Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2016
No. 16-1912-cv

JOSEPH WAGGONER, MOHIT SAHNI, BARBARA STROUGO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellees,

v.

BARCLAYS PLC, ROBERT DIAMOND, ANTONY JENKINS, BARCLAYS CAPITAL INC., WILLIAM WHITE,
Defendants-Appellants,

CHRIS LUCAS, TUSHAR MORZARIA,
*Defendants.**

Appeal from the United States District Court
for the Southern District of New York
No. 14-cv-5797 — Shira A. Scheindlin, *Judge.*

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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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Chicago, IL, *on the brief*), *for Plaintiffs-Appellees*.

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Robert V. Prongay, Glancy Prongay & Murray LLP, Los Angeles, CA, *for Securities Law Professors as* amicus curiae *in support of Plaintiffs-Appellees*.

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amicus curiae *in support of Defendants-Appellants*.

David S. Lesser (Fraser L. Hunter, Jr., Colin T. Reardon, John Paredes, *on the brief*), Wilmer Cutler Pickering Hale and Dorr LLP, New York, NY, *for Paul S. Atkins*, *Elizabeth Cosenza*, *Daniel M. Gallagher*, *Joseph A. Grundfest*, *Paul G. Mahoney*, *Richard W. Painter*, *and Andrew N. Vollmer as* amicus curiae *in support of Defendants-Appellants*.

Michael H. Park, Consovoy McCarthy Park PLLC, New York, NY (J. Michael Connolly, Consovoy McCarthy Park PLLC, Arlington, VA; Kate Comerford Todd and Warren Postman, U.S. Chamber Litigation Center, Washington, DC, *on the brief*), *for the Chamber of Commerce of the United States of America as* amicus curiae *in support of Defendants-Appellants*.

DRONEY, *Circuit Judge*:

Barclays PLC, its American subsidiary Barclays Capital Inc. (collectively, "Barclays"), and

three senior officers of those companies[1] appeal from an order of the United States District Court for the Southern District of New York (Scheindlin, *J.*) granting a motion for class certification filed by the Plaintiffs-Appellees ("Plaintiffs"), three individuals[2] who purchased Barclays' American Depository Shares ("Barclays' ADS")[3] during the class period.

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[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 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.

The Plaintiffs brought this suit alleging violations of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and the Securities and Exchange Commission's Rule 10b-5.[4]

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

We agree with the Defendants that the district court erred in applying the *Affiliated Ute* presumption, but reject the remainder of their arguments and conclude that the district court did not err in granting the Plaintiffs' motion for class certification. Specifically, we hold that: (1) the *Affiliated Ute* presumption does not apply because

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[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.

the Plaintiffs' claims are primarily based on misstatements, not omissions; (2) direct evidence of price impact is not always necessary to demonstrate market efficiency, as required to invoke the *Basic* presumption of reliance, 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 in this case failed to do; and (4) the district court's conclusion regarding the Plaintiffs' classwide damages methodology was not erroneous. We therefore **AFFIRM** the order of the district court.

BACKGROUND

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

Barclays is a London-based international financial services provider involved in banking, credit cards, wealth management, and investment management services in more than fifty countries.[5] Barclays was the subject of a number of investigations and suits involving the misrepresentation of its borrowing data submitted for the calculation of the London Interbank Offered Rate ("LIBOR").[6] Barclays and other financial

[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

institutions manipulated LIBOR, an important set of benchmarks for international interest rates. In June 2012, Barclays was fined more than $450,000,000 as a result of its involvement. As a result of the LIBOR investigation, Barclays' corporate leadership undertook significant measures to change the company's culture and develop more integrity in its operations.[7]

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

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

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).

[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'

Barclays' Liquidity Cross, or, more simply, as Barclays' LX ("LX"). LX belongs to a particular subset of alternate trading systems known as "dark pools." Dark pools permit investors to trade securities in a largely anonymous manner. Neither "information regarding the orders placed into the pool for execution [n]or the identities of subscribers that are trading in the pool" are displayed at the time of the trade.[9]

The anonymous nature of dark pools makes them popular with institutional investors, who seek to avoid victimization at the hands of high-frequency traders.[10] [11] High-frequency traders often engage in

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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 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 highfrequency 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*

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

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https://www.sec.gov/news/studies/2010/marketevents-report.pdf.

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

III. Barclays' Statements Regarding LX and Liquidity

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

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

- Touting LX as encompassing a "sophisticated surveillance framework that protects clients from predatory trading activity." J.A. 240.

- Representing that "LX underscores Barclays' belief that transparency is not only important, but that it benefits both our clients and the market overall." J.A. 246.

- Stating that Barclays' algorithm and scoring methodology enabled it "to restrict [high-frequency traders] interacting with our clients." J.A. 247.

Barclays also created a service for its LX customers entitled "Liquidity Profiling." First marketed in 2011, Liquidity Profiling purportedly allowed Barclays' personnel to monitor high-frequency trading in LX more closely and permitted traders to avoid entities that engaged in such trading. For example, Barclays issued a press release stating that Liquidity Profiling enabled "Barclays to evaluate each client's trading in LX based on quantitative factors, thereby providing more accurate assessments of aggressive, neutral and passive trading strategies." J.A. 246. Based on a numerical ranking system that categorized traders, LX users could, according to Barclays, avoid trading with high-frequency traders. Barclays made numerous other alleged misstatements regarding Liquidity Profiling, such as:

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

- Explaining that "transparency" was the biggest theme of the year 2013, and that "Liquidity Profiling analyzes each interaction in the dark pool, allowing us to monitor the behavior of individual participants. This was a very significant step because it was important to provide . . . clients with transparency about the nature of counterparties in the dark pool and how the control framework works." J.A. 252.

IV. The New York Attorney General's Lawsuit

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

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

V. The Plaintiffs' Action

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

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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).

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

According to the complaint, Barclays "did not monitor client orders continuously," or even apply Liquidity Profiling "to a significant portion of the trading" conducted in LX. J.A. 228. Instead, the Plaintiffs alleged that Barclays "favored high frequency traders" by giving them information about LX that was not available to other investors and applying "overrides" that allowed such traders to be given a Liquidity Profiling rating more favorable than the one they should have received. J.A. 228.

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

VI. Procedural History

The Defendants moved to dismiss the Plaintiffs' claims. They contended, among other arguments, that the alleged misstatements recited by the Plaintiffs were not material and therefore could not form the basis for a § 10(b) action. In

particular, the Defendants pointed out that the revenue generated by LX was only 0.1% of Barclays' total revenue, which was, according to the Defendants, significantly below what would ordinarily be considered quantitatively material to investors. The Defendants also contended that the Plaintiffs had not adequately pleaded that the alleged misstatements were qualitatively material because they had not alleged that any Barclays investor had considered them in making investment decisions; the statements were directed only to LX clients, not investors.

The district court denied the Defendants' motion to dismiss, in part. *Strougo v. Barclays PLC*, 105 F. Supp. 3d 330, 353 (S.D.N.Y. 2015). The court explained that it was obligated to consider whether the purported misstatements were quantitatively or qualitatively material. *Id.* at 349–50. In its quantitative analysis, the court agreed with the Defendants that LX was a small part of Barclays' business operation and accounted for a small fraction of the company's revenue. *Id.* at 349. It nevertheless concluded that the misstatements could be qualitatively material. *Id.* After the LIBOR scandal, the court explained, "Barclays had staked its long-term performance on restoring its integrity." *Id.* (internal quotation marks omitted). Barclays' statements regarding LX and Liquidity Profiling could therefore "call into question the integrity of the company as a whole."[16] *Id.*

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[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

a. *The Plaintiffs' Motion for Class Certification*

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

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

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

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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.

[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.

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

With respect to the final factor—the fifth *Cammer* factor, or "*Cammer* 5," which is considered the only "direct" measure of efficiency—Dr. Nye conducted an "event study" to determine whether the price of Barclays' ADS changed when new material information about the company was released. Based on the results of that event study, Dr. Nye concluded that the final factor also weighed in favor of concluding that the market for Barclays' ADS was efficient. Thus, relying on Dr. Nye's report, the Plaintiffs asserted that they were entitled to the *Basic* presumption.

In the alternative, the Plaintiffs argued that reliance could be established under the presumption of reliance for omissions of material information, as recognized by the Supreme Court in *Affiliated Ute*, 406 U.S. at 128. That presumption, the Plaintiffs asserted, applied because Barclays had failed to disclose material information regarding LX, such as the fact that Liquidity Profiling did not apply to a significant portion of the trades conducted in LX and that Barclays provided advantages such as "overrides" to high-frequency traders.

Dr. Nye also addressed the calculation of class damages. He opined that the damages class members had suffered as a result of Barclays' fraudulent conduct could be calculated on a classwide basis. According to Dr. Nye, the amount by which a stock's price was inflated by fraudulent statements or omissions could be calculated by measuring how much the price of the stock declined when those statements were revealed to be false or when previously undisclosed information was revealed. An event study could then isolate company-specific changes in stock price from changes resulting from outside factors such as fluctuations in the stock market generally or the particular industry. Once the decline caused by the corrective disclosure was isolated, the "daily level of price inflation" could be readily calculated for Barclays' ADS for the class period. J.A. 348. Then, each class member's actual trading in the security could be used to determine individual damages.[19]

b. *The Defendants' Opposition to Class Certification*

In response, the Defendants argued that the Plaintiffs had not made the requisite showing to invoke the *Basic* presumption because they had failed to show that the market for Barclays' ADS was efficient.[20] The Defendants pointed to the report of

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

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

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

The Defendants also argued that even if the district court were to conclude that the Plaintiffs were entitled to the *Basic* presumption of reliance, class certification should be denied because the Defendants rebutted that presumption. They asserted that the event study conducted by Dr. Nye indicated that the price of Barclays' ADS did not increase by a statistically significant amount on any of the days on which the purportedly fraudulent statements had been made. Thus, according to the Defendants, there was no connection between the misstatements and the price of Barclays' ADS.

The Defendants further contended that the *Affiliated Ute* presumption was inapplicable to the complaint's allegations. That presumption, they argued, applied only to situations primarily

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[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.

involving omissions, and the complaint alleged affirmative misstatements, not omissions.

Finally, the Defendants contended that the damages model proposed by Dr. Nye failed to satisfy *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). Dr. Nye's model, the Defendants argued, did not disaggregate confounding factors that could have caused the price drop in Barclays' ADS that occurred when the New York Attorney General announced his action, such as the likelihood of regulatory fines. Nor had the model sufficiently accounted for variations in the time each alleged misstatement became public. According to the Defendants, these deficiencies precluded class certification.

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

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

In the alternative, the district court concluded that the *Basic* presumption of reliance for misrepresentations applied. *Id.* at 323. The Defendants, the court noted, had conceded that the Plaintiffs had "established four of the five *Cammer*

factors and all three *Krogman* factors." *Id.* at 319–20. They disputed only the sufficiency of Dr. Nye's event study under *Cammer* 5. *Id.* at 320. Although Dr. Nye's event study had been presented to the district court (and was the subject of extensive court proceedings), the district court concluded that direct evidence of price impact under *Cammer* 5 was not necessary to its determination that the market for Barclays' ADS was efficient during the class period.[22] *Id.* The district court noted that although an event study may be particularly important where the indirect factors do not weigh heavily in favor of market efficiency, it was not necessary here where the application of the indirect factors, including that the "stock trades in high volumes on a large national market and is followed by a large number of analysts," weighed so strongly in favor of a finding of market efficiency. *Id.* at 322–23. Therefore, the court declined to determine whether *Cammer* 5 was satisfied, but concluded based on the showing made by the Plaintiffs on all the indirect factors that Barclays' ADS traded in an efficient market during the class period. *Id.* at 323.

The district court noted that, based on Dr. Nye's report, Barclays' ADS had an average weekly trading volume of 17.7% during the class period. *Id.* at 323 n.103. That volume far exceeded the 2% threshold for a "strong presumption" of efficiency based on the average weekly trading volume

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[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.

described in *Cammer*. *Id.* Additionally, the district court noted that analysts had published more than 700 reports regarding Barclays' ADS during the class period, and it explained that "the amount of reporting on Barclays['] [ADS] by security analysts during the Class Period indicates that company-specific news was widely disseminated to investors." *Id.* at 323 n.104. That consideration was directly relevant to a different "indirect" *Cammer* factor and, like the average weekly trading volume, supported the conclusion that the market for Barclays' ADS was efficient. *Id.* at 316.

The court further determined that the Defendants had not rebutted the *Basic* presumption. *Id.* at 327. They had failed to demonstrate that the allegedly fraudulent statements did not impact the price of Barclays' ADS. *Id.* The "fact that other factors contributed to the price decline does not establish *by a preponderance of the evidence* that the drop in the price of Barclays['] ADS was not caused *at least in part* by the disclosure of the fraud at LX," the district court reasoned. *Id.* (first emphasis added).

Finally, the district court concluded that Dr. Nye's damages model complied with *Comcast Corp. v. Behrend*. *Id.* The methodology proposed by the Plaintiffs fit their legal theory of the case because they had proposed using an event study and a constant dollar method that was based on the decline in stock price following the disclosure of the Attorney General's lawsuit. *Id.* The court also concluded that individual damages issues would not predominate and could be readily calculated. *Id.* It

therefore granted the Plaintiffs' motion for class certification. *Id.* at 328–29.

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

DISCUSSION

The Defendants argue that the district court erred in four respects by granting the Plaintiffs' motion for class certification. First, they assert that the district court incorrectly concluded that the Plaintiffs properly invoked the *Affiliated Ute* presumption. Second, the Defendants contend that the court improperly concluded that the *Basic* presumption applied without considering direct evidence of market efficiency under *Cammer* 5. Third, they argue that the district court erroneously required them to rebut the *Basic* presumption by a preponderance of the evidence (and wrongly concluded that they failed to satisfy that standard). Finally, the Defendants assert that the Plaintiffs' damages model violates *Comcast Corp. v. Behrend*.

