# 16-1912

IN THE

# United States Court of Appeals

FOR THE SECOND CIRCUIT

JOSEPH WAGGONER, MOHIT SAHNI, BARBARA STROUGO,
individually and on behalf of all others similarly situated,
*Plaintiffs-Appellees,*
v.
BARCLAYS BANK PLC, ROBERT DIAMOND,
ANTONY JENKINS, BARCLAYS CAPITAL INC., WILLIAM WHITE
*Defendants-Appellants,*

CHRISTOPHER LUCAS, TUSHAR MORZARIA, BOB DIAMOND
*Defendants.*

FROM AN ORDER GRANTING CERTIFICATION OF CLASS ENTERED ON FEBRUARY 2, 2016
BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
NO. 14-CV-5797(SAS) THE HONORABLE SHIRA A. SCHEINDLIN

## BRIEF OF *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1, the Securities Industry and Financial Markets Association hereby states that it has no parent corporation and that no publicly held corporation owns 10% of its stock.

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## INTEREST OF AMICUS CURIAE

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers.[1] Its mission is to support a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA is the United States regional member of the Global Financial Markets Association. It regularly files *amicus curiae* briefs in cases such as this one that raise issues of vital concern to securities industry participants.[2] This case involves important issues concerning standards for class certification in private securities actions, which are directly relevant to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry.

## INTRODUCTION

Recognizing the "practical consequences of an expansion" of liability under the federal securities laws—including "allow[ing] plaintiffs

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[1] The parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(c)(5), the undersigned counsel certify that no party's counsel authored this brief in whole or in part; no party or party's counsel, or any other person, other than amici or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

[2] These cases include *Halliburton Co*. v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014), and *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013).

with weak claims to extort settlements from innocent companies," *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc*., 552 U.S. 148, 162–64 (2008)—the Supreme Court and this Court have, in ruling on claims under Section 10(b), sought a balance between appropriate enforcement of the law and weeding out non-meritorious suits. The careful limitations on class certification established by the Supreme Court are central to that balance. The District Court's class certification ruling badly disrupts it.

The District Court misapplied the law governing two essential elements of the class certification inquiry: (i) the presumptions of reliance established by *Basic Inc*. v. *Levinson*, 485 U.S. 224, 241–50 (1988), and *Affiliated Ute Citizens of Utah* v. *U.S*., 406 U.S. 128, 153–54 (1972); and (ii) the requirements with respect to classwide damages established by *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432–33 (2013). In each of these areas, the District Court afforded securities plaintiffs a virtually unchallengeable path to class certification. It rendered largely nugatory the defenses explicitly recognized by the Supreme Court, tipping the scales in favor of plaintiffs in a manner that will burden the financial markets and drive up the costs of litigation.

*First*, the District Court held that Defendants had failed to meet their burden, which is not a heavy one, of rebutting the *Basic* presumption; it

credited Plaintiffs' unsupported speculation over Defendants' solid evidence. Its approach is contrary to the Supreme Court's guidance that the burden of proving market efficiency lies with plaintiffs, and would also deprive defendants of the meaningful rebuttal opportunity preserved by the Supreme Court in *Halliburton Co*. v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412, 2415–16 (2014) ("*Halliburton II*").

The District Court's opinion thus disregarded the Supreme Court's express instruction that a defendant can rebut the presumption of reliance through "[*a*]*ny showing* that severs the link between the alleged misrepresentation" and the security's price by imposing heightened obligations that render rebuttal virtually impossible. *Id*. at 2415 (emphasis added). The error is particularly problematic because the District Court also freed Plaintiffs of their obligation to demonstrate that the market is in fact efficient before relying on the *Basic* presumption.

The District Court further tipped the scales in plaintiffs' favor by expanding the definition of "omission" under *Affiliated Ute* in a way that would transform every misrepresentation into an omission entitled to the presumption of reliance. It did so by recharacterizing alleged misstatements as omissions of the truth—a characteristic of every purported misstatement.

It is difficult to imagine any disclosure cases that would not qualify for the *Affiliated Ute* presumption if this were the law.

*Second*, the District Court relieved plaintiffs of the burden of showing that their damages case is consistent with their liability case, contrary to *Comcast*. It ignored governing law by shifting to defendants the duty of plaintiffs to disaggregate damages not flowing from the alleged misstatements. Moreover, it eviscerated the predominance requirement of Federal Rule of Civil Procedure 23 by declaring any defect in plaintiffs' damages analysis to be a classwide issue that would not stand in the way of class certification. In doing so, it overlooked the Supreme Court's rejection of class certification in *Comcast* under exactly that circumstance.

