basic* presumption: "Defendants do not provide an alternate explanation for the[] significant declines in the Cobalt stock price. As a result, Defendants have not demonstrated that there was no price impact from the challenged disclosures . . . ." *Id.* at 16.

The court gave similarly short shrift to Defendants' argument that a Securities Act class could not be certified on the stock claims because tracing would be a fact-intensive process that would predominate those claims. The court rejected the tracing argument as presenting a merits question, without considering Rule 23's predominance requirement. But that reasoning contradicts the Supreme Court's pronouncement in *Comcast Corp. v. Behrend* that class certification may only be granted if the trial court is satisfied, after a "rigorous analysis," that Rule 23 is met, even if such analysis overlaps with the merits. 133 S. Ct. 1426, 1432 (2013).

The court took the same approach with respect to Defendants' argument that a Securities Act class could not be certified because the claims of unnamed class members were barred by the statute of repose, rejecting it as presenting a common question without considering the illogical result of that position—a certified class on legally barred claims.

Having summarily dealt with these and other issues,[2] the district court certified the exact class proposed by Plaintiffs—one that spans a more than three-and-a-half-year period and includes five separate offerings.

SUMMARY OF THE ARGUMENT

Leave to appeal is warranted to protect defendants' right to make full price-impact rebuttals at the class-certification stage. The district court mistakenly believed it could not consider whether the alleged corrective disclosures preceding price declines actually corrected any alleged misrepresentations, despite the serious correctiveness issues raised by Defendants, and severely and improperly limited the methods through which a defendant can rebut price impact allegations. These errors led the court to certify the class.

[2] Defendants also argued below that certification was inappropriate because, among other reasons, individual issues concerning Plaintiffs' knowledge would predominate in the Securities Act claims and questions regarding extraterritorial transactions and purchasers defeat predominance.

Whether a disclosure is in fact corrective is central to determining whether an alleged misrepresentation distorted the market price in the first place. That is particularly true where, as here, plaintiffs do not attempt to show front-end price impact. Because price impact is an essential precondition to a class action under *Halliburton II*, this question cannot be deemed a purely merits issue and deferred for later consideration. Moreover, defendants are not required to establish an alternative explanation for a stock-price decline to rebut price impact. In ruling otherwise, the district court erred and contravened *Halliburton II.*

Leave to appeal is also warranted to provide guidance on whether the requirement that class members trace their shares to the challenged offering is one that courts should consider as part of the predominance analysis for a Securities Act class, and whether it is ever appropriate to certify a class for claims barred by a statute of repose.

ARGUMENT

I. Immediate review under Rule 23(f) is appropriate.

Leave to appeal is appropriate when a "certification decision turns on a novel or unsettled question of law." *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007) (quoting Fed. R. Civ. P. 23(f) advisory committee note). The decision below is the latest in a growing number of district court cases to confront the question of whether, under the

Supreme Court's holding in *Halliburton II*, a district court may, at the certification stage, determine whether a disclosure that precedes a price decline is corrective. Such "unsettled questions of law concerning the entanglement of the merits with the class certification decision," *id.* at 380, are a well-settled ground for Rule 23(f) review.

"[S]ecurities litigation typically focuses on a price change at the time of a corrective disclosure." *Erica P. John Fund, Inc. v. Halliburton Co. ("EPJF II")*, 309 F.R.D. 251, 262 (N.D. Tex. 2015). That is because, as here, plaintiffs often cannot prove price impact directly by showing price inflation when the alleged misrepresentation was made. It is thus essential to know whether defendants may rebut price impact allegations by showing that the alleged disclosures did not in fact correct any previous alleged misrepresentation.

As this Court has noted, "class certification may be the backbreaking decision that places 'insurmountable pressure' on a defendant to settle, even where the defendant has a good chance of succeeding on the merits." *Regents*, 482 F.3d at 379. The alleged corrective disclosures here are Plaintiffs' hook for seeking enormous damages based on billions of dollars in lost market capitalization that they claim resulted from the disclosures, *see* Dkt. No. 200 ¶¶ 1-13—damages that vastly exceed Cobalt's current market capitalization. The same factors that warranted Rule 23(f) review twice before on this issue are equally compelling now.

Likewise, the tracing and statute of repose issues raise substantial doubt as to whether the Securities Act claims can proceed as a class, significantly implicating the class scope. Specifically, as to the statute of repose, the district court erred in certifying a Securities Act class for the February 2012 offering because no Plaintiff with standing brought a claim based on that offering within the three-year repose period. Additionally, *CalPERS* held that equitable tolling does not apply to the repose period, 2017 WL 2722415, at *11, which means that certification of any Securities Act class was improper because the period had expired for all offerings before the court granted certification.