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

I. Standard of Review

"We review a district court's class certification determination for abuse of discretion . . . . 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).

II. Class Certification Requirements

In addition to satisfying the requirements set forth in Federal Rule of Civil Procedure 23(a), a plaintiff seeking class certification must establish one of the bases for certification identified in Federal Rule of Civil Procedure 23(b). *See* Fed. R. Civ. P. 23(b). One such basis, at issue here, permits certification if "questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "Predominance is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Roach*, 778 F.3d at 405 (internal quotation marks omitted).

III. The Presumptions of Reliance

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

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

Alternatively, a plaintiff may also seek to take advantage of two presumptions of reliance established by the Supreme Court.

The first—the *Affiliated Ute* presumption—allows the element of reliance to be presumed in cases involving primarily omissions, rather than affirmative misstatements, because proving reliance in such cases is, in many situations, virtually impossible.[24] *Wilson v. Comtech Telecomms. Corp.*,

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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).

[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.*,

648 F.2d 88, 93 (2d Cir. 1981); *see also Affiliated Ute*, 406 U.S. at 153–54.

The second—the *Basic* presumption—permits reliance to be presumed in cases based on misrepresentations if the plaintiff satisfies certain requirements.[25] [26] *See Halliburton Co. v. Erica P. John Fund, Inc.*, ––– U.S. –––, 134 S. Ct. 2398, 2413 (2014) ("*Halliburton II*"). One of them, and the only

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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).

[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.

one at issue in this appeal, is that "the stock [at issue] traded in an efficient market." *Id.* An efficient market is "one in which the prices of the [stock] incorporate most public information rapidly."[27] *Teamsters Local 445 Freight Div. Pension, Fund v. Bombardier Inc.*, 546 F.3d 196, 204 (2d Cir. 2008). In other words, an efficient market is one in which "market professionals generally consider most publicly announced material statements about companies, thereby affecting stock prices." *Id.* at 199 n.4 (internal quotation marks omitted).

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

> (1) the average weekly trading volume of the [stock], (2) the number of securities analysts following and reporting on [it], (3) the extent to which market makers traded in the

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[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.

> [stock], (4) the issuer's eligibility to file an SEC registration Form S–3, and (5) the demonstration of a cause and effect relationship between unexpected, material disclosures and changes in the [stock's] price[].

Bombardier, 546 F.3d at 200.

The first four "*Cammer* factors examine indirect indicia of market efficiency for a particular security." *Petrobras*, 862 F.3d at 276. However, the fifth factor—"*Cammer* 5"—permits 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." *Id.* (internal quotation marks omitted). Plaintiffs generally attempt to satisfy *Cammer* 5 by submitting an event study. Such studies are "regression analyses that seek to show that the market price of the defendant's stock tends to respond to pertinent publicly reported events." *Halliburton II*, 134 S. Ct. at 2415.

In addition to the *Cammer* factors, courts often consider what are known as the three *Krogman* factors when analyzing whether the market for a stock is efficient. *Petrobras*, 862 F.3d at 276. Those factors are "(1) the capitalization of the company; (2) the bid-ask spread of the stock; and (3) the percentage of stock not held by insiders ('the float')." *Krogman*, 202 F.R.D. at 474.

If a plaintiff demonstrates to the district court that the market for the stock is efficient and that the

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

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

IV. The Defendants' Arguments

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

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

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

When the Supreme Court first recognized the *Affiliated Ute* presumption, it explained that under the circumstances of that case, a case "involving *primarily a failure to disclose*, positive proof of reliance is not a prerequisite to recovery." *Affiliated Ute*, 406 U.S. at 153 (emphasis added). We later determined that the presumption was inapplicable in two cases because the claims of fraud at issue were not based primarily on omissions. Those decisions are particularly helpful in discerning whether the allegations here principally concern misrepresentations or omissions.

In the first, *Wilson v. Comtech Telecommunications Corp.*, 648 F.2d 88 (2d Cir. 1981), we cautioned that the labels "misrepresentation" and "omission" "are of little help" because in "many instances, an omission to state a material fact relates back to an earlier statement, and if it is reasonable to think that that prior statement still stands, then the omission may also be termed a misrepresentation." *Id.* at 93. We explained that what "is important is to understand the rationale for a presumption of causation in fact in cases like *Affiliated Ute*, in which no positive statements exist: reliance as a practical matter is impossible to prove." *Id.* (italics added). In *Wilson*, the president of the defendant corporation made sales and earnings projections at a conference of investors and securities analysts. *Id.* at 89. Several months later, those projections were shown to be materially inaccurate. *Id.* The earlier projections became misleading when subsequent corrective information was not timely disclosed. In other words, as we explain in somewhat more detail, the projections eventually became "half-truths." Unlike

in *Affiliated Ute*, however, in *Wilson* the omissions alone were not the actionable events and proving reliance on them was therefore not "impossible"; accordingly, we concluded that the plaintiff was required to demonstrate that he relied on the earlier misrepresentations in executing his stock purchases. *Id.* at 94.

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

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

Indeed, the omissions the Plaintiffs list in their complaint are directly related to the earlier statements Plaintiffs also claim are false. For example, the Plaintiffs argue that Barclays failed to disclose that Liquidity Profiling did not apply to a significant portion of the trades conducted in LX. That "omission" is simply the inverse of the Plaintiffs' misrepresentation allegation: Barclays' statement that Liquidity Profiling protected LX traders was false. Thus, as alleged in *Starr*, the omissions here "exacerbated the misleading nature of the affirmative statements." *Starr*, 412 F.3d at 109 n.5. The *Affiliated Ute* presumption does not apply to earlier misrepresentations made more misleading by subsequent omissions, or to what has been described as "half-truths," nor does it apply to misstatements whose only omission is the truth that the statement misrepresents. *See Joseph v. Wiles*, 223 F.3d 1155, 1162 (10th Cir. 2000), *abrogated on other grounds by Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, ––– U.S. –––, 137 S. Ct. 2042 (2017).

For these reasons, the *Affiliated Ute* presumption does not apply.

b. *The Applicability of the* Basic *Presumption*

We next turn to the Defendants' challenge to the district court's conclusion that the *Basic* presumption applied.

The Defendants assert three reasons why the district court incorrectly found that the *Basic* presumption applied and was not rebutted. First, the Defendants contend that the court erred by failing to consider whether direct evidence of price impact

under *Cammer* 5 showed that Barclays' ADS traded in an efficient market. Second, the Defendants argue that even if the failure to make that finding was not erroneous, the court erred by shifting the burden of persuasion, rather than imposing only the burden of production, on the Defendants to rebut the *Basic* presumption. Third, the Defendants assert that even if they bore the burden of rebutting the *Basic* presumption by a preponderance of the evidence, the district court incorrectly concluded that they had failed to satisfy that standard.

We are not persuaded by the Defendants' arguments. We conclude that direct evidence of price impact under *Cammer* 5 is not always necessary to establish market efficiency and invoke the *Basic* presumption, and that such evidence was not required in this case at the class certification stage. Also, the Defendants were required to rebut the *Basic* presumption by a preponderance of the evidence, and they failed to do so.

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

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

As previously discussed, we recently once again declined to adopt a particular test for market efficiency in *Petrobras*. *See* 862 F.3d at 276. Although we also declined in *Petrobras* to decide "whether plaintiffs may satisfy the *Basic* presumption without *any* direct evidence of price

impact," *id.* at 276–77, *i.e.*, without producing evidence under *Cammer* 5, we nevertheless explained that 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," *id.* at 277.

We then also rejected the argument that "directional" direct evidence of price impact[28] was required by *Cammer* 5. *Id.* at 277–78. In so doing, we explained that we have "never suggested" that an event study "was the *only* way to prove market efficiency." *Id.* at 278. We then noted that the Supreme Court has suggested that the burden required to establish market efficiency "is not an onerous one." *Id.* Lastly, we explained that "indirect evidence of market efficiency" under the other four *Cammer* factors would "add little to the *Basic* analysis if courts only ever considered them after finding a strong showing based on direct evidence alone." *Id.* Indeed, we noted that indirect evidence regarding the efficiency of a market for a company's stock under the first four *Cammer* factors "is particularly valuable in situations where direct

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[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.*

evidence does *not* entirely resolve the question" of market efficiency. *Id.*

Here, building on *Petrobras*, we conclude that a plaintiff seeking to demonstrate market efficiency need not always present direct evidence of price impact through event studies.

In so concluding, we do not imply that direct evidence of price impact under *Cammer* 5 is never important. Indeed, as the Defendants point out, we have recognized that *Cammer* 5 has been considered the most important *Cammer* factor in certain cases because it assesses "'the essence of an efficient market and the foundation for the fraud on the market theory.'" *Bombardier*, 546 F.3d at 207 (quoting *Cammer*, 711 F. Supp. at 1287). In *Bombardier*, we concluded that the district court did not err in rejecting the plaintiffs' particular event study, but also emphasized that *Cammer* 5's importance was greater because a number of the indirect *Cammer* factors suggested the inefficiency of the market. *Id.* at 210. Those factors were "the absence of market makers for the Certificates [at issue in that case], the lack of analysts following the Certificates, and the absence of proof that unanticipated, material information caused changes in the Certificates' prices—as well as the infrequency of trades in the Certificates." *Id.*

Direct evidence of an efficient market may be more critical, for example, in a situation in which the other four *Cammer* factors (and/or the *Krogman* factors) are less compelling in showing an efficient market. In *Bombardier*, the district court concluded that the *Cammer* factors were split: two supported

the conclusion that the market for the certificates issued by Bombardier was efficient while the three other factors—including *Cammer* 5—weighed against finding an efficient market. *Id.* at 200. The certificates in *Bombardier* were relatively few in number and of high dollar denominations, and they traded infrequently—primarily "in large amounts by sophisticated institutional investors." *Id.* at 198. Hence, establishing market efficiency was undoubtedly more difficult there than it is in cases involving the common stock of large financial institutions, traded frequently on a national exchange.

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

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

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

Because the resolution of this issue required the district court to apply the applicable law to the facts before it, we ask only "whether the district court's decision falls within the range of permissible decisions." *Roach*, 778 F.3d at 405.

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

This case is different from the situation in *Bombardier*, where we concluded that certain of the indirect factors did not demonstrate market efficiency, and that the plaintiffs' event study was flawed. *Bombardier*, 546 F.3d at 210. Barclays' ADS is effectively Barclays' common stock on the New York Stock Exchange. Because Barclays is one of the largest financial institutions in the world, it is unsurprising that the market for Barclays' ADS is efficient. Indeed, this conclusion is so clear that the Defendants failed to challenge such efficiency—based on seven other factors—apart from their attack on Dr. Nye's *Cammer* 5 event study. This case is more similar to the situation in *Petrobras*, where holders of ADS of Petrobras, a multinational oil and

gas company headquartered in Brazil that was "once among the largest companies in the world," whose shares traded on the New York Stock Exchange, brought suit. *Petrobras*, 862 F.3d at 256. In particular, the strong indirect evidence of an efficient market, which showed that Barclays' ADS was actively traded "in high volumes," *Strougo*, 312 F.R.D. at 322, on the New York Stock Exchange, on over-the-counter markets, and in the secondary market, and had "heavy analyst coverage," *id.* at 323, as well as the evidence related to the other indirect factors, tipped the balance in favor of the Plaintiffs on their burden to demonstrate market efficiency. Under the circumstances here, the district court was not required to reach a conclusion concerning direct evidence of market efficiency.[29] It therefore acted within its discretion in finding an efficient market based on the remaining seven factors.[30]

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[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

c. *Rebutting the* Basic *Presumption*

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

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

The *Basic* presumption is rebuttable. *Halliburton II*, 134 S. Ct. at 2405. The Supreme Court held so when it first articulated the presumption in *Basic*, 485 U.S. at 224, and when it reaffirmed the presumption of reliance in *Halliburton II*, stating that "any showing that severs the link between the alleged misrepresentation and

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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").

either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." *Halliburton II*, 134 S. Ct. at 2408 (alteration omitted) (quoting *Basic*, 485 U.S. at 248).

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

In *Basic*, Basic Incorporated, a chemical manufacturing firm, repeatedly denied in public statements that it was involved in merger discussions with Combustion Engineering, another chemical firm, shortly before it announced a merger of the two firms. *See Basic*, 485 U.S. at 226–28. Former Basic shareholders who had sold their stock before the merger was announced sued under § 10(b), claiming that the company's prior statements constituted misrepresentations. *Id.* at 227–28. The district court applied a presumption of reliance and certified the plaintiffs' class. *Id.* at 228. The Supreme Court agreed that reliance on the statements that no merger would occur would be presumed because of the "well developed market" for the securities, and the fact that the Basic stock was sold in an "efficient market." *Id.* at 247–48, 250. The Court explained, however, that the presumption of reliance could be rebutted if the defendants "could show that the

'market makers' were privy to the truth about the merger discussions" in that case "and thus that the market price would not have been affected by" the defendants' misrepresentations. *Id.* at 248. Such a showing would break the causal connection for the inference that the fraud had been incorporated into the market price. *Id.* The Court further stated that the defendants would have successfully rebutted the *Basic* presumption if they established that "news of the merger discussions credibly entered the market and dissipated the effects of the misstatements." *Id.* at 249. Finally, the Court acknowledged that the defendants "could rebut the presumption of reliance as to plaintiffs who would have divested themselves of their Basic shares without relying on the integrity of the market." *Id.* at 249.

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

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

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

> namely, publicity, materiality, market efficiency, and market timing.