The class certification opinion in this case is one of several decisions from the Southern District of New York that misapply *Halliburton II* and *Comcast* in a way that undermines the careful judicial limitations on class certification, lowering class certification standards and thereby unravelling the framework created by the Supreme Court, to the detriment of securities markets and investors.[3] As such, the decision is part of an

[3] *See, e.g., In re Goldman Sachs Grp., Inc. Sec. Litig.*, 2015 WL 5613150, at *7–8 (S.D.N.Y. Sept. 24, 2015), *leave to appeal granted*, 15-3179 (2d Cir. Jan. 26, 2016); *In re Petrobras Sec. Litig.*, 312 F.R.D. 354 (S.D.N.Y. 2016), *leave to appeal granted*, 16-463 (2d Cir. June 15, 2016); *Carpenters Pension Trust Fund of St. Louis* v. *Barclays PLC*, 310 F.R.D.

unfortunate trend in the Southern District. The district courts' misapplication of Supreme Court precedent underscores the importance of setting clear class certification standards in this Circuit that comport with governing law in actions under the federal securities laws. This Court should set litigation applying *Halliburton II* and *Comcast* back on a path consistent with the language and purpose of those decisions—in the case of *Halliburton II* to ensure "a proper connection between a defendant's misrepresentation and a plaintiff's injury" in order to respect the careful limits on 10b-5 liability; and in the case of *Comcast*, to preserve the predominance requirement of Rule 23, which protects against improper certification of classes. *Halliburton II*, 134 S. Ct. at 2407.

"No one sophisticated about markets believes that multiplying liability is free of cost." *SEC* v. *Tambone*, 597 F.3d 436, 452 (1st Cir. 2010). The costs of abusive class actions inevitably "get passed along to the public." *Id*. This is especially the case in securities class actions, where if classes survive dismissal and are certified, even weak cases can result in "blackmail settlements" induced by a small probability of an immense judgment. *Cf. SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir.

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69 (S.D.N.Y. 2015). This Court has granted Rule 23(f) petitions in the first two of these cases; the third settled and therefore the decision was not subject to appellate review.

1968) (Friendly, J., concurring) (the costs of improperly certified securities class actions are "payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers"); Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) (class actions risk "recoveries that would ruin innocent shareholders or, what is more likely . . . blackmail settlements").[4] This Court should therefore reverse the District Court's class certification order.

## BACKGROUND AND SUMMARY OF THE ARGUMENT

The allegations remaining in the case after the District Court's ruling on Defendants' motion to dismiss are that Barclays PLC and Barclays Capital Inc. (collectively, "Barclays"), along with a Barclays' employee, made misrepresentations about the safety of their "dark pool" trading operations while concealing the amount of aggressive high-frequency trading that occurred as well as the over-routing of customer orders into that trading venue. Plaintiffs, purchasers of Barclays PLC's American

[4] *See* Tom J. Baker and Sean J. Griffith, *How the Merits Matter: Directors' and Officers' Insurance and Securities Settlements*, 157 U. Pa. L. Rev. 755, 757–58 (2009) (the merits of securities fraud claims are essentially irrelevant to settlement of securities class actions); Geoffrey Rapp, *Rewiring the DNA of Securities Fraud Litigation: Amgen's Missed Opportunity*, 44 Loy. U. Chi. L.J. 1475, 1478 (2013) ("[B]ecause securities litigation is so high risk for defendants, these cases—should they survive motions to dismiss and obtain class certification—will almost always settle.").

Depository Shares, contend that the truth about the riskiness of Barclays' dark pool trading operations was revealed when the New York State Attorney General brought suit against Barclays alleging violations of the Martin Act in connection with their dark pool trading, leading to a decline in share price. (SPA3.)

Plaintiffs supported their request for class certification primarily by invoking the *Basic* presumption of reliance for cases involving misrepresentations, but also by mentioning in a cursory fashion the *Affiliated Ute* presumption of reliance for cases involving omissions. Defendants responded, among other things, that, according to Plaintiffs' own allegations, the case involved supposed misrepresentations about the safety of Barclays' dark pool trading operations, rather than omissions, so that the *Affiliated Ute* presumption was inapplicable. (SPA23.)

Defendants went on to show that Plaintiffs had failed to establish market efficiency, a prerequisite to reliance on the *Basic* presumption. They rebutted the *Basic* presumption with undisputed record evidence—Plaintiffs' own expert regression analysis—showing that the allegedly misleading disclosures, when made, had no price impact. (SPA39.) Defendants also showed that the share price drops at issue were

caused by collateral factors other than the alleged corrective disclosures, including the disclosure of government enforcement activity. (SPA42-44.)

Defendants further demonstrated that, like the plaintiffs in *Comcast*, Plaintiffs here advanced a damages theory that was disconnected from their theory of liability: they failed to make any attempt to separate damages resulting from the allegedly misleading statements from those attributable to other causes. (SPA45.)

Notwithstanding Defendants' showing, the District Court granted the motion for class certification. It first held that this case involves allegations that Barclays had failed to disclose that it was giving advantages to high-frequency traders and failed to apply certain protections to trading in its dark pool—that is, that its affirmative representations on these subjects were untrue. It concluded that this was an omissions case, to which the *Affiliated Ute* presumption of reliance applies. (SPA23-24.)

It then held that Plaintiffs had properly demonstrated market efficiency, ruling that Plaintiffs were not required to submit any event study, let alone a defensible one—a holding that it justified with the purely theoretical concern that event studies sometimes are based on an inadequate sample size. (SPA32.)

