In the
United States Court of Appeals
for the Second Circuit

August Term, 2016

(Argued: November 2, 2016 Decided: July 7, 2017)

Docket No. 16-1914-cv

IN RE PETROBRAS SECURITIES

UNIVERSITIES SUPERANNUATION SCHEME LIMITED, EMPLOYEES RETIREMENT SYSTEM OF THE STATE OF HAWAII, NORTH CAROLINA DEPARTMENT OF STATE TREASURER,

Plaintiffs-Appellees,

PETER KALTMAN, individually and on behalf of all others similarly situated, DIMENSIONAL EMERGING MARKETS VALUE FUND, DFA INVESTMENT DIMENSIONS GROUP INC., on behalf of its series Emerging Markets Core Equity Portfolio, Emerging Markets Social Core Equity Portfolio and T.A. World ex U.S. Core Equity Portfolio, DFA INVESTMENT TRUST COMPANY, on behalf of its series The Emerging Markets Series, DFA AUSTRIA LIMITED, solely in its capacity as responsible entity for the Dimensional Emerging Markets Trust, DFA International Core Equity Fund and DFA International Vector Equity Fund by Dimensional Fund Advisors Canada ULC solely in its capacity as Trustee, DIMENSIONAL FUNDS PLC, on behalf of its sub-fund Emerging Markets Value Fund, DIMENSIONAL FUNDS ICVC, on behalf of its sub-fund Emerging Markets Core Equity Fund, SKAGEN AS, DANSKE INVEST MANAGEMENT A/S, DANSKE INVEST MANAGEMENT COMPANY, NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, NEW YORK CITY POLICE PENSION

FUND, BOARD OF EDUCATION RETIREMENT SYSTEM OF THE CITY OF NEW YORK, TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT PENSION FUND, NEW YORK CITY DEFERRED COMPENSATION PLAN, FORSTA AP-FONDEN, TRANSAMERICA INCOME SHARES, INC., TRANSAMERICA FUNDS, TRANSAMERICA SERIES TRUST, TRANSAMERICA PARTNERS PORTFOLIOS, JOHN HANCOCK VARIABLE INSURANCE TRUST, JOHN HANCOCK FUNDS II, JOHN HANCOCK SOVEREIGN BOND FUND, JOHN HANCOCK BOND TRUST, JOHN HANCOCK STRATEGIC SERIES, JOHN HANCOCK INVESTMENT TRUST, JHF INCOME SECURITIES TRUST, JHF INVESTORS TRUST, JHF HEDGED EQUITY & INCOME FUND, ABERDEEN EMERGING MARKETS FUND, ABERDEEN GLOBAL EQUITY FUND, ABERDEEN GLOBAL NATURAL RESOURCES FUND, ABERDEEN INTERNATIONAL EQUITY FUND, each a series of Aberdeen Funds, ABERDEEN CANADA EMERGING MARKETS FUND, ABERDEEN CANADA SOCIALLY RESPONSIBLE GLOBAL FUND, ABERDEEN CANADA SOCIALLY RESPONSIBLE INTERNATIONAL FUND, ABERDEEN CANADA FUNDS EAFE PLUS EQUITY FUND AND ABERDEEN CANADA FUNDS GLOBAL EQUITY FUND, each a series of Aberdeen Canada Funds, ABERDEEN EAFE PLUS ETHICAL FUND, ABERDEEN EAFE PLUS FUND, ABERDEEN EAFE PLUS SRI FUND, ABERDEEN EMERGING MARKETS EQUITY FUND, ABERDEEN FULLY HEDGED INTERNATIONAL EQUITIES FUND, ABERDEEN INTERNATIONAL EQUITY FUND, ABERDEEN GLOBAL EMERGING MARKETS EQUITY FUND, ABERDEEN GLOBAL ETHICAL WORLD EQUITY FUND, ABERDEEN GLOBAL RESPONSIBLE WORLD EQUITY FUND, ABERDEEN GLOBAL WORLD EQUITY DIVIDEND FUND, ABERDEEN GLOBAL WORLD EQUITY FUND, ABERDEEN GLOBAL WORLD RESOURCES EQUITY FUND, ABERDEEN EMERGING MARKETS EQUITY FUND, ABERDEEN ETHICAL WORLD EQUITY FUND, ABERDEEN MULTI-ASSET FUND, ABERDEEN WORLD EQUITY FUND, ABERDEEN LATIN AMERICA EQUITY FUND, INC., AAAID EQUITY PORTFOLIO, ALBERTA TEACHERS RETIREMENT FUND, AON HEWITT INVESTMENT CONSULTING, INC., AURION INTERNATIONAL DAILY EQUITY FUND, BELL ALIANT REGIONAL COMMUNICATIONS INC., BMO GLOBAL EQUITY CLASS, CITY OF ALBANY PENSION PLAN, DESJARDINS DIVIDEND INCOME FUND, DESJARDINS EMERGING MARKETS FUND,

DESJARDINS GLOBAL ALL CAPITAL EQUITY FUND, DESJARDINS OVERSEAS EQUITY VALUE FUND, DEVON COUNTY COUNCIL GLOBAL EMERGING MARKET FUND, DEVON COUNTY COUNCIL GLOBAL EQUITY FUND, DGIA EMERGING MARKETS EQUITY FUND L.P., ERIE INSURANCE EXCHANGE, FIRST TRUST/ABERDEEN EMERGING OPPORTUNITY FUND, GE UK PENSION COMMON INVESTMENT FUND, HAPSHIRE COUNTY COUNCIL GLOBAL EQUITY PORTFOLIO, LONDON BOROUGH OF HOUNSLOW SUPPERANNUATION FUND, MACKENZIE UNIVERSAL SUSTAINABLE OPPORTUNITIES CLASS, MARSHFIELD CLINIC, MOTHER THERESA CARE AND MISSION TRUST, MTR CORPORATION LIMITED RETIREMENT SCHEME, MYRIA ASSET MANAGEMENT EMERGENCE, NATIONAL PENSION SERVICE, NPS TRUST ACTIVE 14, OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM, WASHINGTON STATE INVESTMENT BOARD, ABERDEEN LATIN AMERICAN INCOME FUND LIMITED, ABERDEEN GLOBAL EX JAPAN PENSION FUND PPIT, FS INTERNATIONAL EQUITY MOTHER FUND, NN INVESTMENT PARTNERS B.V., acting in the capacity of management company of the mutual fund NN Global Equity Fund and in the capacity of management company of the mutual fund NN Institutioneel Dividend Aandelen Fonds, NN INVESTMENT PARTNERS LUXEMBOURG S.A., acting in the capacity of management company SICAV and its Sub-Funds and NN (L) SICAV, for and on behalf of NN (L) Emerging Markets High Dividend, NN (L) FIRST, AURA CAPITAL LTD., WGI EMERGING MARKETS FUND, LLC, BILL AND MELINDA GATES FOUNDATION TRUST, BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM, TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP, LOUIS KENNEDY, individually and on behalf of all others similarly situated, KEN NGO, individually and on behalf of all others similarly situated, JONATHAN MESSING, individually and on behalf of all others similarly situated, CITY OF PROVIDENCE, individually and on behalf of all others similarly situated, UNION ASSET MANAGEMENT HOLDING AG,

Plaintiffs,

v.

PETRÓLEO BRASILEIRO S.A. PETROBRAS, BB SECURITIES LTD., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, BANK OF CHINA (HONG KONG) LIMITED, BANCA IMI, S.P.A., SCOTIA CAPITAL (USA) INC., THEODORE MARSHALL HELMS, PETROBRAS GLOBAL FINANCE B.V., PETROBRAS AMERICA INC., CITIGROUP GLOBAL MARKETS INC., ITAU BBA USA SECURITIES, INC., J.P. MORGAN SECURITIES LLC, MORGAN STANLEY & CO. LLC, MITSUBISHI UFJ SECURITIES (USA), INC., HSBC SECURITIES (USA) INC., STANDARD CHARTERED BANK, BANCO BRADESCO BBI S.A.,

Defendants-Appellants,

JOSE SERGIO GABRIELLI, SILVIO SINEDINO PINHEIRO, PAULO ROBERTO COSTA, JOSE CARLOS COSENZA, RENATO DE SOUZA DUQUE, GUILLHERME DE OLIVEIRA ESTRELLA, JOSE MIRANDA FORMIGL FILHO, MARIA DAS GRACAS SILVA FOSTER, ALMIR GUILHERME BARBASSA, MARIANGELA MOINTEIRO TIZATTO, JOSUE CHRISTIANO GOME DA SILVA, DANIEL LIMA DE OLIVEIRA, JOSE RAIMUNDO BRANDA PEREIRA, SERVIO TULIO DA ROSA TINOCO, PAULO JOSE ALVES, GUSTAVO TARDIN BARBOSA, ALEXANDRE QUINTAO FERNANDES, MARCOS ANTONIO ZACARIAS, CORNELIS FRANCISCUS JOZE LOOMAN, PRICEWATERHOUSECOOPERS AUDITORES INDEPENDENTES,

Defendants.

Before:

HALL, LIVINGSTON, *Circuit Judges*, AND GARAUFIS, *District Judge*.*

Appeal from an order of the United States District Court for the Southern District of New York (Rakoff, *J.*) certifying two classes under Federal Rule of Civil Procedure 23(b)(3): one asserting claims under the Securities Exchange Act of 1934 (the "Exchange Act"), and the second asserting claims under the Securities Act of 1933 (the "Securities Act"). Appellants assert two challenges.

First, Appellants challenge both class definitions insofar as they include all otherwise eligible persons who purchased debt securities in "domestic transactions," as defined in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010). Because the district court must verify the domesticity of individual over-the-counter transactions in globally traded notes, Appellants argue that both classes fail to satisfy the requirements for certification under Rule 23. We hold that the district court committed legal error by failing to address the need for such *Morrison* inquiries in its analysis of predominance under Rule 23(b)(3). We therefore vacate this portion of the district court's order and remand for further proceedings. In addition, we clarify the narrow scope of the "implied" Rule 23 requirement of "ascertainability."

Second, Appellants assert that the district court erred in finding that the Exchange Act class was entitled to a presumption of reliance under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). We find no abuse of discretion in the district court's blended analysis of direct and indirect evidence of market efficiency. We therefore affirm as to this issue.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

JEREMY A. LIEBERMAN, Mark I. Gross, Emma Gilmore, John A. Keho & Brenda F. Szydlo (*on the brief*), Pomerantz LLP, New York, NY, *for the Plaintiffs-Appellees*.

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* Judge Nicholas G. Garaufis, of the United States District Court for the Eastern District of New York, sitting by designation.

LEWIS J. LIMAN, Jared Gerber & Mitchell A. Lowenthal (*on the brief*), Cleary Gottlieb Steen & Hamilton LLP, New York, NY, *for Defendants-Appellants Petróleo Brasileiro S.A. — Petrobras, Theodore Marshall Helms, Petrobras Global Finance B.V., and Petrobras America Inc.*

JAY B. KASNER, Boris Bershteyn, Scott D. Musoff & Jeremy A. Berman (*on the brief*), Skadden, Arps, Slate, Meagher & Flom LLP, New York NY, *for Defendants-Appellants BB Securities Ltd., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Bank of China (Hong Kong) Limited, Banca IMI, S.p.A., Scotia Capital (USA) Inc., Citigroup Global Markets Inc., Itau BBA USA Securities, Inc., J.P. Morgan Securities LLC, Morgan Stanley & Co. LLC, Mitsubishi UFJ Securities (USA), Inc., HSBC Securities (USA) Inc., Standard Chartered Bank, and Banco Bradesco BBI S.A.*

GARAUFIS, *District Judge*:

This expedited appeal arises out of an order entered in the United States District Court for the Southern District of New York (Rakoff, *J.*) certifying two classes in this securities fraud action against Petróleo Brasileiro S.A. – Petrobras ("Petrobras") and various other defendants. *See In re Petrobras Sec. Litig.* (the "*Certification Order*"), 312 F.R.D. 354 (S.D.N.Y. 2016).

Petrobras is a multinational oil and gas company headquartered in Brazil and majority-owned by the Brazilian government. Though Petrobras was once among the largest companies in the world, its value declined precipitously after the exposure of a multi-year, multi-billion-dollar money-laundering and kickback scheme, prompting a class action by holders of Petrobras equity and debt securities ("Plaintiffs") against multiple defendants ("Defendants"): Petrobras and certain wholly owned subsidiaries (the "Subsidiaries"; collectively with Petrobras, the "Petrobras Defendants"[1]); former officers and directors of the Petrobras Defendants; several underwriters of Petrobras debt securities (the "Underwriter Defendants"[2]); and Petrobras's independent auditor.

The district court certified two classes (the "Classes") for money damages under Federal Rule of Civil Procedure 23(b)(3): the first asserts claims under the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78a *et seq.*; and

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[1] The Petrobras Defendants include Petrobras itself, along with two wholly owned subsidiaries (Petrobras Global Finance B.V. and Petrobras America Inc.) and Petrobras's United States Representative (Theodore Marshall Helms).

[2] The Underwriter Defendants include the following underwriters of Petrobras debt securities: BB Securities Ltd., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Bank of China (Hong Kong) Limited, Banca IMI, S.p.A., Scotia Capital (USA) Inc., Citigroup Global Markets Inc., Itau BBA USA Securities, Inc., J.P. Morgan Securities LLC, Morgan Stanley & Co. LLC, Mitsubishi UFJ Securities (USA), Inc., HSBC Securities (USA) Inc., Standard Chartered Bank, and Banco Bradesco BBI S.A.

the second asserts claims under the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. §§ 77a *et seq.*[3] On appeal, the Petrobras Defendants and the Underwriter Defendants (collectively, "Appellants") contest the *Certification Order* on two grounds.

First, Appellants challenge both class definitions insofar as they include all otherwise eligible persons who purchased Petrobras debt securities in "domestic transactions." Because Petrobras's debt securities do not trade on a domestic exchange, the district court must assess each class member's over-the-counter transactions for markers of domesticity under *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010). Appellants assert that the need for such assessments precludes class certification, particularly in light of concerns over the availability and content of the necessary transaction records. We first address Appellants' arguments regarding the "implied" Rule 23 requirement of "ascertainability," taking this opportunity to clarify the scope of the contested ascertainability doctrine: a class is ascertainable if it is defined using objective criteria that

[3] Plaintiffs-Appellees are the three class representatives in the underlying action: Universities Superannuation Scheme Limited (representing the Exchange Act Class); and the Employees Retirement System of the State of Hawaii and the North Carolina Department of State Treasurer (jointly representing the Securities Act Class).

establish a membership with definite boundaries. That threshold requirement is met here. However, we next hold that the district court committed legal error by finding that Rule 23(b)(3)'s predominance requirement was satisfied without considering the need for individual *Morrison* inquiries regarding domestic transactions. We therefore vacate this portion of the *Certification Order*.

Second, with regard to the Exchange Act Class, the Petrobras Defendants[4] challenge the district court's finding that Plaintiffs were entitled to a presumption of reliance under the "fraud on the market" theory established in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). We find no abuse of discretion in the district court's determination that Plaintiffs met their burden under *Basic* with a combination of direct and indirect evidence of market efficiency. We therefore affirm as to this issue.

For the reasons set forth below, we AFFIRM IN PART and VACATE IN PART the judgment of the district court and REMAND the case for further proceedings consistent with this opinion.

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[4] The Underwriter Defendants are not named as defendants with respect to Plaintiffs' Exchange Act claims. They therefore limit their arguments on appeal to the first issue described in text, concerning putative class members' proof of "domestic transactions."

BACKGROUND

We provide here a brief summary of the proceedings below as relevant for the issues on appeal. For additional background on Plaintiffs' allegations and causes of action, see the district court's prior orders. *See In re Petrobras Sec. Litig.* (the "*July 2015 Order*"), 116 F. Supp. 3d 368, 373–77 (S.D.N.Y. 2015) (summarizing the original consolidated complaint); *In re Petrobras Sec. Litig.* (the "*December 2015 Order*"), 150 F. Supp. 3d 337 (S.D.N.Y. 2015) (discussing new allegations in the amended pleadings).[5]

I. Factual Background

A. Plaintiffs' Allegations of Corruption at Petrobras

Plaintiffs' claims arise out of a conspiracy that began in the first decade of the new millennium, at which time Petrobras was expanding its production capacity. The company used a competitive bidding process for major capital expenditures, including the construction and purchase of oil refineries. Over a

[5] As compared to the original consolidated complaint, the operative pleading at the time of this appeal (the Consolidated Fourth Amended Complaint, filed November 30, 2015) adds allegations concerning Defendants' continued misconduct in 2015; provides additional details regarding the locations of the named plaintiffs' transactions in Petrobras securities; and omits certain causes of action that were dismissed in earlier proceedings. *See July 2015 Order*, 116 F. Supp. 3d at 386–89 (dismissing claims asserted under Brazilian law based on a finding that they were subject to mandatory arbitration).

period of several years, a cartel of contractors and suppliers coordinated with corrupt Petrobras executives to rig Petrobras's bids at grossly inflated prices. The excess funds were used to pay billions of dollars in bribes and kickbacks to the corrupt executives and to government officials. In addition, the inflated bid prices artificially increased the carrying value of Petrobras's assets. Plaintiffs allege that Petrobras knew about the kickback cartel, and was complicit in concealing information from investors and the public.

Brazil's Federal Police discovered the scheme during a money-laundering investigation, and ultimately arrested a number of the individuals involved. As details of the scandal emerged, Petrobras made corrective disclosures that, according to Plaintiffs, significantly understated the extent of incorrectly capitalized payments and inflated asset values. Even so, the value of Petrobras's securities declined precipitously. Plaintiffs allege that, "[a]t its height in 2009, Petrobras was the world's fifth-largest company, with a market capitalization of $310 billion"; by early 2015, its worth had allegedly declined to $39 billion. 4th Am. Compl. ¶ 2.

B. Petrobras Securities

Petrobras's common and preferred shares trade on a Brazilian stock exchange, the BM&F BOVESPA. The company sponsors American Depository Shares ("ADS")[6] that represent its common and preferred shares. Those ADS are listed and trade on the New York Stock Exchange ("NYSE").

In addition, Petrobras has issued multiple debt securities (the "Notes"; collectively with ADS, "Petrobras Securities") underwritten by syndicates of domestic and foreign banks. The Notes do not trade on any U.S. exchange. Investors trade Notes in over-the-counter transactions, whether in connection with an initial debt offering or in the global secondary market.

II. Procedural History

In December 2014 and January 2015, Petrobras investors filed five putative class actions asserting substantially similar claims against Petrobras and other defendants. The district court consolidated those actions in February 2015 and

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[6] American Depository Shares "represent an interest in the shares of a non-U.S. company that have been deposited with a U.S. bank." *Investor Bulletin: American Depository Receipts*, Office of Inv'r Educ. & Advocacy, SEC 1 (Aug. 2012), https://www.sec.gov/investor/alerts/adr-bulletin.pdf. ADS "allow U.S. investors to invest in non-U.S. companies" and also "give non-U.S. companies easier access to the U.S. capital markets. Many non-U.S. issuers use [ADS] as a means of raising capital or establishing a trading presence in the U.S." *Id.*

certified the Classes in February 2016. The district court also presided over several individual actions involving similar claims.[7]

A. Plaintiffs' Causes of Action

As relevant for this appeal, Plaintiffs assert a cause of action under the Exchange Act against the Petrobras Defendants, and three causes of action under the Securities Act against various Petrobras and Underwriter Defendants.

1. Claims Under the Exchange Act

Plaintiffs' Exchange Act claims are brought against Petrobras and the Subsidiaries on behalf of holders of Petrobras ADS and Notes. Plaintiffs assert that, during the class period of January 22, 2010, to July 28, 2015, the Petrobras Defendants made two types of false and misleading statements in violation of Section 10(b) of the Exchange Act and Rule 10b-5. *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b–5. First, the Petrobras Defendants produced financial statements with inflated asset values. Second, they assured Petrobras investors that the company

[7] *See, e.g.*, *In re Petrobras Sec. Litig.*, 193 F. Supp. 3d 313, 315 (S.D.N.Y. 2016) (By the time of the *Certification Order*, "no fewer than 27 substantial entities, such as pension funds, institutional investors, and others, had 'opted out' of the class action and brought their own, individual actions.").

adhered to ethical management principles and maintained strict financial controls to prevent fraud and corruption.

2. Claims Under the Securities Act

Plaintiffs rely on similar factual allegations in their claims under the Securities Act, brought on behalf of Petrobras Noteholders. Plaintiffs allege that the Petrobras Defendants and the Underwriter Defendants made materially false representations in registration statements and other documents connected with offerings of Petrobras Notes in May 2013 and March 2014 (the "Offerings"), thereby establishing liability under Sections 11, 12(a)(2), and 15 of the Securities Act. *See* 15 U.S.C. §§ 77k, 77*l*(a)(2), 77o.

B. The Certification Order

On February 2, 2016, the district court granted Plaintiffs' motion to certify two classes under Rule 23(b)(3), one asserting claims under the Exchange Act and the other asserting claims under the Securities Act. *Certification Order*, 312 F.R.D. 354.

Because Petrobras Notes do not trade on any U.S.-based exchange, Noteholders in both Classes are only entitled to assert claims under the Exchange Act and the Securities Act if they can show that they acquired their Notes in "domestic transactions." *Morrison*, 561 U.S. at 267. To ensure compliance with

Morrison, the district court limited both class definitions to "members [who] purchased Notes in domestic transactions." *Certification Order*, 312 F.R.D. at 360.

The Exchange Act Class is defined, in relevant part,[8] as:

> [A]ll purchasers who, between January 22, 2010 and July 28, 2015, . . . purchased or otherwise acquired [Petrobras Securities], including debt securities issued by [the Subsidiaries] on the [NYSE] or pursuant to other domestic transactions, and were damaged thereby.

Id. at 372.

The Securities Act Class is defined, in relevant part, as:

> [A]ll purchasers who purchased or otherwise acquired [Notes] in domestic transactions, directly in, pursuant and/or traceable to [U.S.-registered public offerings on May 15, 2013, and March 11, 2014] . . . , and were damaged thereby.[9]

Id. The Securities Act Class definition is temporally limited to purchases made "before Petrobras made generally available to its security holders an earnings

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[8] Both class definitions exclude "Defendants, current or former officers and directors of Petrobras, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which Defendants have or had a controlling interest." *Certification Order*, 312 F.R.D. at 372–73.

[9] This definition applies to claims under Sections 11 and 15 of the Securities Act. The class definition as to claims under Section 12(a)(2) is identical, except that it limits class membership to purchasers who acquired Notes *directly in* one of the U.S.-registered Offerings. *Certification Order*, 312 F.R.D. at 372. Unlike claims under Sections 11 and 15, class membership with regard to Section 12(a)(2) does not extend to those who acquired a Note "pursuant and/or traceable to" one of the Offerings. *Id*.

statement covering a period of at least twelve months beginning after the effective date of the offerings." *Id*. This language conforms to the limitations inherent in Section 11, given the absence of any allegation that Plaintiffs relied on any such earnings statement.[10] *See* 15 U.S.C. § 77k(a).