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

Quoting *Basic*, the *Halliburton II* Court also explained that the showing to sever the link between the misrepresentation and the price received or paid would rebut the *Basic* presumption "because 'the basis for finding that the fraud had been transmitted through market price would be gone.'" *Halliburton II*, 134 S. Ct. at 2415–16 (quoting *Basic*, 485 U.S. at 248). The Court then stated that although "*Basic* allows plaintiffs to establish [price impact] indirectly, it does not require courts to ignore a defendant's direct, *more salient* evidence showing

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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.

that the alleged misrepresentation did not actually affect the stock's market price." *Id.* at 2416 (emphasis added).

A concurring opinion in *Halliburton II* by Justice Ginsburg and joined by Justices Breyer and Sotomayor stated that the majority recognized "that it is incumbent upon the defendant to *show* the absence of price impact."[32] *Id.* at 2417 (Ginsburg, J., concurring) (emphasis added).

This Supreme Court guidance indicates that defendants seeking to rebut the *Basic* presumption must 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.

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

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[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).

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

Second, the language chosen by the Court in *Halliburton II* demonstrates that the Court understood the burden that shifts to defendants as one of persuasion rather than production. As mentioned above, the majority in *Halliburton II* explained that evidence that satisfied the "severing the link" standard would rebut the *Basic* presumption because "'the basis for finding that the fraud had been transmitted through market price would be gone,'" and the defendants' "direct, more salient evidence" that the misrepresentations did not affect the stock price would rebut the *Basic* presumption. *Halliburton II*, 134 S. Ct. at 2415–16 (quoting *Basic*, 485 U.S. at 248).

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

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

Second, we held in *Black v. Finantra Capital, Inc.*, 418 F.3d 203 (2d Cir. 2005), that a district court correctly instructed the jury when it charged that the defendants in a securities fraud case could overcome the presumption that the "plaintiff relied on the market price to his detriment" if the defendants proved "by a preponderance of the evidence that [the] plaintiff did not in fact rely on the market price."[33] *Id.* at 209. Although the claims of fraud in that case focused largely on omissions, and the jury instruction stage follows class certification, it is nevertheless helpful guidance.

Third, we have explained that when the plaintiffs have demonstrated that they are entitled to the *Basic* presumption by showing "that the alleged misrepresentation was material and publicly

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[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).

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

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

> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Fed. R. Evid. 301.

The Defendants assert that because no federal statute or other rule of evidence "provide[s]

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[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.*

otherwise," we are required to conclude that defendants bear only the burden of producing evidence when they seek to rebut the *Basic* presumption. We disagree.

The *Basic* presumption was adopted by the Supreme Court pursuant to federal securities laws. Thus, there is a sufficient link to those statutes to meet Rule 301's statutory element requirement. In *United States Department of Justice v. Landano*, 508 U.S. 165 (1993), the Court referred to the *Basic* presumption as one of several "judicially created presumptions under federal statutes that make no express provision for their use," *id.* at 174–75; *see also Amgen*, 568 U.S. at 462 (referring to the *Basic* presumption as "a substantive doctrine of federal securities-fraud law"); *Basic*, 485 U.S. at 245 ("The presumption of reliance . . . supports[] the congressional policy embodied in the 1934 Act.").

While in *Stoneridge Investment Partners, LLC v. Scientific- Atlanta, Inc.*, 552 U.S. 148 (2008), the Supreme Court stated that "narrow dimensions" must be given to a plaintiff's cause of action not specifically set forth in a statute, that was in the context of determining that Rule 10b-5 liability did not extend to suppliers and customers of stock issuers, *id.* at 167, that had not issued public statements themselves, *see Salomon*, 544 F.3d at 481. That holding does not undermine the language of *Basic* and *Halliburton II* that indicates defendants have the obligation to rebut the *Basic* presumption of reliance by a preponderance of evidence. Even in *Stoneridge* the Court stated that "there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one." 552

U.S. at 164. Thus, the Court again acknowledged the statutory source for the 10b-5 implied cause of action.

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

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[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 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.

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

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

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

This issue once again required the district court to apply the relevant law to the facts before it. As we see no error of law or clear error in any findings of fact, our review is therefore limited to determining whether the court abused its discretion when it concluded that class certification was proper. *Roach*, 778 F.3d at 405.

As the district court concluded, it is unsurprising that the price of Barclays' ADS did not move in a statistically significant manner on the dates that the purported misstatements regarding LX and Liquidity Profiling were made; the Plaintiffs proceeded on a price maintenance theory. That

theory, which we have previously accepted, recognizes "that statements that merely maintain inflation already extant in a company's stock price, but do not add to that inflation, nonetheless affect a company's stock price." *Vivendi*, 838 F.3d at 256. Thus, the district court was well within its discretion in concluding that the lack of price movement on the dates of the alleged misrepresentations does not rebut the *Basic* presumption.[37] [38]

As to the Defendants' assertion that Dr. James concluded that the post-disclosure drop in stock price was the result of investor concern regarding regulatory action and potential fines, the record supports the district court's conclusion that such a concern was merely a contributing factor to the decline. For example, Dr. James opined that "the

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[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.

alleged corrective disclosure regarding LX *may* have had a bigger impact on Barclays' ADS price due to the announcement of the [New York Attorney General's] lawsuit" and that "*some* of the price reaction was independent of the specific allegations relating to LX," and was instead "a response to the regulatory action itself." J.A. 613 (emphases added). Dr. James also noted that all of the analyst reports that Dr. Nye had reviewed in conducting his event study had discussed "potential regulatory action and fines." *Id.*

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

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

e. *The Classwide Damages Issue*

Finally, the Defendants argue that the Plaintiffs' classwide damages model fails to comply with *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). They contend that the Plaintiffs' model fails to (1) disaggregate damages that resulted from factors other than investor concern about Barclays' integrity (namely, the New York Attorney General's

regulatory action and the potential fines associated with it), and (2) account for variations in inflation in stock price over time. We review the district court's decision to certify the Plaintiffs' class in light of this challenge to their classwide damages model for abuse of discretion. *Roach*, 778 F.3d at 405; *see also In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 123 n.8 (2d Cir. 2013). We find no abuse of discretion here.

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

The Supreme Court reversed the district court's grant of class certification. *Id.* at 38. It concluded that the plaintiffs' damages "model failed to measure damages resulting from the particular antitrust injury on which [the defendants'] liability" was premised. *Id.* at 36. In light of that deficiency, the damages model could not support class certification by satisfying Federal Rule of Civil Procedure 23(b)(3)'s predominance requirement. *Id.* at 38. The Court explained:

> [A] model purporting to serve as evidence of damages in this class action must measure only those damages attributable to [the overbuilder theory]. 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. at 35.

We have since interpreted *Comcast* as precluding class certification "only . . . because the sole theory of liability that the district court determined was common in that antitrust action, overbuilder competition, was a theory of liability that the plaintiffs' model indisputably failed to measure when determining the damages for that injury." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 88 (2d Cir. 2015) (internal quotation marks omitted). In other words, we have stated that *Comcast* "held that a model for determining classwide damages relied upon to certify a class under Rule 23(b)(3) must actually measure damages that result from the class's asserted theory of injury." *Roach*, 778 F.3d at 407.

The Plaintiffs' damages model in this case complies with *Comcast*. The Plaintiffs' allegations are that shareholders of Barclays' ADS were harmed when statements that maintained the impression that Barclays was protecting its LX investors were shown to be false, thereby exposing Barclays' business practices and culture, and causing a substantial drop in share price. Their damages model directly measured that harm by examining

the drop in price that occurred when the New York Attorney General's action revealed ongoing problems related to Barclays' management. This is not a case where a plaintiff's damages model does not track his theory of liability. Instead, this is a case in which the Plaintiffs' "proposed measure for damages is . . . directly linked with their underlying theory of classwide liability . . . and is therefore in accord with the Supreme Court's . . . decision in *Comcast*." *U.S. Foodservice*, 729 F.3d at 123 n.8.

The *Comcast* standard is met notwithstanding that some of the decline in the price of Barclays' ADS may have been the result of the New York Attorney General's action and potential fines. Investors were concerned with lack of management honesty and control because, as had happened in the past following the LIBOR scandal, such problems could result in considerable costs related to defending a regulatory action and, ultimately, in the imposition of substantial fines. Thus, the regulatory action and any ensuing fines were a part of the alleged harm the Plaintiffs suffered, and the failure to disaggregate the action and fines did not preclude class certification.

Finally, we are not persuaded by the Defendants' argument that class certification was improper under *Comcast* because the Plaintiffs' damages model failed to account for variations in inflation over time. *Comcast* does not suggest that damage calculations must be so precise at this juncture. To the contrary, *Comcast* explicitly states that "[c]alculations need not be exact." 569 U.S. at 35. Thus, even accepting the Defendants' premises that inflation would have varied during the class

period in this case and that such variation could not be accounted for, the Defendants' argument fails.

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

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

CONCLUSION

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BARBARA STROUGO, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, -against- BARCLAYS PLC, BARCLAYS CAPITAL INC., ROBERT DIAMOND, ANTONY JENKINS, CHRISTOPHER LUCAS, TUSHAR MORZARIA, and WILLIAM WHITE, Defendants.	)	CIVIL ACTION 14-cv-5797(SAS)

SHIRA A. SCHEINDLIN, U.S.D.J.:

OPINION AND ORDER

I. INTRODUCTION

Before the Court is plaintiffs' motion for class certification pursuant to Federal Rule of Civil Procedure 23. Plaintiffs bring claims for violations of section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder against two corporate defendants – Barclays PLC and Barclays Capital Inc. (collectively

"Barclays") – and one individual defendant – William White.[1] On April 24, 2015, this Court issued an Opinion and Order on defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (the "April 2015 Order").[2] While I denied defendants' motion to dismiss the section 10(b) claims, I deemed two of the three categories of statements to be inactionable.[3]

The misstatements remaining in the case concern the operation of Barclays' "dark pool," known as Barclays' Liquidity Cross or LX, a private trading venue where investors can trade stocks with near anonymity. For example, "White attributed [LX's] growth to Barclays' commitment to being transparent about how Barclays operates, how Barclays routes client orders, and the kinds of counterparties traders can expect to deal with when trading in the dark pool."[4] According to plaintiffs, however, Barclays both concealed the amount of aggressive high-frequency trading in LX, and inappropriately over-routed client orders into LX,

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1 In addition, plaintiffs bring claims under section 20(a) of the Exchange Act against individual defendants White, Robert Diamond, and Antony Jenkins.

2 *See Strougo v. Barclays PLC*, 105 F. Supp. 3d 330 (S.D.N.Y. 2015). For purposes of this Opinion and Order, familiarity with the April 2015 Order – including the general background and facts alleged in the Second Amended Complaint ("Complaint") – is assumed.

3 *See id.* at 336.

4 *See* Complaint ¶ 61.

making White's statement false.[5] On June 25, 2014, the New York State Office of the Attorney General ("NYAG") brought a lawsuit against Barclays under New York's Martin Act, alleging that Barclays concealed information about the operation of LX.[6] On news of the lawsuit, Barclays PLC's American Depositary Shares ("Barclays ADS") fell 7.38 percent on heavy volume.[7]

The putative class consists of all persons and entities who purchased Barclays ADS between August 2, 2011 and June 25, 2014 and were allegedly damaged thereby. To be certified, a putative class must demonstrate that it satisfies all four of the requirements of Rule 23(a) and one of the categories of Rule 23(b) of the Federal Rules of Civil Procedure. In this case, plaintiffs seek certification based on Rule 23(b)(3). For the following reasons, plaintiffs' motion for class certification is GRANTED.

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5 *See id.* ¶¶ 85-88, 104-112.

6 *See id.* ¶ 5.

7 *See id.* ¶ 6.

II. LEGAL STANDARD[8]

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate [its] compliance with the Rule — that is, [it] must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."[9] Under Rule 23(b)(3), certification is appropriate where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and class litigation "is superior to other available methods for the fair and efficient adjudication of the controversy."

The matters pertinent to these findings include the class members' interests in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already begun by or against class members; the desirability or undesirability of concentrating the litigation of the

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[8] Rule 23(a) requires that the class be so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, the claims or defenses of the representative parties are typical of the claims or defenses of the class, and the representative parties will fairly and adequately protect the interests of the class. There is no dispute that plaintiffs have satisfied these requirements, and after careful review of the record I find that each has been satisfied. Thus, under Rule 23(a)(4), Lead Plaintiffs Mohit Sahni and Joseph Waggoner are appointed as Class Representatives.

[9] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (emphasis in original).

claims in the particular forum; and the likely difficulties in managing a class action.[10]

The predominance inquiry focuses on whether "a proposed class is 'sufficiently cohesive to warrant adjudication by representation.'"[11] It is akin to, but ultimately "a more demanding criterion than," the "commonality inquiry under Rule 23(a)."[12] Class-wide issues predominate "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof."[13] The Second Circuit has emphasized that "Rule 23(b)(3) requires that common questions predominate, not that the action include only common questions."[14]

"Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of

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10 Fed. R. Civ. P. 23(b)(3)(A)-(D).

11 *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1196 (2013) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).

12 *In re Nassau County Strip Search Cases*, 461 F.3d 219, 225 (2d Cir. 2006) (citing *Amchem*, 521 U.S. at 623-24).

13 *Catholic Healthcare W. v. U.S. Foodservice Inc. (In re U.S. Foodservice Inc. Pricing Litig.)*, 729 F.3d 108, 118 (2d Cir. 2013) (internal citations omitted).

14 *Brown v. Kelly*, 609 F.3d 467, 484 (2d Cir. 2010).

action."[15] To sustain a claim for securities fraud under section 10(b), "a plaintiff 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."[16]

Defendants opposing class certification often challenge a plaintiff's claim of reliance.[17] By the same token, it is well settled that if proof of individual reliance were required, it would be impossible to meet the predominance requirement.[18] The predominance requirement is typically met in securities fraud class actions by plaintiffs' invocation of one of two presumptions developed by the Supreme Court that obviate the need to prove

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15 *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011) ("Halliburton I").

