No. 17-1209

IN THE

Supreme Court of the United States

BARCLAYS PLC, *et al.*,

Petitioners,

v.

JOSEPH WAGGONER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES:

STATEMENT OF THE CASE

I. The Fraud.

Barclays had been marred by a series of unprecedented scandals predating the August 2, 2011 to June 25, 2014 Class Period. In light of these scandals and the 2008 financial crisis, which placed significant scrutiny on the banking industry ethics, Barclays' investors placed great emphasis on its reputation and integrity.

Nevertheless, unbeknownst to its ADS investors, Barclays continued its penchant for dishonesty during the Class Period. This case involves Barclays' "dark-pool" ("LX"), an alternative trading system, where the size and price of orders are not revealed to other participants. A unique attribute of dark pools is that the operating broker need not provide equal access to all market participants and can take steps to exclude or minimize predatory trading.

During the Class Period, Barclays touted LX as a safe trading venue "built on transparency," with "built in safeguards to manage toxicity [of aggressive traders]" who could victimize other dark pool investors by trading ahead of anticipated purchase and sell orders, thereby rapidly capitalizing on proprietary information regarding trading patterns. Barclays also touted its Liquidity Profiling tool, which Defendant William White (who oversaw LX) described, as "a sophisticated surveillance framework that protects clients from predatory trading activity in LX." Liquidity Profiling was supposed to categorize LX clients into one of six categories that identified that client as passive or aggressive. Other LX clients could then purportedly opt to avoid interacting with aggressive traders like predatory high frequency traders ("HFT").

However, in reality, Barclays allowed predatory HFTs to take advantage of its liquidity clients. Barclays failed to disclose that it did not effectively protect LX clients from predatory trading with Liquidity Profiling partly because Barclays applied manual overrides to re-categorize "aggressive" clients as "passive," failed to police LX to prevent/punish toxic trading, intentionally altered marketing materials to omit reference to the largest predatory HFT in LX, preferentially routed dark orders to LX where those orders rested for two seconds seeking a "fill" vulnerable to toxic traders, and did not include the NYSE and EDGX direct feeds to construct the national best bid and best offer ("NBBO") used to update the prices of orders resting in LX.

As a result, Petitioners improperly maintained the price of Barclays' securities at levels reflecting investor confidence in the integrity of the Company. Were Petitioners honest about the workings of LX and the level of "transparency" surrounding its operations, Barclays' securities would have traded at a substantially lower price.

Investors learned about Barclays' persistent misconduct on June 25, 2014, when the New York State Office of the Attorney General ("NYAG") commenced a lawsuit against Barclays under the New York Martin Act, asserting that Barclays concealed material information regarding the operation of its dark pool. As a result, Barclays' shares fell 7.38% on June 26, 2014––the biggest decline in over two years.

II. The Opinions Below.

A. The District Court Opinion.

Respondents moved for class certification on July 24, 2015. In support thereof, Respondents submitted a market efficiency report prepared by Dr. Zachary Nye. Prior to ruling, the Hon. Judge Shira Scheindlin held a hearing on November 5, 2015, during which she questioned the market efficiency experts proffered by both parties. Thereafter, she engaged in a thorough and careful analysis based on Supreme Court and Second Circuit precedent and the parties' comprehensive briefing, resulting in the order certifying the Class entered on February 2, 2016 ("D.C. Order"). Petitioners' Appendix, filed on February 26, 2018, ("Pet. App."), at 57a. In rendering her opinion, Judge Scheindlin had the benefit of a substantial record of direct evidence of efficiency. The D.C. Order, described below, is beyond reproach.

1. The District Court Found that Respondents Are Entitled to the *Basic* Presumption of Reliance[1]

As the District Court noted, in opposing class certification, Petitioners only challenged market efficiency, thus conceding the other requisites for invoking *Basic's* fraud on the market presumption of reliance. *Id.* at 83a. Moreover, Petitioners conceded seven out of the eight factors courts consider in assessing market efficiency. *Id.* Consistent with a vast body of case law, Judge Scheindlin

1. Established by this Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) ("*Basic*").

held that because the other seven factors without exception supported a finding of market efficiency she need not consider *Cammer* 5, though the record is replete with evidence supporting such a finding, all of which Judge Scheindlin carefully assessed at the evidentiary hearing. *Id.* at 83a-92a.