The District Court also found that Defendants had failed to rebut the *Basic* presumption by showing a lack of price impact at the front end, when the alleged misstatements were made, and at the back end, at the time of the alleged corrective disclosures. The District Court concluded that the absence of an increase in share price when the alleged misstatements were made was irrelevant to Plaintiffs' "price maintenance" theory (they alleged that the share price would have gone down in the absence of the supposed misstatements), and therefore that Defendants' had not "proven by a preponderance of the evidence" that the market was inefficient. (SPA39-40, 42.) The District Court ruled that Defendants had similarly failed to show by a preponderance of the evidence that government enforcement activity had caused the share price drops at issue. (SPA42, 44.)

Finally, the District Court held that Plaintiffs' damages model did not preclude class certification on the grounds that: Plaintiffs need not proffer a methodology that isolates the price decline caused by Defendants' alleged misstatements; and the issues would affect all class members in the same fashion. (SPA45-46.)

The District Court's class certification order was premised on numerous legal errors, each of which impermissibly and unfairly favors Plaintiffs. If allowed to stand, the District Court's erroneous rulings would

provide securities plaintiffs with enormous leverage, and would fundamentally alter the careful framework established by the Supreme Court. Put simply, the class certification order, if not corrected, would make class certification virtually inevitable in every securities fraud case that survived a motion to dismiss. The resulting additional costs would be to the serious detriment of investors. It is therefore critical that this Court—the Court of Appeals recognized as the foremost authority on federal securities laws—reverse the class certification order and preserve the limits that the Supreme Court has imposed on securities litigation.

## ARGUMENT

### I. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT DEFENDANTS FAILED TO REBUT THE *BASIC* PRESUMPTION

The Supreme Court has held that defendants may rebut the *Basic* presumption at class certification by making "[a]ny showing that severs the link between the alleged misrepresentation" and the share price. *Halliburton II*, 134 S. Ct. at 2415. Defendants' burden of production is not a "heavy" one, and "proffered evidence is sufficient to rebut a presumption as long as the evidence could support a reasonable jury finding of the nonexistence of the presumed fact." *ITC Ltd.* v. *Punchgini, Inc.*, 482 F.3d 135, 149 (2d Cir. 2007) (internal quotations omitted). We address this issue

only briefly here, since it is thoroughly covered in Barclays' brief. (Barclays Br. at 43-44.)

The District Court's order should be reversed because the Court improperly rejected Defendants' undisputed rebuttal evidence—which clearly constituted a "showing that severed the link" between the alleged misstatements and the share price—in favor of Plaintiffs' unsupported contention that the alleged misstatements maintained the price of Barclays' stock. (SPA42.) By accepting an unsupported price maintenance theory, the District Court effectively foreclosed any rebuttal opportunity under *Halliburton II* that remained available to Defendants after the incorrect ruling on market efficiency. This issue is currently before this Court in the appeal of the class certification order in *Goldman*. *See supra* note 3.

Plaintiffs' own expert performed a regression analysis showing that the allegedly misleading disclosures, when made, had no impact on the share price (SPA39). This rebutted the presumption of reliance. *See In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480, 492 (S.D.N.Y. 2011) (an event study showing "no statistically significant change in Moody's value when any alleged misrepresentation was made . . . . would rebut the presumption").

This analysis should have trumped Plaintiffs' unsubstantiated invocation of the price maintenance theory, which "should give way to an evidentiary showing of no price impact of the challenged statement[s] when made." 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 5:26 (12th ed. 2015). The theory, without more, cannot be the basis for certifying a class, because "there is no way to test" it, and it is "based not on facts but on speculation." *Id.* As the district court explained in *In re Credit Suisse First Boston Corp. (Lantronix, Inc.) Analyst Sec. Litig.*, 250 F.R.D. 137, 145 (S.D.N.Y. 2008), evidence showing that the alleged misstatements "had no impact on the price of the stock at the time they were issued" is more persuasive on the issue of market efficiency than the plaintiffs' price maintenance theory, because that theory "is based not on facts." It is a mantra, not evidence.

The ruling below conflicts with a recent decision of the Eighth Circuit, *IBEW Local 98 Pension Fund* v. *Best Buy Co.*, 818 F.3d 775 (8th Cir. 2016). There, the court credited the defendants' "evidence of no front-end price impact[,]" rejecting plaintiffs' price maintenance theory because it "provided no evidence that refuted defendants' overwhelming evidence of no price impact." *Id.* at 782–83.