II. The district court erred by refusing to evaluate whether the alleged corrective disclosures were actually corrective.

A. Price impact addresses "whether the alleged misrepresentations affected the market price in the first place." *Halliburton I*, 563 U.S. at 814. It is the "fundamental premise" of the presumption of reliance that enables securities class actions because it allows courts to presume that plaintiffs relied in common on a misrepresentation that distorted the price of the stock. *Halliburton II*, 134 S. Ct. at 2416. Without price impact, there is "no grounding for any contention that [the] investor[] indirectly relied on th[at] misrepresentation[] through [his] reliance on the integrity of the market price." *Id.* at 2414 (alterations in original) (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1199 (2013)).

Without the presumption, reliance is an issue unique to each class member that precludes certification.

Plaintiffs made no effort to demonstrate a stock price increase resulting from a positive misrepresentation. Instead, their price impact argument depended entirely on reverse-engineering price impact via a later price decline, after a purported corrective disclosure. Dkt. No. 164 at 19; Dkt. No. 239 at 22-33. But plaintiffs "cannot trigger the presumption of reliance by simply offering evidence of any decrease in price following the release of negative information." *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 655 (5th Cir. 2004). The price must have declined "because of the correction to a prior misleading statement" to raise an inference that the alleged misstatement actually inflated the price. *AMSF I*, 597 F.3d at 336. If no disclosure reveals the fraud, no price impact exists.

Whether a disclosure is "corrective"—*i.e.*, whether it reveals the fraud—is central to whether there is evidence of price impact at the time of the misrepresentation. Price declines occur for countless reasons following an endless variety of disclosures. Standing alone, these declines say nothing about whether the price was inflated by an earlier misrepresentation. Only a disclosure that corrects a previous misrepresentation—and precipitates a price decline—suggests that the misrepresentation distorted the market price—*i.e.*, that there was price impact. As this Court has explained, if the price decline was caused by anything other than "revelation of the truth," the price decline does not "raise an inference that the price was actually affected by … alleged misrepresentations." *Id.*

Courts that anticipated *Halliburton II*'s allowance of price-impact rebuttals accurately perceived that a "class cannot be certified" if no evidence exists that an "alleged misrepresentation caused a statistically significant increase in the price" or a "corrective disclosure caused a statistically significant decline in the price." *In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480, 493 (S.D.N.Y. 2011). If there was no price movement at the time of the alleged misrepresentation, and the court "determine[s] that there was no corrective disclosure," the disclosure "cannot serve as a basis for certifying the class." *Id*.

Although price impact is a merits issue, it must be fully considered at the class-certification stage because it goes to "*Basic*'s fundamental premise," which "has everything to do with the issue of predominance at the class certification stage." *Halliburton II*, 134 S. Ct. at 2416. "[T]o maintain the consistency of the presumption with the class certification requirements of [Rule] 23, defendants must be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock." *Id*. at 2417. Courts may not "ignore … evidence showing that the alleged misrepresentation did not actually affect the stock's market price." *Id.* at 2416. Under *Halliburton II*, "any showing" that rebuts the presumption, *id.* at 2415-16—including whether disclosures were corrective—must be considered at class certification.

The district court conceded that "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.'" App. 1 at 15. But it then contravened that principle by refusing to consider correctiveness, reasoning that "whether the disclosures were actually corrective has no bearing on the predominance inquiry for class certification" because it is an issue "common to all members of the class." *Id.* at 16 n.2. That reasoning fails to recognize that whether disclosures are actually corrective is an essential link in the chain connecting price impact to an alleged misrepresentation, which is why showing a lack of correctiveness "sever[s] the link" and rebuts the presumption of reliance. The court's reasoning also cannot be squared with price impact's essential role in determining whether a plaintiff may invoke the presumption of reliance or whether individual reliance issues predominate and preclude certification.

B. The court's refusal to consider the non-corrective nature of the alleged corrective disclosures was outcome-determinative on certification of the Exchange Act claims. Plaintiffs identified, and a class was certified based on, five purported corrective disclosures, none of which was actually corrective.

First, Plaintiffs contended that two April 15, 2012 *Financial Times* articles regarding the ownership of Nazaki Oil & Gáz ("Nazaki")—a company assigned by the Angolan government to be one of Cobalt's partners on two exploration "blocks" offshore Angola—contained "corrective" Nazaki ownership allegations, namely, allegations that three Angolan government officials held concealed ownership interests in Nazaki. Dkt. No. 200 ¶ 200. However, the "revelation" of this information, which was already publically known, was not corrective of any prior statement by Cobalt, which never opined on who owned Nazaki. *See* Dkt. No. 205 Ex. 1 ¶ 14.