16 *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008).

17 Reliance is typically the only ground on which to challenge predominance because section 10(b) claims will almost always arise from a common nucleus of facts surrounding the fraudulent misrepresentation of material facts and the causal relationship between the correction of that misrepresentation and the price of the security.

18 *See Halliburton I*, 131 S. Ct. at 2185 ("Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would prevent such plaintiffs from proceeding with a class action, since individual issues would overwhelm the common ones.") (internal quotation marks and alterations omitted).

reliance on an individual basis.[19] These are the "*Basic* presumption" of reliance in fraudulent misrepresentation cases, and the "*Affiliated Ute* presumption" of reliance in fraudulent omission cases.

Issues and facts surrounding damages have rarely been an obstacle to establishing predominance in section 10(b) cases.[20] In *Comcast Corp. v. Behrend*,[21] the Supreme Court held, in the context of an antitrust claim, that class certification is appropriate only when class-wide damages may be measured based on the theory of injury asserted by the plaintiffs. The Second Circuit has rejected a broad reading of *Comcast*:

> *Comcast* [ ] did not hold that a class cannot be certified under Rule 23(b)(3) simply because damages cannot be measured on a classwide basis. *Comcast*'s holding was

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19 *See Basic Inc. v. Levinson*, 485 U.S. 224, 241 (1988) (establishing rebuttable presumption of reliance in fraudulent misrepresentation cases); *Affiliated Ute Citizens of the State of Utah v. United States*, 406 U.S. 128, 154 (1972) (establishing presumption of reliance in fraudulent omission cases).

20 *See, e.g., In re Fogarazzo v. Lehman Bros.*, Inc., 263 F.R.D. 90, 109 (S.D.N.Y. 2009) ("'[T]he fact that damages must be calculated on an individual basis is no impediment to class certification.'") (quoting *Klay v. Humana*, 382 F.3d 1241, 1260-61 (11th Cir. 2004)) (citing *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 429 (4th Cir. 2003)) ("The possibility that individualized inquiry into Plaintiffs' damages claims will be required does not defeat the class action because common issues nevertheless predominate.")).

21 133 S. Ct. 1426 (2013).

narrower. *Comcast* held that a model for determining classwide damages relied upon to certify a class under Rule 23(b)(3) must actually measure damages that result from the class's asserted theory of injury; but the Court did not hold that proponents of class certification must rely upon a classwide damages model to demonstrate predominance. . . . .

To be sure, *Comcast* reiterated that damages questions should be considered at the certification stage when weighing predominance issues, but this requirement is entirely consistent with our prior holding that "the fact that damages may have to be ascertained on an individual basis is . . . a factor that we must consider in deciding whether issues susceptible to generalized proof 'outweigh' individual issues." *McLaughlin* [v. *American Tobacco Co.*], 522 F.3d [215,] 231 [2d Cir. 2008]. The Supreme Court did not foreclose the possibility of class certification under Rule 23(b)(3) in cases involving individualized damages calculations.[22]

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[22] *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407-08 (2d Cir. 2015) (internal citations omitted) (citing *In re Deepwater Horizon*, 739 F.3d 790, 817 (5th Cir. 2014) (construing the "principal holding of *Comcast* [as being] that a 'model purporting to serve as evidence of damages . . . must measure only those damages attributable to th[e] theory' of liability on which the class action is premised" (ellipsis and second alteration in original) (quoting *Comcast*, 133 S. Ct. at 1433)); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013) (construing *Comcast* as holding only "that a damages suit cannot be certified to proceed as a class action unless the

Thus, "[p]redominance is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof."[23] And "the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification."[24]

III. APPLICABLE LAW[25]

A. The Presumption of Reliance for Omissions

The Supreme Court has held that a presumption of reliance may apply in section 10(b) cases in which plaintiffs have alleged that defendants failed to disclose information. In

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damages sought are the result of the class-wide *injury* that the suit alleges" (emphasis in original)); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (interpreting *Comcast* to hold that class-action plaintiffs "must be able to show that their damages stemmed from the defendant's actions that created the legal liability"); *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d at 123 n.8 (stating that "[p]laintiffs' proposed measure for damages is thus directly linked with their underlying theory of classwide liability . . . and is therefore in accord with the Supreme Court's recent decision in *Comcast*")).

23 *Id.* at 405 (internal quotation marks omitted).

24 *Id.* (internal quotation marks omitted).

25 In this section, I incorporate without citation large portions of my opinion in *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 310 F.R.D. 69 (S.D.N.Y. 2015).

Affiliated Ute Citizens of the State of Utah v. United States, the Court held that where a plaintiff's fraud claims are based on omissions, reliance may be satisfied so long as the plaintiff shows that defendants had an obligation to disclose the information and the information withheld is material.[26] This presumption may be rebutted by evidence that even if the material facts had been disclosed, a plaintiff's decision to enter into the transaction would have been the same.[27]

B. The Presumption of Reliance for Misrepresentations

1. The *Basic* Presumption

The Supreme Court has also held that a presumption of reliance may apply in section 10(b) cases in which plaintiffs have alleged that defendants made fraudulent misrepresentations. In *Basic v. Levinson*, the Supreme Court recognized that plaintiffs are typically entitled to a rebuttable presumption based on the "fraud-on-the-market" theory.[28] Under this theory, "'the market price of shares traded on well-developed markets reflect all publicly available information, and, hence, any material misrepresentations.'"[29] To invoke the *Basic*

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[26] See 406 U.S. at 154.

[27] *See*, e.g., *In re Initial Pub. Offering Sec. Litig.*, 260 F.R.D. 81, 93 (S.D.N.Y. 2009).

[28] *See* 485 U.S. at 241.

[29] *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014) ("*Halliburton II*") (quoting *Basic*, 485 U.S. at 246).

presumption, a plaintiff must prove 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.[30]

2. The *Basic* Presumption at Class Certification

The *Basic* presumption does not relieve plaintiffs of the burden of proving predominance under Rule 23(b)(3).[31] Plaintiffs can establish predominance at the class certification stage by satisfying the prerequisites of the Basic presumption.[32] The first three prerequisites — publicity, materiality, and market efficiency — are directed at "price impact" — "whether the alleged misrepresentation affected the market price in the first place."[33] "In the absence of price impact, Basic's fraud-on-the-market theory and presumption of reliance collapse."[34] Significantly, however, the

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[30] *See id.* (citing *Basic*, 485 U.S. at 248, n.27).

[31] *See id.* at 2412.

[32] *See id.* However, in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, the Supreme Court held that materiality does not need to be proven before a class can be certified, but is instead left to be addressed at the merits stage. *See* 133 S. Ct. at 1195-96.

[33] *Halliburton II*, 134 S. Ct. at 2414 (internal quotation marks omitted).

[34] *Id.* (quotation marks, alterations, and citations omitted).

Supreme Court made clear in *Halliburton II* that plaintiffs are not required to prove price impact directly to invoke the Basic presumption. Rather, market efficiency, publicity, and materiality serve as a proxy for price impact.[35] Furthermore, in *Halliburton I* the Supreme Court held that a securities fraud plaintiff need not establish loss causation — i.e., that plaintiffs' damages were caused by the fraud and nothing else — in order to certify a class. In so holding, the Supreme Court explained that loss causation was not an element of reliance.[36]

Halliburton II held that defendants may submit price impact evidence prior to class certification for the purpose of rebutting the *Basic* presumption. This is because "an indirect proxy should not preclude direct evidence when such evidence is available."[37] Thus, "any showing that severs the link between the alleged misrepresentation and the price received (or paid) by the plaintiff will be sufficient to rebut the presumption of reliance because the basis for finding that the fraud had been transmitted through market price would be gone."[38]

3. Market Efficiency

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[35] *See id.* at 2414-15.

[36] *See Halliburton I*, 131 S. Ct. at 2185-86.

[37] *Halliburton II*, 134 S. Ct. at 2415.

[38] *Id.* at 2415-16 (internal quotation marks and alterations omitted).

Under *Basic* and its progeny, a market is efficient when the prices of securities incorporate most public information such that they respond reasonably promptly to new material information.[39] As clarified in *Halliburton II*, the *Basic* court did not adopt any particular theory of market efficiency.[40] Instead, the *Basic* presumption is based "on the fairly modest premise that 'market professionals generally consider most publicly announced material

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[39] See *Halliburton II*, 134 S. Ct. at 2410 ("Debates about the degree to which stock prices accurately reflect public information" are "largely beside the point."). The "debates" referred to in *Halliburton II* were "among economists about the degree to which the market price of a company's stock reflects public information about the company — and thus the degree to which an investor can earn an abnormal, above-market return by trading on such information." Id. (citing Brief for Financial Economists as Amici Curiae ("Amici Br."), at 4-10 (describing the debate)). As explained by the Financial Economists, "while the proposition that market prices respond relatively promptly to material information about a stock is true if the ["semi-strong" version of the efficient markets hypothesis ("SSEMH")] is true, it does not depend on the SSEMH being true. The SSEMH entails that the market price instantly (or at least very quickly) and fully incorporates all publicly available information about a stock. It does not even tolerate modest lags or other anomalies." See Amici Br. at 5.

[40] See *Halliburton II*, 134 S. Ct. at 2410. Halliburton had argued that the Supreme Court should overrule *Basic* in part because "overwhelming empirical evidence now suggests that capital markets are not fundamentally efficient" because "public information is often not incorporated immediately (much less rationally) into market prices." *Id.* at 2409 (internal quotation marks omitted). While Halliburton did not argue that capital markets are always inefficient, "in its view, *Basic*'s fundamental error was to ignore the fact that efficiency is not a binary, yes or no question." *Id.* (internal quotation marks omitted).

statements about companies, thereby affecting stock market prices.'"[41] Thus, a finding of market efficiency does not "always require[] proof that the alleged misrepresentations had an immediate effect on the stock price."[42] Likewise, "[t]hat the price of a stock may be inaccurate does not detract from the fact that false statements affect it, and cause loss, which is all that *Basic* requires."[43] In short, the fact that *Basic* does not require that stocks reflect all public information within a specific time-frame — except that most information must be assimilated reasonably promptly — affects the required proof of the relationship between stock price movement and unexpected news.

4. Proving Market Efficiency

In an efficient market there are "[l]arge numbers of rational and intelligent investors," and "[i]mportant current information" that is "almost freely available to all participants . . . ."[44] Because it

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41 *Id.* at 2410 (quoting Basic, 485 U.S. at 247, n.24).

42 *Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248, 1256 (11th Cir. 2014).

43 *Halliburton II*, 134 S. Ct. at 2410 (internal quotation marks and alterations omitted).

44 Paolo Cioppa, *The Efficient Capital Market Hypothesis Revisited: Implications of the Economic Model for the United States Regulator*, 5 Global Jurist Advances 1, 5-6 (2005). The first component does not require that all investors be rational and intelligent, merely that there be enough rational, intelligent investors to outweigh any irrational actions. *See id.* at 5.

is difficult to test for these requirements directly, courts use a variety of factors to evaluate whether a market for securities is efficient.

In *Cammer v. Bloom*, the court enumerated five factors that are frequently used to determine whether a market is efficient.[45] These factors are (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 ("SEC") Form S-3;[46] and (5) evidence of share price response to unexpected news. In *Krogman v. Sterritt*, the court added three factors. *First*, the court noted that investors tend to be more interested in companies with higher market capitalizations, thus leading to more efficiency.[47] Second, the court determined that a small bid-ask spread indicated that trading in the stock was inexpensive, suggesting efficiency.[48] Third, the court looked to the percentage of shares that were available to the public. Because insiders are more likely to have

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[45] *See* 711 F. Supp. 1264, 1283-87 (D.N.J. 1989).

[46] *See generally* Cioppa, 5 Global Jurist Advances at 28 ("The SEC's three tiered system recognized that markets for different securities in the United States are efficient to different degrees. Essentially, moving from the S1 filers to the S3 filers, the more widely traded and followed the issuing company and the longer it has traded, the more efficient the market for it and the less information it must disclose in its registration statements.").

[47] *See* 202 F.R.D. 467, 478 (N.D. Tex. 2001).

[48] *See id.*

private information, if substantial portions of shares are held by insiders, the price is less likely to reflect only the total of all public information.[49]

a. Average Weekly Trading Volume

High volume suggests efficiency "because it implies significant investor interest in the company. Such interest, in turn, implies a likelihood that many investors are executing trades on the basis of newly available or disseminated corporate information."[50] Cammer supposes that turnover of two percent or more of outstanding shares would justify a strong presumption of efficiency, while turnover of one percent would justify a substantial presumption.[51]

b. Number of Securities Analysts

Cammer recognizes that a stock covered by a "significant number of analysts" is more likely to be efficient because such coverage implies that investment professionals are following the company and making buy/sell recommendations to investors.[52]

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[49] *See id.*

[50] *Cammer*, 711 F. Supp. at 1286.

[51] *See id.* (citing Bromberg & Lowenfels, 4 Securities Fraud and Commodities Fraud § 8.6 (Aug. 1988)).

[52] *Id.*

c. Existence of Market Makers and Arbitrageurs

Cammer explained that "[t]he existence of market makers and arbitrageurs would ensure completion of the market mechanism; these individuals would react swiftly to company news and reported financial results by buying or selling stock and driving it to a changed price level."[53] *Krogman* further explained that the mere number of market makers, without more, is essentially meaningless; "what is important is 'the volume of shares that they committed to trade, the volume of shares they actually traded, and the prices at which they did so.'"[54] One study has found that the number of market makers is not correlated with the efficiency of the market.[55] Nevertheless, this factor can provide reasonable guidance in determining whether the *Basic* presumption applies.

d. Eligibility to File Form S-3

The SEC permits a company to file Form S-3 when, in the SEC's judgment, the market for shares in the company is reasonably efficient at processing

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53 *Id.* at 1286-87.