The District Court, by rejecting Defendants' rebuttal evidence in favor of *ipse dixit*, which is always available, rendered meaningless Defendants' opportunity under *Halliburton II* to rebut the presumption of reliance.[5]

## II. THE DISTRICT COURT USED AN INCORRECT TEST OF MARKET EFFICIENCY TO DETERMINE THAT PLAINTIFFS WERE ENTITLED TO THE *BASIC* PRESUMPTION

This Court should reverse the District Court's class certification order for the further reason that it incorrectly concluded that Plaintiffs had demonstrated that the market was efficient and therefore that they were entitled to the *Basic* presumption of reliance. The District Court mistakenly held that Plaintiffs could prove market efficiency even without an event study showing a causal relationship between unexpected news and market price—it declined to consider whether the event study of Plaintiffs' expert was valid or not, based on the erroneous premise that less reliable, indirect

[5] The District Court erred in adopting Plaintiffs' price maintenance argument for the independent reason that it does not comport with the fraud-on-the-market theory underlying the *Basic* presumption. Plaintiffs contended that one would not have expected the alleged misrepresentations to have moved the share price, because the statements "did not contain new value relevant information." (JA767.) This assertion is a concession that "there is no link between the price of [Defendants'] stock and any of the alleged misrepresentations because these misrepresentations just reflected the status quo." *In re Moody's Corp. Sec. Litig.*, 274 F.R.D. at 492–93 (emphasis omitted). Such a concession is fatal to reliance on *Basic*.

indicia of market efficiency were sufficient. (SPA32-34.) Similar issues are before this Court in the appeal of the class certification order in *Petrobras*. *See supra* note 3.

*In Halliburton II*, the Supreme Court held that a plaintiff must prove that the security at issue traded in an efficient market to invoke the *Basic* presumption, because without such proof, "the fraud-on-the-market theory underlying the presumption completely collapses, rendering class certification inappropriate." *Halliburton II,* 134 S. Ct. at 2416. To test for market efficiency, courts have historically considered the five factors set forth in *Cammer* v. *Bloom*, 711 F. Supp. 1264, 1286–87 (D.N.J. 1989).

The first four *Cammer* factors, however—(1) the average weekly trading volume; (2) the number of analysts who follow the stock; (3) the existence of market makers and arbitrageurs; (4) the ability of the company to file Securities Exchange Commission Form S-3—,only indirectly address whether the market is efficient. *In re Fed. Home Loan Mortgage Corp. (Freddie Mac) Sec. Litig.*, 281 F.R.D. 174, 178 (S.D.N.Y. 2012) ("The other *Cammer* factors do not directly address whether the market price reflects public information").[6] At most, they are "indicative of

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[6] *See also* Noel M.B. Hensley, *The Fraud-on-the-Market Doctrine and Class Certification in Securities Fraud Cases*, 27 No. 6 Class Action Reports ART 1 (2006) ("Of the five factors identified in *Cammer*, [the

circumstances in which an efficient market might operate." Noel M.B. Hensley, *The Fraud-on-the-Market Doctrine and Class Certification in Securities Fraud Cases*, 27 No. 6 Class Action Reports ART 1 (2006).

As a result, courts rely on the fifth *Cammer* factor—empirical evidence in the form of an "event study" showing a causal relationship between unexpected news and the price of a security—because such a relationship is "the essence of an efficient market and the foundation for the fraud on the market theory." *Teamsters Local 445 Freight Div. Pension Fund* v. *Bombardier Inc.*, 546 F.3d 196, 207–08 (2d Cir. 2008). This Court has explicitly recognized that the fifth *Cammer* factor is the most important one, because it is the only factor that *directly* demonstrates whether the market functioned efficiently. *Id.* at 207. Event studies are, in the words of one district court, the "critical factor—the *sine qua non of* [market] efficiency." *In re Freddie Mac Sec. Litig.*, 281 F.R.D. at 182.

Without evidence in the form of a valid event study of a causal relationship between unexpected news and market price, "it is difficult to presume that the market will integrate the release of material information about a security into its price." *Teamsters*, 546 F.3d at 207; *see In re Freddie Mac Sec. Litig.*, 281 F.R.D. at 182 (in the absence of evidence of

first] four are not direct evidence of whether a given stock trades in an efficient market.").

such a causal relationship, "the market cannot be called efficient"). Accordingly, even when the first four *Cammer* factors suggest that a market *may* be efficient, courts evaluate the causal relationship as demonstrated by an event study. *See In re JPMorgan Chase & Co. Sec. Litig.*, 2015 WL 10433433, at *5, 6 (S.D.N.Y. Sept. 29, 2015) (evaluating whether plaintiff's event study shows this "cause and effect relationship" notwithstanding that the other four *Cammer* factors all weighed in favor of finding market efficiency). The four indirect *Cammer* factors "cannot substitute for evidence of a cause-and-effect relationship between unexpected news and market price." *In re Freddie Mac Sec. Litig.*, 281 F.R.D. at 182.

The District Court based its ruling that Plaintiffs need not provide a valid event study to prove market efficiency on the theoretical observation that event studies can sometimes be "unreliable" if they have an inadequate sample size. (SPA12-13, SPA30-32.) Notably, there is no indication—let alone any suggestion by any party—that an event study *in this case* would have suffered from that flaw. Thus, the District Court's ruling on this issue was untethered to the facts of the case—a further reason why this Court should reverse the class certification order.