Second, Plaintiffs pointed to Cobalt's August 5, 2014 disclosure of its receipt of a Wells Notice from the Staff of the SEC, indicating the continuation of the SEC's investigation into Cobalt's Angolan operations. Dkt. No. 200 ¶ 206. This likewise cannot constitute a corrective disclosure because Cobalt never represented that the SEC would not issue a Wells Notice but instead repeatedly disclosed the existence of the SEC's investigation and the associated risks. *See, e.g.*, Dkt. No. 205 Exs. 5, 31. Indeed, as this Court has recognized, government investigations generally "do not, standing alone, amount to a corrective disclosure." *See Pub. Emps.' Ret. Sys. of Miss., P.R. Teachers Ret. Sys. v. Amedisys, Inc.*, 769 F.3d 313, 323 (5th Cir. 2014).

Third, Plaintiffs cited an August 5, 2014 *Bloomberg* article regarding contractually mandated social payments to the Angolan state oil company, Sonangol, by Cobalt and other Western oil companies to fund a social project in Angola, the Sonangol Research and Technology Center ("SRTC"). Dkt. No. 200 ¶¶ 118-19. They claimed it constitutes a corrective disclosure because it reported that Global Witness "said in a statement on its website that it was unable to gain information from BP, Cobalt or Angolan state oil company Sonangol confirming that the [SRTC] exists." Dkt. No. 205 Ex. 45. As Cobalt publicly disclosed, it was contractually obligated to make certain contributions for bonuses, scholarships, and social projects, including the SRTC. Dkt. No. 205 Ex. 7. That Sonangol had not yet built the SRTC is hardly corrective of Cobalt's prior disclosure that it was contractually obligated to pay to Sonangol a social bonus earmarked for the SRTC. Cobalt never stated that the SRTC was even under construction, much less already built.

Finally, Plaintiffs alleged that Cobalt's disclosures announcing drilling results for two of its exploratory wells offshore Angola—Lontra and Loengo—were corrective of prior misstatements regarding these wells. Dkt. No. 200 ¶¶ 202-04, 209-11. On December 1, 2013, Cobalt announced that Lontra contained "more gas than [Cobalt's] pre-drill estimates." *Id.* ¶ 108 (alteration in original). On November 4, 2014, Cobalt announced that the Loengo exploratory well "did not encounter commercial hydrocarbons." *Id.* ¶ 124. Before these announcements, Cobalt had described Lontra as an "oil-focused," "super-sized prospect" in a "very large pre-salt structure," *Id.* ¶¶102, 104, and Loengo as a "'750 million-barrel' prospect" in "quite a large structure." *Id.* ¶¶ 113, 116. The announcement of the Lontra and Loengo drilling results did not reveal any previously obscured truth about Cobalt's exploratory wells. Rather, these announcements simply reflected the realization of one of the known risks that always accompanies oil and gas development. Indeed, inherent in any estimate is the distinct possibility that the estimate will vary—either lower or higher—from the end result.

Had the district court analyzed these disclosures, it would have had no choice but to recognize their non-corrective nature, thereby defeating price impact. In refusing to consider correctiveness, the district court gutted Cobalt's right to rebut Plaintiffs' sole theory of price impact.[3]

[3] *Ludlow v. BP, P.L.C.* does not suggest otherwise, as it dealt with loss causation, not price impact. There, this Court held that correctiveness need not be considered at the class-certification stage for purposes of loss causation because it was relevant only to the calculation of damages and, therefore, could be relegated to the merits stage. 800 F.3d 674, 686-88 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1824 (2016). This case, by contrast, deals exclusively with price-impact rebuttal under the reliance element when plaintiffs seek to invoke a presumption of class-wide reliance. The Supreme Court has squarely held that price-impact evidence must be fully considered at class certification to determine whether common issues of reliance predominate. *Halliburton II*, 134 S. Ct. at 2415-17. Where, as here, correctiveness evidence is proffered to defeat the presumption of reliance, it must be considered at the class-certification stage even if such evidence is also relevant to loss causation. *Id.* at 2417.