54 *Krogman*, 202 F.R.D. at 476 (quoting *O'Neil v. Appel*, 165 F.R.D. 479, 501-02 (W.D. Mich. 1996)).

55 *See* Dr. Allen Michel et al., 24 Am. Bankr. Inst. J. 58, 60 (2005) (citing Brad Barber et al., *The Fraud–on–the–Market Theory and the Indicators of Common Stocks' Efficiency*, 19 J. Corp. L. 285, 286 (1994)).

information.[56] *Cammer* emphasized the SEC's statement that the Form S-3 is "'*predicated on the Commission's belief that the market operates efficiently for these companies* [that file Form S-3s]*, i.e., that the disclosure in Exchange Act reports and other communications by the registrant, such as press releases, has already been disseminated and accounted for by the market place.*'"[57] Deferring to the SEC's expertise in this area, I agree that this factor provides a strong indication of efficiency.

e. *Cammer* 5

Cammer 5 — empirical evidence of price changes in response to unexpected information — is often highly probative of efficiency.[58] However, there is no consensus as to how quickly share prices must change to justify a finding of efficiency.

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[56] *See Cammer*, 711 F. Supp. at 1284 (observing that the SEC permits seasoned issuers to incorporate by reference because "'[t]o the extent that the market accordingly acts efficiently, and this information is adequately reflected in the price of a registrant's outstanding securities, there seems little need to reiterate this information in a prospectus in the context of a distribution'") (quoting SEC Securities Act Release No. 6235, 45 Fed. Reg. 63,693 (1980)).

[57] *Id.* (quoting SEC Securities Act Release No. 6331, 46 Fed. Reg. 41,902 (1981) (emphasis in original).

[58] *See id.* at 1287 (stating that "it would be helpful to a plaintiff seeking to allege an efficient market to allege empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price" and noting that this factor is "the essence of an efficient market and the foundation for the fraud on the market theory").

Cammer 5 is often proven with an event study. An event study is "a statistical regression analysis that examines the effect of an event . . . on a dependent variable, such as a company's stock price."[59] An event study has four parts: defining the event (*e.g.*, an earnings announcement), establishing the announcement window (*i.e.*, the period over which stock price changes are calculated), measuring the expected return of the stock, and computing the abnormal return (which is the actual return minus the expected return).

Performing the third step, "requires the expert to isolate the effect of the event from other market, industry, or company-specific factors simultaneously affecting the company's stock price."[60] "A large abnormal stock price movement occurring at the same time the market receives news about an event suggests that the event caused the abnormal price movement."[61]

In sum:

> [A]n event study is similar to a medical experiment in which there is a control group and a treatment group. The control group provides the benchmark against which the

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59 Michael J. Kaufman & John M. Wunderlich, *Regressing: The Troubling Dispositive Role of Event Studies in Securities Fraud Litigation*, 15 Stan. J. L. Bus. & Fin. 183, 190 (2009) (internal quotation marks omitted).

60 *Id.* at 192.

61 *Id.* at 193 (internal quotation marks omitted).

> treatment group is compared to determine if the event being studied had any effect. In a securities setting, the control group is established by modeling the normal relationship of a stock's price movements to movements of a market and/or industry index. The difference between the stock price movement we actually observe and the movement we expected to observe (i.e. the difference between the treatment and the control group) that occurs upon the release of a particular piece of information is called the excess price movement of the stock at the time of the event. This excess price movement is tested for statistical significance to see whether the result is unusual or unlikely to be explained by the normal random variations of the stock price.[62]

In most scientific work, the level needed to obtain a statistically significant result is set at a five percent

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[62] *Id.* at 193-94 (internal quotation marks omitted). *Accord In re Federal Home Mortg. Corp. (Freddie Mac) Sec. Litig.*, 281 F.R.D. 174, 178 (S.D.N.Y. 2012) (explaining, in a case that pre-dates *Halliburton II*, that in an event study "[t]he actual price of the security during the event is compared against the expected price, which is calculated based on the security's historical relationship to a market index. This historical relationship is measured over a 'control period.' The difference between the stock's actual price and the expected price is defined as an 'abnormal return.' A. Craig MacKinlay, *Event Studies in Economics and Finance*, 35 J. Econ. Lit. 13, 14-16 (1997). In an efficient market, stock prices should show statistically significant abnormal returns on days in which unexpected, material information is released into the market.").

level of confidence, which means that there is no more than a five percent chance that the observed relationship is purely random.

f. Other Factors

The markets for companies with higher market capitalizations and shares with a smaller bid-ask spread are more likely to be efficient.[63] The percentage of shares available to the public generally bears a direct relationship to efficiency.[64] A put-call parity relationship between the share price and the prices of the put and call options written on the share indicates that the market for the stock and the options written on the stock are efficient.[65] In an efficient market, stock returns follow what is known as a "random walk," meaning that investors cannot use past stock price movements to predict the next day's stock price movement.[66]

In addition, some courts have held that if "'a security is listed on the NYSE . . . or a similar national market, the market for that security is

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63 *See Krogman*, 202 F.R.D. at 478.

64 See id.

65 Arbitrageurs correct put-call disparities by engaging in short-sales. When short-selling bans restrict an arbitrageur's ability to exploit put-call disparities, these constraints may cause the stock to be overpriced. Thus, short-selling constraints may result in inefficiency.

66 *See generally* Eugene F. Fama and Kenneth R. French, *Permanent and Temporary Components of Stock Prices*, 96 Journal of Political Economy 2 (1988).

[often] presumed to be efficient.'"[67] While other courts have been reluctant to conclude that a stock was traded efficiently solely because it was traded on the NYSE or NASDAQ, most courts in this Circuit agree that such listing is a good indicator of efficiency.[68] Courts in other circuits have reached the same conclusion.[69]

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[67] *Wagner v. Barrick Gold Corp.*, 251 F.R.D. 112, 119 (S.D.N.Y. 2008) (quoting *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, No. 05 Civ. 1898, 2006 WL 2161887, at *5 (S.D.N.Y. Aug. 1, 2006)). *Accord Stevelman v. Alias Research*, No. 91 Civ. 682, 2000 WL 888385, at *4 (D. Conn. June 22, 2000) ("For stocks . . . that trade on a listed exchange such as NASDAQ, [the] reliance element of a 10b-5 cause of action is presumed.").

[68] *See Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 183 (S.D.N.Y. 2008) ("[N]o argument can be made that the [NYSE] is not an efficient market."); *In re Initial Pub. Offering Sec. Litig.*, 544 F. Supp. 2d 277, 296 n.133 (S.D.N.Y. 2008) ("[T]he federal courts are unanimous in their agreement that a listing on the NASDAQ or a similar national market is a good indicator of efficiency"); *RMED Int'l v. Sloan's Supermarkets*, 185 F. Supp. 2d 389, 404-05 (S.D.N.Y. 2002) ("Indeed, research has failed to reveal any case where a stock traded on the AMEX was found not to have been traded in an open and efficient market. . . . Rather, to the contrary, numerous courts have held that stocks trading on the AMEX are almost always entitled to the presumption.") (citations omitted).

[69] *See In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 634 (3d Cir. 2011) ("[T]he listing of a security on a major exchange such as the NYSE or the NASDAQ weighs in favor of a finding of market efficiency."); *In re Merck & Co., Inc. Sec. Litig.*, MDL No. 1658, 2013 WL 396117, at *11 (D.N.J. Jan. 30, 2013) (finding efficiency where stock traded on the NYSE, without employing a *Cammer* analysis, because the NYSE is "consistently recognized by courts — including the Third Circuit and other United States Court of Appeals — as . . . well

In unusual circumstances, courts in this Circuit have found that securities traded on major exchanges are not traded on an efficient market.[70] In *IBEW Local 90 Pension Fund v. Deutsche Bank AG*, the stock at issue was a global registered share, which unlike common stock or ADS, trade globally on various markets, and only a small percentage of those shares traded on the NYSE.[71] And in *In re Federal Home Mortgage Corporation (Freddie Mac) Securities Litigation*, the securities were "a limited series of preferred shares, which are traded in

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suited for application of the fraud on the market theory"); *In re Diamond Foods, Inc., Sec. Litig.*, 295 F.R.D. 240, 250 (N.D. Cal. 2013) ("[D]efendant [has not] identified any authority, binding or otherwise, that has held that common shares traded on the NASDAQ are not traded in an efficient market."); *Lumen v. Anderson*, 280 F.R.D. 451, 459 (W.D. Mo. 2012) (noting that *Basic* itself recognized the NYSE was an efficient market"); *Cheney v. Cyberguard Corp.*, 213 F.R.D. 484, 498 (S.D. Fla. 2003) ("NASDAQ . . . is more likely than not to be considered an efficiently traded market"); *Levine v. SkyMall, Inc.*, No. 99 Civ. 166, 2002 WL 31056919, at *5 (D. Ariz. May 24, 2002) ("Although not dispositive, the fact that SkyMall stock is traded on the NASDAQ stock market's National Market System also contributes to finding that the market is efficient."); *Appel*, 165 F.R.D. at 504 (stating that "[t]he market system upon which a particular stock trades provides some insight as to the likelihood that the market for that stock is efficient").

70 *See generally IBEW Local 90 Pension Fund v. Deutsche Bank AG*, No. 11 Civ. 4209, 2013 WL 5815472 (S.D.N.Y. Oct. 29, 2013) (holding that market efficiency had not been established in a case in which the security at issue traded on the NYSE); *Freddie Mac*, 281 F.R.D. 174 (same).

71 *See* 2013 WL 5815472, at *3-4 (noting that only two percent of the global registered shares traded on the NYSE).

patterns significantly different from the trading patterns typical of common shares."[72]

IV. DISCUSSION

In order to meet the Rule 23(b)(3) requirement that common issues predominate, plaintiffs must establish reliance on a class-wide basis.[73] Plaintiffs argue that they are entitled to both the *Affiliated Ute* and *Basic* presumptions of reliance. I consider the applicability of each presumption in turn. I then address defendants' arguments regarding damages and the scope of the Class. I conclude with the appointment of Class Counsel.

A. The *Affiliated Ute* Presumption of Reliance Applies

Plaintiffs are entitled to the *Affiliated Ute* presumption. Defendants contend that the *Affiliated Ute* presumption of reliance only applies to cases "primarily involving omissions."[74] They argue that "[b]ecause Plaintiffs allege that Barclays made a

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[72] *In re Computer Sci. Corp. Sec. Litig.*, 288 F.R.D. 112, 120 (E.D. Va. 2012). In addition, the *Freddie Mac* court explicitly required proof of efficiency at the semi-strong level. *See* 281 F.R.D. at 177 ("The fraud on the market theory is based on the semi-strong form of market efficiency.").

[73] *See Halliburton II*, 134 S. Ct. at 2416.

[74] Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification ("Def. Opp."), at 7 n.8 (citing *Affiliated Ute*, 406 U.S. at 153-54 ("Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery.").

number of affirmative misstatements concerning LX and the Bank's commitment to restoring its integrity, the *Affiliated Ute* presumption does not apply."[75]

However, a case could be made that it is the material omissions, not the affirmative statements, that are the heart of this case.[76] In the April 2015 Order I explained that the Complaint's materiality allegations were sufficient because "the specific misstatements about LX — which include touting its safety while secretly encouraging predatory behavior — call into question the integrity of the company as a whole."[77] As discussed in the April 2015 Order, the revenue of LX relative to Barclays' overall business is fractional.[78] While that fact makes it debatable whether investors would have considered affirmative statements about LX material, it appears far more likely that investors would have found the omitted

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75 *Id.*

76 Under Rule 10b-5 it is unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . ." 17 C.F.R. § 240.10b-5. Thus, omissions cases include statements.

77 *Strougo*, 105 F. Supp. 3d at 349. The concealed conduct includes "Barclays giving perks and other systemic advantages to high-frequency traders, and Barclays' failure to apply the protections of Liquidity Profiling to a significant portion of the trading in its dark pool." Reply Memorandum of Law in Further Support of Plaintiffs' Motion for Class Certification ("Reply Mem."), at 3 n.3.

78 *See Strougo*, 105 F. Supp. 3d at 349 n.119.

conduct material. Thus, the existence of "affirmative misrepresentations does not at this stage in the litigation preclude [plaintiffs] from relying on the *Affiliated Ute* presumption."[79]

Defendants argue that the *Affiliated Ute* presumption does not apply for the additional reason that defendants did not have a duty to disclose that they "were engaged in illegal conduct."[80] While it is true that there is no general duty to disclose illegal conduct, "a duty to disclose uncharged criminal conduct does arise if it is necessary to ensure that a corporation's statements are not misleading."[81] Accordingly, plaintiffs are entitled to the *Affiliated Ute* presumption to establish reliance for purposes of class certification.

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79 *Dodona I, LLC v. Goldman, Sachs & Co.*, 296 F.R.D. 261, 270 (S.D.N.Y. 2014). *Accord City of Livonia Emps' Ret. Sys. v. Wyeth*, 284 F.R.D. 173, 182 (S.D.N.Y. 2012) (holding that both the *Affiliated Ute* and *Basic* presumptions applied in case "primarily about omissions").

80 Tr. at 14:13-20 [Jeffrey T. Scott, defendants' attorney] ("With respect to this duty of disclosure, there is no such thing. We addressed this in *Carpenters*. In that case, they argued we had a duty to disclose that we were engaged in LIBOR manipulation and tell the world we were engaged in illegal conduct. Second Circuit precedent says a bank doesn't — or a company doesn't have an obligation to disclose it's engaged in wrongful conduct. So that is not a claim that is in the case.").