The District Court's stated concern—that difficulties arising out of an inadequate sample size mean that "a plaintiff attempting to

demonstrate market efficiency through an event study will often face an onerous task, whether or not the market is efficient" (SPA32)—is unwarranted. Well-founded event studies are accepted as generally the most reliable evidence of market efficiency. *See* 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 5:26 (12th ed. 2015).[7] Plaintiffs "can and do introduce evidence of the existence of price impact in connection with 'event studies.'" *Halliburton II*, 134 S. Ct. at 2415. In fact, event studies are widely used by plaintiffs and accepted by courts.[8] There is no basis to conclude that it would have been unduly difficult for Plaintiffs to present a reliable event study, and in fact Plaintiffs submitted an event study that the District Court inexplicably declined to consider. Even if it were the case that it would have been onerous for Plaintiffs to present a reliable event study, if a plaintiff is unable to satisfy a governing test, the solution is not to dumb down the test; the solution is to rule against that plaintiff.

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[7] *See also* Morgan, Nicholas, et al., Halliburton *Fallout: Fate of the 'Efficient Market' Hypothesis and Event Studies in Securities Litigation*, 20 No. 5 Westlaw J. Sec. Litig. & Regulation 1, 2 (2014) ("Experts regularly assess market efficiency through event studies" because they are "considered by most finance academics to be the best available test of market efficiency.").

[8] *See, e.g.,* Madge S. Thorsen et al., *Rediscovering the Economics of Loss Causation*, 6 J. Bus. & Sec. L. 93, 109 (2006) ("The gold standard, which is accepted by both courts and economists, is the event study.").

The District Court's concern that requiring plaintiffs to submit and defend an event study to demonstrate market efficiency would set the bar too high led it to go much too far in the other direction, making class certification for large companies practically a foregone conclusion. For cases involving such companies, the District Court effectively shifted the burden onto defendants to disprove market efficiency, in contravention of *Halliburton II*'s clear directive that the burden of proving market efficiency remains with plaintiffs. *Halliburton II*, 134 S. Ct. at 2412.

While plaintiffs in the past, like Plaintiffs here, have routinely submitted event studies to support their motions for class certification, they will not do so in future litigation against large companies if the District Court's approach is endorsed by this Court as good law. Event studies can be challenged, as the event study in this case was, and those challenges may be successful. Why would future plaintiffs run the risk of actually addressing the critical evidence of market efficiency—which can be controverted—when, under the District Court's ruling, it is superfluous? The end result would be a rise in "blackmail settlements" in cases involving large companies.

Moreover, this undesirable outcome would likely be only the beginning. The District Court's rationale—that the prescribed test was

simply too difficult for plaintiffs to meet—if applied in other cases, would lead to a complete erosion of the requirements for class certification established by the Supreme Court.

## III. THE DISTRICT COURT IMPROPERLY GAVE PLAINTIFFS THE BENEFIT OF THE *AFFILIATED UTE* PRESUMPTION IN A CASE BASED ON MISSTATEMENTS

The District Court's class certification order is flawed for the additional reason that it is premised on a mischaracterization of Plaintiffs' alleged misrepresentations as omissions. As a result of this error, the District Court impermissibly broadened the *Affiliated Ute* presumption of reliance to cover virtually all affirmative disclosure cases—effectively reading the element of reliance out of Section 10(b) cases. If the District Court's approach were upheld, it would dramatically alter the careful balance that the Supreme Court and this Court have struck in securities class action litigation, and sustain cases in which the alleged misrepresentations have no connection with plaintiffs' claimed injuries.

The *Affiliated Ute* presumption is a narrow one, which this Court has limited to "instances of total non-disclosure." *Wilson* v. *Comtech Telecomms. Corp*., 648 F.2d 88, 93 (2d Cir. 1981). It explained that "in instances of total non-disclosure, as in *Affiliated Ute*, it is of course impossible to demonstrate reliance." *Id.* at 93 (quoting *Titan Grp., Inc.*, v.

*Faggen*, 513 F.2d 234, 239 (2d Cir. 1975)). In such cases, it is presumed (subject to rebuttal) that an investor who was exposed to the relevant disclosures would have made a different investment decision had the omitted material information been included.

If, on the other hand, a defendant has made affirmative statements, a plaintiff *can* be expected to prove that he or she read and relied on the statements at issue. Thus, where "positive statements are central to the alleged fraud, thereby eliminating the evidentiary problems inherent in proving reliance on an omission, the *Affiliated Ute* presumption does not apply." *Goodman* v. *Genworth Fin. Wealth Mgmt., Inc.*, 300 F.R.D. 90, 104 (E.D.N.Y. 2014); *see also In re Lehman Bros. Sec. & ERISA Litig.*, 2013 WL 5730020, at *3 (S.D.N.Y. Oct. 22, 2013) (the *Affiliated Ute* presumption "does not apply to cases where, as here, plaintiffs could … plead reliance on certain of defendants' statements"). In such cases, courts properly require plaintiffs to demonstrate reliance (or invoke the distinct fraud on the market presumption, if they can satisfy its requirements). *See Zuckerman* v. *Harnishchfeger Corp.*, 591 F. Supp. 112, 121 (S.D.N.Y 1984) (the *Affiliated Ute* presumption did not apply because "[p]ositive statements do exist and plaintiff cannot escape the obligation of pleading reliance on those assertions he alleges were fraudulent").