III. The Instant Appeal

On June 15, 2016, a panel of this Court granted Appellants' timely filed petition for permission to appeal the *Certification Order* under Federal Rule of Civil Procedure 23(f) and Federal Rule of Appellate Procedure 5(a). On August 2, 2016, a separate panel granted Appellants' motion for a stay pending resolution of this expedited interlocutory appeal.

DISCUSSION

A plaintiff seeking certification of a Rule 23(b)(3) class action bears the burden of satisfying the requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—as well as Rule 23(b)(3)'s requirements: (1) that "the questions of law or fact common to class members

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[10] Prior to the *Certification Order*, the district court had already dismissed all Section 11 claims "based on purchases of the 2014 Notes made after May 15, 2015," the date on which Petrobras filed earning statements "covering the twelve-month period following the effective date of the 2014 Notes' offering." *December 2015 Order*, 150 F. Supp. 3d at 344 (citing 15 U.S.C. § 77k(a)).

predominate over any questions affecting only individual members" (the "predominance" requirement); and (2) that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" (the "superiority" requirement). Fed. R. Civ. P. 23(a), (b)(3); *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 117 (2d Cir. 2013) ("To certify a class, a district court must . . . find that each [Rule 23] requirement is 'established by at least a preponderance of the evidence.'" (quoting *Brown v. Kelly*, 609 F.3d 467, 476 (2d Cir. 2010))). This Court has also "recognized an implied requirement of ascertainability in Rule 23," which demands that a class be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015) (internal quotation marks and citations omitted).

Appellants do not challenge the district court's findings with regard to the class certification elements under Rule 23(a). Rather, they assert two arguments under Rule 23(b)(3). Appellants first argue that both Classes fail to satisfy ascertainability, predominance, and superiority because putative class members must establish, on an individual basis, that they acquired their securities in "domestic transactions." The Petrobras Defendants assert a second

predominance challenge specific to the Exchange Act Class: they argue that the district court erred in finding that Plaintiffs successfully established a class-wide presumption of reliance under the "fraud on the market" theory.

I. Standard of Review

"We review a district court's conclusions as to whether the requirements of Federal Rule of Civil Procedure 23 were met, and in turn whether class certification was appropriate, for abuse of discretion."[11] *In re Vivendi, S.A. Sec.*

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[11] We note that although we have sometimes stated in the past that we "apply[] a 'noticeably less deferential' standard when the district court has denied class certification," *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) (quoting *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 224–25 (2d Cir. 2006)), this language apparently arose from a misreading of earlier Second Circuit cases. Moreover, it is out of step with recent Supreme Court authority.

The first case to suggest that we apply a different standard to denials of class certification was *Lundquist v. Security Pacific Automotive Financial Services Corp.*, 993 F.2d 11, 14 (2d Cir. 1993) (per curiam). *Lundquist* cited *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993), and *Abrams v. Interco Inc.*, 719 F.2d 23, 28 (2d Cir. 1983), for the proposition that "we are noticeably less deferential to the district court when that court has denied class status than when it has certified a class." *Id*. But *Abrams* and *Robidoux* do not support this proposition. *Abrams* states, in relevant part: "Abuse of discretion can be found far more readily on appeals from the denial *or grant* of class action status than where the issue is, for example, the curtailment of cross-examination or the grant or denial of a continuance," because "courts have built a body of case law with respect to class action status." 719 F.2d at 28 (emphasis added) (citation omitted). *Robidoux* repeated that "abuse of discretion can be found more readily on appeals from the denial of class status *than in other areas*, for the courts have built a body of case law with respect to class action status." 987 F.2d at 935 (emphasis added) (citing *Abrams*, 719 F.2d at 28).

Litig., 838 F.3d 223, 263 (2d Cir. 2016) (citations omitted). "While we review the district court's construction of legal standards *de novo,* we review the district court's application of those standards for whether the district court's decision falls within the range of permissible decisions." *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) (citing *Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010)). "To the extent that the district court's decision as to class certification is premised on a finding of fact, we review that finding for clear error." *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 130–31 (2d Cir. 2010)

Thus, neither *Abrams* nor *Robidoux* applied a different standard to denials versus grants of class certification. Rather, both cases stated that this Court is more likely to find abuse of discretion in appeals involving the *issue* of class certification—whether certification was granted or denied—when compared with *other types of legal issues*. It appears that *Lundquist* misinterpreted that comparison. In sum, no Second Circuit case provides any reasoning or justification for the idea that we review denials of class certification with more scrutiny than grants.

The Supreme Court has never drawn a distinction between the standard used to review district court denials or grants of class certification. *See, e.g., Tyson Foods, Inc. v. Bouaphakeo*, — U.S. —, 136 S. Ct. 1036, 1045–46 (2016). Recent Supreme Court class certification cases emphasize that courts must "conduct a rigorous analysis" to determine whether putative class plaintiffs meet Rule 23's requirements. *Comcast Corp. v. Behrend*, — U.S. —, 133 S. Ct. 1426, 1432 (2013); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). That said, we need not decide the issue here. We take this opportunity, however, to point out the distinction as one that need not and ought not be drawn. Should the resolution of this issue prove determinative of the outcome in a future matter, the question can likely be resolved by this Court's protocol for the circulation of opinions at that time.

(citing *In re Initial Pub. Offering Sec. Litig.* ("*In re IPO*"), 471 F.3d 24, 40–41 (2d Cir. 2006)); *see also In re Vivendi*, 838 F.3d at 263.

II. "Domestic Transactions" as a Condition for Class Membership

The two certified Classes include all claims arising out of Petrobras Notes purchased in "domestic transactions" during the class period, thereby capturing the broadest membership possible under *Morrison*. Appellants argue that the difficulties inherent in assessing putative class members' transaction records make the Classes uncertifiable for several reasons, the most important of which, for our purposes, are (1) the ascertainability doctrine, which has seen recent developments in this Circuit and others; and (2) predominance. We hold that both class definitions satisfy the ascertainability doctrine as it is defined in this Circuit. We further hold, however, that the district court erred in conducting its predominance analysis without considering the need for individualized *Morrison* inquiries. On that basis, we vacate the district court's certification decision and remand for further proceedings.

A. Extraterritoriality and Federal Securities Law

1. Defining "Domestic Transactions": *Morrison* and *Absolute Activist*

"It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison*, 561 U.S. at 255 (internal quotation marks and citation omitted). Based on that presumption against extraterritoriality, the Supreme Court held in *Morrison* that the reach of U.S. securities law is presumptively limited to (1) "transactions in securities listed on domestic exchanges," and (2) "domestic transactions in other securities." *Id.* at 267 (discussing Section 10(b) of the Exchange Act); *see also id.* at 268 (noting that "[t]he same focus on domestic transactions is evident in the Securities Act").[12]

As noted in the margin, we assume that a purchase of Petrobras ADS qualifies under *Morrison*'s first prong as long as the transaction occurs on the

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[12] The district court applied *Morrison*'s extraterritoriality analysis to Plaintiffs' claims under both the Exchange Act and the Securities Act. *See July 2015 Order*, 116 F. Supp. 3d at 386. In addition, all parties appear to have proceeded under the assumption that *Morrison* applies to ADS in the same manner that it applies to common stock. Appellants have not challenged these conclusions on appeal, and we therefore see no need to address them.

NYSE, a "domestic exchange." *See City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 180–81 (2d Cir. 2014) (holding that mere *listing* on a domestic exchange is not sufficient to establish domesticity if the relevant securities transaction did not *occur* on a domestic exchange). The Notes, however, do not trade on any domestic exchange.[13] Therefore, to assert claims under federal securities laws, Noteholders must show in some other manner that the Notes they hold were acquired in a "domestic transaction."

This Court's decision in *Absolute Activist* elaborated on that standard: for "securities that are not traded on a domestic exchange," a transaction is considered "domestic if [1] irrevocable liability is incurred or [2] title passes within the United States." *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012). In other words, for a transaction to qualify as domestic, either (1) the purchaser must have "incurred irrevocable liability within the United States to take and pay for a security, or . . . the seller [must have] incurred irrevocable liability within the United States to deliver a

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[13] "[A]lthough the Notes were listed or intended to be listed on the [NYSE], they did not *trade* there. . . . [M]ere listing, without trading, is insufficient to satisfy *Morrison*'s first prong." *December 2015 Order*, 150 F. Supp. 3d 337, 339–40 (emphasis added) (citing *City of Pontiac*, 752 F.3d at 179–81).

security," or (2) legal title to the security must have transferred in the United States. *Id.* at 68.

The location or residency of the buyer, seller, or broker will not necessarily establish the situs of the transaction. *Id*. at 68–69. Rather, plaintiffs demonstrate the location where irrevocable liability was incurred or legal title transferred by producing evidence "including, but not limited to, facts concerning the formation of the contracts, the placement of purchase orders, . . . or the exchange of money." *Id*. at 70.

2. The District Court's Pre-Certification *Morrison* Inquiries

Before certifying the Classes, the district court twice adjudicated *Morrison*-based challenges to Plaintiffs' claims. When the class action was first consolidated, the court dismissed, without prejudice, all Securities Act claims based on Plaintiffs' failure "to allege that they purchased the relevant securities in domestic transactions." *July 2015 Order*, 116 F. Supp. 3d at 386.

Plaintiffs responded with new allegations and documentary evidence regarding Notes transactions for each of the four putative named plaintiffs. Defendants once again moved to dismiss. The district court found that two of the named plaintiffs had adequately pleaded domestic transactions based on their acquisition of Notes directly from U.S. underwriters in the Offerings.

December 2015 Order, 150 F. Supp. 3d at 340. For example, one plaintiff's "traders in Raleigh, North Carolina purchased Notes on May 13, 2013, and March 10, 2014, from underwriters in New York, New York." *Id*. The district court found that this plaintiff had alleged "the kinds of facts required by *Absolute Activist*, including New York area code phone numbers on the confirmations sent by representatives of the underwriters." *Id*. at 340 n.5.

The district court determined that the other two named plaintiffs had failed to satisfy the *Morrison* inquiry and dismissed their Securities Act claims. *Id*. at 340–43. One plaintiff, for example, presented a confirmation slip stating that Petrobras Notes had been purchased "in U.S. dollars and that the Notes were held in '[s]afekeeping of securities abroad, depository country: U.S.A.'" *Id*. at 341 (quoting the 4th Am. Compl.). According to the district court, this "language suggests that the purchase occurred *outside* the United States because it refers to the United States as 'abroad.'" *Id*. (emphasis added). The district court similarly found insufficient an allegation that an investment manager "located in the United Kingdom[] instructed its U.S. affiliate, located in Chicago, Illinois, to transfer Petrobras Notes to [the plaintiff entity,] located in the United Kingdom." *Id*. The court noted that "a 'transfer,' rather than a purchase, [was]

all that [was] alleged. Moreover, the allegations suggest that irrevocable liability was incurred in the United Kingdom," where both the plaintiff and the investment manager were located, "rather than in the United States." *Id.*

In an attempt to preserve those claims, Plaintiffs offered two alternative methods for establishing domestic transactions as a matter of law. First, Plaintiffs argued that a securities transaction should qualify as "domestic" if *beneficial* title is transferred when the transaction is settled through a domestic securities depository, such as the Depository Trust Company ("DTC") located in New York City. *Id.* The district court disagreed, finding that "[t]he mechanics of DTC settlement are actions needed to *carry out* transactions, but they involve neither the substantive indicia of a contractual commitment necessary to satisfy *Absolute Activist*'s first prong nor the formal weight of a transfer of [legal] title necessary for its second." *Id.* at 342 (emphasis added); *see also id*. ("[T]he Second Circuit has [] indicated that domestic 'actions needed to carry out transactions, and not the transactions themselves,' are insufficient to satisfy *Morrison*." (quoting *Loginovskaya v. Batratchenko*, 764 F.3d 266, 275 (2d Cir. 2014))). The district court also expressed concern that, "assuming the parties are correct that most securities transactions settle through the DTC or similar depository

institutions, the entire thrust of *Morrison* and its progeny would be rendered nugatory if all DTC-settled transactions necessarily fell under the reach of the federal securities laws." *Id*.

Finally, Plaintiffs proposed a method for constructively establishing the domesticity of Notes transactions: "allegations that a plaintiff purchased Notes 'on the offering date and at the offering price' [should be] sufficient to demonstrate irrevocable liability because all the underwriters who sold in the initial offerings only did so in the United States." *Id*. at 342 (quoting the 4th Am. Compl.). The district court rejected this theory, noting that certain documents related to the Offerings "imply that some underwriters *did* initially offer the Notes outside the United States." *Id*. (emphasis added).[14]

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[14] The district court resolved similar factual and legal questions in the related individual actions. *See In re Petrobras Sec. Litig.*, 152 F. Supp. 3d 186, 192–93 (S.D.N.Y. 2016) (finding that several "plaintiffs [had] failed to adequately allege they purchased Notes in domestic transactions" and granting leave to amend); *Internationale Kapitalanlagegesellschaft mbH v. Petróleo Brasileiro S.A. (In re Petrobras Sec. Litig.)*, No. 15 CIV. 6618 (JSR), 2016 U.S. Dist. LEXIS 46570 (S.D.N.Y. Mar. 24, 2016) (granting in part a motion to dismiss after analyzing various allegations, trade confirmations, trade memoranda, and investment manager employment records).

B. Ascertainability

"Most [] circuit courts of appeals have recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable," often characterized as "an 'ascertainability' requirement." *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 995 (8th Cir. 2016) (internal quotation marks and citation omitted) (collecting cases). "[C]ourts ascribe widely varied meanings to that term," however. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124 n.3 (9th Cir. 2017) (describing two versions of the ascertainability requirement); *see generally* Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 Yale L.J. 2354, 2366–88 (2015) (describing different conceptions of ascertainability and critiquing the proffered justifications).

In *Brecher v. Republic of Argentina*, we offered our first and, thus far, only affirmative definition[15] of the implied ascertainability requirement:

> [T]he touchstone of ascertainability is whether the class is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member. A class is ascertainable when

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[15] We cursorily defined ascertainability in the negative in a 2006 opinion, noting that "ascertainability [] is an issue distinct from the predominance requirement." *In re IPO*, 471 F.3d at 45. We did "not further define[]" ascertainability's "content" until *Brecher*, however. 806 F.3d at 24.

> defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case.

Brecher, 806 F.3d at 24–25 (internal quotation marks and citations omitted). Based on this language, Appellants argue for a "heightened" ascertainability requirement under which any proposed class must be "administratively feasible," over and above the evident requirements that a class be "definite" and "defined by objective criteria," and separate from Rule 23(b)(3)'s requirements of predominance and superiority.

We take this opportunity to clarify the ascertainability doctrine's substance and purpose. We conclude that a freestanding administrative feasibility requirement is neither compelled by precedent nor consistent with Rule 23, joining four of our sister circuits in declining to adopt such a requirement. The ascertainability doctrine that governs in this Circuit requires only that a class be defined using objective criteria that establish a membership with definite boundaries. Applying that doctrine, we determine that ascertainability is not an impediment to certification of the Classes as currently defined.

1. <u>The Proceedings Below and Arguments on Appeal</u>

In its *Certification Order*, the district court rejected Defendants' argument that, "because of the nuances of the 'domestic transaction' standard, determining

[class membership] and damages will be an *administratively unfeasible* task for this Court, for putative class members who receive notice of the action, and for future courts facing claims from class members who have not properly opted out." 312 F.R.D. at 363–64 (emphasis added) (footnote omitted).

Appellants renew that argument on appeal, packaged as a challenge to the district court's finding "that the *Morrison* determination is 'administratively feasible.'" *Id.* at 364 (quoting *Brecher*, 806 F.3d at 24). Appellants cite heavily to cases from the Third Circuit, which has formally adopted a "heightened" two-part ascertainability test under which plaintiffs must not only show that "the class is 'defined with reference to objective criteria,'" but also that "there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Byrd v. Aaron's Inc.*, 784 F.3d 154, 166 (3d Cir. 2015), *as amended* Apr. 28, 2015 (quoting *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013)); *see also Carrera v. Bayer Corp.*, 727 F.3d 300, 305 (3d Cir. 2013); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-95 (3d Cir. 2012).

With all due respect to our colleagues on the Third Circuit, we decline to adopt a heightened ascertainability theory that requires a showing of

administrative feasibility at the class certification stage. The reasoning underlying our decision in *Brecher* does not suggest any such prerequisite, and creating one would upset the careful balance of competing interests codified in the explicit requirements of Rule 23. In declining to adopt an administrative feasibility requirement, we join a growing consensus that now includes the Sixth, Seventh, Eighth, and Ninth Circuits. *See Briseno*, 844 F.3d at 1123; *Sandusky*, 821 F.3d at 995–96; *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015), *cert. denied*, — U.S. —, 136 S. Ct. 1493 (2016); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657–58 (7th Cir. 2015), *cert. denied*, — U.S. —, 136 S. Ct. 1161 (2016); *see also Byrd*, 784 F.3d at 177 (Rendell, *J.*, concurring) ("suggest[ing]" that the Third Circuit "retreat from [its] heightened ascertainability requirement" by eliminating the administrative feasibility prong).

2. Our Decision in *Brecher v. Republic of Argentina*

Brecher was one of several opinions in which we assessed a class action initiated by holders of Argentinian bonds "[a]fter Argentina defaulted on between $80 and $100 billion of sovereign debt in 2001." *Brecher*, 806 F.3d at 23 (listing prior decisions). The district court originally "certified a class under a continuous holder requirement, *i.e.*, the class contained only those individuals who [] possessed beneficial interests in a particular bond series issued by the

Republic of Argentina from the date of the complaint [] through the date of final judgment." *Id.*

When the district court granted summary judgment to the plaintiffs, we vacated in part after finding that the district court's method of calculating aggregate damages had likely produced impermissibly inflated awards. *See Seijas v. Republic of Argentina*, 606 F.3d 53, 58–59 (2d Cir. 2010); *Hickory Sec., Ltd. v. Republic of Argentina*, 493 F. App'x 156, 160 (2d Cir. 2012) (summary order). On remand, the district court "modif[ied] the class definition by removing the continuous holder requirement and expanding the class to all holders of beneficial interests in the relevant bond series[,] without limitation as to time held." *Brecher*, 806 F.3d at 24. The defendants appealed once again.

We concluded that, without the continuous holder requirement, the modified class was unascertainable. *Id.* at 26. We first defined the elements of ascertainability, explaining that a proposed class: (1) must be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member"; and (2) must be "defined by objective criteria that are administratively feasible," such that "identifying its members would not require a mini-hearing on the merits of each case." *Id.* at 24 (citations omitted).

These requirements operate in harmony: "the use of objective criteria cannot alone determine ascertainability when those criteria, taken together, do not establish the definite boundaries of a readily identifiable class.[16]" *Id*. at 25 (footnote in original as n.2).

Turning to the facts of the case, we expressed concern that the class was insufficiently bounded:

> The secondary market for Argentine bonds is active and has continued trading after the commencement of this and other lawsuits. . . . Further, all bonds from the same series have the same trading number identifier (called a CUSIP/ISIN), making it practically impossible to trace purchases and sales of a particular beneficial interest. Thus, when it becomes necessary to determine who holds bonds that fall inside (or outside) of the class, it will be nearly impossible to distinguish between them once traded on the secondary market without a criterion as to time held.

Id. at 25–26 (citations omitted). We concluded that "[t]his case presents [] a circumstance where an objective standard—owning a beneficial interest in a bond series without reference to time owned—is insufficiently definite to allow

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[16] "Of course, 'identifiable' does not mean 'identified'; ascertainability does not require a complete list of class members at the certification stage." *Brecher*, 806 F.3d at 25 n.2 (citation omitted).

ready identification of the class or the persons who will be bound by the judgment." *Id*. at 25 (footnote omitted).

As this summary clarifies, we reached our decision in *Brecher* by asking whether the class was defined by objective criteria that made the class's membership sufficiently definite, not whether the class was administratively feasible.[17] *See, e.g.*, *id*. at 26 ("The lack of a defined class period . . . makes the modified class *insufficiently definite* as a matter of law." (emphasis added)). The opinion's language about "administrative feasibility" and "mini-hearings" was not strictly part of the holding, and was not intended to create an independent element of the ascertainability test; rather, that language conveyed the *purpose* underlying the operative requirements of definiteness and objectivity. That is, a class must be "sufficiently definite *so that* it is administratively feasible for the court to determine whether a particular individual is a member"; a class must be "defined by objective criteria" *so that* it will not be necessary to hold "a mini-

[17] The Ninth Circuit highlighted this distinction in their survey of the circuit case law on ascertainability. *Briseno*, 844 F.3d at 1126 n.6 ("[A]dministrative feasibility played no role in the [*Brecher*] decision, which instead turned on the principle that a class definition must be objective and definite.").

hearing on the merits of each case." *Id*. at 24 (emphasis added) (citations omitted).

This interpretation finds further support in the district court cases we cited in *Brecher*'s articulation and application of the ascertainability standard. *Compare Bakalar v. Vavra*, 237 F.R.D. 59, 65 (S.D.N.Y. 2006) (declining to certify a class seeking recovery of artworks traceable to a particular estate—an objective criterion—because the movants were unable to *identify* the specific artworks, and were therefore also unable to identify "the owners, possessors or individuals who participated in transfers of such works"), *with Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014) (acknowledging the challenge of identifying individuals who purchased a particular brand of olive oil during the class period, but finding the class ascertainable because "ascertainability . . . is designed only to prevent the certification of a class whose membership is *truly indeterminable*" (emphasis added) (internal quotation marks and citations omitted)), *and Charron v. Pinnacle Grp. N.Y. LLC*, 269 F.R.D. 221, 229 (S.D.N.Y. 2010) (finding that ascertainability was satisfied because the proposed class was "defined by objective criteria—namely, whether a given apartment is rent-regulated" and "owned by the [defendant corporation]; and whether the

putative Class member is a tenant" on a fixed date—"thus allowing the Court to readily identify Class members without needing to resolve the merits of Plaintiffs' claims").[18]

3. Ascertainability and Rule 23

Having concluded that our decision in *Brecher* did not create an independent administrative feasibility requirement, we now consider whether such a requirement is compulsory under Rule 23, or at least complementary to the requirements enumerated therein. We find that it is neither. In pursuing this analysis, we are mindful that "[c]ourts are not free to amend [the Federal Rules

[18] *Weiner v. Snapple Beverage Corp.*, No. 07 CIV. 8742 (DLC), 2010 WL 3119452 (S.D.N.Y. Aug. 5, 2010), which was also cited in *Brecher*, appears to have treated administrative feasibility as an independent requirement alongside objective criteria and definite class membership. *See id*. at *12 (finding that "Plaintiffs [] failed to prove that it would be administratively feasible to ascertain the members of the putative class" because "the process of verifying class members' claims would be extremely burdensome for the court or any claims administrator"). That language was pure dicta, however: the district court denied class certification on predominance grounds, *see id*. at *10–11, and discussed superiority and ascertainability only to show that, even if predominance had been satisfied, "*potentially* serious impediments to class certification [would] remain," *id*. at *12 (emphasis added).