Judge Scheindlin never held that Respondents had failed to satisfy Cammer 5 but rather simply rejected Petitioners' contention that Respondents could not establish market efficiency without it. *Id*. The District Court noted that accepting Petitioners' position regarding *Cammer* 5 would obviate the need to consider any other factors at all. *Id.* at 85a-86a (citing the Second Circuit decision in *Teamsters Local 445 Fright Division Pension Fund v. Bombardier* declining to find any particular factor dispositive, as well as other Circuit Court decisions adopting a similar approach). Notably, neither Petitioners nor their expert have ever argued that Barclays ADS did not trade in an efficient market.

The District Court also acknowledged the pitfalls of using event studies to test market efficiency in securities litigation. Event studies are typically, and more accurately, conducted across "a large swath of firms" in academic research. *Id.* at 88a-89a. In securities litigation, however, event studies only examine a single firm thus "dramatically" decreasing the "chances of finding statistically significant results," yielding an unworkably small sample size. *Id*. As a result, the latter type of event study is often "unreliable" and not an accurate indicator of market efficiency. *Id*. at 88a, fn. 94 (*citing* Alon Brav and J.B. Heaton's article, Event Studies in Securities Litigation: Low Power, Confounding Effects, and Bias, thereafter published in the Washington University Law Review, 93 Wash. U. L. Rev. 583, 585 (2016)). Given these questions regarding the reliability of event studies and the overwhelming indirect evidence of market efficiency here, the court did not consider *Cammer* 5 in its written opinion. However, it did so at length during the evidentiary hearing. Regardless, there can be little question that Dr. Nye's event study satisfied *Cammer* 5—it showed that Barclays' securities moved in a statically significant and directionally consistent manner on nine out of fourteen earnings release event dates. The event study also showed that for the five dates on which Barclays' securities did not move in a statistically significant manner, the Company's earnings results were generally in line with market expectations, and/or the results were largely mixed, such that the insignificant returns are consistent with that expected in an efficient market.

Following an extensive analysis, Judge Scheindlin found the market for Barclays ADS efficient and certified the class.

2. The District Court Found That Petitioners Did Not Rebut the *Basic* Presumption

The District Court concluded that Petitioners did not meet their burden of proving a lack of price impact and explained that though the Supreme Court in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407-08 (2014) (*Halliburton II*) provides a right of rebuttal, "having this right does not mean that it is easily done." *Id.* at 94a. Indeed, Petitioners did not present an event study or any affirmative evidence to prove a lack of price impact. *Id.* at 98a. Acknowledging the price maintenance theory of Respondents' case, the District Court discounted Petitioners' criticism that Respondents' expert, Dr. Nye, did not show a statistically significant rise in Barclays' ADS price on the misrepresentation dates, because "[u] nder [plaintiff's] theory, "a material misstatement can impact a stock's value ... by improperly maintaining the existing stock price." *Id*. Hence, given that Respondents' rely on a price maintenance theory, the Court held that there was no obligation to show a statistically significant stock price increase following misstatements.

Lastly, the District Court rejected Petitioners' argument that there is no price impact because other factors might have contributed to the price decline on the corrective disclosure date because Petitioners did not meet their burden of showing "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." *Id.* at 103a.

B. The Second Circuit Opinion.

Petitioners sought interlocutory review under Rule 23(f), which the Second Circuit granted. Thereafter the Second Circuit affirmed the District Court's class certification order, holding that "direct evidence of price impact under *Cammer* 5 is not always necessary to establish market efficiency and invoke the *Basic* presumption." Pet. App., at 1a-56a. ("Order"). The Court further held that defendants seeking to rebut the *Basic* presumption must do so by a preponderance of the evidence.