In this case, the Complaint is replete with allegations that Defendants made affirmative misstatements. It summarizes those statements as follows:

> Barclays accomplished this goal ("We will not be happy until we are number one") through false representations about the dark pool's transparency and safeguards. Barclays touted LX as a safe trading venue "built on transparency," with "built in safeguards to manage toxicity [of aggressive traders]" who victimize investors trading in the dark pool . . . .

(JA188.). The Complaint lists throughout its factual allegations affirmative statements that it claims were false.[9] It begins its allegations concerning Barclays' allegedly false and misleading statements with the following summary:

> Defendants' false and misleading statements about Barclays' transparency and safeguards, as well as Barclays' repeated commitment to a reformed culture,

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[9] *See*, *e.g*., JA206 (alleging false statement regarding safeguards built into dark pool), 208 ("Barclays' false assurances did not stop there ...."), 209 ("White also made rosy statements about LX to" various media), 211 ("Contrary to Barclays' widely-disseminated assurances, however, Barclays' dark pool was a magnet for high frequency traders"), 214 ("Barclays also issued marketing material that included representations purporting to show the amount of aggressive trading activity in its dark pool"), 215 ("Barclays represented that its Liquidity Profiling tool 'protect[s] investors from predatory trading ....'"), 216 ("Despite Barclays' representations that '[w]e monitor client orders continuously,' the Company has not regularly updated the ratings of its traders ...."), 218 ("Barclays falsely represented how Liquidity Profiling evaluated traders."), 220 ("Barclays also misrepresented how it routes client orders to benefit its clients.").

> maintained the price of Barclays' common stock at levels which reflected investor confidence in the integrity of the company. Particularly in light of the public's concern of aggressive trading and manipulations by high frequency traders, Defendants' assurances of Barclays' transparency and credibility were meant to and did assuage those concerns.

(JA224.) It then follows with a set of bullet points accusing Barclays of "falsif[ying] marketing materials"; making false "asserti[ons] to clients and to the investing public" and false claims about its Liquidity Profiling service, which was designed to protect investors from predatory trading; and "falsely represent[ing] that it routed client orders for securities to trading venues in a manner that did not favor Barclays' own dark pool." (JA225.) The remaining allegations in the Complaint similarly focus on affirmative statements that allegedly were misleading.[10]

The District Court held that this is nonetheless an omissions case as well as a misrepresentations case. It reasoned that Defendants had failed to disclose that they engaged in conduct that rendered the affirmative statements untrue—that Barclays was giving advantages to high-frequency traders and failing to apply the protections of Liquidity Profiling consistent

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[10] The Complaint identifies a series of affirmative statements, followed by a paragraph alleging why these statements were false or misleading. (*See, e.g.*, JA229-256.)

with its affirmative statements. (SPA23-4.) It therefore held that the *Affiliated Ute* presumption was applicable.

The District Court's approach—characterizing an affirmative misstatement as an omission of the contrary truth—would effectively eliminate the reliance element entirely, because *every* misstatement necessarily "omits the truth." *Goodman*, 300 F.R.D. at 104. Under this construction, the reliance requirement of Section 10(b) would be nullified because every statement would be magically transformed into an omission, and therefore subject to the *Affiliated Ute* presumption. *See In re Barclays Liquidity Cross & High Frequency Trading Litig.*, 126 F. Supp. 3d 342, 366 (S.D.N.Y. 2015) ("If a misrepresentation claim could be reframed as an omission claim merely by alleging that a defendant 'did nothing to dispel' its own misrepresentation, then the limitation of the *Affiliated Ute* presumption to omissions alone would be meaningless indeed."). This approach has been rejected by this Circuit and other Circuits across the country. *Starr ex Rel. Estate of Sampson* v. *Georgeson S'holder, Inc.*, 412 F.3d 103, 109 n.5 (2d Cir. 2005) (*Affiliated Ute* presumption does not apply if an omission merely "exacerbate[s] the misleading nature of the affirmative statements").[11]

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[11] *See also Joseph* v. *Wiles*, 223 F.3d 1155, 1163 (10th Cir. 2000) ("We cannot allow the mere fact of [] concealment to transform the alleged malfeasance into an omission rather than an affirmative act. To do

Because Plaintiffs' claims are based on affirmative statements in public disclosures, they do not face the evidentiary problem that gives rise to the *Affiliated Ute* presumption. The reason for the existence of that presumption is inapplicable here and in cases like this.

The Supreme Court has described the reliance requirement as "essential" because it ensures that there is a "causal connection between a defendant's misrepresentation and a plaintiff's injury." *Stoneridge Inc.*, 552 U.S. at 159. The District Court's ruling would in practice eliminate that requirement, and should therefore be reversed.