In any event, our opinion in *Brecher* did not cite to *Weiner*'s fact-based analysis. We cited only to *Weiner*'s articulation of the legal standard for ascertainability, which quoted directly from *Charron*. *See Weiner*, 2010 WL 3119452, at *12 (quoting *Charron*, 269 F.R.D. at 229). Meanwhile, *Brecher* cited approvingly to *Ebin*, which explicitly disagreed with *Weiner*'s ascertainability analysis. *See Ebin*, 297 F.R.D. at 567 (*Weiner* "goes further than this Court is prepared to go, and, indeed, would render class actions against producers almost impossible to bring.").

of Civil Procedure] outside the process Congress ordered." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). "The text" of Rule 23 thus "limits judicial inventiveness." *Id*.

The heightened ascertainability test, as articulated by the Third Circuit and endorsed by Appellants, treats administrative feasibility as an absolute standard: plaintiffs must provide adequate "assurance that there can be 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Byrd*, 784 F.3d at 164–65 (quoting *Hayes*, 725 F.3d at 355); *cf. Mullins*, 795 F.3d at 663 ("When administrative inconvenience is addressed as a matter of ascertainability, courts tend to look at the problem in a vacuum, considering only the administrative costs and headaches of proceeding as a class action." (citation omitted)).

On its face, this test appears to duplicate Rule 23's requirement that district courts consider "the likely difficulties in managing a class action."[19] Fed. R. Civ.

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[19] Certain arguments that appeared in Appellants' briefs under the heading of ascertainability are properly construed as challenges to superiority. This includes, for example, due process concerns regarding notice to absent class members. *See* Fed. R. Civ. P. 23(c)(2)(B); *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 222 (2d Cir. 2012) ("Absent class members have a due process right to notice and an opportunity to opt out of [certain types of] class litigation," and "Rule 23 protects that right by providing a

P. 23(b)(3)(D). This apparent redundancy is misleading, however, because of a key difference in analytical orientation. Whereas ascertainability is an absolute standard, manageability is a component of the superiority analysis, which is explicitly comparative in nature: courts must ask whether "a class action is *superior to other available methods* for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added). We share the concern voiced by our sister circuits that heightened ascertainability and superiority could push in opposite directions. Though a court may not ignore concerns about the manageability of a putative class action, it may be that challenges of administrative feasibility are most prevalent in cases "in which there may be no realistic alternative to class treatment," *Briseno*, 844 F.3d at 1128 (agreeing with *Mullins*, 795 F.3d at 663–64), underscoring the importance of a comparative inquiry. This concern is particularly acute in light of our admonition that "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir.

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parallel statutory requirement of notice and the opportunity to opt out for classes certified under subdivision (b)(3)." (citations omitted)).

2001), *overruled on other grounds by In re IPO*, 471 F.3d at 39–40 (internal quotation marks and citation omitted).

The proposed administrative feasibility test also risks encroaching on territory belonging to the predominance requirement, such as classes that require highly individualized determinations of member eligibility. *See, e.g.*, *Mazzei v. The Money Store*, 829 F.3d 260, 272 (2d Cir. 2016) (internal quotation marks omitted), *cert. denied*, — U.S. —, 137 S. Ct. 1332 (2017). Like superiority, predominance is a comparative standard: "Rule 23(b)(3) [] does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof. What the rule does require is that common questions '*predominate* over any questions affecting only individual [class] members.'" *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 133 S. Ct. 1184, 1196 (2013) (quoting Fed. R. Civ. P. 23(b)(3); other quotation marks, citations, and alterations omitted).

We conclude that an implied administrative feasibility requirement would be inconsistent with the careful balance struck in Rule 23, which directs courts to weigh the competing interests inherent in any class certification decision. *Accord Briseno*, 844 F.3d at 1128 ("[A] freestanding administrative feasibility

requirement" would "have practical consequences inconsistent with the policies embodied in Rule 23."); *Mullins*, 795 F.3d at 658 ("The policy concerns motivating the heightened ascertainability requirement are better addressed by applying carefully the explicit requirements of Rule 23(a) and especially (b)(3)."); *Byrd*, 784 F.3d at 177 (Rendell, *J.*, concurring) (concluding that the Third Circuit's "heightened ascertainability requirement . . . contravenes the purpose of Rule 23 and . . . disserves the public"); *see also* Shaw, 124 Yale L.J. at 2366 ("Rule 23 already safeguards the interests that the ascertainability requirement supposedly protects and adequately guards against the problems that the requirement supposedly forestalls.").

Our decision in *Brecher* did not create an administrative feasibility requirement, and we decline to adopt one now. The ascertainability requirement, as defined in this Circuit, asks district courts to consider whether a proposed class is defined using objective criteria that establish a membership with definite boundaries. This modest threshold requirement will only preclude certification if a proposed class definition is indeterminate in some fundamental way. If there is no focused target for litigation, the class itself cannot coalesce, rendering the class action an inappropriate mechanism for adjudicating any

potential underlying claims. In other words, a class should not be maintained without a clear sense of who is suing about what. Ascertainability does not directly concern itself with the plaintiffs' ability to offer *proof of membership* under a given class definition, an issue that is already accounted for in Rule 23.[20]

4. Application

The district court's analysis in the *Certification Order* is not precisely consistent with the ascertainability standard articulated in this opinion. The district court focused primarily on the types of feasibility concerns that we hold are not controlling of the ascertainability analysis, and effectively addressed ascertainability as a component of superiority. 312 F.R.D. at 363–64. Nonetheless, the district court's findings reflect an understanding that objective criteria would permit the identification of class members. We agree.

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[20] This clarified conception of ascertainability supports, rather than supplants, the plain text of Rule 23. As we noted above in our discussion of *Brecher*, a class must be "sufficiently definite" and "defined by objective criteria" *so that* "it is administratively feasible for the court to determine whether a particular individual is a member" (a superiority concern) and *so that* "identifying [the class's] members would not require a mini-hearing on the merits of each case" (a predominance concern). *Brecher*, 806 F.3d at 24 (emphasis added) (citation omitted). So understood, the ascertainability requirement merely gives name to a particularly vexing type of class defect that would cause a proposed class to founder on the shoals of predominance, superiority, or both. Ascertainability provides a guiding principle for the otherwise murky analysis of classes that, though ostensibly defined by objective criteria, nonetheless present fatal challenges of determinability.

The Classes include persons who acquired specific securities during a specific time period, as long as those acquisitions occurred in "domestic transactions." *Id.* at 372. These criteria—securities purchases identified by subject matter, timing, and location—are clearly objective. The definition is also sufficiently definite: there exists a definite subset of Petrobras Securities holders who purchased those Securities in "domestic transactions"[21] during the bounded class period. Appellants vigorously challenge the *practicality* of making the domesticity determination for each putative class member, but as we explain above, the ascertainability analysis is limited to narrower question of whether those determinations are objectively *possible*.

Unlike in *Brecher* or the cases cited therein, neither the parties nor the properties that are the subject of this litigation are fundamentally indeterminate. Finding no error in the district court's conclusion on this point, we reject Appellants' contention that the classes defined by the district court fail on ascertainability grounds.

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[21] As explained in the sections that follow, legal questions as to the "domesticity" of any given transaction—and the resulting individualized determinations of class member eligibility—go to the core of the predominance analysis, and are not properly analyzed as issues of ascertainability.

C. Predominance

1. Legal Standard

A district court may only certify a class under Federal Rule of Civil Procedure 23(b)(3) if "questions of law or fact common to class members predominate over any questions affecting only individual members." This "predominance" requirement is satisfied if: (1) resolution of any material "legal or factual questions . . . can be achieved through generalized proof," and (2) "these [common] issues are more substantial than the issues subject only to individualized proof." *Mazzei*, 829 F.3d at 272 (quoting *Myers*, 624 F.3d at 547).

The distinction between "individual" and "common" questions is thus central to the predominance analysis. As the Supreme Court has explained:

> An individual question is one where "members of a proposed class will need to present evidence that varies from member to member," while a common question is one where "the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized class-wide proof."

Tyson Foods, Inc. v. Bouaphakeo, — U.S. —, 136 S. Ct. 1036, 1045 (2016) (alteration omitted) (quoting 2 William B. Rubenstein, Newberg on Class Actions § 4:50, at 196–97 (5th ed. 2012)).

The predominance inquiry is a core feature of the Rule 23(b)(3) class mechanism, and is not satisfied simply by showing that the class claims are framed by the common harm suffered by potential plaintiffs. *Amchem Prods.*, 521 U.S. at 623–24 (noting that "predominance criterion is far more demanding" than the "commonality" requirement under Rule 23(a)); *see also Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 138 (2d Cir. 2015). Where individualized questions permeate the litigation, those "fatal dissimilarit[ies]" among putative class members "make use of the class-action device inefficient or unfair." *Amgen*, 133 S. Ct. at 1197 (citation omitted); *see also* 7AA Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1778, at 141 (3d ed. 2005). ("[W]hen individual rather than common issues predominate, the economy and efficiency of class-action treatment are lost and. . . the risk of confusion is magnified." (footnote omitted)).

The predominance inquiry mitigates this risk by "ask[ing] whether the common, aggregation-enabling, issues in the case are *more prevalent or important* than the non-common, aggregation-defeating, individual issues." *Tyson Foods*, 136 S. Ct. at 1045 (emphasis added) (quoting Rubenstein, *supra*, at 195–96); *see also id.* (The "inquiry tests whether proposed classes are sufficiently cohesive to

warrant adjudication by representation." (quoting *Amchem Prods.*, 521 U.S. at 623)). For this reason, the Supreme Court has emphasized district courts' "duty to take a 'close look' at whether common questions predominate over individual ones." *Comcast Corp. v. Behrend*, — U.S. —, 133 S. Ct. 1426, 1432 (2013) (quoting *Amchem Prods.*, 521 U.S. at 615); *see also Tyson Foods*, 136 S. Ct. at 1045 (2016) (The predominance requirement "calls upon courts to give *careful scrutiny* to the relation between common and individual questions in a case." (emphasis added)). This analysis is "more [] qualitative than quantitative," Rubenstein, *supra*, at 197 (footnote omitted), and must account for the nature and significance of the material common and individual issues in the case, *see Roach*, 778 F.3d at 405.

2. Application

A proper assessment of predominance in this action involves two predicate questions about the role of *Morrison* inquiries. First, is the determination of domesticity material to Plaintiffs' class claims? *See Amchem Prods.*, 521 U.S. at 623 (explaining that predominance "trains on the legal or factual questions that qualify each class member's case as a genuine controversy"). If so, is that determination "susceptible to generalized class-wide proof" such that it represents a "common" question rather than an "individual"

one? *Tyson Foods*, 136 S. Ct. at 1045 (internal quotation marks and citation omitted). We find that the district court failed to meaningfully address the second question. That omission was an error of law, and we vacate the certification decision on that basis. Only by answering *both* predicate questions can the district court properly assess whether, in the case as a whole, common issues are "more prevalent or important" than individual ones. *Id*. (citation omitted).

With regard to the first question, "*Morrison* makes clear that [determining] whether [federal securities law] applies to certain conduct is a 'merits' question." *Absolute Activist*, 677 F.3d at 67 (quoting *Morrison*, 561 U.S. at 254). In other words, a putative class member only has a viable cause of action if the specific Petrobras Securities sued upon were purchased in a qualifying "domestic transaction." *City of Pontiac*, 752 F.3d at 179; *see also Morrison*, 561 U.S. at 273 (holding that securities fraud claims that lack a domestic connection must be dismissed for "fail[ure] to state a claim on which relief can be granted").

The district court clearly recognized *Morrison*'s importance because the class definitions import *Morrison*'s unelaborated legal standard, namely that Petrobras Securities must have been purchased in "domestic transactions." *See*

Certification Order, 312 F.R.D. at 372. Indeed, it appears that the district court consciously sought to certify encompassing classes that would extend as far as *Morrison* allows. *See id.* at 364 (rejecting a proposed limitation to the class definition because it "would cut off purchasers who have valid claims under *Morrison*'s second prong"). When it came to predominance, however, the district court did not mention *Morrison* at all. The court found that predominance was satisfied, explaining that, "with the exception of reliance[[22]] and damages, plaintiffs' claims rest almost exclusively on class-wide questions of law and fact centered around" Petrobras's alleged misconduct "and the effects of these actions and events on the market." *Id.* at 364. The court proceeded to discuss reliance and damages in great detail, *id*. at 364–72, but made no mention of *Morrison*.[23]

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[22] As discussed in greater detail below, the Exchange Act claims include a reliance element that must be satisfied on an individual basis unless the plaintiffs establish a class-wide presumption of reliance under the "fraud on the market" theory. *See* Discussion Section III.A, *infra*.

[23] The district court did address *Morrison*-related issues when analyzing superiority. *Certification Order*, 312 F.R.D. at 363–64. Notably, the district court expressed its "confiden[ce] that the *Morrison* determination is administratively feasible." *Id*. at 364. We are unable to transplant those findings into the predominance context, however, because of substantive differences among the three inquiries. *See* Discussion Section II.B.3, *supra*.

The *Certification Order* is susceptible to two possible readings: either the district court implicitly held that *Morrison* inquiries constituted a common issue, or the court simply sidestepped the question. Either way, given the nature of the *Morrison* inquiries at issue, the district court cannot be said to have "give[n] careful scrutiny to the relation between [the] common and individual questions" central to this case. *See Tyson Foods*, 136 S. Ct. at 1045.

On the available record, the investigation of domesticity appears to be an "individual question" requiring putative class members to "present evidence that varies from member to member." *Id*. (citation omitted). As discussed above, a plaintiff may demonstrate the domesticity of a particular transaction by producing evidence "including, but not limited to, facts concerning the formation of the contracts, the placement or purchase orders, the passing of title, or the exchange of money." *Absolute Activist*, 677 F.3d at 70; *see also* Discussion Section II.A, *supra*. These transaction-specific facts are not obviously "susceptible to [] class-wide proof,"[24] nor did Plaintiffs suggest a form of representative proof

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[24] As did the district court, we reject Plaintiff's argument that a securities transaction is "domestic" under *Morrison* and *Absolute Activist* if it settles through the DTC. *See December 2015 Order*, 150 F. Supp. 3d at 342. *See generally* Br. of the Depository Tr. Co. as

that would answer the question of domesticity for individual class members. *See Tyson Foods*, 136 S. Ct. at 1045–46 (explaining that class plaintiffs may rely on representative samples to prove class-wide liability where they can show "that each class member could have relied on that sample to establish liability if he or she had brought an individual action").

In cases that have applied *Morrison* and *Absolute Activist*—including the district court's own experience adjudicating Petrobras-specific inquiries—factfinders have considered various types of evidence offered to prove the domesticity of various types of transactions. *See, e.g.*, *Loginovskaya*, 764 F.3d at 274–75 (finding that domestic wire transfers failed to satisfy *Absolute Activist* because they were "actions needed to carry out the transactions, and not the transactions themselves"); *In re Petrobras Sec. Litig.*, 152 F. Supp. 3d 186, 193 (S.D.N.Y. 2016) (explaining that the high-level documentation provided by various plaintiffs was insufficient to plead a domestic transaction); *December 2015 Order*, 150 F. Supp. 3d at 340–41 (finding that two proposed class representatives failed to plead domestic transactions in Petrobras Notes).

Amicus Curiae Not in Support of Any Party, ECF No. 293 (describing the DTC's history and its procedures for settling securities transactions).

The district court suggested that the pertinent locational details for each transaction are likely to be found in the "record[s] routinely produced by the modern financial system," and "are highly likely to be documented in a form susceptible to the bureaucratic processes of determining who belongs to a Class." *Certification Order*, 312 F.R.D. at 364. Even if that fact is true, however, it does not obviate the need to consider the plaintiff-specific nature of the *Morrison* inquiry.

The two approved class representatives with Notes-based claims were both located in the United States, placed their Notes purchase orders in the United States, and procured their securities directly from United States underwriters as part of the initial Notes Offerings. *See December 2015 Order*, 150 F. Supp. 3d at 340. Appellants argue that those transactions are the easy case. As the Underwriter Defendants observe, the Classes as currently defined potentially "include[] numerous foreign and domestic entities that purchased securities from other foreign and domestic entities, possibly through foreign and domestic intermediaries, using different methods, under different circumstances, and reflected in different types of records (assuming any records of the purchases exist at all)." Underwriter Defs.' Br. at 3.

Significantly, the Classes include investors who purchased Notes in the initial Offerings, as well as investors who purchased their Notes on the secondary market. *See Certification Order*, 312 F.R.D. at 372. Aftermarket purchasers asserting claims under Sections 11 and 15 of the Securities Act must not only establish that they acquired their Notes in a domestic secondary transaction, but must also show that the particular Notes they acquired are "traceable to" one of the U.S.-registered Offerings. *See id.* The *Certification Order* offers no indication that the district court considered the ways in which evidence of domesticity might vary in nature or availability across the many permutations of transactions in Petrobras Securities.

The need for *Morrison* inquiries nominally presents a common question because the need to show a "domestic transaction" applies equally to each putative class member. However, Plaintiffs bear the burden of showing that, more often than not, they can provide common *answers*. *Amgen*, 133 S. Ct. at 1196. In this case, the potential for variation across putative class members—who sold them the relevant securities, how those transactions were effectuated, and what forms of documentation might be offered in support of domesticity—appears to generate a set of individualized inquiries that must be considered

within the framework of Rule 23(b)(3)'s predominance requirement. *See Tyson Foods*, 136 S. Ct. at 1045–46 (explaining that "[a]n individual question is one where members of a proposed class will need to present evidence that varies from member to member . . . ." (internal quotation marks and citation omitted)).

Consider, for instance, the Supreme Court's recent *Amgen* decision, which similarly involved class claims under Section 10(b) the Exchange Act. 133 S. Ct. 1184. Such claims require a showing that the defendants made a "*material* misrepresentation or omission." *Id.* at 1195. Materiality—like domesticity—is thus an "essential predicate" of an Exchange Act claim. *Id.* The *Amgen* Court held, however, that *proof* of materiality was not required for the purpose of satisfying predominance at the class certification stage. *Id*. Because materiality is determined objectively from the perspective of the "'reasonable investor,' materiality can be proved through evidence *common to the class*." *Id.* (emphasis added) (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976)). "In no event will the individual circumstances of particular class members bear on the [materiality] inquiry." *Id.* at 1191. "Consequently, materiality is a common question for purposes of Rule 23(b)(3)." *Id.* at 1196 (internal quotation marks, alteration, and citation omitted).

In the present action, by contrast, it cannot be said that the class members' *Morrison* inquiries will "prevail or fail in unison." *Id*. The district court has already adjudicated several individualized *Morrison* inquiries, preserving some plaintiffs' claims and dismissing others. *See* Discussion Section II.A.2, *supra*. "[W]ithout *class-wide* evidence" of domesticity, "the fact-finder would have to look at every class member's [transaction] documents to determine who did and who did not have a valid claim." *Mazzei*, 829 F.3d at 272 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)) (affirming a finding that predominance was not satisfied because the class claims turned on individualized determinations of privity). The predominance analysis must account for such individual questions, particularly when they go to the viability of each class member's claims.[25]

[25] An instructive example may be found in *Myers v. Hertz Corporation*, a case in which the class claims turned on a "complex, disputed issue" and "a number of subsidiary questions" concerning employee exemptions under the Fair Labor Standards Act. 624 F.3d at 548. We cautioned that "the predominance requirement [will only be] satisfied[] if the plaintiffs can show that some of [those] questions can be answered with respect to the members of the class as a whole through generalized proof and that those common issues are more substantial than individual ones." *Id*. at 549 (internal quotation marks and citations omitted).

Finally, we emphasize that district courts are authorized to implement management strategies tailored to the particularities of each case. In addition to modifying class definitions and issuing class-wide rulings, district courts can, for example, bifurcate the proceedings to home in on threshold class-wide inquiries; sever claims not properly adjudicated on a class-wide basis to isolate key common issues; or certify subclasses that separate class members into smaller, more homogenous groups defined by common legal or factual questions.[26] *See* Fed. R. Civ. P. 23(c)(4), (c)(5); *see also In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006); *In re Visa Check*, 280 F.3d at 141 (summarizing various class action "management tools" and collecting cases). While these options need not necessarily be exercised or even planned for prior to class certification, the possibility of post-certification procedural tailoring does not attenuate the obligation to take a "close look" at predominance when assessing the motion for certification itself.

For the foregoing reasons, we vacate the district court's certification of the Classes insofar as they include all otherwise eligible class members who acquired

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[26] For instance, the district court might certify a subclass—or a separate class—of Petrobras ADS holders who purchased their securities on the NYSE, or of Petrobras Noteholders who acquired their Notes directly through one of the initial Offerings.

their Securities in "domestic transactions." We take no position as to whether, on remand, the district court might properly certify one or more classes that capture some or all of the Securities holders who fall within the Classes as currently defined.[27] Our purpose is merely to outline the contours of the robust predominance inquiry that Rule 23 demands. We leave the adjudication thereof to the district court in the first instance.

III. "Fraud on the Market" and the Presumption of Reliance

The second issue on appeal concerns the district court's finding that the Exchange Act Class was entitled to a presumption of class-wide reliance on the market price of Petrobras's ADS and Notes. In reaching that conclusion, the district court found that Plaintiffs satisfied their burden of showing that the Petrobras Securities traded in efficient markets, as required under the "fraud on

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[27] Moreover, our analysis is limited to the current record, and should not be taken as expressing an opinion on the wide range of conceivable circumstances in which plaintiffs may assert class claims in connection with foreign-issued securities that do not trade on a domestic exchange. For instance, a district court might find that the transaction records for a particular security among particular parties display certain common indicia of domesticity. Class plaintiffs may propose a mechanism for assembling a representative sample of the manner in which a given security will trade, with an emphasis on the domesticity factors highlighted in *Absolute Activist*. A district court could also carefully weigh the relationship between common and individual questions in the case and determine that any variation across plaintiffs is, on balance, insufficient to defeat predominance.

the market" theory established in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). The Petrobras Defendants challenge that finding, arguing that the district court erred in the relative weight it assigned to the parties' competing evidence. We find no error of law in the district court's blended consideration of direct and indirect evidence of market efficiency, nor do we find any clear error in the district court's factual analysis. We therefore affirm as to this issue.

A. The "Fraud on the Market" Theory

1. Legal Standard

Plaintiffs alleging claims under Section 10(b) of the Exchange Act must prove "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Halliburton Co. v. Erica P. John Fund, Inc.* ("*Halliburton II*"[28]), — U.S. —, 134 S. Ct. 2398, 2407 (2014) (citation omitted). The key element for the purpose of this appeal is reliance, the element

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[28] The case commonly referred to as "*Halliburton I*" is *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011).

that establishes a sufficient "connection between a defendant's misrepresentation and a plaintiff's injury." *Id*. (citation omitted).

On its face, the reliance element would appear to preclude class certification on predominance grounds: "[e]ach plaintiff would have to prove reliance individually," with the result that "common issues would not 'predominate' over individual ones." *Id*. at 2416 (citation omitted). The Supreme Court resolved that tension almost three decades ago in *Basic Inc. v. Levinson*, reasoning that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price," and so "an investor's reliance on any public material misrepresentations [] may be *presumed* for purposes of a Rule 10b–5 action." 485 U.S. at 247 (emphasis added).