81 *In re Sanofi Sec. Litig.*, No. 14 Civ. 9624, 2016 WL 93866, at *10 (S.D.N.Y. Jan. 6, 2016) (citing cases).

B. Plaintiffs Are Entitled to the *Basic* Presumption of Reliance

1. The Market for Barclays ADS Was Efficient

Of the four requisites to invoking the *Basic* presumption — publicity, materiality, market efficiency, and market timing — only market efficiency is at issue. Defendants concede that plaintiffs have established four of the five *Cammer* factors and all three *Krogman* factors. According to defendants, however, plaintiffs failed to demonstrate *Cammer* 5, and without *Cammer* 5, plaintiffs cannot meet their burden of proving market efficiency by a preponderance of the evidence.[82] Defendants recognize that I rejected the same argument — that establishing *Cammer* 5 was necessary to demonstrate efficiency — with respect to the same stock in *Carpenters Pension Trust Fund of St. Louis*

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[82] *See, e.g.*, Def. Opp. at 17-20; 11/5/15 Hearing Transcript ("Tr.") at 23:8-17 [Jeffrey T. Scott, defendants' attorney] ("[Defendants'] arguments on efficiency are based on the fact that [plaintiffs] haven't shown cause and effect. If you don't show cause and effect, it is really hard to show that for that particular stock, new material information was impounded into the stock price. And [the] report [of plaintiffs' expert, Dr. Zachary Nye, Ph.D.,] is flawed from top to bottom. It is not consistent with the standards used in the field of economics. It wouldn't be accepted in a peer-reviewed journal. Frankly, that evidence shouldn't even come in with respect to efficiency. That is why we argue there is no evidence of cause and effect here."). Although defendants argue that Dr. Nye's report should not come in as evidence, defendants have not made a motion to exclude his report pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

v. Barclays PLC.[83] My view has not changed,[84] and in the interim additional courts have reached the same conclusion.[85]

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83 *See* Def. Opp. at 18 ("Although this Court found in *Carpenters* that, in the ordinary case of a high volume stock followed by a large number of analysts and traded on a national exchange, *Cammer* factor five is not dispositive, Barclays respectfully submits that proof of a cause and effect relationship between unexpected, material disclosures and changes in a defendant's stock price is necessary to prove market efficiency, and that, for the reasons set forth below, Plaintiffs have failed to meet that burden.") (internal quotation marks and citations omitted). While *Carpenters* also concerned Barclays ADS, the class period in that case was from July 10, 2007 to June 27, 2012, as compared with the minimally overlapping period of August 2, 2011 through June 25, 2014 in the present case.

84 *See Carpenters*, 310 F.R.D. at 83-86. Following the issuance of the *Carpenters* decision, Barclays petitioned the Second Circuit for review pursuant to Rule 23(f). While the petition was pending, the parties reached a settlement, and jointly requested a stay of the petition, which was granted. A fairness hearing relating to the settlement is scheduled for March 14, 2016. Accordingly, the *Carpenters* opinion has not been subjected to appellate review.

85 *See Forsta AP-Fonden v. St. Jude Med., Inc.*, --- F.R.D. ----, No. Civ. 12-3070, 2015 WL 9308224, at *7 (D. Minn. Dec. 22, 2015) ("There is no doubt that empirical evidence of a cause-and-effect relationship is helpful for a finding of market efficiency, but Defendants' arguments go too far. '[H]elpful' does not mean "determinative." A plaintiff's shortfall on the fifth *Cammer* factor alone does not outweigh, as here, showings on many other relevant factors.") (collecting cases); *In re NII Holdings, Inc. Sec. Litig.*, --- F.R.D. ----, No. 14 Civ. 227, 2015 WL 7283110, at *9 (E.D. Va. Nov. 17, 2015) (holding that because defendants had neither rebutted plaintiff's expert's findings nor offered evidence that the market was not efficient, that "even if the fifth *Cammer* factor were considered weak, the

As a threshold matter, the Second Circuit has never adopted a definitive test for market efficiency and explicitly declined to do so in *Teamsters Local 445 Fright Division Pension Fund v. Bombardier*.[86] While the Second Circuit endorsed the use of the *Cammer* factors in *Bombardier*, it has not required their use or held that any one of them is dispositive. A substantially similar approach has been taken by the Courts of Appeals for the First, Third, Fourth, Fifth, and Eleventh Circuits.[87]

Likewise, there would be no need for a five factor test — or consideration of the other factors

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evidence offered in support of the other *Cammer* factors as well as the non-*Camme*r factors is more than sufficient to demonstrate by a preponderance of the evidence that the stocks and bonds at issue traded in an efficient market.").

[86] *See* 546 F.3d 196, 205 n.11 (2d Cir. 2008) ("This Court has not adopted a test for the market efficiency of stocks or bonds, and we do not do so here.").

[87] *See In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 18 (1st Cir. 2005) ("While we agree . . . that the [*Cammer*] factors considered by the district court were relevant to the issue of market efficiency, these factors are not exhaustive."); *In re DVI*, 639 F.3d at 634 n.16 ("We have noted the *Cammer* factors may be instructive depending on the circumstances."); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 368 (4th Cir. 2004) (citing *Cammer* for the proposition that, "to determine whether a security trades on an efficient market, a court should consider factors such as, among others, whether the security is actively traded, the volume of trades, and the extent to which it is followed by market professionals"); *Unger v. Amedisys Inc.*, 401 F.3d 316, 323 (5th Cir. 2005) ("[T]his list [of eight factors, including the five *Cammer* factors,] does not represent an exhaustive list, and in some cases one of the above factors may be unnecessary."); *Regions Fin. Corp.*, 762 F.3d at 1257 (same).

described earlier in part III.B. — if one factor were dispositive in every context. Not surprisingly, no court has adopted a per se rule that any one *Cammer* factor is dispositive.[88] The majority of courts have used the *Cammer* factors as "an analytical tool rather than as a checklist."[89] Thus, numerous courts have found market efficiency in the absence of an event study or where the event study was not definitive.[90]

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[88] Not even the *Cammer* court considered the fifth factor necessary, stating only that "it *would be helpful* to a plaintiff seeking to allege an efficient market . . . ." *Cammer*, 711 F. Supp. at 1287 (emphasis added).

[89] *Billhofer v. Flamel Techs., S.A.*, 281 F.R.D. 150, 159 (S.D.N.Y. 2012) (citing *Unger*, 401 F.3d at 325). *Accord Bombardier*, 546 F.3d at 210 ("We conclude [ ] that the district court properly used the *Cammer* factors as an 'analytical tool[.]'") (quoting *Unger*, 401 F.3d at 325).

[90] *See Winstar Commc'ns Sec. Litig.*, 290 F.R.D. 437, 448 (S.D.N.Y. 2013) (holding that although plaintiff's expert "was unable to complete a formal event study" due to lack of data, the expert had demonstrated efficiency by "select[ing] five days on which news was released that she thought might be material, and qualitatively analyz[ing] the change in the price of Winstar bonds relative to the price change of the Lehman U.S. Bond Composite Index (a market-wide bond index composed of investment grade government, agency, corporate and mortgage-backed bonds)" and finding that on two of those days the price changed in response to news); *Aranaz v. Catalyst Pharm. Partners Inc.*, 302 F.R.D. 657, 669 (S.D. Fla. 2014) (finding market efficient for common stock even though expert had not performed an event study and implicitly finding that empirical evidence of the stock price change on the corrective disclosure date satisfied *Cammer* 5); *In re Computer Sci. Corp. Sec. Litig.*, 288 F.R.D. at 120 (rejecting the argument that plaintiffs had failed to establish market efficiency because they had not submitted an event study); *Smilovits v. First Solar,*

Furthermore, requiring a plaintiff to submit proof of market reactions — and to do so with an event study — ignores Supreme Court precedent as well as practical considerations. Event studies test for a degree of efficiency that may not be required. In *Halliburton II*, the Supreme Court reaffirmed that the fraud on the market presumption is based "on the fairly modest premise" that "market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices."[91] "That the . . . price [of a stock] may be inaccurate does not detract from the fact that false statements affect it, and cause loss," which is "all that *Basic* requires."[92] Yet, event studies are designed to test the hypothesis "that publicly available information is impounded immediately into stock prices such that an investor cannot earn abnormal profits by trading on the information after its release."[93] The failure of an event study to show immediate impoundment does not necessarily indicate whether the market is efficient for purposes of the *Basic* presumption.

Inc., 295 F.R.D. 423, 437 (D. Ariz. 2013) (holding that where *Cammer* 1, 2, and 4 weighed in plaintiffs' favor, *Cammer* 3 was partially unsatisfied, and *Cammer* 5 did not favor either the plaintiffs or the defendants, plaintiffs' evidence was sufficient to establish market efficiency by a preponderance of the evidence).

91 *Halliburton II*, 134 S. Ct. at 2410.

92 *Id.*

93 Sanjai Bhagat & Roberta Romano, *Event Studies and the Law: Part I: Technique and Corporate Litigation*, 4 Am. L. & Econ. Rev. 141, 142 (2002).

In academic research, event studies are almost exclusively conducted across a large swath of firms.[94] The notion that event studies are the paramount tool for testing market efficiency comes from multi-firm event studies, and courts have generally not distinguished between the power of multi-firm and single firm event studies. However, when the event study is used in a litigation to examine a single firm, the chances of finding statistically significant results decrease dramatically.[95] "[T]he event study technique

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94 *See* Alon Brav and J.B. Heaton, *Event Studies in Securities Litigation: Low Power, Confounding Effects, and Bias* at 3 ("Importing a methodology that economists developed for use with multiple firms into a single firm context creates three substantial difficulties: low statistical power, confounding effects, and bias.").

95 *See* Bhagat & Romano, 4 Am. L. & Econ. Rev. at 149 ("An important question is can an event study be conducted with just one firm, that is, is a sample size of one acceptable? This question is especially relevant in court cases or regulatory injunctions involving only one firm. Conceptually, a sample of one is a rather small sample but this by itself does not invalidate the event study methodology. However, the statistical power with a sample of one is likely to be quite low. First, the variability of (abnormal) returns of a portfolio with just one stock in it is significantly higher than a portfolio with even a few, say five, stocks in it. Any standard finance or investment textbook will have a graph depicting the sharp drop in variance of portfolio returns as the number of stocks in the portfolio increases from one, to five, to ten; after about fifty stocks in the portfolio the decrease in variance is quite small. Second, it is plausible that the announcement period return of an announcing firm will be affected by other information unrelated to the event under study. If a sample of one is considered, it is quite difficult to determine the separate effects on firm value of the announcement and of the unrelated information item(s). If the sample has several firms, then the

improves as the number of firms in the sample increase, as the number of days in the announcement window decrease, and as the alternative of a larger abnormal return is considered against the null hypothesis of zero abnormal return."[96] The following example from the literature highlights the problems inherent in placing too much emphasis on event studies to measure market efficiency:

> [i]n a sample size of twenty-five companies, the probabilities of detecting an abnormal return (or an effect on the stock price) of 0.5%, 1% and 2% is 24%, 71% and 100% respectively. But if the sample size is increased to 100 companies, the probabilities of detecting an abnormal return of 0.5%, 1%, and 2% is 71%, 94%, and 100% respectively. Thus, there is significant difference in detecting an abnormal return, or effect on the stock price, depending on the size of the event study.[97]

A further problem is that in any particular case it may not be possible to conduct an event study that looks at the relationship between the stock price

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effect on firm value of such unrelated information is likely to cancel out. As the sample size increases the effect on firm value of such unrelated information (goes to zero) becomes less and less significant.").

[96] *Id.* at 148.

[97] Kaufman & Wunderlich, 15 Stan. J. L. Bus. & Fin. at 232-33.

and unexpected news. For example, there may only be a few — or perhaps no — unexpected events in a given class period that can be tested.[98] This could be because of the short length of the class period, a long period of uninteresting news, or because the company has withheld the unexpected information.[99] As just discussed, the corollary of this is that event studies become increasingly unreliable when the period they cover increases.[100]

For all these reasons, a plaintiff attempting to demonstrate market efficiency through an event study will often face an onerous task, whether or not the market is efficient. However, indirect evidence of market efficiency — including that a stock trades in high volumes on a large national market and is followed by a large number of analysts — will typically be sufficient to satisfy the *Basic* presumption on class certification.[101] In such cases

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98 *See Regions Fin. Corp.*, 762 F.3d at 1257 ("In any given case there may be no unexpected disclosures during the period at all, because the company is withholding that information.").

99 It is true that different event study methodologies may be used in the absence of unexpected news. In *Freddie Mac* the methodology was simply to look at news days versus non-news days and to determine whether there were substantially more statistically significant returns on news days than non-news days. *See* 281 F.R.D. at 179-80.

100 *See* Bhagat & Romano, 4 Am. L. & Econ. Rev. at 148.