1. Direct Evidence of Market Efficiency is Not Always Necessary

In determining that direct evidence of market efficiency through event studies is not always necessary, the Second Circuit noted that "the Supreme Court has suggested that the burden required to establish market efficiency "is not an onerous one."" *Id.* at 35a; *In re Petrobras Sec. Litig.*, 862 F.3d 250, 278 (2d Cir. 2017) (citing *Halliburton II*, 134 S. Ct. at 2410 ("Even the foremost critics of the efficient-capital-markets hypothesis acknowledge that public information generally affects stock prices," and so "[d]ebates about the precise *degree* to which stock prices accurately reflect public information are [] largely beside the point."); *id.* at 2417 (Ginsburg, *J.*, concurring) (interpreting the holding in *Halliburton II* as "impos[ing] no heavy toll on securities-fraud plaintiffs with tenable claims"); *Amgen*, 133 S. Ct. at 1192 ("[I]t is reasonable to presume that most investors . . . will rely on [a] security's market price as an unbiased assessment of the security's value in light of all public information."); *Basic*, 485 U.S. at 246 n.24 ("For purposes of accepting the presumption of reliance . . . , we need only believe that market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices."); *see also id.* at 246 ("The presumption is supported by common sense and probability.")).

Moreover, the Second Circuit 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." Pet. App., at 35a.

The Second Circuit ***did not rule*** that direct evidence pursuant to *Cammer* 5 is ***never necessary.*** Indeed, it recognized the importance of direct evidence where indirect *Cammer* factors suggest inefficiency. *Id.* at 36a-37a. Indeed, the court made clear that:

> 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.

Id. at 37a. The Second Circuit then ruled that in this case, for this security, direct evidence of market efficiency was unnecessary because "[a]ll 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." *Id.* at 38a. As the Second Circuit noted, "because Barclays is one of the largest financial institutions in the world, it is unsurprising that the market for Barclays' ADS is efficient." *Id.*

2. Petitioners' Rebuttal Burden is by Preponderance of the Evidence

Next, relying on Supreme Court precedent, the Second Circuit held that defendants have the right to rebut the *Basic* presumption, as provided for in *Basic* and reaffirmed in *Halliburton II,* but must do so by a preponderance of the evidence.

The court noted that "[i]t would be inconsistent with *Halliburton II* to require that plaintiffs meet [their] 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. The presumption of reliance would also be of little value if it were so easily overcome. *Id.* at 43a. Moreover, the Supreme Court's language in *Halliburton II* makes clear that defendants' burden is one of persuasion:

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

Id. at 43a-44a. Justice Ginsburg also made clear in the concurring opinion in *Halliburton II* "that it is incumbent upon the defendant to *show* the absence of price impact." *Id.* at 2417 (Ginsburg, J., concurring) (emphasis added). *Id.* at 44a.

The Second Circuit found that the phrase ""[a]ny showing that severs the link" aligns more logically with imposing a burden of persuasion rather than a burden of production." *Id.* (citing *Halliburton II*, 134 S. Ct. at 2408 (alteration in original)). Requiring that defendants make a "showing" that "severs the link" demonstrates the Supreme Court's understanding that it is a burden of persuasion that shifts to defendants, not merely one of production, 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. *Id.* at 45a (citing *Halliburton II*, 134 S. Ct. at 2415-16 (quoting *Basic*, 485 U.S. at 248)). The Court also noted that requiring defendants to show a lack of price impact by a preponderance of the evidence is consistent with its prior holding that the *Affiliated Ute* presumption (which, like the *Basic* presumption, is also a presumption of reliance) 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. *Id.* at 46a (citing *duPont v. Brady*, 828 F.2d 75, 76 (2d Cir. 1987)).

The Second Circuit also rejected Petitioners' contention that Federal Rule of Evidence 301 ("Rule 301") states that they only hold a burden of production in rebutting the *Basic* presumption. Rule 301 does not apply when "a federal statute… provide[s] otherwise." The Second Circuit, citing numerous decisions of the Supreme Court, noted that "[t]he *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." *Id.* at 48a. (citing *United States Department of Justice v. Landano*, 508 U.S. 165, 113 S. Ct. 2014, 124 L. Ed. 2d 84 (1993)(referring to the *Basic* presumption as one of several "judicially created presumptions under federal statutes that make no express provision for their use); *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.")). Indeed:

> 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.