In 2014, the Court affirmed the continued vitality of the "fraud on the market" theory, and clarified that the so-called "*Basic* presumption actually incorporates two constituent presumptions:"

> First, if a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price.
>
> Second, if the plaintiff also shows that he purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased

> the stock in reliance on the defendant's misrepresentation.

Halliburton II, 134 S. Ct. at 2414. If a putative class successfully establishes the *Basic* presumption, "defendants must be afforded an opportunity . . . to defeat the presumption through evidence that [the] alleged misrepresentation [at issue in the plaintiffs' legal claim] did not actually affect the market price of the stock." *Id*. at 2417.

2. Market Efficiency and the *Cammer* Factors

"The fraud-on-the-market theory rests on the premise that certain well developed markets are efficient processors of public information," meaning that "the 'market price of shares' will 'reflect all publicly available information.'" *Amgen*, 133 S. Ct. at 1192 (quoting *Basic*, 485 U.S. at 246 (alteration omitted)).

This Court "has not adopted a test for the market efficiency of stocks or bonds." *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 204 n.11 (2d Cir. 2008). A test based on the so-called "*Cammer* factors" has been "routinely applied by district courts considering the efficiency of equity markets," and has also been applied, in modified form, "to bond markets with a recognition of the differences between the manner in which debt bonds and equity securities trade." *Id.*; *see also Cammer v. Bloom*, 711 F. Supp.

1264, 1286–87 (D.N.J. 1989) (articulating five factors); *Krogman v. Sterritt*, 202 F.R.D. 467, 478 (N.D. Tex. 2001) (describing three additional factors that are commonly included in *Cammer* analyses); *In re Enron Corp. Sec.*, 529 F. Supp. 2d 644, 747–49 (S.D. Tex. 2006) (applying the *Cammer* factors in modified form to debt securities).

All but one of the *Cammer* factors examine indirect indicia of market efficiency for a particular security, such as high trading volume, extensive analyst coverage, multiple market makers, large market capitalization, and an issuer's eligibility for simplified SEC filings. The fifth *Cammer* factor, however, invites plaintiffs to submit direct evidence, consisting of "empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price." *Cammer*, 711 F. Supp. at 1287; *see also Halliburton II*, 134 S. Ct. at 2415 ("[P]laintiffs [] can and do introduce evidence of the existence of price impact in connection with 'event studies'—regression analyses that seek to show that the market price of the defendant's stock tends to respond to pertinent publicly reported events." (citation and emphasis omitted)).

B. Application

At the outset, the Petrobras Defendants assert an error of law: they challenge the district court's purported holding that Plaintiffs were entitled to the *Basic* presumption based solely on their *indirect* evidence of market efficiency. This argument mischaracterizes the district court's analysis. True, the court noted that "Petrobras was one of the largest and most-analyzed firms in the world throughout the Class Period," and explained that in instances where "the indirect [*Cammer*] factors overwhelmingly describe a large and well-functioning market for Petrobras securities, common sense suggests that the market would materially react to material disclosures." *Certification Order*, 312 F.R.D. at 367. The opinion did not stop there, however. The court proceeded with an "involved analysis" of Plaintiffs' empirical evidence—which Defendants disputed as to "almost every aspect"—and "ultimately conclude[d] that plaintiffs [had] satisfied the fifth *Cammer* factor." *Id.*; *see also id*. at 367–71. Anything to the contrary was, at most, a holding in the alternative. We therefore decline to reach the Petrobras Defendants' legal question—whether plaintiffs may satisfy the *Basic* presumption without *any* direct evidence of price impact—because the issue is not squarely presented for our review.

Having confirmed the *existence* of Plaintiffs' direct evidence of market efficiency, we turn to the Petrobras Defendants' attack on the *quality* of that evidence. They argue, first, that the district court gave undue weight to Plaintiffs' empirical test, which measured the magnitude of responsive price changes in Petrobras Securities without considering the direction of those changes, and second, that the district court unduly discounted Defendants' rebuttal evidence. We find these arguments unpersuasive.

In the class certification proceedings, the parties' "experts [] sparred over whether any direct evidence of [*Cammer*'s] fifth factor existed." *Id*. at 367. Plaintiffs' expert ran multiple event studies and reported that "there were more likely to be big price movements on days when important Petrobras events occurred, demonstrating [that] the markets in Petrobras securities were responsive to new information." *Id*. at 367–68. Defendants responded with numerous challenges to "the execution and the sufficiency" of that test. *Id*. at 368. They specifically criticized the test's failure to examine directionality, that is, "whether the price of a security moved up or down as expected based on the precipitating market event." *Id*. at 369; *see also id*. at 370 (describing the defense expert's position that "in an efficient market, the price of a security should *always*

move in response to the release of new value-relevant information that is materially different from expectations"). Plaintiffs' expert conducted supplementary analyses of directional price impact, but the district court accorded them "only limited weight" after Defendants highlighted certain methodological flaws. *Id*. at 369–70. As to the non-directional analysis, the court declined to "let the perfect become the enemy of the good":

> In this case, where the indirect *Cammer* factors lay a strong foundation for a finding of efficiency, a statistically significant showing that statistically significant price returns are more likely to occur on event dates is sufficient as direct evidence of market efficiency and thereby to invoke *Basic*'s presumption of reliance at the class certification stage.

Id. at 371.

We find that the district court's conclusion "falls within the range of permissible decisions." *Roach*, 778 F.3d at 405 (citation omitted). The district court properly declined to view direct and indirect evidence as distinct requirements, opting instead for a holistic analysis based on the totality of the evidence presented. *See*, *e.g.*, *In re JPMorgan Chase & Co. Sec. Litig.*, No. 12 CIV. 03852 (GBD), 2015 WL 10433433, at *7 (S.D.N.Y. Sept. 29, 2015) ("Defendants' criticisms of Plaintiffs' event study distract[] from the central

question: Does the weight of the evidence tip in favor of the finding that the market for JPMorgan's common stock was efficient during the Class Period?").

The Petrobras Defendants' contentions on appeal amount to an intensified reformulation of the claim we bypassed above: not only should putative class plaintiffs be required to offer direct evidence of market efficiency, they argue, but the evidence must specifically consist of empirical data showing that the price of the relevant securities predictably moved up in response to good news and down in response to bad news. The gravamen of their claim is that plaintiffs would only be entitled to the *Basic* presumption after making a substantial showing of market efficiency based on directional empirical evidence alone, irrespective of any other evidence they may have offered.[29]

We reject this proposition. In short, the Petrobras Defendants are attempting to relabel a *sufficient* condition as a *necessary* one. We noted in *Bombardier* that "[a]n event study that correlates the disclosures of unanticipated,

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[29] The Petrobras Defendants' arguments focus on the class certification stage, but a class, once certified, bears the burden of establishing the *Basic* presumption at trial. *See Halliburton II*, 134 S. Ct. at 2414. It would be a strange standard indeed that imposed a stricter burden for class certification than on the final merits adjudication. Presumably, then, the Petrobras Defendants would require that direct evidence take precedence over indirect evidence both at the certification stage and with the ultimate finder of fact.

material information about a security with corresponding fluctuations in price has been considered *prima facie* evidence of the existence of such a causal relationship." *Bombardier*, 546 F.3d at 207–08 (citing *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 512–14, 516 (1st Cir. 2005)). We never suggested, however, that such evidence was the *only* way to prove market efficiency; indeed, we explicitly declined to adopt any particular "test for the market efficiency of stocks or bonds." *Id*. at 204 n.11.

The Supreme Court has similarly declined to define a precise evidentiary standard for market efficiency, but the Court's opinions consistently suggest that the burden is not an onerous one. *See Halliburton II*, 134 S. Ct. at 2410 ("Even the foremost critics of the efficient-capital-markets hypothesis acknowledge that public information generally affects stock prices," and so "[d]ebates about the precise *degree* to which stock prices accurately reflect public information are [] largely beside the point."); *id.* at 2417 (Ginsburg, *J.*, concurring) (interpreting the holding in *Halliburton II* as "impos[ing] no heavy toll on securities-fraud plaintiffs with tenable claims"); *Amgen*, 133 S. Ct. at 1192 ("[I]t is reasonable to presume that most investors . . . will rely on [a] security's market price as an unbiased assessment of the security's value in light of all public information.");

Basic, 485 U.S. at 246 n.24 ("For purposes of accepting the presumption of reliance . . . , we need only believe that market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices."); *see also id*. at 246 ("The presumption is supported by common sense and probability.").

The Petrobras Defendants' proposed evidentiary hierarchy unreasonably discounts the potential probative value of indirect evidence of market efficiency. As noted above, all but one of the widely used *Cammer* factors focus on elements that would logically appear in, or contribute to, an efficient securities market. Those factors would add little to the *Basic* analysis if courts only ever considered them after finding a strong showing based on direct evidence alone.

Indeed, indirect evidence is particularly valuable in situations where direct evidence does *not* entirely resolve the question. Event studies offer the seductive promise of hard numbers and dispassionate truth, but methodological constraints limit their utility in the context of single-firm analyses. *See generally* Alon Brav & J. B. Heaton, *Event Studies in Securities Litigation: Low Power, Confounding Effects, and Bias*, 93 Wash. U. L. Rev. 583 (2015); *see also id*. at 588 n.11 (collecting academic criticism of single-firm event studies). Notably, small

sample sizes may limit statistical power, meaning that only very large-impact events will be detectable.[30] *See id*. at 589–605. In addition, it can be extremely difficult to isolate the price impact of any one piece of information in the presence of confounding factors, such as other simultaneously released news about the company, the industry, or the geographic region. *See id*. at 605–08. These methodological challenges counsel against imposing a blanket rule requiring district courts to, at the class certification stage, rely on directional event studies and directional event studies alone.

In sum, the district court properly considered a combination of direct and indirect evidence in reaching its conclusion that Petrobras ADS and Notes both trade in efficient markets. The court conducted a rigorous analysis of the parties' proffered evidence and objections. We find no abuse of discretion, and therefore

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[30] Brav and Heaton caution courts against misinterpreting studies that fail to find statistically significant price changes: "[W]hile a statistically significant reaction to a firm-specific news event is evidence that information was reflected in the price (absent confounding effects), the converse is *not true*—the failure of the price to react so extremely as to be [detectable] does *not* establish that the market is inefficient; it may mean only that the" effect size was not large enough to be detected in the available sample. Brav & Heaton, 93 Wash. U. L. Rev. at 602 (emphasis added). "While some courts have been sensitive to this distinction . . . , other courts have remained inattentive to this fact, which has generated inaccurate findings in some securities cases." *Id*. (footnote omitted).

affirm the district court's finding that Plaintiffs were entitled to a presumption of reliance on the market price of the Petrobras Securities. We caution that this determination is limited to the district court's class certification order, and is not binding on the ultimate finder of fact.

CONCLUSION

For the foregoing reasons, the district court's *Certification Order* is AFFIRMED IN PART and VACATED IN PART, and the case is REMANDED to the district court for further proceedings consistent with this opinion.

1 In the
2 United States Court of Appeals
3 For the Second Circuit
4

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6 August Term, 2016
7 No. 16-1912-cv
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9 JOSEPH WAGGONER, MOHIT SAHNI, BARBARA STROUGO, INDIVIDUALLY
10 AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
11 *Plaintiffs-Appellees*,
12
13 *v.*
14
15 BARCLAYS PLC, ROBERT DIAMOND, ANTONY JENKINS, BARCLAYS
16 CAPITAL INC., WILLIAM WHITE,
17 *Defendants-Appellants*,
18
19 CHRIS LUCAS, TUSHAR MORZARIA,
20 *Defendants.*[*]
21

22
23 Appeal from the United States District Court
24 for the Southern District of New York.
25 No. 14-cv-5797 — Shira A. Scheindlin, *Judge*.
26
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[*] The Clerk of Court is directed to amend the official caption as set forth above.

ARGUED: NOVEMBER 15, 2016
DECIDED: NOVEMBER 6, 2017

Before: KEARSE, LOHIER, and DRONEY, *Circuit Judges*.

Appeal from an order of the United States District Court for the Southern District of New York (Scheindlin, *J.*) granting the Plaintiffs-Appellees' motion for class certification in this action asserting violations of § 10(b) of the Securities Exchange Act of 1934. We affirm, concluding that: (1) although the district court erred in holding that the *Affiliated Ute* presumption of reliance applied because the claims are primarily based on misstatements, not omissions, the *Basic* presumption of reliance applied; (2) direct evidence of price impact is not always necessary to demonstrate market efficiency to invoke the *Basic* presumption, and was not required here; (3) defendants seeking to rebut the *Basic* presumption must do so by a preponderance of the evidence, which the Defendants-Appellants in this case failed to do; and, (4) the Plaintiffs-Appellees' damages methodology for calculating classwide damages is appropriate. We therefore **AFFIRM** the order of the district court.

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3 *for Paul S. Atkins, Elizabeth Cosenza,*
4 *Daniel M. Gallagher, Joseph A.*
5 *Grundfest, Paul G. Mahoney, Richard*
6 *W. Painter, and Andrew N. Vollmer as*
7 amicus curiae *in support of*
8 *Defendants-Appellants*.
9
10 Michael H. Park, Consovoy
11 McCarthy Park PLLC, New York, NY
12 (J. Michael Connolly, Consovoy
13 McCarthy Park PLLC, Arlington,
14 VA; Kate Comerford Todd and
15 Warren Postman, U.S. Chamber
16 Litigation Center, Washington, DC,
17 *on the brief*), *for the Chamber of*
18 *Commerce of the United States of*
19 *America as* amicus curiae *in support of*
20 *Defendants-Appellants*.
21
22 DRONEY, *Circuit Judge*:

23 Barclays PLC, its American subsidiary Barclays Capital Inc.
24 (collectively, "Barclays"), and three senior officers of those
25 companies[1] appeal from an order of the United States District Court

[1] The individual defendants are Robert Diamond, Barclays' former CEO, Antony Jenkins, Barclays' CEO at the time this action was filed, and William White, the former Head of Equities Electronic Trading at Barclays Capital Inc. The district

1 for the Southern District of New York (Scheindlin, *J.*) granting a
2 motion for class certification filed by the Plaintiffs-Appellees
3 ("Plaintiffs"), three individuals[2] who purchased Barclays' American
4 Depository Shares ("Barclays' ADS")[3] during the class period. The
5 Plaintiffs brought this suit alleging violations of § 10(b) of the

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court previously dismissed claims against two other individual defendants, Chris Lucas and Tushar Morzaria.

[2] The Plaintiffs are Joseph Waggoner, Mohit Sahni, and Barbara Strougo.

[3] As we recently explained:

> American Depository Shares represent an interest in the shares of a non-U.S. company that have been deposited with a U.S. bank. ADS allow U.S. investors to invest in non-U.S. companies and also give non-U.S. companies easier access to the U.S. capital markets. Many non-U.S. issuers use [ADS] as a means of raising capital or establishing a trading presence in the U.S.

In re Petrobras Sec., 862 F.3d 250, 258 n.6 (2d Cir. 2017) (citation and internal quotation marks omitted).

The Plaintiffs' expert in this case described Barclays' ADS as the rough U.S. equivalent of Barclays' stock on the London Stock Exchange: "In the U.S., Barclays' stock was listed on the [New York Stock Exchange], under the symbol 'BCS,' and traded in the form of American Depository Shares (ADSs), each of which represented four ordinary shares (*i.e.*, four BARC [the symbol for Barclays' stock on the London Stock Exchange] shares)." J.A. 310.

1 Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and the Securities
2 and Exchange Commission's Rule 10b-5.[4]

3 The Defendants-Appellants ("Defendants") contend that the
4 district court erred in granting class certification by: (1) concluding
5 that the *Affiliated Ute* presumption of reliance applied, *see Affiliated*
6 *Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972); (2)
7 determining, alternatively, that the *Basic* presumption, *see Basic Inc.*
8 *v. Levinson*, 485 U.S. 224 (1988), applied without considering direct
9 evidence of price impact when it found that Barclays' ADS traded in
10 an efficient market; (3) requiring the Defendants to rebut the *Basic*
11 presumption by a preponderance of the evidence (and concluding
12 that the Defendants had failed to satisfy that standard); and
13 (4) concluding that the Plaintiffs' proposed method for calculating
14 classwide damages was appropriate.

[4] The Plaintiffs also brought claims against the individual defendants under § 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t. Those claims are not at issue in this appeal.

1 We agree with the Defendants that the district court erred in
2 applying the *Affiliated Ute* presumption, but reject the remainder of
3 their arguments and conclude that the district court did not err in
4 granting the Plaintiffs' motion for class certification. Specifically, we
5 hold that: (1) the *Affiliated Ute* presumption does not apply because
6 the Plaintiffs' claims are primarily based on misstatements, not
7 omissions; (2) direct evidence of price impact is not always
8 necessary to demonstrate market efficiency, as required to invoke
9 the *Basic* presumption of reliance, and was not required here; (3)
10 defendants seeking to rebut the *Basic* presumption must do so by a
11 preponderance of the evidence, which the Defendants in this case
12 failed to do; and (4) the district court's conclusion regarding the
13 Plaintiffs' classwide damages methodology was not erroneous. We
14 therefore **AFFIRM** the order of the district court.
15
16

1 **BACKGROUND**

2 **I. Barclays' Recent Involvement in the LIBOR Scandal and Its**
3 **Investigations**

4 Barclays is a London-based international financial services
5 provider involved in banking, credit cards, wealth management, and
6 investment management services in more than fifty countries.[5]
7 Barclays was the subject of a number of investigations and suits
8 involving the misrepresentation of its borrowing data submitted for
9 the calculation of the London Interbank Offered Rate ("LIBOR").[6]
10 Barclays and other financial institutions manipulated LIBOR, an
11 important set of benchmarks for international interest rates. In June
12 2012, Barclays was fined more than $450,000,000 as a result of its

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[5] In stating the facts of this case, we rely in part on the allegations of the Plaintiffs' operative second amended complaint, which we accept as true in this context. *See Shelter Realty Corp. v. Allied Maint. Corp.*, 574 F.2d 656, 661 n.15 (2d Cir. 1978) (explaining that it is proper for a district court "to accept the complaint allegations as true in a class certification motion").

[6] LIBOR is used to set benchmark interest rates for many world currencies. We recently explained LIBOR rates and their importance in greater detail in *United States v. Allen*, 864 F.3d 63, 69–72 (2d Cir. 2017). We also discussed Barclays' participation in the LIBOR investigations and settlements in greater detail in *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 230–32 (2d Cir. 2014).

1 involvement. As a result of the LIBOR investigation, Barclays'
2 corporate leadership undertook significant measures to change the
3 company's culture and develop more integrity in its operations.[7]

4 **II. LX, Dark Pools, and High-Frequency Traders**

5 From the time it was involved in the LIBOR investigations to
6 the present, Barclays, through its American subsidiary Barclays
7 Capital Inc., has operated an alternate trading system—essentially a
8 private venue for trading securities[8]—known as Barclays' Liquidity

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[7] Among other steps, Barclays commissioned an independent review of the company's business practices, and then indicated it would implement dozens of changes proposed in a report produced by Sir Anthony Salz (a lawyer and former chairman of the BBC). Those changes were aimed at, *inter alia*, developing a culture that valued long-term success as opposed to short-term profit, and measures aimed at providing greater transparency regarding operations.

[8] The Securities and Exchange Commission defines alternate trading system as "any organization, association, person, group of persons, or system" that "constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange" that does not set "rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system" or "[d]iscipline subscribers other than by exclusion from trading." 17 C.F.R. § 242.300(a). Alternate trading systems are regulated by the Securities and Exchange Commission. *See id.* §§ 242.301–.303. They have

1 Cross, or, more simply, as Barclays' LX ("LX"). LX belongs to a
2 particular subset of alternate trading systems known as "dark
3 pools." Dark pools permit investors to trade securities in a largely
4 anonymous manner. Neither "information regarding the orders
5 placed into the pool for execution [n]or the identities of subscribers
6 that are trading in the pool" are displayed at the time of the trade.[9]
7 The anonymous nature of dark pools makes them popular
8 with institutional investors, who seek to avoid victimization at the
9 hands of high-frequency traders.[10] [11] High-frequency traders often

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grown significantly over the last decade, in part because of the advantages offered by a subset of alternate trading systems known as "dark pools," which we discuss *infra*. *See, e.g.*, Matthew S. Freedman, *Rise in SEC Dark Pool Fines*, 35 Rev. Banking & Fin. L. 150, 150–52 (2015) (noting that approximately 40% of all trades occurred in alternate trading systems in 2014, up from 16% in 2008, and explaining that there are approximately forty dark pools in existence).

[9] *In the Matter of ITG Inc. & Alternet Sec., Inc., Respondents*, Exchange Act Release No. 9887, 112 SEC Docket 887, ¶ 18 (Aug. 12, 2015).

[10] In a report, the Securities and Exchange Commission has loosely defined high-frequency traders "as 'market makers' with very large daily trading frequency." *Findings Regarding the Market Events of May 6, 2010: Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues*, at 13, *available at* https://www.sec.gov/news/studies/2010/marketevents-report.pdf.

1 engage in "front running" or "trading ahead" of the market,
2 meaning that they detect patterns involving large incoming trades,
3 and then execute their own trades before those incoming trades are
4 completed.[12] Front running results in the incoming trades being
5 more costly or less lucrative for the individuals or institutions
6 making them.[13] Thus, many investors prefer to avoid high-
7 frequency traders, and utilize dark pools to do so. Some literature
8 nevertheless suggests that dark pools are also popular with high-
9 frequency traders, who similarly prefer them because they are
10 anonymous.[14]

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[11] *See* Edwin Batista, *A Shot in the Dark: An Analysis of the SEC's Response to the Rise of Dark Pools*, 14 J. High Tech. L. 83, 84 (2014) (explaining that traders use dark pools "to avoid front running by high-frequency traders"); *see also* Freedman, *supra* note 8, at 150 (noting that dark pools "were largely created to allow institutional investors to execute large volume trades without creating an unfavorable impact on market prices").

[12] *See* Batista, *supra* note 11, at 84.

[13] *Id.*

[14] *See, e.g.*, Michael Morelli, *Regulating Secondary Markets in the High Frequency Age: A Principled and Coordinated Approach*, 6 Mich. Bus. & Entrepreneurial L. Rev.

1 **III. Barclays' Statements Regarding LX and Liquidity**
2 **Profiling**

3 To address concerns that high-frequency traders may have
4 been front running in LX, Barclays' officers made numerous
5 statements asserting that LX was safe from such practices, and that
6 Barclays was taking steps to protect traders in LX.

7 For example, Barclays' Head of Equities Electronic Trading
8 (and a Defendant in this action) William White told *Traders Magazine*
9 that Barclays monitored activity in LX and would remove traders
10 who engaged in conduct that disadvantaged LX clients. On a
11 different occasion, White publicly stated that LX was "built on
12 transparency" and had "safeguards to manage toxicity, and to help
13 [its] institutional clients understand how to manage their
14 interactions with high-frequency traders." J.A. 237. Other examples
15 of purported misstatements made by Barclays include the following
16 allegations:

79, 92–93 (2016) (explaining that high-frequency trading firms like dark pools in part because of their anonymity).