C. The district court's approach portends absurd results. It allows a plaintiff to obtain class certification by pointing to any day in the class period on which there was a disclosure of company-specific information followed by a statistically significant stock-price drop.[4] The court may not examine whether the disclosure corrects, or indeed bears any linkage at all to, a prior alleged misrepresentation. Instead, it must assume the corrective nature of the disclosure, even if the disclosure has nothing to do with the alleged misrepresentation.[5] Thus, even armed with evidence that a disclosure was not corrective, the defendant is left powerless to rebut price impact. This makes a mockery of *Halliburton II* by requiring certification where there is no evidence of price impact whatsoever—neither price inflation caused by a misrepresentation, nor a price decline caused by a corrective disclosure.

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4 The district court's certification ruling here is even more extreme, as the court did not even require statistical significance. *See* App. 1 at 16 ("Defendants do not provide an alternate explanation for these significant declines in the Cobalt stock price.").

5 For example, imagine a securities class action against a pharmaceutical company for restating its financial results. During the class period, the company lost a patent suit, invalidating an important product, and the stock dropped by what unquestionably was a statistically significant amount. Even though that event had nothing to do with the allegations in the securities fraud suit, as long as the plaintiffs label the news of the patent suit a "corrective disclosure," the district court must certify the class.

III. The district court erred in requiring Defendants to provide alternative explanations for stock price declines after alleged corrective disclosures.

Beyond refusing to consider correctiveness, the district court also held that Defendants did not rebut *Basic*'s presumption because they did not come forward with an alternative explanation for the stock price declines following the purportedly corrective disclosures:

> Defendants do not provide an alternate explanation for the[] significant declines in the Cobalt stock price. As a result, 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.

App. 1 at 16. This holding again directly contravenes *Halliburton II* and this Court's precedent.

As *Halliburton II* makes clear, "a defendant [may] rebut th[e] presumption in a number of ways, including by showing that the alleged misrepresentation did not actually affect the stock's price—that is, that the misrepresentation had no 'price impact.'" *Halliburton II*, 134 S. Ct. at 2405. To show the absence of price impact, defendants likewise have several paths. *See id.* at 2414 ("'*[a]ny showing* that severs the link … will be sufficient to rebut the presumption of reliance'").

First, as the Eighth Circuit recently recognized, defendants can present direct "evidence of no 'front-end' price impact"—that is, when the alleged misrepresentation was made, it "had no discernable impact on the stock price." *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 782 (8th Cir. 2016);

see also In re Virtus Inv. Partners, Inc. Sec. Litig., No. 15CV1249, 2017 WL 2062985, at *4 (S.D.N.Y. May 15, 2017) (noting that a "defendant may rebut the presumption with evidence that the alleged misstatements were not associated with abnormal, positive stock-price returns ('front-end price impact')"). A lack of front-end price impact is "direct evidence . . . that sever[s] any link between the alleged … misrepresentation[] and the stock price at which plaintiffs purchased." *Best Buy*, 818 F.3d at 783. Indeed, it the most direct method of rebutting the presumption. *Id.* at 781 (quoting *Halliburton II*, 134 S. Ct. at 2416-17).

Second, as this Court has previously held, defendants can rebut the presumption by showing there was no "decrease in price following" a claimed corrective disclosure. *Erica P. John Fund, Inc. v. Halliburton Co. ("EPJF I")*, 718 F.3d 423, 434 (5th Cir. 2013), *vacated on other grounds by Halliburton II*. In other words, if defendants demonstrate that there is no statistically significant price drop associated with a claimed corrective disclosure, then there is no price impact, and the fraud-on-the-market presumption does not apply. *See, e.g., EPJF II*, 309 F.R.D. 251 at 269-80 (denying class certification for five corrective disclosures that did not cause a statistically significant price drop).

Third, even if there is a statistically significant price drop following an alleged corrective disclosure, defendants can rebut the presumption by demonstrating that the market reaction was due to other negative news—so-called confounding information—rather than the alleged misrepresentation. When "multiple items of negative information are released on the same day," there are multiple potential sources of a price decline—not just the correction of an alleged misrepresentation. *Greenberg*, 364 F.3d at 665. If, by "[c]omparing the relative seriousness of all the information released" on the day of a price decline, a defendant can show that the alleged corrective disclosure did not "play[] a significant role in the decline in stock price," *id.* at 667, then that showing "severs the link between the alleged misrepresentation and … the price received (or paid) by the plaintiff," thereby rebutting the presumption. *Halliburton II*, 134 S. Ct. at 2415-16 (ellipsis in original) (quoting *Basic*, 485 U.S. at 248).

Finally, as discussed in detail in Section II.A, *supra*, a defendant can rebut the presumption of reliance by showing that a disclosure was not corrective.

For each of the alleged corrective disclosures, Defendants presented evidence from two or more of these categories.