## IV. THE DISTRICT COURT IMPROPERLY RELIED ON AN ARBITRARY DAMAGES MODEL

The District Court also erred by holding that Plaintiffs need not proffer a methodology that isolates the price decline caused by Defendants' alleged misstatements; and the failure to disaggregate would affect all class

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otherwise would permit the *Affiliated Ute* presumption to swallow the reliance requirement almost completely."); *Abell* v. *Potomac Ins. Co.*, 858 F.2d 1104, 1119 (5th Cir. 1988) ("[W]e apply the *Ute* presumption in non-disclosure cases, but not in falsehood or distortion cases."), *judgment vacated on other grounds*, 492 U.S. 914 (1989); *Carpenters Pension Trust Fund of St. Louis* v. *Barclays* PLC, 310 F.R.D. 69, 98 (S.D.N.Y. 2015) (declining to apply the presumption because "[t]he 'omissions' in this case are simply the truth"); *In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480, 494 (S.D.N.Y. 2011) ("Plaintiffs are claiming that Moody's made representations about the quality of their examination that was the exact opposite of what it was in reality…. These plainly are not omissions.").

members in the same way. (SPA45-46.) In so doing, it certified the class in conflict with another important limitation on class actions, the Supreme Court's decision in *Comcast.* The class certification order in *Goldman*, which is currently on appeal to this Court, contains the same flaw. *See supra* note 3.

In *Comcast,* the Supreme Court held that, in order to establish the predominance element for class certification under Rule 23, a plaintiff must show that damages can be proven on a class-wide basis in a manner consistent with the plaintiffs' theory of liability.[12] This requirement appropriately protects defendants from becoming insurers of losses caused by inactionable events that coincide with alleged corrective disclosures.[13] Here, *Comcast* requires Plaintiffs to come forward with a method for measuring class damages resulting solely from the alleged falsity of Barclays' statements about its dark pool trading operations, as distinct from the disclosure of unexpected government enforcement activity.

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[12] *Accord Forsta AP-Fonden* v. *St. Jude Med., Inc.*, 312 F.R.D. 511, 516 (D. Minn. 2015); *Traver* v. *Lowe's Home Centers, LLC*, No. 12 Civ. 3528, slip op. at *5 (E.D.N.Y. March 1, 2016) (denying certification after plaintiff failed to submit a model demonstrating that damages could be calculated on a class-wide basis).

[13] *See Ludlow* v. *BP, p.l.c.*, 800 F.3d 674, 690 (5th Cir. 2015) (the securities laws protect only "against those economic losses that misrepresentations actually cause" and do not provide "broad insurance against market losses"), *petition for cert. filed*, No. 15-952 (U.S. Jan. 28, 2016).

Plaintiffs failed to do so. Their damages model purported only to measure the price decline attributable to the *entire* mixture of news in the alleged corrective disclosures, including news of government enforcement activity. It failed to separate damages resulting from the allegedly misleading statements about Barclays' dark pool trading operations from price inflation attributable to other causes, and therefore was disconnected from Plaintiffs' theory of liability. The Supreme Court held in *Comcast* that to satisfy the predominance requirement in Rule 23(b)(3) with respect to a liability and damages class, a plaintiff must present a class-wide damages theory that separates recoverable damages from other losses. 133 S. Ct. at 1433. Under *Comcast*, therefore, class certification should have been unavailable.

As the Supreme Court noted in *Comcast*, "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable" to the plaintiffs' liability theory. 133 S. Ct. at 1433. "If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.*[14] Although *Comcast* does not require

[14] *See also Sykes* v. *Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 82 (2d Cir. 2015) (affirming certification but noting that "[f]or the purposes of class certification ... plaintiffs cannot 'identify damages that are not the result

plaintiffs to present a class-wide damages model, *Roach* v. *T.L. Cannon Corp.*, 778 F.3d 401, 408–09 (2d Cir. 2015), where, as here, a plaintiff elects to do so, the model "must be consistent with its liability case," and "measure only those damages." *Comcast*, 133 S. Ct. at 1433.[15]

Accordingly, to comply with *Comcast*, plaintiffs must disaggregate losses attributable to the actionable theory of liability from

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of the wrong'"); *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 123 n.8 (2d Cir. 2013) (*Comcast* requires courts to "examine the proposed damages methodology at the certification stage to ensure that it is consistent with the classwide theory of liability"); *Dial* v. *News Corp.*, 314 F.D.R. 108, 118 (S.D.N.Y. 2015) ("Plaintiffs must also show that the damages … are measurable on a class-wide basis through use of common methodology."); *Jacob* v. *Duane Reade, Inc.*, 293 F.R.D. 578, 587 (S.D.N.Y. 2013) (under *Comcast*, "the putative class's theory of liability must track its theory of damages"), *aff'd*, 602 F. App'x 3 (2d Cir. 2015).