1 • Touting LX as encompassing a "sophisticated
2 surveillance framework that protects clients from
3 predatory trading activity." J.A. 240.
4 • Representing that "LX underscores Barclays' belief that
5 transparency is not only important, but that it benefits
6 both our clients and the market overall." J.A. 246.
7 • Stating that Barclays' algorithm and scoring
8 methodology enabled it "to restrict [high-frequency
9 traders] interacting with our clients." J.A. 247.
10 Barclays also created a service for its LX customers entitled
11 "Liquidity Profiling." First marketed in 2011, Liquidity Profiling
12 purportedly allowed Barclays' personnel to monitor high-frequency
13 trading in LX more closely and permitted traders to avoid entities
14 that engaged in such trading. For example, Barclays issued a press
15 release stating that Liquidity Profiling enabled "Barclays to evaluate
16 each client's trading in LX based on quantitative factors, thereby

1 providing more accurate assessments of aggressive, neutral and
2 passive trading strategies." J.A. 246. Based on a numerical ranking
3 system that categorized traders, LX users could, according to
4 Barclays, avoid trading with high-frequency traders. Barclays made
5 numerous other alleged misstatements regarding Liquidity
6 Profiling, such as:

7 • Claiming in a press release that by using Liquidity
8 Profiling, clients could "choose which trading styles
9 they interact with, instead of choosing by the more
10 arbitrary designation of client type." J.A. 246.

11 • Explaining that "transparency" was the biggest theme
12 of the year 2013, and that "Liquidity Profiling analyzes
13 each interaction in the dark pool, allowing us to
14 monitor the behavior of individual participants. This
15 was a very significant step because it was important to
16 provide . . . clients with transparency about the nature

1 of counterparties in the dark pool and how the control
2 framework works." J.A. 252.

3 **IV. The New York Attorney General's Lawsuit**

4 On June 25, 2014, the New York Attorney General commenced
5 an action alleging that Barclays was violating provisions of the New
6 York Martin Act[15] in operating its dark pool. The complaint alleged
7 that many of Barclays' representations about protections LX
8 afforded its customers from high-frequency traders were false and
9 misleading. *See People ex rel. Schneiderman v. Barclays Capital Inc.*, 1
10 N.Y.S.3d 910, 911 (N.Y. Sup. Ct. 2015).

11 The next day, the price of Barclays' ADS fell 7.38%. On the
12 following day, news reports estimated that Barclays could face a fine
13 of more than £300,000,000 as a result of the Attorney General's
14 action, and on June 30th its stock price dropped an additional 1.5%.

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[15] N.Y. Gen. Bus. Law §§ 352–359. The Martin Act grants New York's Attorney General the power to "investigate and enjoin fraudulent practices in the marketing of stocks, bonds and other securities within or from New York." *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 962 N.E.2d 765, 768 (N.Y. 2011) (internal quotation marks omitted).

1 **V. The Plaintiffs' Action**

2 The Plaintiffs filed the instant putative class action shortly
3 thereafter. They alleged in a subsequent second amended complaint
4 that Barclays had violated § 10(b) and Rule 10b-5 by making false
5 statements and omissions about LX and Liquidity Profiling.

6 The Plaintiffs alleged that Barclays' statements about LX and
7 Liquidity Profiling "were materially false and misleading by
8 omission or otherwise because," J.A. 227, contrary to its assertions,
9 "Barclays did not in fact protect clients from aggressive high
10 frequency trading activity, did not restrict predatory traders' access
11 to other clients," and did not "eliminate traders who continued to
12 behave in a predatory manner," J.A. 228.

13 According to the complaint, Barclays "did not monitor client
14 orders continuously," or even apply Liquidity Profiling "to a
15 significant portion of the trading" conducted in LX. J.A. 228.
16 Instead, the Plaintiffs alleged that Barclays "favored high frequency

1 traders" by giving them information about LX that was not available
2 to other investors and applying "overrides" that allowed such
3 traders to be given a Liquidity Profiling rating more favorable than
4 the one they should have received. J.A. 228.

5 The result of these fraudulent statements, the Plaintiffs
6 asserted, was that the price of Barclays' ADS had been "maintained"
7 at an inflated level that "reflected investor confidence in the integrity
8 of the company" until the New York Attorney General's lawsuit.
9 J.A. 224.

10 **VI. Procedural History**

11 The Defendants moved to dismiss the Plaintiffs' claims. They
12 contended, among other arguments, that the alleged misstatements
13 recited by the Plaintiffs were not material and therefore could not
14 form the basis for a § 10(b) action. In particular, the Defendants
15 pointed out that the revenue generated by LX was only 0.1% of
16 Barclays' total revenue, which was, according to the Defendants,

1 significantly below what would ordinarily be considered
2 quantitatively material to investors. The Defendants also contended
3 that the Plaintiffs had not adequately pleaded that the alleged
4 misstatements were qualitatively material because they had not
5 alleged that any Barclays investor had considered them in making
6 investment decisions; the statements were directed only to LX
7 clients, not investors.

8 The district court denied the Defendants' motion to dismiss, in
9 part. *Strougo v. Barclays PLC*, 105 F. Supp. 3d 330, 353 (S.D.N.Y.
10 2015). The court explained that it was obligated to consider whether
11 the purported misstatements were quantitatively or qualitatively
12 material. *Id.* at 349–50. In its quantitative analysis, the court agreed
13 with the Defendants that LX was a small part of Barclays' business
14 operation and accounted for a small fraction of the company's
15 revenue. *Id.* at 349. It nevertheless concluded that the
16 misstatements could be qualitatively material. *Id.* After the LIBOR

1 scandal, the court explained, "Barclays had staked its long-term
2 performance on restoring its integrity." *Id.* (internal quotation
3 marks omitted). Barclays' statements regarding LX and Liquidity
4 Profiling could therefore "call into question the integrity of the
5 company as a whole."[16] *Id.*

[16] The district court dismissed the Plaintiffs' claims related to two other categories of purported misstatements. *See id.* at 343–47. The first related to Barclays' general business practices, and relied on purportedly false statements that asserted that Barclays was changing its values to conduct its "business in the right way." *Id.* at 343. The second category of alleged false statements focused on Barclays' commitment to enacting the recommendations made by the Salz report. *See id.* at 344–47. The court concluded that both of these categories of statements were "inactionable puffery." *See id.* at 347.

1 a. *The Plaintiffs' Motion for Class Certification*

2 The Plaintiffs then sought class certification for investors who
3 purchased Barclays' ADS between August 2, 2011, and June 25,
4 2014.[17]

5 In order to satisfy Federal Rule of Civil Procedure 23(b)(3)'s
6 predominance requirement, the Plaintiffs argued that § 10(b)'s
7 reliance element was satisfied by the members of the proposed class
8 under the presumption of reliance recognized by the Supreme Court
9 in *Basic*, 485 U.S. at 224.

10 In support of their motion, the Plaintiffs submitted an expert
11 report from Dr. Zachary Nye[18] that considered whether the market
12 for Barclays' ADS was efficient, a necessary prerequisite for the *Basic*

[17] These dates encompass the time period between when Barclays first made purportedly false statements regarding LX and the public disclosure of Barclays' misstatements by the New York Attorney General's action.

[18] Dr. Nye is a financial economist and the Vice President of Stanford Consulting Group, Inc. He holds a bachelor's degree in economics from Princeton University, a master's degree in finance from the London Business School, and a Ph.D. from U.C. Irvine. He has conducted research in areas including market efficiency.

1 presumption to apply. Dr. Nye's report applied the five factors
2 identified in *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989), and
3 the three factors identified in *Krogman v. Sterritt*, 202 F.R.D. 467
4 (N.D. Tex. 2001). *See In re Petrobras Sec.*, 862 F.3d 250, 276 (2d Cir.
5 2017). Dr. Nye explained that all eight factors supported the
6 conclusion that the market for Barclays' ADS was efficient. Dr. Nye
7 first concluded that the seven factors that rely on "indirect" indicia
8 of an efficient market—the first four *Cammer* factors and all three
9 *Krogman* factors—supported his conclusion.

10 With respect to the final factor—the fifth *Cammer* factor, or
11 "*Cammer* 5," which is considered the only "direct" measure of
12 efficiency—Dr. Nye conducted an "event study" to determine
13 whether the price of Barclays' ADS changed when new material
14 information about the company was released. Based on the results
15 of that event study, Dr. Nye concluded that the final factor also
16 weighed in favor of concluding that the market for Barclays' ADS

1 was efficient. Thus, relying on Dr. Nye's report, the Plaintiffs
2 asserted that they were entitled to the *Basic* presumption.
3 In the alternative, the Plaintiffs argued that reliance could be
4 established under the presumption of reliance for omissions of
5 material information, as recognized by the Supreme Court in
6 *Affiliated Ute*, 406 U.S. at 128. That presumption, the Plaintiffs
7 asserted, applied because Barclays had failed to disclose material
8 information regarding LX, such as the fact that Liquidity Profiling
9 did not apply to a significant portion of the trades conducted in LX
10 and that Barclays provided advantages such as "overrides" to high-
11 frequency traders.
12 Dr. Nye also addressed the calculation of class damages. He
13 opined that the damages class members had suffered as a result of
14 Barclays' fraudulent conduct could be calculated on a classwide
15 basis. According to Dr. Nye, the amount by which a stock's price
16 was inflated by fraudulent statements or omissions could be

1 calculated by measuring how much the price of the stock declined
2 when those statements were revealed to be false or when previously
3 undisclosed information was revealed. An event study could then
4 isolate company-specific changes in stock price from changes
5 resulting from outside factors such as fluctuations in the stock
6 market generally or the particular industry. Once the decline caused
7 by the corrective disclosure was isolated, the "daily level of price
8 inflation" could be readily calculated for Barclays' ADS for the class
9 period. J.A. 348. Then, each class member's actual trading in the
10 security could be used to determine individual damages.[19]

11 b. *The Defendants' Opposition to Class Certification*

12 In response, the Defendants argued that the Plaintiffs had not
13 made the requisite showing to invoke the *Basic* presumption because
14 they had failed to show that the market for Barclays' ADS was

[19] A security purchased during the class period and sold before the first corrective disclosure would not support a claim for damages.

1 efficient.[20] The Defendants pointed to the report of their expert, Dr.
2 Christopher M. James,[21] which claimed that the Plaintiffs had not
3 shown direct evidence of efficiency under *Cammer* 5 because the
4 event study conducted by Dr. Nye was flawed. The Defendants did
5 not, however, challenge Dr. Nye's conclusion that the seven indirect
6 factors demonstrated that the market for Barclays' ADS was
7 efficient, nor did Dr. James conduct his own event study to
8 demonstrate the inefficiency of the market for Barclays' ADS.

9 The Defendants also argued that even if the district court were
10 to conclude that the Plaintiffs were entitled to the *Basic* presumption
11 of reliance, class certification should be denied because the
12 Defendants rebutted that presumption. They asserted that the event
13 study conducted by Dr. Nye indicated that the price of Barclays'

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[20] The Defendants did not contest the fact that the Plaintiffs satisfied the requirements of Federal Rule of Civil Procedure 23(a).

[21] Dr. James is a professor of finance and economics at the University of Florida. He previously worked for the Department of Treasury and the Securities and Exchange Commission, in addition to holding several other teaching positions. He has also served as an expert witness on matters including market efficiency prior to this case.

1 ADS did not increase by a statistically significant amount on any of
2 the days on which the purportedly fraudulent statements had been
3 made. Thus, according to the Defendants, there was no connection
4 between the misstatements and the price of Barclays' ADS.

5 The Defendants further contended that the *Affiliated Ute*
6 presumption was inapplicable to the complaint's allegations. That
7 presumption, they argued, applied only to situations primarily
8 involving omissions, and the complaint alleged affirmative
9 misstatements, not omissions.

10 Finally, the Defendants contended that the damages model
11 proposed by Dr. Nye failed to satisfy *Comcast Corp. v. Behrend*, 569
12 U.S. 27 (2013). Dr. Nye's model, the Defendants argued, did not
13 disaggregate confounding factors that could have caused the price
14 drop in Barclays' ADS that occurred when the New York Attorney
15 General announced his action, such as the likelihood of regulatory
16 fines. Nor had the model sufficiently accounted for variations in the

1 time each alleged misstatement became public. According to the
2 Defendants, these deficiencies precluded class certification.

3 c. *The District Court's Class Certification Decision*

4 The district court granted the Plaintiffs' motion for class
5 certification. *Strougo v. Barclays PLC*, 312 F.R.D. 307, 311 (S.D.N.Y.
6 2016). It concluded that the *Affiliated Ute* presumption applied. *Id.*
7 at 319. The court explained that "a case could be made that it is the
8 material omissions, not the affirmative statements, that are the heart
9 of this case." *Id.* According to the court, it was "far more likely that
10 investors would have found the omitted conduct," as opposed to the
11 misstatements, material. *Id.*

12 In the alternative, the district court concluded that the *Basic*
13 presumption of reliance for misrepresentations applied. *Id.* at 323.
14 The Defendants, the court noted, had conceded that the Plaintiffs
15 had "established four of the five *Cammer* factors and all three
16 *Krogman* factors." *Id.* at 319–20. They disputed only the sufficiency

1 of Dr. Nye's event study under *Cammer* 5. *Id.* at 320. Although Dr.
2 Nye's event study had been presented to the district court (and was
3 the subject of extensive court proceedings), the district court
4 concluded that direct evidence of price impact under *Cammer* 5 was
5 not necessary to its determination that the market for Barclays' ADS
6 was efficient during the class period.[22] *Id*. The district court noted
7 that although an event study may be particularly important where
8 the indirect factors do not weigh heavily in favor of market
9 efficiency, it was not necessary here where the application of the
10 indirect factors, including that the "stock trades in high volumes on
11 a large national market and is followed by a large number of
12 analysts," weighed so strongly in favor of a finding of market
13 efficiency. *Id.* at 322–23. Therefore, the court declined to determine
14 whether *Cammer* 5 was satisfied, but concluded based on the

[22] The district court also indicated its skepticism of the reliability of single-company event studies, as well as when only a few unexpected events are examined during a class period, especially in a lengthy class period. *Id.* at 321–22.

1 showing made by the Plaintiffs on all the indirect factors that
2 Barclays' ADS traded in an efficient market during the class period.
3 *Id.* at 323.

4 The district court noted that, based on Dr. Nye's report,
5 Barclays' ADS had an average weekly trading volume of 17.7%
6 during the class period. *Id.* at 323 n.103. That volume far exceeded
7 the 2% threshold for a "strong presumption" of efficiency based on
8 the average weekly trading volume described in *Cammer*. *Id.*
9 Additionally, the district court noted that analysts had published
10 more than 700 reports regarding Barclays' ADS during the class
11 period, and it explained that "the amount of reporting on Barclays[']
12 [ADS] by security analysts during the Class Period indicates that
13 company-specific news was widely disseminated to investors." *Id.*
14 at 323 n.104. That consideration was directly relevant to a different
15 "indirect" *Cammer* factor and, like the average weekly trading

1 volume, supported the conclusion that the market for Barclays' ADS
2 was efficient. *Id.* at 316.
3 The court further determined that the Defendants had not
4 rebutted the *Basic* presumption. *Id.* at 327. They had failed to
5 demonstrate that the allegedly fraudulent statements did not impact
6 the price of Barclays' ADS. *Id.* The "fact that other factors
7 contributed to the price decline does not establish *by a preponderance*
8 *of the evidence* that the drop in the price of Barclays['] ADS was not
9 caused *at least in part* by the disclosure of the fraud at LX," the
10 district court reasoned. *Id.* (first emphasis added).
11 Finally, the district court concluded that Dr. Nye's damages
12 model complied with *Comcast Corp. v. Behrend*. *Id.* The
13 methodology proposed by the Plaintiffs fit their legal theory of the
14 case because they had proposed using an event study and a constant
15 dollar method that was based on the decline in stock price following
16 the disclosure of the Attorney General's lawsuit. *Id.* The court also

1 concluded that individual damages issues would not predominate
2 and could be readily calculated. *Id.* It therefore granted the
3 Plaintiffs' motion for class certification. *Id.* at 328–29.

4 This Court granted Barclays' petition for leave to appeal the
5 district court's class certification order. *See* Fed. R. Civ. P. 23(f); Fed.
6 R. App. P. 5(a).

7 **DISCUSSION**

8 The Defendants argue that the district court erred in four
9 respects by granting the Plaintiffs' motion for class certification.
10 First, they assert that the district court incorrectly concluded that the
11 Plaintiffs properly invoked the *Affiliated Ute* presumption. Second,
12 the Defendants contend that the court improperly concluded that
13 the *Basic* presumption applied without considering direct evidence
14 of market efficiency under *Cammer* 5. Third, they argue that the
15 district court erroneously required them to rebut the *Basic*
16 presumption by a preponderance of the evidence (and wrongly

1 concluded that they failed to satisfy that standard). Finally, the
2 Defendants assert that the Plaintiffs' damages model violates
3 *Comcast Corp. v. Behrend*.

4 We agree with the Defendants' contention that the *Affiliated*
5 *Ute* presumption is inapplicable. We reject their other arguments.
6 We affirm the district court's class certification order because the
7 *Basic* presumption of reliance for misrepresentations applies, was
8 not rebutted by the Defendants, and renders the district court's
9 erroneous decision regarding the *Affiliated Ute* presumption for
10 omissions harmless. Further, we conclude that the damages aspect
11 of the district court's certification decision was within its discretion.

12 **I. Standard of Review**

13 "We review a district court's class certification determination
14 for abuse of discretion . . . . While we review the district court's
15 construction of legal standards *de novo*, we review the district court's
16 application of those standards for whether the district court's

1 decision falls within the range of permissible decisions." *Roach v.*
2 *T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015).

3 **II. Class Certification Requirements**

4 In addition to satisfying the requirements set forth in Federal
5 Rule of Civil Procedure 23(a), a plaintiff seeking class certification
6 must establish one of the bases for certification identified in Federal
7 Rule of Civil Procedure 23(b). *See* Fed. R. Civ. P. 23(b). One such
8 basis, at issue here, permits certification if "questions of law or fact
9 common to class members predominate over any questions affecting
10 only individual members," and "a class action is superior to other
11 available methods for fairly and efficiently adjudicating the
12 controversy." Fed. R. Civ. P. 23(b)(3). "Predominance is satisfied if
13 resolution of some of the legal or factual questions that qualify each
14 class member's case as a genuine controversy can be achieved
15 through generalized proof, and if these particular issues are more

1 substantial than the issues subject only to individualized proof."
2 *Roach*, 778 F.3d at 405 (internal quotation marks omitted).

3 **III. The Presumptions of Reliance**

4 In a securities fraud action under § 10(b), one of the elements
5 that a plaintiff must prove is that he relied on a misrepresentation or
6 omission made by the defendant.[23] *In re Am. Int'l Grp., Inc. Sec.*
7 *Litig.*, 689 F.3d 229, 234 n.3 (2d Cir. 2012).

8 "The traditional (and most direct) way a plaintiff can
9 demonstrate reliance is by showing that he was aware of a
10 company's statement and engaged in a relevant transaction—*e.g.*,
11 purchasing common stock—based on that specific
12 misrepresentation." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563
13 U.S. 804, 810 (2011) ("*Halliburton I*").

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[23] The six elements of a § 10(b) claim are: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37–38 (2011).

1 Alternatively, a plaintiff may also seek to take advantage of
2 two presumptions of reliance established by the Supreme Court.
3 The first—the *Affiliated Ute* presumption—allows the element
4 of reliance to be presumed in cases involving primarily omissions,
5 rather than affirmative misstatements, because proving reliance in
6 such cases is, in many situations, virtually impossible.[24] *Wilson v.*
7 *Comtech Telecomms. Corp.*, 648 F.2d 88, 93 (2d Cir. 1981); *see also*
8 *Affiliated Ute*, 406 U.S. at 153–54.
9 The second—the *Basic* presumption—permits reliance to be
10 presumed in cases based on misrepresentations if the plaintiff
11 satisfies certain requirements.[25] [26] *See Halliburton Co. v. Erica P. John*

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[24] That the *Affiliated Ute* presumption applies only in cases involving primarily omissions has been recognized by other Circuits. *See, e.g.*, *In re Interbank Funding Corp. Sec. Litig.*, 629 F.3d 213, 215 (D.C. Cir. 2010); *Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 940 (9th Cir. 2009); *Regents of the Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc.*, 482 F.3d 372, 384 (5th Cir. 2007).

[25] Those requirements are that "(1) the alleged misrepresentations were publicly known, (2) they were material, (3) the stock traded in an efficient market, and (4) the plaintiff traded the stock between when the misrepresentations were made and when the truth was revealed." *Halliburton Co. v. Erica P. John Fund, Inc.*, —— U.S. ——, 134 S. Ct. 2398, 2413 (2014).

1 *Fund, Inc.*, —— U.S. ——, 134 S. Ct. 2398, 2413 (2014) ("*Halliburton II*").
2 One of them, and the only one at issue in this appeal, is that "the
3 stock [at issue] traded in an efficient market." *Id.* An efficient
4 market is "one in which the prices of the [stock] incorporate most
5 public information rapidly."[27] *Teamsters Local 445 Freight Div.*
6 *Pension, Fund v. Bombardier Inc.*, 546 F.3d 196, 204 (2d Cir. 2008). In

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[26] The Supreme Court adopted the *Basic* presumption in large part because of the realities of the "modern securities markets," which involve "millions of shares changing hands daily" and therefore "differ from the face-to-face transactions contemplated by early fraud cases" in which reliance was required. *Basic*, 485 U.S. at 243–44. The Supreme Court, quoting the district court in *Basic*, also noted that the presumption "provided a practical resolution to the problem of balancing the substantive requirement of proof of reliance in securities cases against the procedural requisites of Federal Rule of Civil Procedure 23." *Id.* at 242 (alteration and internal quotation marks omitted). Finally, the Court explained that the presumption was "supported by common sense and probability" because empirical studies suggested that the "market price of shares traded on well-developed markets reflect[] all publicly available information, and, hence, any material misrepresentations." *Id.* at 246.

[27] Market efficiency is required because the *Basic* presumption is premised on the "fraud-on-the-market doctrine." *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 77 (2d Cir. 2004). That doctrine relies on the "efficient market hypothesis, which postulates that an efficient market incorporates fraudulent statements into a price viewed by investors as based on available accurate information." *Pa. Pub. Sch. Emps.' Ret. Sys. v. Morgan Stanley & Co.*, 772 F.3d 111, 121 n.3 (2d Cir.), *as amended* (Nov. 12, 2014), *certified question accepted*, 22 N.E.3d 187 (N.Y. 2014), *certified question answered*, 35 N.E.3d 481 (N.Y. 2015). Hence, absent an efficient market, the basis for the *Basic* presumption does not exist.

1 other words, an efficient market is one in which "market
2 professionals generally consider most publicly announced material
3 statements about companies, thereby affecting stock prices." *Id.* at
4 199 n.4 (internal quotation marks omitted).