101 *See, e.g.*, *Regions Fin. Corp.*, 762 F.3d at 1255 ("[T]he market for a stock is generally efficient when millions of shares change hands daily and [when there is] a critical mass of investors and/or analysts who study the available information and influence the stock price through trades and recommendations.") (internal quotation marks omitted);

there is no need to demonstrate efficiency through a direct test, such as an event study. Of course, if there is reason to doubt the efficiency of the market,

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Fogarazzo v. Lehman Bros., Inc., 232 F.R.D. 176, 185 n.75 (S.D.N.Y. 2005) ("Defendants do not dispute that RSL was traded on an efficient market. Moreover, RSL shares were traded on the NASDAQ National Market . . . were traded at high volumes during the class period . . . [and were] extensively followed by analysts and received extensive media attention.") (internal quotation marks omitted, alterations in original); *In re Initial Pub. Offering Sec. Litig.*, 227 F.R.D. 65, 107 (S.D.N.Y. 2004) (holding that "the record in this case contains several strong indications that the market in which the focus stocks traded was efficient. Three facts stand out as particularly probative: first, all the focus stocks were traded on the NASDAQ National Market; second, the focus stocks were traded actively at high volumes throughout the class period; and third, the focus stocks were the subjects of numerous analyst reports and extensive media coverage. Under any conceivable test for market efficiency, these three facts are sufficient to meet plaintiffs' Rule 23 burden."). *See also Smilovits*, 295 F.R.D. at 431 ("In keeping with *Basic* and the other cases cited in the first paragraph of this section, the Court concludes that the trading of First Solar stock on NASDAQ — a major, well-developed stock exchange — weighs in favor of finding market efficiency. Defendants have not identified any authority, binding or otherwise, that has held that common shares traded on the NASDAQ are not traded in an efficient market. Moreover, Defendants' expert . . . agrees that '[m]ost of the time, . . . stocks traded on large national exchanges are likely to be efficient.'") (internal quotation marks and citations omitted); *In re Computer Sci. Corp. Sec. Litig.*, 288 F.R.D. at 120 ("It is not surprising that no other federal courts have concluded that common shares traded on the NYSE are not traded in an efficient market."); *In re PolyMedica Corp. Sec. Litig.*, 453 F. Supp. 2d 260, 278-79 (D. Mass. 2006) (stating "that listing on such an exchange undisputably improves the market structure for trading in a particular stock" and "that one would be hard-pressed to deny the relevance of this fact in an efficiency analysis").

as when the additional *Cammer* factors do not weigh heavily in favor of market efficiency (or when defendants' evidence weighs against market efficiency), a plaintiff may have to present direct evidence to establish market efficiency.

Having considered the parties' arguments and evidence,[102] including that Barclays ADS trades on the NYSE at high volumes[103] with heavy analyst coverage,[104] I conclude that plaintiffs have established market efficiency indirectly and therefore do not consider whether they have also satisfied *Cammer* 5 by proof of an event study.

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[102] *See* Memorandum of Law in Support of Plaintiffs' Motion for Class Certification ("Pl. Mem."), at 13-22; 7/24/15 Expert Report of Zachary Nye, Ph.D. ("Nye Report") ¶¶ 12-73; Def. Opp. at 17-20; 9/11/15 Declaration of Christopher M. James Ph.D., defendants' expert, at 8-27.

[103] *See* Nye Report ¶ 31 (explaining that the average weekly share trading volume as a percentage of shares outstanding, excluding weeks not entirely contained within the Class Period, was 17.7% for Barclays ADS, and therefore the average weekly reported trading volume for Barclays stock exceeds the 2% strong presumption of market efficiency described in *Cammer*).

[104] *See id.* ¶¶ 37-40 (explaining that over seven hundred analyst reports for Barclays were issued during the Class Period; information pertinent to Barclays was also disseminated to investors via media coverage, investor conferences, trade magazines, public presentations by Barclays, and SEC filings; and that the amount of reporting on Barclays by security analysts during the Class Period indicates that company-specific news was widely disseminated to investors, thereby facilitating the incorporation of such information into the market price of Barclays ADS).

2. Defendants Have Not Rebutted the *Basic* Presumption

In *Halliburton II*, the Supreme Court recognized that "defendants should at least be allowed to defeat the [*Basic*] presumption at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price."[105] The Court reasoned that "[w]hile *Basic* allows plaintiffs to establish [price impact] indirectly, it does not require courts to ignore a defendant's direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply."[106] *Halliburton II* supports this conclusion with the following hypothetical:

> Suppose a defendant at the certification stage submits an event study looking at the impact on the price of its stock from six discrete events, in an effort to refute the plaintiffs' claim of general market efficiency. All agree the defendant may do this. Suppose one of the six events is the specific misrepresentation asserted by the plaintiffs. All agree that this too is perfectly acceptable. Now suppose the district court determines that, despite the defendant's study, the

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105 134 S. Ct. at 2414. The *Basic* presumption can also be rebutted by showing that "a plaintiff would have bought or sold the stock even had he been aware that the stock's price was tainted by fraud . . . ." *Id.* at 2408.

106 *Id.* at 2416.

> plaintiff has carried its burden to prove market efficiency, but that the evidence shows no price impact with respect to the specific misrepresentation challenged in the suit. The evidence at the certification stage thus shows an efficient market, on which the alleged misrepresentation had no price impact. And yet under EPJ Fund's view, the plaintiffs' action should be certified and proceed as a class action (with all that entails), even though the fraud-on-the-market theory does not apply and common reliance thus cannot be presumed.
>
> Such a result is inconsistent with *Basic*'s own logic. Under *Basic*'s fraud-on-the-market theory, market efficiency and the other prerequisites for invoking the presumption constitute an indirect way of showing price impact. As explained, it is appropriate to allow plaintiffs to rely on this indirect proxy for price impact, rather than requiring them to prove price impact directly, given *Basic*'s rationales for recognizing a presumption of reliance in the first place.[107]

Thus, *Halliburton II* permits a defendant to attempt to rebut the *Basic* presumption at class certification. However, having this right does not mean that it is easily done, which is why some have recognized that *Halliburton II*'s holding will not ordinarily present a serious obstacle to class

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107 *Id.* at 2415.

certification.[108] Indeed, this Circuit has permitted rebuttal evidence on class certification since at least 2008,[109] and the vast majority of courts have found that defendants have failed to meet their burden of proving lack of price impact.[110] This is also true of courts in other circuits post-*Halliburton II*.[111]

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[108] *See id.* at 2417 (Ginsburg J., concurring) ("[T]he Court recognizes that it is incumbent upon the defendant to show the absence of price impact. The Court's judgment, therefore, should impose no heavy toll on securities-fraud plaintiffs with tenable claims.") (internal citations omitted); *id.* at 2424 (Thomas, J., concurring in the judgment) ("[I]n practice, the so-called 'rebuttable presumption' is largely irrebuttable."). *Accord Schleicher v. Wendt*, 618 F.3d 679, 681 (7th Cir. 2010) ("When a large, public company makes statements that are said to be false, securities-fraud litigation regularly proceeds as a class action.").

[109] *See In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 484 (2d Cir. 2008) (permitting defendants "to rebut the presumption, prior to class certification, by showing, for example, the absence of a price impact").

[110] *See In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10 Civ. 3461, 2015 WL 5613150, at *7 (S.D.N.Y. Sept. 24, 2015) (defendant's expert failed "to demonstrate that no part of the [stock price] decline was caused by the [ ] disclosure" of the alleged fraud); *Carpenters*, 310 F.R.D. at 95-97 (defendants' reliance on plaintiffs' proof was insufficient to show lack of price impact); *Wallace v. IntraLinks*, 302 F.R.D. 310, 317-18 (S.D.N.Y. 2014) ("defendants' speculation that factors unrelated to the [alleged fraud] . . . exclusively caused the drop in []share price" was insufficient; *McIntire v. China MediaExpress Holdings, Inc.*, 38 F. Supp. 3d 415, 434 (S.D.N.Y. 2014) (defendant did not meet "burden to prove that its alleged misstatements did not improperly maintain" the stock price); *City of Livonia Emps' Ret. Sys.*, 284 F.R.D. at 182 ("Defendants' assertion that '[t]he evidence does not indicate that the drop was due to information about hepatic events in

The notable exception is the district court's decision on remand from *Halliburton II*, in which the district court held that the presumption had been rebutted as to certain misstatements.[112] Such rebuttal was achieved through consideration of the evidence presented by Halliburton, including that its

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Study 315', but rather due to other confounding events, is a loss causation argument and, therefore, not appropriate at the class certification stage.") (internal citations omitted); *In re Bank of Am. Corp. Sec., Derivative & ERISA Litig.*, 281 F.R.D. 134, 142-43 (S.D.N.Y. 2012) (certifying class where market dropped on the corrective disclosure date and defendant's expert failed to demonstrate the case was not related to alleged fraud); *In re SLM Corp. Sec. Litig.*, 2012 WL 209095, at *5-6 (S.D.N.Y. Jan. 24, 2012) (same); *In re Sadia, S.A. Sec. Litig.,* 269 F.R.D. 298, 316 (S.D.N.Y. 2010) (defendants "failed to . . . prov[e] by a preponderance of the evidence that there would have been *no* impact on price as a result of the failure to disclose information") (emphasis in original); *Fogarazzo*, 263 F.R.D. at 106 ("defendants have failed to rebut the fraud on the market presumption by the preponderance of the evidence on the basis that the analyst reports at issue lacked material information"). *Cf. In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480, 493 (S.D.N.Y. 2011) ("Based on the motion currently before this Court, there is no period within the proposed class period where the alleged misrepresentation caused a statistically significant increase in the price or where a corrective disclosure caused a statistically significant decline in the price.").

[111] *See City of Sterling Heights Gen. Emps' Ret. Sys. v. Prudential Fin., Inc.*, No. 12 Civ. 5275, 2015 WL 5097883 (D.N.J. Aug. 31, 2015); *Local 703, I.B. of T. Grocery and Food Emps. Welfare Fund v. Regions Fin. Corp.*, No. 10 Civ. 2847, 2014 WL 6661918 (N.D. Ala. Nov. 19, 2014).

[112] *See generally Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251 (N.D. Tex. 2015) (holding that defendants have the burdens of production and persuasion to show lack of price impact).

expert "developed a market model and performed an event study to determine whether there was statistically significant price movement on the dates of the alleged misrepresentations and corrective disclosures."[113] Reviewing the evidence, the court found that Halliburton's expert had demonstrated lack of price impact on several of the corrective disclosure dates.[114] In addition, the court found that Halliburton had met its burden of showing lack of price impact with respect to a particular date because the plaintiff "ha[d] not shown that Halliburton disclosed any information . . . that [had] not already impounded in the market price of the stock" by that date.[115] Finally, the court held that

> Halliburton [did] not [meet] its burden of showing lack of price impact with respect to the announcement of the Baltimore verdict on December 7th. Although the Court finds that at least some of Halliburton's stock price decline on that date is likely attributable to uncertainty in the asbestos environment that also impacted other companies with asbestos exposure, Halliburton has not demonstrated that uncertainty caused the *entirety* of Halliburton's substantial price decline.[116]

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[113] *Id.* at 263.

[114] *See id.* at 270, 271, 274, 276.

[115] *Id.* at 272.

[116] *Id.* at 280 (emphasis added).

By contrast to the proof submitted on remand in *Halliburton*, the defendants in the instant case have not submitted an event study — either analyzing the price impact on the date of the misstatements or on the corrective disclosure date — to prove lack of price impact. Nonetheless, they argue that they have established lack of price impact. Defendants first note that the regression analysis performed by plaintiff's expert, Dr. Nye, does not show a statistically significant increase in the price of Barclays ADS on any of the alleged misstatement dates.[117] Of course, Dr. Nye did not attempt to show price movement on the misstatement dates. This is because plaintiffs' case is premised on a price maintenance theory.[118] Under that theory, "a material misstatement can impact a stock's value . . . by improperly maintaining the existing stock price."[119]

Defendants contend, however, that plaintiffs' theory of the case is inconsistent with the price maintenance theory. This argument has two prongs. The first is that Dr. Nye apparently believes that the inflation maintained by misstatements about LX made during the Class Period entered the stock price *prior to* the beginning of the Class Period.[120] The second is that following the logic in this Court's April 2015 Order, inflation due to LX could not have

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117 *See* Def. Opp. at 8.

118 *See* Reply Mem. at 6-13.

119 *Carpenters*, 310 F.R.D. at 86-87.

120 *See* Def. Opp. at 10-11.

entered the stock prior to the beginning of the Class Period because LX only became material after the start of the Class Period.

However, these arguments do not foreclose plaintiffs' reliance on the price maintenance theory. *First*, the price maintenance theory *does not* require inflation in the stock price *prior* to the date of a misstatement. When an omission or misrepresentation prevents a non-inflated price from falling, that omission or misrepresentation introduces inflation into the stock.[121] In addition,

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[121] *See* 10/26/16 Expert Rebuttal Report of Zachary Nye, Ph.D. ("Nye Reply"), at 36 ("[M]isstatements and/or material omissions can maintain or introduce artificial inflation even if they are not associated with a statistically significant price increase) (citing Deposition Transcript of Dr. Christopher James at 206 ("Q. Can the omission of a material fact introduce inflation into the stock price? A. Sure."); *City of Livonia Emps' Ret. Sys.*, 284 F.R.D. at 182 ("In a case such as this, where Plaintiffs argue that the failure to disclose information . . . made [] statements misleading, the fact that the stock price did not significantly increase on the days in question is not dispositive. . . . [T]he fact that the stock price remained consistent could, in fact, indicate inflation. Indeed, in an omission case, the impact of the defendants' misrepresentation should be measured by the stock price reaction following the truth being disclosed to the market.") (citing *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 173 (2d Cir. 2005) "[T]o establish loss causation, a plaintiff must allege that the misstatement or omission concealed something from the market that, when disclosed, negatively affected the value of the security.") (internal quotation marks and alterations omitted)); *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 415 (7th Cir. 2015) ("Note too that a stock can be inflated even if the price remains the same or declines after a false statement because the price might have fallen even more (e.g., "We only lost $100 million this year," when actually losses were $200 million)."); *Regions Fin. Corp.*, 762 F.3d at 1257 ("Regions's

plaintiffs are not required to show *when* inflation entered into the price of Barclays ADS.[122]

Furthermore, the allegations in the Second Amended Complaint do not depend on the existence of inflation in the stock price *prior* to the start of the Class Period. According to plaintiffs, "[d]efendants' false and misleading statements regarding Barclays' transparency and safeguards maintained the price of Barclays' securities at levels that reflected investor confidence in the integrity of the Company."[123] Plaintiffs argue that had defendants been "honest about the workings of the dark pool and the level of 'transparency' surrounding its operations, Barclays' securities would have traded at a substantially lower price."[124] Thus, plaintiffs conclude that "[t]he stock

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disclosures were designed to prevent a more precipitous decline in the stock's price, not bring about any change to it. When a company releases expected information, truthful or otherwise, the efficient market hypothesis underlying *Basic* predicts that the disclosure will cause no significant change in the price.").