Id. at 49a. The Second Circuit noted that its holding does not conflict with the Eighth Circuit's decision in *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 782 (8th Cir. 2016), because it only referred to Rule 301 in dictum:

> 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.

Id. at, fn. 36 (citing *Best Buy,* 818 F.3d at 782-83).

Having established that defendants hold a burden of persuasion, the Second Circuit then ruled that Petitioners failed to meet that burden. Specifically, the court ruled that a lack of statistically significant price movement on the misstatement dates is consistent with Respondents' price maintenance theory of the case and the suggestion by Petitioners' expert that another factor may have contributed to the ADS price decline following the corrective disclosure does not negate price impact. *Id.* at 50a-52a.

REASONS TO DENY THE PETITION

The Petition should be denied for three reasons. First, the Second Circuit's decision follows clearly established Supreme Court precedent. Second, there is no lower court confusion or circuit split regarding the issues identified in Petitioners' "Questions Presented." Third, Petitioners have no legitimate claim that they will suffer prejudice as a result of the Second Circuit's ruling.

I. The Second Circuit's Opinion on Market Efficiency follows Supreme Court Precedent.

Petitioners' arguments fall woefully short of demonstrating any need for Supreme Court review. As the Second Circuit aptly recognized, the D.C. Order meticulously applied the now well-established standards articulated in *Basic* and *Halliburton II.*

A. The Lower Court's Ruling That Respondents Satisfied Their Burden to Invoke the *Basic* Presumption is Consistent With *Basic* and *Halliburton II*

Petitioners improperly ask this Court to expend its limited resources to review legal issues it already addressed in *Basic* and *Halliburton II.*

Specifically, to resolve the difficulties inherent in proving direct reliance in modern securities markets, the Supreme Court held in *Basic* that plaintiffs could invoke a rebuttable presumption of reliance by resorting to the "fraud on the market theory," which provides that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." *Basic*, 108 S. Ct. at 992. The *Basic* decision recognized that direct contact between buyer and seller anticipated in the original securities laws had given way to a mostly indirect relationship intermediated through markets. The Supreme Court explained that modern securities markets differ significantly "from the face-to-face transactions contemplated by early fraud cases," and flexibility becomes necessary if the law is to fulfill the fundamental purposes of the securities laws. *Id*. at 990. The *Basic* court made clear that the presumption was grounded in "considerations of fairness, public policy…as well as judicial economy," "common sense and probability." *Id*. at 990-91.

In *Halliburton II*, the Supreme Court rejected defendant's plea to overrule or modify the *Basic* presumption. The Court did not credit Halliburton's argument that the *Basic* presumption is no longer tenable in light of "[empirical] studies purporting to show that 'public information is often not incorporated immediately (much less rationally) into market prices.'" *Id.* Instead, the Court stated:

> To recognize the presumption of reliance, the Court explained, was not "conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price." *Id.*, at 248 n.28, 108 S. Ct. 978. The Court instead based the presumption on the fairly ***modest premise*** that "market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices." *Id.*, at 247 n.24, 108 S. Ct. 978.
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> Even the foremost critics of the efficient-capital-markets hypothesis acknowledge that public information generally affects stock prices... ***Debates about the precise degree to which stock prices accurately reflect public information are thus largely beside the point***. "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."

Halliburton II, 134 S. Ct. at 2410 (internal citation omitted; emphasis added). Adhering to the dictates of *Basic* and its progeny, and their underlying rationale, the Second Circuit affirmed the District Court's unsurprising conclusion that Barclays ADS traded in an efficient market based on uncontested and sufficiently overwhelming evidence.

Courts evaluating market efficiency nearly universally consider the five factors the district court suggested in *Cammer v. Bloom,* 711 F. Supp. 1264, 1283–87 (D.N.J. 1989) and the three factors the district court suggested in *Krogman v. Sterritt*, 202 F.R.D. 467, 478 (N.D. Tex. 2001). Seven of the *Cammer/Krogman* factors look at indirect evidence of market efficiency while one, known as "*Cammer* 5," examines direct evidence, often through use of an event study.