5 We have repeatedly—and recently—declined to adopt a
6 particular test for market efficiency. *Petrobras*, 862 F.3d at 276.
7 However, district courts in this and other Circuits regularly consider
8 five factors first set forth in *Cammer v. Bloom*, 711 F. Supp. at 1286–87.
9 *See Petrobras*, 862 F.3d at 276. Those factors are:

10 (1) the average weekly trading volume of the [stock],
11 (2) the number of securities analysts following and
12 reporting on [it], (3) the extent to which market makers
13 traded in the [stock], (4) the issuer's eligibility to file an
14 SEC registration Form S–3, and (5) the demonstration of
15 a cause and effect relationship between unexpected,
16 material disclosures and changes in the [stock's] price[].
17
18 *Bombardier*, 546 F.3d at 200.

19 The first four "*Cammer* factors examine indirect indicia of
20 market efficiency for a particular security." *Petrobras*, 862 F.3d at

1 276. However, the fifth factor—"*Cammer* 5"—permits plaintiffs to
2 submit direct evidence consisting of "empirical facts showing a
3 cause and effect relationship between unexpected corporate events
4 or financial releases and an immediate response in the stock price."
5 *Id.* (internal quotation marks omitted). Plaintiffs generally attempt
6 to satisfy *Cammer* 5 by submitting an event study. Such studies are
7 "regression analyses that seek to show that the market price of the
8 defendant's stock tends to respond to pertinent publicly reported
9 events." *Halliburton II*, 134 S. Ct. at 2415.
10 In addition to the *Cammer* factors, courts often consider what
11 are known as the three *Krogman* factors when analyzing whether the
12 market for a stock is efficient. *Petrobras*, 862 F.3d at 276. Those
13 factors are "(1) the capitalization of the company; (2) the bid-ask
14 spread of the stock; and (3) the percentage of stock not held by
15 insiders ('the float')." *Krogman*, 202 F.R.D. at 474.

1 If a plaintiff demonstrates to the district court that the market
2 for the stock is efficient and that the other requirements for the *Basic*
3 presumption are met, the presumption applies and § 10(b)'s reliance
4 requirement is satisfied at the class certification stage. *Hevesi v.*
5 *Citigroup Inc.*, 366 F.3d 70, 77 (2d Cir. 2004). If, however, a plaintiff
6 fails to qualify for the *Basic* presumption, and the *Affiliated Ute*
7 presumption for omissions does not apply, then class certification
8 under Rule 23(b)(3) is usually impossible because reliance would
9 have to be proven on a plaintiff-by-plaintiff basis. *Halliburton II*, 134
10 S. Ct. at 2416.

11 Even if a plaintiff successfully invokes the *Basic* presumption,
12 however, defendants may rebut the presumption through "any
13 showing that severs the link between the alleged misrepresentation
14 and either the price received (or paid) by the plaintiff, or his decision
15 to trade at a fair market price." *Id.* at 2408 (alteration and internal
16 quotation marks omitted).

1 **IV. The Defendants' Arguments**

2 With that background in mind, we now address the
3 Defendants' specific arguments.

4 a. *The Applicability of the* Affiliated Ute *Presumption*

5 The Defendants first argue that the district court erred by
6 concluding that the *Affiliated Ute* presumption applies because the
7 Plaintiffs' complaint is based primarily on allegations of affirmative
8 misrepresentations, not omissions. We agree.

9 When the Supreme Court first recognized the *Affiliated Ute*
10 presumption, it explained that under the circumstances of that case,
11 a case "involving *primarily a failure to disclose*, positive proof of
12 reliance is not a prerequisite to recovery." *Affiliated Ute*, 406 U.S. at
13 153 (emphasis added). We later determined that the presumption
14 was inapplicable in two cases because the claims of fraud at issue
15 were not based primarily on omissions. Those decisions are

1 particularly helpful in discerning whether the allegations here
2 principally concern misrepresentations or omissions.
3 In the first, *Wilson v. Comtech Telecommunications Corp.*, 648
4 F.2d 88 (2d Cir. 1981), we cautioned that the labels
5 "misrepresentation" and "omission" "are of little help" because in
6 "many instances, an omission to state a material fact relates back to
7 an earlier statement, and if it is reasonable to think that that prior
8 statement still stands, then the omission may also be termed a
9 misrepresentation." *Id.* at 93. We explained that what "is important
10 is to understand the rationale for a presumption of causation in fact
11 in cases like *Affiliated Ute*, in which no positive statements exist:
12 reliance as a practical matter is impossible to prove." *Id.* (italics
13 added). In *Wilson*, the president of the defendant corporation made
14 sales and earnings projections at a conference of investors and
15 securities analysts. *Id.* at 89. Several months later, those projections
16 were shown to be materially inaccurate. *Id.* The earlier projections

1 became misleading when subsequent corrective information was not
2 timely disclosed. In other words, as we explain in somewhat more
3 detail, the projections eventually became "half-truths." Unlike in
4 *Affiliated Ute*, however, in *Wilson* the omissions alone were not the
5 actionable events and proving reliance on them was therefore not
6 "impossible"; accordingly, we concluded that the plaintiff was
7 required to demonstrate that he relied on the earlier
8 misrepresentations in executing his stock purchases. *Id.* at 94.

9 Similarly, in *Starr ex rel. Estate of Sampson v. Georgeson*
10 *Shareholder, Inc.*, 412 F.3d 103 (2d Cir. 2005), we concluded that the
11 *Affiliated Ute* presumption did not apply because the plaintiffs'
12 claims in that case were "not 'primarily' omission claims." *Id.* at 109
13 n.5. We explained that the plaintiffs' claims there, as in *Wilson*,
14 focused on "misleading statements" that were not corrected. *Id.*
15 The plaintiffs asserted that the omissions only "exacerbated the
16 misleading nature of the affirmative statements." *Id.*

1 In this case, the *Affiliated Ute* presumption does not apply for
2 the same reasons that it was inapplicable in *Wilson* and *Starr*. First,
3 the Plaintiffs' complaint alleges numerous affirmative misstatements
4 by the Defendants. The Plaintiffs are therefore not in a situation in
5 which it is impossible for them to point to affirmative
6 misstatements. Second, the Plaintiffs focus their claims on those
7 affirmative misstatements. In arguing that class certification was
8 proper, for example, the Plaintiffs stated that Barclays had "touted
9 LX as a safe trading venue" and "consistently assured the public that
10 its dark pool was a model of transparency and integrity." J.A. 280–
11 81.

12 Indeed, the omissions the Plaintiffs list in their complaint are
13 directly related to the earlier statements Plaintiffs also claim are
14 false. For example, the Plaintiffs argue that Barclays failed to
15 disclose that Liquidity Profiling did not apply to a significant
16 portion of the trades conducted in LX. That "omission" is simply

1 the inverse of the Plaintiffs' misrepresentation allegation: Barclays'
2 statement that Liquidity Profiling protected LX traders was false.
3 Thus, as alleged in *Starr*, the omissions here "exacerbated the
4 misleading nature of the affirmative statements." *Starr*, 412 F.3d at
5 109 n.5. The *Affiliated Ute* presumption does not apply to earlier
6 misrepresentations made more misleading by subsequent omissions,
7 or to what has been described as "half-truths," nor does it apply to
8 misstatements whose only omission is the truth that the statement
9 misrepresents. *See Joseph v. Wiles*, 223 F.3d 1155, 1162 (10th Cir.
10 2000), *abrogated on other grounds by Cal. Pub. Emps.' Ret. Sys. v. ANZ*
11 *Sec., Inc.*, ––– U.S. –––, 137 S. Ct. 2042 (2017).
12 For these reasons, the *Affiliated Ute* presumption does not
13 apply.
14 b. *The Applicability of the* Basic *Presumption*
15 We next turn to the Defendants' challenge to the district
16 court's conclusion that the *Basic* presumption applied.

1 The Defendants assert three reasons why the district court
2 incorrectly found that the *Basic* presumption applied and was not
3 rebutted. First, the Defendants contend that the court erred by
4 failing to consider whether direct evidence of price impact under
5 *Cammer* 5 showed that Barclays' ADS traded in an efficient market.
6 Second, the Defendants argue that even if the failure to make that
7 finding was not erroneous, the court erred by shifting the burden of
8 persuasion, rather than imposing only the burden of production, on
9 the Defendants to rebut the *Basic* presumption. Third, the
10 Defendants assert that even if they bore the burden of rebutting the
11 *Basic* presumption by a preponderance of the evidence, the district
12 court incorrectly concluded that they had failed to satisfy that
13 standard.

14 We are not persuaded by the Defendants' arguments. We
15 conclude that direct evidence of price impact under *Cammer* 5 is not
16 always necessary to establish market efficiency and invoke the *Basic*

1 presumption, and that such evidence was not required in this case at
2 the class certification stage. Also, the Defendants were required to
3 rebut the *Basic* presumption by a preponderance of the evidence,
4 and they failed to do so.

5 1. Whether "*Cammer* 5" Must Be Satisfied

6 Whether direct evidence of price impact under *Cammer* 5 is
7 required to demonstrate market efficiency is a question of law over
8 which we exercise *de novo* review. *See Roach*, 778 F.3d at 405.

9 As previously discussed, we recently once again declined to
10 adopt a particular test for market efficiency in *Petrobras*. *See* 862 F.3d
11 at 276. Although we also declined in *Petrobras* to decide "whether
12 plaintiffs may satisfy the *Basic* presumption without *any* direct
13 evidence of price impact," *id.* at 276–77, *i.e.*, without producing
14 evidence under *Cammer* 5, we nevertheless explained that the
15 "district court properly declined to view direct and indirect evidence

1 as distinct requirements, opting instead for a holistic analysis based
2 on the totality of the evidence presented," *id.* at 277.
3 We then also rejected the argument that "directional" direct
4 evidence of price impact[28] was required by *Cammer* 5. *Id.* at 277–78.
5 In so doing, we explained that we have "never suggested" that an
6 event study "was the *only* way to prove market efficiency." *Id.* at
7 278. We then noted that the Supreme Court has suggested that the
8 burden required to establish market efficiency "is not an onerous
9 one." *Id.* Lastly, we explained that "indirect evidence of market
10 efficiency" under the other four *Cammer* factors would "add little to
11 the *Basic* analysis if courts only ever considered them after finding a
12 strong showing based on direct evidence alone." *Id.* Indeed, we
13 noted that indirect evidence regarding the efficiency of a market for

[28] Direct evidence of price impact under *Cammer* 5 may simply determine whether the price of a stock moves, in one direction or the other, when new information becomes available. Alternatively, such evidence may determine whether the stock price moves in the *direction* that it would be expected to move in light of the new information. In other words, this latter type of evidence, *directional* direct evidence of price impact, asks not just whether the stock price moved at all in response to new material information, but whether it increased in response to "good" news and decreased in response to "bad" news. *See id.*

1 a company's stock under the first four *Cammer* factors "is
2 particularly valuable in situations where direct evidence does *not*
3 entirely resolve the question" of market efficiency. *Id.*
4 Here, building on *Petrobras*, we conclude that a plaintiff
5 seeking to demonstrate market efficiency need not always present
6 direct evidence of price impact through event studies.
7 In so concluding, we do not imply that direct evidence of price
8 impact under *Cammer* 5 is never important. Indeed, as the
9 Defendants point out, we have recognized that *Cammer* 5 has been
10 considered the most important *Cammer* factor in certain cases
11 because it assesses "'the essence of an efficient market and the
12 foundation for the fraud on the market theory.'" *Bombardier*, 546
13 F.3d at 207 (quoting *Cammer*, 711 F. Supp. at 1287). In *Bombardier*, we
14 concluded that the district court did not err in rejecting the plaintiffs'
15 particular event study, but also emphasized that *Cammer* 5's
16 importance was greater because a number of the indirect *Cammer*

1 factors suggested the inefficiency of the market. *Id.* at 210. Those
2 factors were "the absence of market makers for the Certificates [at
3 issue in that case], the lack of analysts following the Certificates, and
4 the absence of proof that unanticipated, material information caused
5 changes in the Certificates' prices—as well as the infrequency of
6 trades in the Certificates." *Id.*

7 Direct evidence of an efficient market may be more critical, for
8 example, in a situation in which the other four *Cammer* factors
9 (and/or the *Krogman* factors) are less compelling in showing an
10 efficient market. In *Bombardier*, the district court concluded that the
11 *Cammer* factors were split: two supported the conclusion that the
12 market for the certificates issued by Bombardier was efficient while
13 the three other factors—including *Cammer* 5—weighed against
14 finding an efficient market. *Id.* at 200. The certificates in *Bombardier*
15 were relatively few in number and of high dollar denominations,
16 and they traded infrequently—primarily "in large amounts by

1 sophisticated institutional investors." *Id.* at 198. Hence, establishing
2 market efficiency was undoubtedly more difficult there than it is in
3 cases involving the common stock of large financial institutions,
4 traded frequently on a national exchange.

5 The *Cammer* and *Krogman* factors are simply tools to help
6 district courts analyze market efficiency in determining whether the
7 *Basic* presumption of reliance applies in class certification decision-
8 making. But they are no more than tools in arriving at that
9 conclusion, and certain factors will be more helpful than others in
10 assessing particular securities and particular markets for efficiency.

11 2. Whether "*Cammer* 5" Was Required Here

12 We now consider whether evidence of price impact under
13 *Cammer* 5 was required here in determining whether the market for
14 Barclays' ADS was efficient during the class period.

15 Because the resolution of this issue required the district court
16 to apply the applicable law to the facts before it, we ask only

1 "whether the district court's decision falls within the range of
2 permissible decisions." *Roach*, 778 F.3d at 405.
3 Applying that deferential standard of review, we conclude
4 that the district court's decision not to rely on direct evidence of
5 price impact under *Cammer* 5 in this case fell comfortably within the
6 range of permissible decisions. All seven of the indirect factors
7 considered by the district court (the first four *Cammer* factors and the
8 three *Krogman* factors) weighed so clearly in favor of concluding that
9 the market for Barclays' ADS was efficient that the Defendants did
10 not even challenge them. The district court explained that Barclays'
11 ADS had an average weekly trading volume many times higher than
12 the volume found to create a "strong presumption" of market
13 efficiency in *Cammer*, and it further noted that Barclays is closely
14 followed by many analysts. *Strougo*, 312 F.R.D. at 323 nn.103–04. In
15 its analysis, the court cited Dr. Nye's report favorably, which had
16 addressed all of the *Cammer* factors and concluded that they

1 supported a finding that the market for Barclays' ADS was efficient.
2 *Id.*
3 This case is different from the situation in *Bombardier*, where
4 we concluded that certain of the indirect factors did not demonstrate
5 market efficiency, and that the plaintiffs' event study was flawed.
6 *Bombardier*, 546 F.3d at 210. Barclays' ADS is effectively Barclays'
7 common stock on the New York Stock Exchange. Because Barclays
8 is one of the largest financial institutions in the world, it is
9 unsurprising that the market for Barclays' ADS is efficient. Indeed,
10 this conclusion is so clear that the Defendants failed to challenge
11 such efficiency—based on seven other factors—apart from their
12 attack on Dr. Nye's *Cammer* 5 event study. This case is more similar
13 to the situation in *Petrobras*, where holders of ADS of Petrobras, a
14 multinational oil and gas company headquartered in Brazil that was
15 "once among the largest companies in the world," whose shares
16 traded on the New York Stock Exchange, brought suit. *Petrobras*,

1 862 F.3d at 256. In particular, the strong indirect evidence of an
2 efficient market, which showed that Barclays' ADS was actively
3 traded "in high volumes," *Strougo*, 312 F.R.D. at 322, on the New
4 York Stock Exchange, on over-the-counter markets, and in the
5 secondary market, and had "heavy analyst coverage," *id.* at 323, as
6 well as the evidence related to the other indirect factors, tipped the
7 balance in favor of the Plaintiffs on their burden to demonstrate
8 market efficiency. Under the circumstances here, the district court
9 was not required to reach a conclusion concerning direct evidence of

1 market efficiency.[29] It therefore acted within its discretion in finding
2 an efficient market based on the remaining seven factors.[30]
3
4
5

[29] We therefore have no occasion in this case to identify all the circumstances in which direct evidence of price impact under *Cammer* 5 might be required. Nor does our conclusion here—that a finding as to direct evidence of price impact was not required—indicate that securities of large publicly traded companies always trade in an efficient market; the specific circumstances may require plaintiffs to present direct evidence of efficiency in cases involving such securities, and defendants always have the opportunity to present their own event studies demonstrating that *Cammer* 5 is not satisfied, as well as the other *Cammer* and *Krogman* factors.

[30] We note that several of our sister Circuits have concluded that *Cammer* 5 is not necessary but nevertheless often helpful. *See Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248, 1256 (11th Cir. 2014) ("Neither are we persuaded by [the defendant's] argument that a finding of market efficiency always requires proof that the alleged misrepresentations had an immediate effect on the stock price. . . . [The defendant] does not point us to any court that has adopted the unwavering evidentiary requirement it urges upon us. Nor could it. Even the *Cammer* court itself did not establish such a strict evidentiary burden at the class certification stage."); *Unger v. Amedisys Inc.*, 401 F.3d 316, 325 (5th Cir. 2005) (explaining that the district court improperly used three of the *Cammer* factors, including *Cammer* 5, "as a checklist rather than an analytical tool"); *see also Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 368 (4th Cir. 2004) (explaining that courts "should consider factors *such as*" the *Cammer* factors (emphasis added)); *Cammer*, 711 F. Supp. at 1287 (stating only that it would be "helpful" for a plaintiff to demonstrate "a cause and effect relationship between unexpected corporate events . . . and an immediate response in . . . stock price").

1 c. *Rebutting the* Basic *Presumption*

2 We now turn to the Defendants' argument that the district
3 court erred by shifting the burden of persuasion, rather than the
4 burden of production, to rebut the *Basic* presumption.

5 The burden defendants face to rebut the *Basic* presumption is
6 a question of law that we review *de novo*. *Roach*, 778 F.3d at 405.
7 Applying that standard, we conclude that defendants must rebut the
8 *Basic* presumption by disproving reliance by a preponderance of the
9 evidence at the class certification stage.

10 The *Basic* presumption is rebuttable. *Halliburton II*, 134 S. Ct.
11 at 2405. The Supreme Court held so when it first articulated the
12 presumption in *Basic*, 485 U.S. at 224, and when it reaffirmed the
13 presumption of reliance in *Halliburton II*, stating that "any showing
14 that severs the link between the alleged misrepresentation and either
15 the price received (or paid) by the plaintiff, or his decision to trade at
16 a fair market price, will be sufficient to rebut the presumption of

1 reliance." *Halliburton II*, 134 S. Ct. at 2408 (alteration omitted)
2 (quoting *Basic*, 485 U.S. at 248).

3 In assessing whether the Supreme Court has indicated that the
4 burden on defendants to rebut the *Basic* presumption of reliance is
5 one of merely production or one of persuasion, it is first important to
6 consider the development of the presumption and the burden the
7 Court imposed on plaintiffs to invoke it at the class certification
8 stage, as well as the specific language of *Basic* and *Halliburton II*
9 concerning the showing defendants must make to rebut the
10 presumption.

11 In *Basic*, Basic Incorporated, a chemical manufacturing firm,
12 repeatedly denied in public statements that it was involved in
13 merger discussions with Combustion Engineering, another chemical
14 firm, shortly before it announced a merger of the two firms. *See*
15 *Basic*, 485 U.S. at 226–28. Former Basic shareholders who had sold
16 their stock before the merger was announced sued under § 10(b),

1 claiming that the company's prior statements constituted
2 misrepresentations. *Id.* at 227–28. The district court applied a
3 presumption of reliance and certified the plaintiffs' class. *Id.* at 228.
4 The Supreme Court agreed that reliance on the statements that no
5 merger would occur would be presumed because of the "well-
6 developed market" for the securities, and the fact that the Basic
7 stock was sold in an "efficient market." *Id.* at 247–48, 250. The
8 Court explained, however, that the presumption of reliance could be
9 rebutted if the defendants "could show that the 'market makers'
10 were privy to the truth about the merger discussions" in that case
11 "and thus that the market price would not have been affected by"
12 the defendants' misrepresentations. *Id.* at 248. Such a showing
13 would break the causal connection for the inference that the fraud
14 had been incorporated into the market price. *Id.* The Court further
15 stated that the defendants would have successfully rebutted the
16 *Basic* presumption if they established that "news of the merger

1 discussions credibly entered the market and dissipated the effects of
2 the misstatements." *Id.* at 249. Finally, the Court acknowledged that
3 the defendants "could rebut the presumption of reliance as to
4 plaintiffs who would have divested themselves of their Basic shares
5 without relying on the integrity of the market." *Id.* at 249.

6 In *Halliburton II*, the Supreme Court pointed to *Basic* as
7 establishing that "if a defendant could show that the alleged
8 misrepresentation did not, for whatever reason, actually affect the
9 market price, or that a plaintiff would have bought or sold the stock
10 even had he been aware that the stock's price was tainted by fraud,
11 then the presumption of reliance would not apply." *Halliburton II*,
12 134 S. Ct. at 2408.

13 The Court also restated the burden plaintiffs must meet at the
14 class certification stage to satisfy the predominance requirement:

> 15 The *Basic* presumption does not relieve plaintiffs of the
> 16 burden of proving—before class certification—that this
> 17 requirement is met. *Basic* instead establishes that a
> 18 plaintiff satisfies that burden by proving the

1 prerequisites for invoking the presumption—namely,
2 publicity, materiality, market efficiency, and market
3 timing.

4 *Id.* at 2412. It would be inconsistent with *Halliburton II* to require
5 that plaintiffs meet this evidentiary burden while allowing
6 defendants to rebut the *Basic* presumption by simply producing *some*
7 evidence of market inefficiency, but not demonstrating its
8 inefficiency to the district court.[31] The presumption of reliance
9 would also be of little value if it were so easily overcome. Both in
10 *Basic* and again in *Halliburton II*, the Supreme Court recognized the
11 importance of the presumption of reliance in putative class actions
12 where, without such a presumption, there would be "'an
13 unnecessarily unrealistic evidentiary burden on the Rule 10b-5
14 plaintiff who has traded on an impersonal market.'" *Halliburton II*,
15 134 S. Ct. at 2407 (quoting *Basic*, 485 U.S. at 245).

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[31] Although in *Halliburton II* the Court identified the prerequisites plaintiffs must meet to invoke the *Basic* presumption of reliance, that burden should not be regarded as "onerous." *Petrobras*, 862 F.3d at 278.

1 Quoting *Basic*, the *Halliburton II* Court also explained that the
2 showing to sever the link between the misrepresentation and the
3 price received or paid would rebut the *Basic* presumption "because
4 'the basis for finding that the fraud had been transmitted through
5 market price would be gone.'" *Halliburton II*, 134 S. Ct. at 2415–16
6 (quoting *Basic*, 485 U.S. at 248). The Court then stated that although
7 "*Basic* allows plaintiffs to establish [price impact] indirectly, it does
8 not require courts to ignore a defendant's direct, *more salient*
9 evidence showing that the alleged misrepresentation did not
10 actually affect the stock's market price." *Id.* at 2416 (emphasis
11 added).
12 A concurring opinion in *Halliburton II* by Justice Ginsburg and
13 joined by Justices Breyer and Sotomayor stated that the majority
14 recognized "that it is incumbent upon the defendant to *show* the

1 absence of price impact."[32] *Id.* at 2417 (Ginsburg, J., concurring)
2 (emphasis added).