[122] *See, e.g.*, *Glickenhaus*, 787 F.3d at 418 (explaining that "there is no law" that "requires the plaintiffs to prove how the inflation was introduced into the stock price in the first place").

[123] Pl. Mem. at 6. *See* Complaint ¶ 113 ("Defendants' false and misleading statements about Barclays' transparency and safeguards, as well as Barclays' repeated commitment to a reformed culture, 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.").

[124] Pl. Mem. at 6.

was maintained at an artificially inflated level until . . . Barclays' shares fell 7.38% on June 26, 2014."[125] In short, "[p]laintiffs allege that Defendants' misstatements began as early as August 2011 (the start of the Class Period) and that [the misstatements] 'maintained the price of Barclays' common stock at levels which reflected investor confidence in the integrity of the company.'"[126] Consequently, plaintiffs have asserted a tenable theory of price maintenance, and defendants' attempt at rebuttal via their argument regarding the timing of the inflation in the stock price fails.

Defendants also attempt to prove lack of price impact by reference to the price change on the corrective disclosure date. To succeed, defendants must prove by a preponderance of the evidence that the price drop on the corrective disclosure date was not due to the alleged fraud. Defendants attempt to do this by focusing on Dr. Nye's testimony and expert report. Again, they do not offer their own regression analysis to show that the price drop on the corrective disclosure date was not due to the alleged fraud.

Defendants' argument has two parts. The first is that Dr. Nye agrees that the disclosure of a government investigation can, by itself, result in a statistically significant decline in the price of a security. Defendants thus suggest that because the disclosure in this case was in the context of the

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[125] *Id.*

[126] Nye Reply at 36 (quoting Complaint ¶ 113).

NYAG lawsuit, plaintiffs have not demonstrated that the misstatements themselves caused part of the price decline.[127] Defendants also rely on Dr. Nye's use of reports and news stories that do not

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[127] Plaintiffs, of course, were under absolutely no duty to establish that the decline in price was "because of the correction to a prior misleading statement and that the subsequent loss could not otherwise be explained by some additional factors revealed then to the market." *Halliburton I*, 131 S. Ct. at 2185 (internal quotation marks omitted) (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005)). That is the showing required to prove loss causation, and plaintiffs do not have to prove loss causation at class certification. *See id.* at 2186 ("The fact that a subsequent loss may have been caused by factors other than the revelation of a misrepresentation has nothing to do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively through the fraud-on-the-market theory. Loss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory."). And while defendants presume that disclosure of the NYAG lawsuit is not related to the alleged fraud as a matter of law, I decline to make that determination at this stage in the proceedings. To a large extent, it is a merits based inquiry relating to loss causation that is not ripe for resolution on class certification. *See* Reply Mem. at 15 (arguing that "disclosure of the fraud and announcement of regulatory action are inextricably intertwined (the regulatory action constitutes a materialization of the risk caused by Defendants' unethical operation of Barclays LX) and therefore do not require disaggregation"); Tr. at 138:19-139:1 [Jeremy Lieberman, plaintiffs' attorney] ("There has been testimony regarding whether or not the investigations relate to the fraud, whether or not the investigatory effects somehow relate to the fraud or is that a separate issue. We don't think so at all, your Honor. It can't be a separate issue. If investors knew during the [C]lass [P]eriod there was an exposure to this type of investigation, this type of lawsuit, that would have been factored into the share price.").

attribute the post-disclosure price drop to "concern[s] about Barclays' alleged misconduct related to LX or Barclays' attempts to restore its 'integrity.'"[128]

While defendants' arguments suggest that the post-disclosure price movement does not support a strong inference or provide compelling evidence of price impact, they have not met their burden of proving *lack of* price impact. The fact that other factors contributed to the price decline does not establish by a preponderance of the evidence that the drop in the price of Barclays ADS was not caused *at least in part* by the disclosure of the fraud at LX.[129] Accordingly, plaintiffs have established that they are entitled to rely on the *Basic* presumption, and defendants have failed to rebut the applicability of that presumption.

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128 Def. Opp. at 13.

129 *See Halliburton Co.*, 309 F.R.D. at 280 ("Halliburton has not demonstrated that uncertainty caused the entirety of Halliburton's substantial price decline."); *In re Goldman Sachs Grp., Inc. Sec. Litig.*, 2015 WL 5613150, at *7 ("Defendants' attempt to demonstrate a lack of price impact merely marshals evidence which suggests a price decline for an alternate reason, but does not provide conclusive evidence that no link exists between the price decline and the misrepresentation.") (citing *Aranaz*, 302 F.R.D. at 672 ("Because Defendants have the burden of showing an absence of price impact, they must show that price impact is *inconsistent* with the results of their analysis. Thus, that an absence of price impact is consistent with their analysis is insufficient.") (emphasis in original)).

C. Individualized Damages Issues Will Not Predominate

Comcast Corp. v. Behrend held that a model for determining damages must "measure damages resulting from the class's asserted theory of damages."[130] Relying on *Comcast*, defendants argue that plaintiffs have not shown that damages can be calculated on a class-wide basis.[131] However, "*Comcast* does not mandate that certification pursuant to Rule 23(b)(3) requires a finding that damages are capable of measurement on a classwide basis."[132]

Plaintiffs intend to use an event study and the constant dollar method to calculate damages. The proposed methodology fits their theory of the case and individualized damages issues will not predominate.[133] Defendants argue that plaintiffs must demonstrate the mechanism by which confounding information can be identified and disaggregated in order to determine the precise level of price inflation.[134] However, "any failure of the methodology to disaggregate the losses purportedly attributable to disclosures about government enforcement activities from those that Plaintiffs

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130 *Roach*, 778 F.3d at 407 (interpreting *Comcast* narrowly).

131 Def. Opp. at 20-24.

132 *Roach*, 778 F.3d at 402.

133 *See Carpenters*, 310 F.R.D. at 99-100.

134 *See* Def. Opp. at 23-24.

attribute to the challenged statements would not defeat the class's predominance because it would affect all class members in the same manner."[135] Whether plaintiffs will be able to prove loss causation or damages are questions that go to the merits and not to whether common issues predominate.[136]

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[135] *In re Goldman Sachs Grp., Inc. Sec. Litig.*, 2015 WL 5613150, at *8 (internal citations and quotation marks omitted). Defendants raise additional arguments that do not preclude class certification but may have to be addressed at a later stage of this case. For example, they argue that because plaintiffs allege two distinct schemes — that Barclays both (i) concealed the amount of aggressive high-frequency trading in LX and (ii) improperly over-routed client orders on LX — plaintiffs' damages framework must separately account for both. *See* Def. Opp. at 22.

[136] *See, e.g.*, *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 414 (S.D.N.Y. 2015) (stating that "nothing in *Comcast* requires an expert to perform his analyses at the class certification stage") (citing cases); *Wallace*, 302 F.R.D. at 318 ("Defendants' arguments concerning the proper class period belong more properly to the discussion of damages, not class certification. Individualized calculations of damages do not generally defeat the predominance requirement. Presumably, if plaintiff prevails, class members who purchased or sold at different times during the class period will be entitled to significantly different recoveries. While calculating the proper damages based on the date of purchase and sale may be complicated, it does not demand excessive individual inquiry. Plaintiff's proposed determination of damages by event study appears to be a workable methodology of determining damages on a class-wide basis that conforms to its theory of liability .. . .") (citations omitted); *Dodona I*, 296 F.R.D. at 270-71 (same). I have considered and now reject defendants' remaining arguments under *Comcast*.

D. Class Period

Defendants contend that the Class Period should be defined to begin no earlier than February 24, 2013. According to defendants, the April 2015 Order held that only misstatements that were made after Barclays' June 27, 2012 LIBOR-related settlement are material.[137] Plaintiffs believe that Supreme Court precedent holding that "proof [of materiality] is not a prerequisite to class certification"[138] precludes defendants' line of attack.

District courts are "empowered to carve out any appropriate class"[139] and a class should be defined to be consistent with the theory underlying plaintiffs' allegations. Thus, were the proposed class inconsistent with the August 2015 Order as a matter of law, it would be appropriate to limit the class as suggested by the defendants. However, at the time of the motion to dismiss, the parties did not ask the Court to consider when statements became material, and I did not make any finding regarding this issue.

In addition, I am satisfied that plaintiffs' allegations are consistent with material misrepresentations occurring prior to June 2012.[140]

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[137] *See* Def. Opp. at 25.

[138] *Amgen*, 133 S. Ct. at 1191.

[139] *Charron v. Pinnacle Grp. N.Y. LLC*, 269 F.R.D. 221, 229 (S.D.N.Y. 2010).

[140] *See, e.g.*, Tr. 134:18-135:6 [Jeremy Lieberman, plaintiff's attorney] ("There is reference in the materiality section to the LIBOR scandal, but there is reference generally to the integrity of the company, the integrity of the bank, and

While defendants will have the opportunity to require plaintiffs to prove materiality — including the relevant time period — they have not shown that there is a reason to circumscribe the Class Period now.

E. Appointment of Class Counsel Under Rule 23(g)

Lead Plaintiffs have retained Pomerantz LLP to represent them and the proposed Class in this matter. The Pomerantz firm has litigated securities fraud cases under federal and state laws for seventy-five years, on behalf of institutional and individual investors in both class and individual actions. Courts in this Circuit have previously approved the Pomerantz firm as lead plaintiffs' counsel in securities class actions on a number of occasions.[141] I

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integrity of its management, all of which are implicated, whether or not there was a LIBOR settlement or not. We do allege, going back as early as 2009, that the SEC was very concerned about dark pools, how they were being managed, how they were being maintained, and the ability for fraud to occur. Your Honor, the integrity of banks in the aftermath of the financial crisis, your Honor, to say that any investor after the financial crisis would not be concerned about blatant illegal activity which implicates large institutional investors, we think, your Honor, is actually a frivolous defense.").

[141] *See, e.g.*, *Elstein v. Net1 UEPS Techs., Inc.*, No. 13 Civ. 9100, 2014 WL 3687277, at *8 (S.D.N.Y. July 23, 2014); *Goldberger v. PXRE Grp., Ltd.*, No. 06 Civ. 3410, 2007 WL 980417, at *5 (S.D.N.Y. Mar. 30, 2007); *In re Elan Corp. Sec. Litig.*, No. 02 Civ. 865, 2002 WL 31720410, at *5 (S.D.N.Y. Dec. 3, 2002) ; *In re Symbol Techs., Inc. Sec. Litig.*, No. 05 Civ. 3923, 2006 WL 1120619, at *3 (E.D.N.Y. Apr. 26, 2006). *See also In re Groupon, Inc. Sec. Litig.*, No. 12 Civ. 2450, 2012 WL 3779311, at *5 (N.D. Ill. Aug. 28, 2012).

have considered each of the factors set forth in Rule 23(g) and am satisfied that the Pomerantz firm is qualified, and, along with Lead Plaintiffs, will vigorously protect the interests of the Class. Accordingly, I hereby appoint the Pomerantz firm as Class Counsel.

V. CONCLUSION

For the foregoing reasons, plaintiffs' motion is GRANTED. The following Class is certified pursuant to Rule 23(a) and (b)(3):

> All purchasers of Barclays American Depositary Shares during the period from August 2, 2011 through and including June 25, 2014, excluding Defendants, officers and directors of Barclays, 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.

Lead Plaintiffs Mohit Sahni and Joseph Waggoner are appointed as Class Representatives, and Pomerantz LLP is appointed as Lead Counsel. The Clerk of the Court is directed to close this motion (Docket Nos. 50 and 55).

SO ORDERED:
*_/s/ Shira A. Schneindlin_*
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
February 2, 2016

-Appearances-

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 5th day of January, two thousand eighteen.

Joseph Waggoner, Mohit Sahni, Barbara Strougo, individually and on behalf of all others similarly situated,

Plaintiffs - Appellees,

v.

Barclays PLC, Robert Diamond, Antony Jenkins, Barclays Capital Inc., William White,

Defendants - Appellants,

Chris Lucas, Tushar Morzaria,

Defendants.

ORDER

Docket No. 16-1912

Appellants, Barclays PLC, Robert Diamond, Antony Jenkins, Barclays Capital Inc., and William White, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has

considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe

RELEVANT STATUTORY PROVISIONS AND RULES

* * * * *

1. 15 U.S.C. 78j provides:

§78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) (1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the

public interest or for the protection of investors.

(c) (1) To effect, accept, or facilitate a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Nothing in paragraph (1) may be construed to limit the authority of the appropriate Federal banking agency (as defined in section 1813(q) of Title 12), the National Credit Union Administration, or any other Federal department or agency having a responsibility under Federal law to prescribe rules or regulations restricting transactions involving the loan or borrowing of securities in order to protect the safety and soundness of a financial institution or to protect the financial system from systemic risk.

Rules promulgated under subsection (b) that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements to the same extent

as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78o, 78p, 78t, and 78u-1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements to the same extent as they apply to securities.

* * * * *

2. 17 C.F.R. 240.10b–5 provides:

§240.10b–5. Employment of manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

* * * * *

3. Fed. R. Civ. P. Rule 23 provides in pertinent part:

Rule 23. Class Actions

(f) **Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

* * * * *

4. Fed. R. Evid. Rule 301 provides:

Rule 301. Presumptions in Civil Cases Generally

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.