[15] In *Roach*, this Court rejected a *per se* rule that "individualized damages determinations alone" always preclude class certification, but stated that "damages questions should be considered at the certification stage." *Roach*, 778 F.3d at 408, 409; *see also In re Barrick Gold Sec. Litig.*, 314 F.R.D. 91, 100 (S.D.N.Y. 2016) (whether damages require individualized attention is "a factor that we must consider in deciding whether issues susceptible to generalized proof 'outweigh' individual issues"). In *Roach*, each class member's damages would be calculated based on the number of times the class member was the subject of the alleged class-wide wage-and-hour violations, thus tying directly to the class-wide theory of injury. By contrast, in *Comcast* and here, the problem is not merely that individual class member characteristics require some individualized proof and separate damages calculations. The more fundamental flaw is that Plaintiffs' damages model fails to connect to the theories of liability and injury, because Plaintiffs have no class-wide method for disaggregating recoverable damages from other losses.

non-recoverable losses flowing from confounding factors.[16] Meeting this requirement is particularly important in cases, such as this one, premised on a price maintenance theory. *In re N. Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d 446, 461 (S.D.N.Y. 2000) (in price maintenance cases it is essential to "rule out causes for that maintenance other than the defendants' purported failure to disclose certain information"). The burden is on plaintiffs; defendants do not bear the burden of showing that disaggregation is impossible.[17]

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[16] *See, e.g.*, *In re Processed Egg Prods. Antitrust Litig.*, 2016 WL 410279, at *8 (E.D. Pa. Feb. 3, 2016) (damages model improperly "intermingles lawful and unlawful behavior"); *In re POM Wonderful LLC*, 2014 WL 1225184, at *5 (C.D. Cal. Mar. 25, 2014) (damages expert improperly "assumed that 100% of th[e] price difference was attributable to Pom's alleged misrepresentations").

[17] *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 254 (D.C. Cir. 2013) ("It is not enough [for plaintiffs] to submit a questionable model whose unsubstantiated claims cannot be refuted through *a priori* analysis."); *Processed Egg Products*, 2016 WL 410279, at *4 ("[I]t is the plaintiff's burden to show that all the requisite elements of Rule 23 have been met."). This Court's ruling in *In re Pfizer Inc. Sec. Litig.*, 819 F.3d 642 (2d Cir. 2016), that the plaintiffs' expert was not required to disaggregate damages attributable to alleged misstatements by Pfizer from alleged misstatements by other companies—statements over which Pfizer had no control—is not to the contrary. The *Pfizer* plaintiffs' theory was that the defendants were responsible for all of their losses, even losses tied to alleged misrepresentations by other companies, because Pfizer had subsequently misrepresented the same information. Since, under this theory of liability, misrepresentations on a single subject allegedly caused all of the claimed losses, there was no need to disaggregate losses tied to Pfizer's statements from losses arising from other companies' statements. *See In re Pfizer Inc.*, 819 F.3d at 655. By

Plaintiffs failed to meet their burden, because their damages model cannot separate claimed harm arising out of Defendants' alleged misstatements about Barclays' dark pool trading operations from harm due to the announcement of government enforcement activity. As such, their damages model was arbitrary.

The District Court nevertheless certified a class, based on reasoning that was flawed in at least two respects. To begin with, the District Court incorrectly held that "[w]hether plaintiffs will be able to prove loss causation or damages are questions that go to the merits and not to whether common issues predominate." (SPA46.) This statement directly conflicts with *Comcast*, which allows for inquiry into both the merits and damages models for the purposes of a predominance analysis under Rule 23(b)(3). *Comcast*, 133 S. Ct. at 1432 ("Such an analysis will frequently entail 'overlap with the merits of the plaintiff's underlying claim' ... because the 'class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'").[18]

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contrast, Defendants here have showed that at least some of Plaintiffs losses were caused by the unexpected announcement of government enforcement activity. (SPA42-44.) Since Defendants would not be responsible for such losses, Plaintiffs are obliged to disaggregate them from losses due to the alleged corrective disclosures.

[18] *Accord Roach*, 778 F.3d 401, 406–07.

The Supreme Court in *Comcast* identified this same refusal to address the merits during certification as an error of law. *Id.* ("By refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry.").[19]

The District Court excused the failure of Plaintiffs' damages model to isolate the price decline caused by the alleged misstatements on the ground that this issue would "affect all class members in the same manner." (SPA45-46.) However, in *Comcast* the Supreme Court considered and rejected this position. It held that even damages that are measurable "classwide" will not survive a Rule 23(b)(3) predominance analysis if the damages model is arbitrary. 133 S. Ct. 1433. The Supreme Court explained that holding otherwise "would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.*

By certifying a class based on a methodology that cannot isolate the price impact, if any, of the alleged misstatements, the District Court effectively relieved Plaintiffs of the burden of showing that their damages

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[19] *Accord Jacob* v. *Duane Reade, Inc.*, 602 Fed. Appx. 3, 6 (2d. Cir 2015) (summary order) (decertifying class as to damages and rejecting argument that plaintiffs' pleadings are taken as true at the class certification stage).

and liability cases are consistent, and thereby "travel[led] to a place forbidden by *Comcast*." *Ludlow*, 800 F.3d at 688. If followed, this ruling would allow plaintiffs to require companies to compensate them for losses due to inactionable events, such as announcements of unexpected government enforcement activity, which often coincide with alleged securities law violations, simply because the events corresponded in time.

## CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's class certification order.

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(b) and Fed. R. App. P. 32(a)(7)(B) because it contains 6,987 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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