3 This Supreme Court guidance indicates that defendants
4 seeking to rebut the *Basic* presumption must demonstrate a lack of
5 price impact by a preponderance of the evidence at the class
6 certification stage rather than merely meet a burden of production.

7 First, the phrase "[a]ny showing that severs the link" aligns
8 more logically with imposing a burden of persuasion rather than a
9 burden of production. *See Halliburton II*, 134 S. Ct. at 2408 (alteration
10 in original). The Supreme Court has described the burden of
11 production as being satisfied when a litigant has "come forward
12 with evidence to support its claim," *Dir., Office of Workers' Comp.*
13 *Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272
14 (1994), or, alternatively (in the Title VII context), when a defendant
15 has "articulate[d]" a "legitimate, nondiscriminatory reason for the

[32] The concurring opinion also stated that the "Court's judgment, therefore, should impose no heavy toll on securities-fraud plaintiffs with tenable claims." *Id.* at 2417 (Ginsburg, J., concurring).

1 employee's rejection," *O'Connor v. Consol. Coin Caterers Corp.*, 517
2 U.S. 308, 311 (1996). Thus, the Court has defined the burden of
3 production as one that *could* permit a trier of fact to rule in favor of
4 the party in question. By requiring that the "showing" defendants
5 must make to rebut the *Basic* presumption actually "sever[] the link"
6 between the misrepresentation and the price a plaintiff paid or
7 received for a stock, the Court requires defendants to do more than
8 merely produce evidence that *might* result in a favorable outcome;
9 they must demonstrate that the misrepresentations did not affect the
10 stock's price by a preponderance of the evidence.

11 Second, the language chosen by the Court in *Halliburton II*
12 demonstrates that the Court understood the burden that shifts to
13 defendants as one of persuasion rather than production. As
14 mentioned above, the majority in *Halliburton II* explained that
15 evidence that satisfied the "severing the link" standard would rebut
16 the *Basic* presumption because "'the basis for finding that the fraud

1 had been transmitted through market price would be gone,'" and
2 the defendants' "direct, more salient evidence" that the
3 misrepresentations did not affect the stock price would rebut the
4 *Basic* presumption. *Halliburton II*, 134 S. Ct. at 2415–16 (quoting
5 *Basic*, 485 U.S. at 248).

6 In addition to this Supreme Court guidance, our own Court's
7 prior decisions applying the presumptions of reliance support our
8 conclusion that defendants bear the burden of persuasion to rebut
9 the *Basic* presumption of reliance at the class certification stage.

10 First, we held that the *Affiliated Ute* presumption is rebutted if
11 a defendant proves "by a preponderance of the evidence that the
12 plaintiff did not rely on the omission [at issue] in making" his
13 investment decision. *duPont v. Brady*, 828 F.2d 75, 76 (2d Cir. 1987).
14 Although our decision in *duPont* predated *Basic* and the *Affiliated Ute*
15 presumption differs from the *Basic* presumption in several respects,
16 both allow reliance to be presumed.

1 Second, we held in *Black v. Finantra Capital, Inc.*, 418 F.3d 203
2 (2d Cir. 2005), that a district court correctly instructed the jury when
3 it charged that the defendants in a securities fraud case could
4 overcome the presumption that the "plaintiff relied on the market
5 price to his detriment" if the defendants proved "by a
6 preponderance of the evidence that [the] plaintiff did not in fact rely
7 on the market price."[33] *Id.* at 209. Although the claims of fraud in
8 that case focused largely on omissions, and the jury instruction stage
9 follows class certification, it is nevertheless helpful guidance.
10 Third, we have explained that when the plaintiffs have
11 demonstrated that they are entitled to the *Basic* presumption by
12 showing "that the alleged misrepresentation was material and
13 publicly transmitted into a well-developed market," plaintiffs "do

[33] Two other Circuits' model jury instructions similarly place the burden of persuasion on defendants seeking to rebut the *Basic* presumption. *See* Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit*, § 18.7 (2017); Committee on Pattern Jury Instructions, District Judges Association, Fifth Circuit, *Pattern Jury Instructions (Civil Cases)*, § 7.1 (2016).

1 not bear the burden of showing an impact on price." *In re Salomon*
2 *Analyst Metromedia Litig.*, 544 F.3d 474, 483 (2d Cir. 2008), *abrogated in*
3 *part on other grounds by Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*,
4 568 U.S. 455 (2013).[34] But the "burden of *showing* that there was no
5 price impact is properly placed on defendants at the rebuttal stage."
6 *Id.* at 483 (emphasis added).

7 Apart from their arguments that *Basic* and *Halliburton II* do
8 not support the conclusion that it is a burden of persuasion that
9 applies to defendants attempting to rebut the *Basic* presumption at
10 the class certification stage, the Defendants have relied on Federal
11 Rule of Evidence 301 in arguing that it is merely a burden of
12 production that is placed upon defendants. Rule 301 provides:

> 13 In a civil case, unless a federal statute or these rules
> 14 provide otherwise, the party against whom a
> 15 presumption is directed has the burden of producing
> 16 evidence to rebut the presumption. But this rule does

[34] In *Amgen*, the Supreme Court held that a plaintiff does not have to prove that a misrepresentation is material at the class certification stage. *Amgen*, 568 U.S. at 459. That holding abrogated this Court's contrary conclusion in *Salomon*.

1 not shift the burden of persuasion, which remains on
2 the party who had it originally.
3
4 Fed. R. Evid. 301.

5 The Defendants assert that because no federal statute or other
6 rule of evidence "provide[s] otherwise," we are required to conclude
7 that defendants bear only the burden of producing evidence when
8 they seek to rebut the *Basic* presumption. We disagree.

9 The *Basic* presumption was adopted by the Supreme Court
10 pursuant to federal securities laws. Thus, there is a sufficient link to
11 those statutes to meet Rule 301's statutory element requirement. In
12 *United States Department of Justice v. Landano*, 508 U.S. 165 (1993), the
13 Court referred to the *Basic* presumption as one of several "judicially
14 created presumptions under federal statutes that make no express
15 provision for their use," *id.* at 174–75; *see also Amgen*, 568 U.S. at 462
16 (referring to the *Basic* presumption as "a substantive doctrine of
17 federal securities-fraud law"); *Basic*, 485 U.S. at 245 ("The

1 presumption of reliance . . . supports[] the congressional policy
2 embodied in the 1934 Act.”).
3 While in *Stoneridge Investment Partners, LLC v. Scientific-*
4 *Atlanta, Inc.*, 552 U.S. 148 (2008), the Supreme Court stated that
5 “narrow dimensions” must be given to a plaintiff’s cause of action
6 not specifically set forth in a statute, that was in the context of
7 determining that Rule 10b-5 liability did not extend to suppliers and
8 customers of stock issuers, *id.* at 167, that had not issued public
9 statements themselves, *see Salomon*, 544 F.3d at 481. That holding
10 does not undermine the language of *Basic* and *Halliburton II* that
11 indicates defendants have the obligation to rebut the *Basic*
12 presumption of reliance by a preponderance of evidence. Even in
13 *Stoneridge* the Court stated that “there is an implied cause of action
14 only if the underlying statute can be interpreted to disclose the
15 intent to create one.” 552 U.S. at 164. Thus, the Court again

1 acknowledged the statutory source for the 10b-5 implied cause of
2 action.
3 In *Halliburton II* the Supreme Court stated that "[a]lthough the
4 [*Basic*] presumption is a judicially created doctrine designed to
5 implement a judicially created cause of action, we have described
6 the presumption as a substantive doctrine of federal securities-fraud
7 law." 134 S. Ct. at 2411 (internal quotation marks omitted). Rule 301
8 therefore imposes no impediment to our conclusion that the burden
9 of persuasion, not production, to rebut the *Basic* presumption shifts
10 to defendants.[35] [36]

---

[35] The Defendants note that Rule 301 was cited in *Basic*. But the Supreme Court relied on Rule 301 merely for the proposition that "presumptions are . . . useful devices for allocating the burdens of proof between parties." *Basic*, 485 U.S. at 245.

[36] The Defendants also note that the Eighth Circuit cited Rule 301—that the party seeking to rebut a presumption "has the burden of producing evidence," Fed. R. Evid. 301—for the conclusion that defendants seeking to rebut the *Basic* presumption have "the burden to come forward with evidence showing a lack of price impact." *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 782 (8th Cir. 2016). To the extent that the Eighth Circuit imposed only a burden of production on defendants, we disagree with its conclusion. We do not, however, read the Eighth Circuit's decision as being in direct conflict with our holding. The Eighth Circuit's statement appears to be dictum because the extent of the

1 d. *Whether the* Basic *Presumption Was Rebutted Here*

2 That leaves the question of whether the Defendants met their
3 burden of persuasion and rebutted the *Basic* presumption by a
4 preponderance of the evidence.

5 The Defendants contend that they rebutted the presumption
6 because (1) the Plaintiffs' event study showed that the alleged
7 misstatements did not affect the price of Barclays' ADS, and (2) Dr.
8 James, the Defendants' expert, concluded that the decline in the
9 price of the stock following the disclosure of the New York Attorney
10 General's action was due "to potential regulatory action and fines,
11 *not* the revelation of any allegedly concealed truth." Appellants' Br.
12 40. We find these arguments unpersuasive and conclude that the
13 district court did not err in concluding that the Defendants failed to
14 rebut the *Basic* presumption.

---

burden was not at issue. *Id.* at 782–83. The Eighth Circuit ultimately concluded that the "overwhelming evidence" in the case demonstrated that there had been no price impact and that the *Basic* presumption had therefore been rebutted. *Id.* at 782. Thus, the Eighth Circuit's ruling did not depend on the standard of proof.

1 This issue once again required the district court to apply the
2 relevant law to the facts before it. As we see no error of law or clear
3 error in any findings of fact, our review is therefore limited to
4 determining whether the court abused its discretion when it
5 concluded that class certification was proper. *Roach*, 778 F.3d at 405.
6 As the district court concluded, it is unsurprising that the
7 price of Barclays' ADS did not move in a statistically significant
8 manner on the dates that the purported misstatements regarding LX
9 and Liquidity Profiling were made; the Plaintiffs proceeded on a
10 price maintenance theory. That theory, which we have previously
11 accepted, recognizes "that statements that merely maintain inflation
12 already extant in a company's stock price, but do not add to that
13 inflation, nonetheless affect a company's stock price." *Vivendi*, 838
14 F.3d at 256. Thus, the district court was well within its discretion in

1 concluding that the lack of price movement on the dates of the
2 alleged misrepresentations does not rebut the *Basic* presumption.[37] [38]
3 As to the Defendants' assertion that Dr. James concluded that
4 the post-disclosure drop in stock price was the result of investor
5 concern regarding regulatory action and potential fines, the record
6 supports the district court's conclusion that such a concern was
7 merely a contributing factor to the decline. For example, Dr. James
8 opined that "the alleged corrective disclosure regarding LX *may*
9 have had a bigger impact on Barclays' ADS price due to the

[37] In conjunction with their argument regarding lack of price movement, the Defendants assert that the Plaintiffs have not offered evidence of how the inflation they claim was "maintained" initially entered the price of Barclays' ADS. Although it is true that the Plaintiffs did not identify a specific date on which inflation entered Barclays' ADS, Dr. Nye opined that inflation would have entered the stock when Barclays marketed "LX in a way that promised to filter out high frequency predatory trading." J.A. 669.

[38] The Defendants further suggest that the "price maintenance theory is entirely inconsistent with [the] Plaintiffs' theory of the case and the District Court's ruling on [the] Defendants' motion to dismiss" because the district court ruled that the purported misstatements did not become material until after Barclays admitted to wrongdoing in the LIBOR scandal in June 2012. Appellants' Br. 38. Thus, the Defendants assert that statements made prior to that date were not material and therefore could not have maintained any price inflation. However, the majority of the statements cited by the Plaintiffs occurred after June 2012.

1 announcement of the [New York Attorney General's] lawsuit" and
2 that "*some* of the price reaction was independent of the specific
3 allegations relating to LX," and was instead "a response to the
4 regulatory action itself." J.A. 613 (emphases added). Dr. James also
5 noted that all of the analyst reports that Dr. Nye had reviewed in
6 conducting his event study had discussed "potential regulatory
7 action and fines." *Id.*

8 Dr. James concluded that a portion of the 7.38% decrease in
9 the price of Barclays' ADS following the announcement of the New
10 York Attorney General's action resulted from concerns about that
11 action itself and the potential fines that might accompany it. But
12 merely suggesting that another factor *also* contributed to an impact
13 on a security's price does not establish that the fraudulent conduct
14 complained of did not also impact the price of the security.

1 Thus, the district court did not abuse its discretion when it
2 concluded that the Defendants had failed to rebut the *Basic*
3 presumption.

4 e. *The Classwide Damages Issue*

5 Finally, the Defendants argue that the Plaintiffs' classwide
6 damages model fails to comply with *Comcast Corp. v. Behrend*, 569
7 U.S. 27 (2013). They contend that the Plaintiffs' model fails to
8 (1) disaggregate damages that resulted from factors other than
9 investor concern about Barclays' integrity (namely, the New York
10 Attorney General's regulatory action and the potential fines
11 associated with it), and (2) account for variations in inflation in stock
12 price over time. We review the district court's decision to certify the
13 Plaintiffs' class in light of this challenge to their classwide damages
14 model for abuse of discretion. *Roach*, 778 F.3d at 405; *see also In re*
15 *U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 123 n.8 (2d Cir. 2013).
16 We find no abuse of discretion here.

1 In *Comcast*, the plaintiffs alleged that Comcast had violated
2 antitrust law in its telecommunications business under four distinct
3 legal theories. 569 U.S. at 30–31. The district court concluded that
4 only one of those theories—the "overbuilder theory"—was
5 amenable to classwide proof. *Id.* at 31. The district court further
6 concluded that the damages that resulted from that theory of
7 liability "could be calculated on a classwide basis." *Id.* In so
8 concluding, the district court relied on a damages model that "did
9 not isolate damages resulting from any one theory of antitrust
10 impact," but instead calculated the damages that occurred due to the
11 antitrust violations collectively. *Id.* at 32.

12 The Supreme Court reversed the district court's grant of class
13 certification. *Id.* at 38. It concluded that the plaintiffs' damages
14 "model failed to measure damages resulting from the particular
15 antitrust injury on which [the defendants'] liability" was premised.
16 *Id.* at 36. In light of that deficiency, the damages model could not

1 support class certification by satisfying Federal Rule of Civil
2 Procedure 23(b)(3)'s predominance requirement. *Id.* at 38. The
3 Court explained:

> 4 [A] model purporting to serve as evidence of damages
> 5 in this class action must measure only those damages
> 6 attributable to [the overbuilder theory]. If the model
> 7 does not even attempt to do that, it cannot possibly
> 8 establish that damages are susceptible of measurement
> 9 across the entire class for purposes of Rule 23(b)(3).

10
11 *Id.* at 35.

12 We have since interpreted *Comcast* as precluding class
13 certification "only . . . because the sole theory of liability that the
14 district court determined was common in that antitrust action,
15 overbuilder competition, was a theory of liability that the plaintiffs'
16 model indisputably failed to measure when determining the
17 damages for that injury." *Sykes v. Mel S. Harris & Assocs. LLC*, 780
18 F.3d 70, 88 (2d Cir. 2015) (internal quotation marks omitted). In
19 other words, we have stated that *Comcast* "held that a model for
20 determining classwide damages relied upon to certify a class under

1 Rule 23(b)(3) must actually measure damages that result from the
2 class's asserted theory of injury." *Roach*, 778 F.3d at 407.
3 The Plaintiffs' damages model in this case complies with
4 *Comcast*. The Plaintiffs' allegations are that shareholders of Barclays'
5 ADS were harmed when statements that maintained the impression
6 that Barclays was protecting its LX investors were shown to be false,
7 thereby exposing Barclays' business practices and culture, and
8 causing a substantial drop in share price. Their damages model
9 directly measured that harm by examining the drop in price that
10 occurred when the New York Attorney General's action revealed
11 ongoing problems related to Barclays' management. This is not a
12 case where a plaintiff's damages model does not track his theory of
13 liability. Instead, this is a case in which the Plaintiffs' "proposed
14 measure for damages is . . . directly linked with their underlying
15 theory of classwide liability . . . and is therefore in accord with the

1 Supreme Court's . . . decision in *Comcast*." *U.S. Foodservice*, 729 F.3d
2 at 123 n.8.
3 The *Comcast* standard is met notwithstanding that some of the
4 decline in the price of Barclays' ADS may have been the result of the
5 New York Attorney General's action and potential fines. Investors
6 were concerned with lack of management honesty and control
7 because, as had happened in the past following the LIBOR scandal,
8 such problems could result in considerable costs related to
9 defending a regulatory action and, ultimately, in the imposition of
10 substantial fines. Thus, the regulatory action and any ensuing fines
11 were a part of the alleged harm the Plaintiffs suffered, and the
12 failure to disaggregate the action and fines did not preclude class
13 certification.
14 Finally, we are not persuaded by the Defendants' argument
15 that class certification was improper under *Comcast* because the
16 Plaintiffs' damages model failed to account for variations in inflation

1 over time. *Comcast* does not suggest that damage calculations must
2 be so precise at this juncture. To the contrary, *Comcast* explicitly
3 states that "[c]alculations need not be exact." 569 U.S. at 35. Thus,
4 even accepting the Defendants' premises that inflation would have
5 varied during the class period in this case and that such variation
6 could not be accounted for, the Defendants' argument fails.

7 Dr. Nye explained that damages for individual class members
8 could be calculated by applying a method across the entire class that
9 focused on the decline in stock price following the disclosure of the
10 New York Attorney General's lawsuit and then isolating company-
11 specific events from market and industry events. His model also
12 accounted for calculating the damages for individual class members
13 based on their investment history.

14 Therefore, we conclude that the district court did not abuse its
15 discretion when it certified the Plaintiffs' class over the Defendants'
16 damages-related objections.

1 **CONCLUSION**

2 To summarize, we hold that: (1) the *Affiliated Ute* presumption
3 does not apply in this case; (2) direct evidence of price impact under
4 *Cammer* 5 is not always necessary to demonstrate market efficiency,
5 and was not required in this case; (3) defendants seeking to rebut the
6 *Basic* presumption must do so by a preponderance of the evidence,
7 which the Defendants in this case failed to do; and (4) the Plaintiffs'
8 damages methodology posed no obstacle to certification. We
9 therefore **AFFIRM** the district court's order granting the Plaintiffs'
10 motion for class certification.

16-250
Arkansas Teachers Ret. Sys., et al. v. Goldman Sachs Grp., Inc., et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2016

(Argued: March 15, 2017 Decided: January 12, 2018)

Docket No. 16-250

ARKANSAS TEACHERS RETIREMENT SYSTEM, WEST VIRGINIA INVESTMENT MANAGEMENT BOARD, PLUMBERS AND PIPEFITTERS PENSION GROUP, ILENE RICHMAN, individually and on behalf of all others similarly situated, PABLO ELIZONDO, HOWARD SORKIN, individually and on behalf of all others similarly situated, TIVKA BOCHNER, EHSAN AFSHANI, LOUIS GOLD, THOMAS DRAFT, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

GOLDMAN SACHS GROUP, INC., LLOYD C. BLANKFEIN, DAVID A. VINIAR, GARY D. COHN,

Defendants-Appellants.*

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* The Clerk of the Court is respectfully directed to amend the caption.

Before:

CABRANES, WESLEY, *Circuit Judges*, SESSIONS, *District Judge*.*

Defendants-Appellants Goldman Sachs Group, Inc., Lloyd Blankfein, David A. Viniar, and Gary D. Cohn, appeal from a September 24, 2015 order of the United States District Court for the Southern District of New York (Crotty, *J.*), certifying a class of plaintiffs who purchased shares of common stock in Goldman Sachs Group, Inc., between 2007 and 2010. Plaintiffs alleged that defendants made material misstatements about Goldman's efforts to avoid conflicts of interest, and that those misstatements caused the value of their shares to decline. To establish the predominance of class-wide issues under Federal Rule of Civil Procedure 23(b)(3), plaintiffs invoked the rebuttable presumption of reliance established in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). In light of this Court's recent pronouncement that defendants seeking to rebut the *Basic* presumption must do so by a preponderance of the evidence, *see Waggoner v. Barclays PLC*, 875 F.3d 79 (2d Cir. 2017), and for the additional reasons stated herein, we VACATE the District Court's order and REMAND for further proceedings consistent with this opinion.

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* Judge William K. Sessions III, of the United States District Court for the District of Vermont, sitting by designation.

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Rachel S. Bloomekatz, Deepak Gupta, Gupta Wessler PLLC, Washington, D.C.; Mark I. Gross, Jeremy A. Lieberman, Pomerantz LLP, New York, NY; Robert D. Klausner, Klausner, Kaufman, Jensen & Levinson, Plantation, FL, *for Amicus Curiae Louisiana Sheriffs' Pension and Relief Fund in support of Plaintiffs-Appellees*.

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Barbara A. Jones, AARP Foundation Litigation, Pasadena, CA, *for Amici Curiae AARP and AARP Foundation in support of Plaintiffs-Appellees*.

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Charles E. Davidow, Marc Falcone, Robyn Tarnofsky, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, D.C.; Ira D. Hammerman, Kevin M. Carroll, Securities Industry & Financial Markets Association, Washington, D.C., *for Amicus Curiae Securities Industry & Financial Markets Association in support of Defendants-Appellants*.

Lewis J. Liman, Cleary Gottlieb Steen & Hamilton LLP, New York, NY; Kate Comerford Todd, U.S. Chamber Litigation Center, Inc., Washington, D.C., *for Amicus Curiae Chamber of Commerce of the United States of America in support of Defendants-Appellants*.

WESLEY, *Circuit Judge*:

Investors in a securities fraud class action traditionally have a problem proving that "questions of law or fact

common to class members predominate over . . . questions affecting only individual members" under Federal Rule of Civil Procedure 23(b)(3). The presumption established in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), addressed that problem by allowing courts to presume that the price of stock traded in an efficient market reflects all public, material information—including misrepresentations—and that investors rely on the integrity of the market price when they choose to buy or sell stock. *Basic* also established, however, that defendants may rebut the presumption, and therefore defeat class certification, by showing the misrepresentations did not actually affect the price of the stock. The question presented in this case is what defendants must do to meet that burden.

In light of this Court's recent pronouncement that defendants bear the burden of persuasion to rebut the *Basic* presumption by a preponderance of the evidence, *see Waggoner v. Barclays PLC*, 875 F.3d 79 (2d Cir. 2017), and for the additional reasons stated herein, we VACATE the September 24, 2015 Order of the United States District Court for the Southern District of New York (Crotty, *J.*) granting plaintiff's motion for class certification and REMAND for further proceedings consistent with this opinion.