- Defendants showed that none of the alleged corrective disclosures had up-front price impact, and Plaintiffs did not contend otherwise. Dkt. No. 205 Ex. 1 ¶ 21-22.

- Defendants showed that none of the alleged corrective disclosures was in fact corrective. *See* Section II.B *supra*.

- Defendants showed that the price decline following the April 15, 2012 *Financial Times* articles was not statistically significant. *See* Dkt. No. 205 Ex. 1 ¶¶ 37-39.

- Defendants showed that the August 5, 2014 *Bloomberg* article about the SRTC, did not play any role, much less a significant one, in the subsequent stock price decline, given the other items of negative information released the same day. Specifically, Defendants presented evidence that (1) no analyst even mentioned the article, Dkt. No. 205 Ex. 1 ¶ 51—a fact disqualifying the article under Plaintiffs' own expert's (novel) framework, which defined "cashflow-related" news as news items where at least two "analysts covered the subject matter in the disclosure," Dkt. No. 165-1 ¶ 91; and (2) the article was released on the same day Cobalt disclosed its receipt of the SEC's Wells Notice and announced its quarterly earnings per share were lower than anticipated. Dkt. No. 205 Ex.1 ¶ 59 n.95.

The district court failed to consider any of this salient evidence. Instead, it held that Defendants were required, but failed, to provide an alternative explanation for each stock drop. App. 1 at 15. As demonstrated above, that ruling runs contrary to *Halliburton II* and this Court's precedent on price-impact rebuttal.

IV. The district court erred in refusing to consider whether traceability issues impact the predominance analysis for the Securities Act stock claims.

Plaintiffs' Securities Act claims are based on secondary offerings of Cobalt stock on February 23, 2012, January 16, 2013, and May 8, 2013 under a January 4, 2011 shelf registration statement. *See* Dkt. No. 200 ¶¶ 223, 243, 248, 342. Plaintiffs cannot demonstrate predominance for these claims because tracing each putative class member's Cobalt stock purchases will be an individualized, fact-intensive process.

As this Court held in *Krim v. pcOrder.com, Inc.*, "to be able to take advantage of the lower burden of proof and almost strict liability under § 11, a plaintiff must meet higher procedural standards[,] [t]he most significant [of which] is the requirement that a plaintiff be able to trace the security for which damages are claimed to the specific registration statement at issue." 402 F.3d 489, 495 (5th Cir. 2005). That requires "proof of a *direct chain of title* from [a challenged] offering to the plaintiff" to ensure Plaintiffs' shares originated from one of the allegedly tainted offerings rather than Cobalt's earlier, unchallenged IPO. *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 31 n.1 (2d Cir. 2006) (alteration in original omitted, emphasis added) (quoting *In re Initial Pub. Offering Sec. Litig.*, 227 F.R.D. 65, 117 (S.D.N.Y. 2004)). Evidence that shares may be "more likely than not" traceable to the challenged offerings will not suffice. *Krim*, 402 F.3d at 496.

Without any discussion of *Krim* or its implications for Rule 23's predominance requirement, the district court dismissed Defendants' traceability argument as a "merits issue" not appropriate for the class certification stage. App. 1 at 12. That ruling ignores the Supreme Court's mandate in *Comcast* that class certification may be granted only if the trial court is convinced, after a "rigorous analysis," that Rule 23 is satisfied, *even if that analysis overlaps with the* *merits*. 133 S. Ct. at 1432.[6] The district court's failure to analyze traceability issues warrants this Court's review.

CONCLUSION

Defendants request that this Court grant the Petition for Permission to Appeal the June 15, 2017 Order granting Plaintiffs' Motion for Class Certification.

6 Although the district court cited out-of-Circuit district court cases for its ruling, those cases draw from a pre-*Comcast* district court decision that likewise contravenes the Supreme Court's mandate in *Comcast* that courts undertake a full and rigorous analysis of issues like the traceability issue at the class certification stage.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This petition complies with the type-volume limitations of Rule 5(c)(1) of the Federal Rules of Appellate Procedure because it contains 5,176 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 5.

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/s/ Aaron M. Streett
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CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Defendants-Petitioners has contacted counsel for Plaintiffs-Respondents. Counsel for Plaintiffs-Respondents indicated that Plaintiffs-Respondents are opposed to this motion.

/s/ Russell Lewis
Russell Lewis

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Defendants' Petition for Permission to Appeal the District Court's June 15, 2017 Order Granting Plaintiffs' Motion for Class Certification was served electronically on all counsel of record this 29th day of June, 2017.

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