BACKGROUND

Plaintiffs-appellees acquired shares of common stock in The Goldman Sachs Group, Inc. ("Goldman") between February 5, 2007 and June 10, 2010. In July 2011, they commenced a securities fraud action in the District Court against Goldman and several of its directors (collectively,

"defendants"), for violating section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder. *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

I. Plaintiffs' Allegations of Fraud

In their consolidated class action complaint, plaintiffs alleged that defendants made material misstatements about Goldman's efforts to avoid conflicts of interest, causing the value of their stock to decline.[1] Specifically, they alleged that defendants made the following statements in Goldman's Form 10-K filings and Annual Report, as well as in shareholder conference calls:

> Our reputation is one of our most important assets. As we have expanded the scope of our business and our client base, we increasingly have to address potential conflicts of interest, including situations where our services to a particular client or our own proprietary investments or other interests conflict, or are perceived to conflict, with the interest of another client . . . .

---

[1] Plaintiffs also alleged defendants failed to disclose Goldman's receipt of "Wells Notices," which are sent by the SEC in order to inform a firm that the SEC intends to bring an enforcement action against it. The District Court dismissed that cause of action and it is not at issue in this appeal. *See Richman v. Goldman Sachs Grp., Inc.*, 868 F. Supp. 2d 261, 269, 275 (S.D.N.Y. 2012).

> We have extensive procedures and controls that are designed to identify and address conflicts of interest. . . .
>
> Our clients' interests always come first. Our experience shows that if we serve our clients well, our own success will follow. . . .
>
> We are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us. Our continued success depends upon unswerving adherence to this standard. . . .
>
> Most importantly, and the basic reason for our success, is our extraordinary focus on our clients. . . .
>
> Integrity and honesty are at the heart of our business. . . .

Joint App'x 81–87.

Plaintiffs claimed that these statements about Goldman's efforts to avoid conflicts of interest were false and misleading because Goldman acted in direct conflict with the interests of its clients in at least four collateralized debt obligation ("CDO") transactions involving subprime mortgages between 2006 and 2007, most notably the Abacus

2007 AC-1 ("Abacus") transaction involving hedge-fund client Paulson & Co. Plaintiffs alleged that Goldman permitted Paulson, its client, to play an active role in the asset selection process for Abacus, without revealing to institutional investors that Paulson held the sole short position and thus chose particularly risky mortgages that it hoped "would perform poorly or fail." Plaintiffs claimed that Goldman's role in Abacus, which ultimately resulted in a $550 million settlement with the SEC, "allow[ed] a favored client to benefit at the expense of Goldman's other clients," creating a conflict of interest at odds with the company's public statements.

The complaint asserted that Goldman created similar conflicts of interest in three other CDO transactions involving subprime mortgages: Hudson Mezzanine Funding 2006-1 ("Hudson"), Anderson Mezzanine Funding 2007-1 ("Anderson"), and Timberwolf I ("Timberwolf"). Goldman allegedly contributed equity to the portfolios in those transactions and told investors it was "aligned" with them, while simultaneously holding substantial short positions opposite their investments.

Although plaintiffs invested in Goldman—but not any of the CDOs described above—they claimed Goldman's conflicted roles in the transactions revealed that the company did not have "extensive procedures and controls . . . designed to identify and address conflicts of interest" and that it was not "dedicated to complying fully with the letter and spirit of the laws," as its public statements had suggested.

Plaintiffs alleged that news of government enforcement actions against Goldman on three occasions in mid-2010 revealed the falsity of defendants' statements and caused the company's share prices to decline. On April 16, 2010, the SEC filed a securities fraud action against Goldman and one of its employees regarding the Abacus transaction, for failing to disclose to potential investors that Paulson played a significant role in the asset selection process. Following the announcement, the company's stock price declined 13% from $184.27 to $160.70 per share on April 16, 2010. On April 30, 2010, the company's share price dropped another 9% from $160.24 to $145.20 after the Wall Street Journal reported that Goldman was under investigation by the Department of Justice for its purported role in the CDOs. And on June 10, 2010, the press reported that the SEC was investigating Goldman's conduct in the Hudson CDO, which resulted in a further 2% decline in the price of Goldman stock.[2]

According to plaintiffs, these three "corrective disclosures"[3] revealed to the market the falsity of

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[2] The Complaint identified a fourth corrective disclosure on April 26, 2010, but plaintiffs have abandoned any reliance on that disclosure, which did not contain news of government enforcement activities and caused no statistically significant movement in the price of Goldman's stock.

[3] A "corrective disclosure" is an announcement or series of announcements that reveals to the market the falsity of a prior statement. *See Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 175 n.4 (2d Cir. 2005).

defendants' statements regarding Goldman's efforts to avoid conflicts of interest. Plaintiffs claimed that, on April 16, April 30, and June 10, 2010, the market learned for the first time that Goldman had created "clear conflicts of interest with its own clients" by "intentionally packag[ing] and s[elling] . . . securities that were designed to fail, while at the same time reaping billions for itself or its favored clients by taking massive short positions" in the same transactions. Plaintiffs alleged that defendants made the misstatements with the intent to defraud Goldman's shareholders, and that they lost, in total, over $13 billion as a result of defendants' fraud.

Defendants initially moved to dismiss the complaint pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6), arguing the alleged misstatements were too general and vague to be actionable as a matter of law. The District Court denied defendants' motion, holding that plaintiffs sufficiently pleaded all six elements of a securities fraud action.[4] *See Richman,* 868 F. Supp. 2d at 271–72, 279. The District Court subsequently denied defendants' motions for reconsideration and interlocutory appeal. *In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10 Civ. 3461, 2014 WL 2815571, at *6 (S.D.N.Y. June 23, 2014); *In re Goldman Sachs Grp., Inc. Sec.*

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[4] Those elements are "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008).

Litig., No. 10 Civ. 3461, 2014 WL 5002090, at *3 (S.D.N.Y. Oct. 7, 2014).

II. Plaintiffs' Motion for Class Certification

Plaintiffs then moved to certify a class consisting of "[a]ll persons or entities who, between February 5, 2007 and June 10, 2010, purchased or otherwise acquired the common stock of The Goldman Sachs Group, Inc. . . . and were damaged thereby." Plaintiffs argued (and defendants did not dispute) that they satisfied the requirements for class certification under Federal Rule of Civil Procedure 23(a): The class was sufficiently numerous, there were common issues of law or fact, the claims of the representative parties were typical of the claims of the class, and the representative parties would fairly and adequately protect the interests of the class.

Plaintiffs also argued they satisfied Rule 23(b)(3) because common issues of law or fact predominated over issues affecting only individual members and a class action was the superior method of adjudicating the controversy. *See* FED. R. CIV. P. 23(b)(3). To establish the predominance of class-wide issues with respect to the reliance element of their securities fraud claim, plaintiffs argued they were entitled to a presumption that all class members relied on defendants' misstatements in choosing to buy Goldman stock. The presumption derives from *Basic*, 485 U.S. 224, and is based on the theory "that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.* at 246. If plaintiffs in a securities fraud class action

establish certain prerequisites—namely, that defendants' misstatements were publicly known, their shares traded in an efficient market, and plaintiffs purchased the shares at the market price after the misstatements were made but before the truth was revealed—the court presumes the market price reflected the misstatements and that all class members relied on that price when they chose to buy or sell shares. *See Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*), 134 S. Ct. 2398, 2413 (2014).

Defendants opposed class certification by attempting to rebut the *Basic* presumption. They presented evidence in the form of declarations and sworn affidavits that Goldman stock experienced no price increase on the dates the statements were made, and no price decrease on 34 occasions before 2010 when the press reported Goldman's conflicts of interest in the Abacus, Hudson, Anderson, and Timberwolf transactions.[5] For example, as early as December 6, 2007, the

[5] Both plaintiffs' and defendants' experts used "event studies" to determine whether an event or news report caused a statistically significant change in the price of Goldman's stock. An event study isolates the stock price movement attributable to a company (as opposed to market-wide or industry-wide movements) and then examines whether the price movement on a given date is outside the range of typical random stock price fluctuations observed for that stock. If the isolated stock price movement falls outside the range of typical random stock price fluctuations, it is statistically significant. If the stock price movement is indistinguishable from random price fluctuations, it cannot be attributed to company-specific information announced on the event date. *See* Mark L. Mitchell & Jeffry M. Netter, *The Role of Financial Economics in*

Financial Times ran a story suggesting that "Goldman's Glory May [B]e Short-lived," due to numerous accusations that it "behave[ed] unethically and perhaps [broke] the law" in taking massive short positions in the U.S. housing market. The article questioned Goldman's ability to "manage conflicts," noting that "Goldman ha[d] been more aggressive than any other bank" in "advis[ing] a company on a transaction, financ[ing] it and invest[ing] its own money." Approximately one week later, the Dow Jones Business News reported that Goldman had been subpoenaed for its role in various CDO transactions that presented a "massive conflict of interest with major liabilities." Defendants' expert presented evidence that Goldman's stock experienced no price decline in response to these or similar reports about Goldman's conflicts in the CDOs.

Because the market did not react to defendants' misstatements on the dates they were made or on the dates defendants claim the truth about Goldman's conflicts was revealed, defendants argued the misstatements did not affect the price of Goldman stock and plaintiffs could not have relied on them in choosing to buy shares at that price.[6]

Securities Fraud Cases: Applications at the Securities & Exchange Commission, 49 BUS. LAW. 545, 556–69 (1994).

[6] Defendants challenged the materiality of the misstatements again in their opposition to the motion for class certification. Although materiality is "an essential predicate of the fraud-on-the-market theory," it is common to the class and does not bear on the predominance requirement of Rule 23(b)(3). *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466–67 (2013).

Without holding an evidentiary hearing or oral argument, the District Court rejected defendants' arguments and certified the class. *See In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10 Civ. 3461, 2015 WL 5613150 (S.D.N.Y. Sept. 24, 2015). It concluded plaintiffs met all four elements of Rule 23(a) and established predominance under Rule 23(b)(3) by invoking the *Basic* presumption of reliance. *Id.* at *3, 7. Although the court acknowledged that defendants may rebut the *Basic* presumption by a "preponderance of the evidence," *id.* at *4 n.3, it held that defendants failed to do so in this case because they "d[id] not provide conclusive evidence that no link exists between the price decline [of Goldman stock] and the misrepresentation[s]." *Id.* at *7.

The District Court rejected defendants' evidence that the price of Goldman stock did not increase on the dates the misstatements were made, because it determined they could have served to maintain an already inflated stock price. *See id.* at *6. It also rejected defendants' evidence concerning a lack of price impact when the news reported Goldman's conflicts in the CDOs, because, in its view, defendants' evidence was either "an inappropriate truth on the market defense" or an argument for materiality that the court "w[ould] not consider" at the class certification stage. *Id.* at *6 (internal quotation marks omitted). Even if it were to consider the evidence, the court held it did not rebut the *Basic* presumption of reliance because it "failed to conclusively

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Therefore, the District Court correctly held that plaintiffs need not prove the materiality of defendants' misstatements at the class certification stage, and we do not consider it on appeal.

sever th[e] link" between defendants' statements and the market price of Goldman stock. *Id.* at *7. Accordingly, the court held plaintiffs were entitled to the presumption of reliance and certified the class. *Id.* We granted defendants' petition for leave to appeal pursuant to Federal Rule of Civil Procedure 23(f).

DISCUSSION

No one disputes that plaintiffs satisfy the four requirements of Rule 23(a). The battle is joined over whether plaintiffs can meet the predominance requirement of Rule 23(b)(3), with respect to the reliance element of their securities fraud claim.[7]

I. Rule 23(b)(3) and the *Basic* Presumption of Reliance

Reliance in a 10b-5 action ensures "a proper connection between a defendant's misrepresentation and a plaintiff's injury." *Erica P. John Fund, Inc. v. Halliburton Co.* (*Halliburton I*), 563 U.S. 804, 810 (2011) (internal quotation

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[7] The burden of proving compliance with Rule 23 rests with the party moving for class certification. *See Levitt v. J.P. Morgan Sec., Inc.*, 710 F.3d 454, 465 (2d Cir. 2013). On appeal, we review the District Court's grant of class certification for an abuse of discretion, and the legal conclusions underlying that decision *de novo*. *See Barclays*, 875 F.3d at 92. When a case involves the application of legal standards, we look at whether the District Court's application "falls within the range of permissible decisions." *Id.*

marks omitted). "The traditional (and most direct) way a plaintiff can demonstrate reliance is by showing that he was [personally] aware of a company's statement" and purchased shares based on it. *Id*. But requiring that kind of proof in a securities fraud class action "place[s] an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market." *Basic*, 485 U.S. at 245. If every plaintiff had to prove she relied on a misrepresentation in choosing to buy stock, it would effectively prevent investors from proceeding as a class; individual issues of reliance would overwhelm common ones and make certification under Rule 23(b)(3) inappropriate in every case.

The Supreme Court in *Basic* sought to alleviate that concern by permitting securities fraud plaintiffs to satisfy Rule 23(b)(3) by invoking a rebuttable presumption of reliance. The presumption derives from the "fraud-on-the-market" theory, which holds that "the market price of shares traded on [a] well-developed market[] reflects all publicly available information, and, hence, any material misrepresentations." *Id.* at 246. As the Court in *Basic* explained:

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. . . . Misleading statements will therefore defraud purchasers of stock

> even if the purchasers do not directly rely on the misstatements.

Id. at 241–42 (internal quotation marks omitted).

"If a market is generally efficient in incorporating publicly available information into a security's market price," the fraud-on-the-market theory assumes investors rely on that price as an "unbiased assessment of the security's value in light of all public information," including any material misrepresentations. *Amgen*, 568 U.S. at 462.

Basic endorsed the fraud-on-the-market theory and applied it to class action lawsuits for securities fraud. It held that if plaintiff-investors prove that a company's misstatement was public, the company's stock traded in an efficient market, and the plaintiffs purchased the stock after the misstatement was made but before the truth was revealed, they are entitled to a presumption that the misstatement affected the stock price and that they purchased stock in reliance on the integrity of that price. *Basic*, 485 U.S. at 247, 248 n.27. Under the *Basic* presumption, individual class members need not prove they actually relied upon (or even knew about) the misstatement giving rise to their claim; "anyone who buys or sells the stock at the market price may be considered to have relied on th[e] misstatement[]." *Halliburton II*, 134 S. Ct. at 2405.

The *Basic* presumption does not eliminate the predominance requirement of Rule 23(b)(3) or the reliance element of a 10b-5 action for fraud. It simply provides an alternative means of satisfying those requirements, enabling class action litigation of securities fraud claims where none

previously could have survived. *See id.* at 2414. Accordingly, defendants opposing class certification may rebut the presumption of reliance "through evidence that the misrepresentation did not in fact affect the stock price." *Id.*

The "fundamental premise" underlying the fraud-on-the-market theory is "that an investor presumptively relies on a misrepresentation" that "was reflected in the market price at the time of his transaction." *Halliburton I*, 563 U.S. at 813. If defendants "sever[] the link" between the misrepresentation and the market price—by showing, for example, that the misrepresentation was not public, the shares did not trade in an efficient market, or "the misrepresentation in fact did not lead to a distortion of price"—both the theory and the presumption collapse. *Basic*, 485 U.S. at 248. "[T]he basis for finding that the fraud had been transmitted through market price would be gone," and plaintiffs are no longer entitled to the presumption. *Id*. Instead, each plaintiff must prove she *actually* relied on defendants' misrepresentations when choosing to buy or sell stock, which dooms the predominance of class-wide issues under Rule 23(b)(3) and defeats class certification. *See Halliburton II*, 134 S. Ct. at 2416.

II. Rebuttal of the *Basic* Presumption

The parties agree that plaintiffs established the preliminary elements to invoke the *Basic* presumption of reliance: defendants' misrepresentations were public, Goldman's shares traded in an efficient market, and the putative class members purchased Goldman stock at the relevant time (after the misstatements were made but before

the truth was revealed). The parties also agree that defendants in a securities fraud class action may submit rebuttal evidence of a lack of price impact at the class certification stage. The principal question on appeal is whether defendants bear the burden of production or persuasion to rebut the *Basic* presumption.

Relying on Rule 301 of the Federal Rules of Evidence and language in *Basic*, defendants argue they need only produce—i.e., offer—evidence of a lack of price impact to rebut the presumption. Rule 301 states that "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption," while the "burden of persuasion . . . remains on the party who had it originally." FED. R. EVID. 301. Because it is plaintiffs' burden to prove the predominance of class-wide issues and the reliance element of their securities fraud claim, defendants argue plaintiffs also bear the ultimate burden to persuade the court that the statements at issue affected the market price of Goldman stock. According to defendants, that rule comports with the language in *Basic* that "[*a*]*ny showing* that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff" is sufficient to rebut the presumption of reliance. *Basic,* 485 U.S. at 248 (emphasis added). Defendants contend the District Court imposed an impermissibly high evidentiary burden by requiring them to rebut the *Basic* presumption with conclusive proof of a lack of price impact.

After the District Court granted plaintiffs' motion for class certification, another panel of this Circuit concluded that defendants in a securities fraud class action bear the

burden of persuasion to rebut the *Basic* presumption, and that they must do so by a preponderance of the evidence. *See Barclays*, 875 F.3d at 99. The Court in *Barclays* examined "the development of the presumption and the burden the [Supreme] Court imposed on plaintiffs to invoke it at the class certification stage." *Id.* at 100. It determined that the language in *Basic* that "[a]ny showing that severs the link" between the misstatement and the market price places a burden of persuasion, rather than a burden of production, on defendants seeking to rebut the presumption, because it "requires defendants to do more than merely produce evidence that *might* result in a favorable outcome." *Id.* at 101. They must demonstrate that the misrepresentation did not in fact affect the stock's price. *Id.*; *see also Halliburton II.* 134 S. Ct. at 2405 ("[A] defendant c[an] 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.'").

The *Barclays* court also rejected the argument that Rule 301 of the Federal Rules of Evidence requires defendants only to produce "some" evidence to rebut the presumption. Rule 301 contemplates that a federal statute can alter the traditional rule that the burden of persuasion remains on the party who had it originally. *See* FED. R. EVID. 301 ("unless a federal statute or these rules provide otherwise . . . the burden of persuasion . . . remains on the party who had it originally"). Because the *Basic* presumption is a substantive doctrine of federal law that derives from the securities fraud statutes, *Barclays* determined it altered the default rule and

imposed a burden of persuasion on defendants seeking to rebut it. *See Barclays*, 875 F.3d at 102–03.

That conclusion is consistent with the purpose of the presumption. As the *Barclays* court observed, the *Basic* presumption is essential in putative class actions involving securities fraud plaintiffs "who ha[ve] traded on an impersonal market." *Id.* at 101 (internal quotation marks omitted). It would be "of little value" if defendants could overcome it "by simply producing *some* evidence" of a lack of price impact. *Id.* at 100–01 (emphasis added). Accordingly, the panel concluded that *Basic* and its progeny require defendants seeking to rebut the *Basic* presumption to "demonstrate a lack of price impact by a preponderance of the evidence at the class certification stage rather than merely meet a burden of production." *Id.* at 101.

Barclays makes clear that defendants seeking to rebut the *Basic* presumption of reliance must do so by a preponderance of the evidence. *See id*. Although the District Court acknowledged that standard in a footnote its decision, *see In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10 Civ. 3461, 2015 WL 5613150, at *4 n.3, it went on to find that defendants failed to rebut the *Basic* presumption because they did not "conclusively" prove a "complete absence of price impact," *id.* at *7. Because the District Court concluded its findings with these words, it is unclear to us whether the court required more of defendants than a preponderance of the evidence. We therefore vacate the District Court's order and remand for it to reconsider defendants' evidence in light of the *Barclays* standard.

III. Defendants' Price Impact Evidence

Because we are remanding to the District Court to reconsider defendants' evidence under the *Barclays* standard, one final issue regarding defendants' rebuttal evidence needs mention. In their opposition to class certification, defendants' expert presented evidence of 34 dates before 2010 in which various news sources reported Goldman's conflicts of interest in the Abacus, Hudson, Anderson, and Timberwolf transactions, without any accompanying decline in the price of Goldman stock. The District Court construed this evidence as "an inappropriate truth on the market defense" or as evidence of the statements' lack of materiality, neither of which the court thought it could consider at the class certification stage. *Id.* at *6 (internal quotation marks omitted). We agree with defendants that this was error.

The "truth on the market" defense attacks the timing of the plaintiffs' purchase of shares, not price impact. The theory is, essentially, that the market was already aware of the truth regarding defendants' misrepresentations at the time the class members purchased their shares, meaning the market price had already adjusted to the revelation of defendants' misstatements, and class members could not have relied on those misstatements in choosing to buy stock. *See Amgen*, 568 U.S. at 482; *see also Basic*, 485 U.S. at 248–49.

Contrary to the District Court's characterization of their evidence, defendants did not present a "truth on the market" defense. Defendants did not argue, for example, that Goldman's conflicts of interest were already known to

the market at the time plaintiffs purchased their shares of Goldman common stock. Indeed, it was undisputed that plaintiffs purchased their shares after the misstatements were made but before the truth was revealed. Rather, defendants presented evidence that the market learned the truth about Goldman's conflicts of interests in the Abacus, Hudson, Anderson, and Timberwolf transactions on 34 occasions from 2007 to 2009, without any accompanying decline in the price of Goldman stock. Defendants used that evidence to show that their statements about Goldman's efforts to avoid conflicts of interest "did not actually affect the stock's market price." *Halliburton II*, 134 S. Ct. at 2416.

Although price impact touches on materiality, which is not an appropriate consideration at the class certification stage, it "differs from materiality in a crucial respect." *Id*. Price impact "refers to the effect of a misrepresentation on a stock price." *Halliburton I*, 563 U.S. at 814. Whether a misrepresentation was reflected in the market price at the time of the transaction—whether it had price impact—"is *Basic*'s fundamental premise. It . . . has everything to do with the issue of predominance at the class certification stage." *Halliburton II*, 134 S. Ct. at 2416 (internal quotation marks and citation omitted). If a defendant shows that an "alleged misrepresentation did not, for whatever reason, actually affect the market price" of defendant's stock, "there is no grounding for any contention that the investor indirectly relied on that misrepresentation through his reliance on the integrity of the market price"; the fraud-on-the-market theory underlying the presumption would "completely

collapse[]." *Id.* at 2408, 2414 (internal quotation marks and brackets omitted).

Accordingly, the District Court erred in declining to consider defendants' evidence at this stage of the litigation. We espouse no views as to whether the evidence is sufficient to rebut the *Basic* presumption; we hold only that the District Court should consider it on remand, in determining whether defendants established by a preponderance of the evidence that the misrepresentations did not in fact affect the market price of Goldman stock. We encourage the court to hold any evidentiary hearing or oral argument it deems appropriate under the circumstances.

CONCLUSION

Defendants seeking to rebut the *Basic* presumption of reliance must do so by a preponderance of the evidence. *See Barclays*, 875 F.3d at 99. Because it is unclear whether the District Court applied the correct standard in this case, we VACATE the order of the District Court and REMAND for further proceedings consistent with this opinion.