Petitioners ask this Court to review the Second Circuit's decision to reject their untenable position that market efficiency can never be established without *Cammer* 5. However, as both the Second Circuit and the District Court pointedly noted, adopting Petitioners' position would obviate the need to ever consider any of the other seven factors. Pet. App. at 35a ("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."); Pet. App., at 85a-86a ("there would be no need for a five factor test—or consideration of the other factors described earlier in part III.B.—if one factor were dispositive in every context").

Petitioners' position is indefensible in light of Supreme Court precedent and extensive lower court decisions that have found efficiency without *Cammer* 5. Pet. App., at 87a ("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."); *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 Comput. Sci. Corp. Sec. Litig.*, 288 F.R.D. 112, 120 (E.D. Va. 2012) (rejecting the argument that plaintiffs had failed to establish market efficiency because they had not submitted an event study); *Smilovits v. First Solar, 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).

In holding that Barclays ADS traded in an efficient market, neither the Second Circuit nor the District Court "radically alter[ed]" the required showing for market efficiency established by this Court, as Petitioners incorrectly assert. Pet. at 22. The decisions below simply recognized *Halliburton II*'s conclusion that no specific degree of efficiency is mandated to invoke the *Basic* presumption. *Halliburton II*, 134 S. Ct. at 2410 ("Debates about the precise *degree* to which stock prices accurately reflect public information are thus largely beside the point. "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." *Schleicher v. Wendt,* 618 F.3d 679, 685 (7th Cir. 2010) (Easterbrook, C.J.)"). An event study is thus not required to determine the level and extent that the securities in question react to new information. That is entirely consistent with

Basic's unambiguous holding that the fraud on the market presumption is based on a "fairly modest premise." *Halliburton II* at 2410 (quoting *Basic*, 485 U.S. at 247, n. 24, 108 S. Ct. 978 (1988)). By insisting that plaintiffs cannot invoke the presumption without *Cammer* 5, Petitioners are seeking to eradicate the very foundation of *Basic*.

Petitioners argue that in *Halliburton II,* "this Court presumed that securities plaintiffs provide direct evidence of market efficiency…" Pet. at 20. *Halliburton II,* however, did not ***obligate*** plaintiffs to do so. The decision simply states that "plaintiffs themselves ***can*** and do introduce evidence of the *existence* of price impact in connection with "event studies," not that they ***must.*** *Halliburton II*, 134 S. Ct. at 2415. This is entirely consistent with the Second Circuit's ruling here that while direct evidence is ***sometimes*** necessary, it is not ***always*** necessary when the indirect evidence of market efficiency is overwhelming and, as here, uncontested.

Here, there was no "reason to doubt the efficiency of the market" necessitating utilization of a direct test. Having assessed all of the indirect evidence overwhelmingly demonstrating the efficiency of the market, a point Petitioners conceded, as well as Circuit Court precedent regarding how to test for market efficiency, and having conducted a thorough evaluation of the pitfalls involved in utilizing event studies, the District Court properly held:

> ***Having considered the parties' arguments and evidence, <u>including</u>*** that Barclays ADS trades on the NYSE at high volumes with heavy analyst coverage, 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.

Pet. App. at 92a (Emphasis supplied).

Indeed, given the overwhelming size of Barclays market capitalization and extensive analyst coverage on the Company, and that there was no inhibition to trading Barclays' securities during the Class Period, Petitioners have never deigned to argue that Barclays traded in an inefficient market.

Nevertheless, though not required, Respondents proffered an event study in support of *Cammer* 5 which provides prodigious evidence that Barclays ADS traded in an efficient market, ***a conclusion Petitioners do not dispute***. Moreover, ***Judge Scheindlin did in fact evaluate Cammer 5***, though stating it was unnecessary in light of the overwhelming indirect evidence of efficiency. Pet. App. at 92a. ("Having considered the parties arguments and evidence…"). Indeed, ***almost every question Judge Scheindlin asked Dr. Nye at the evidentiary hearing pertained to the event study he conducted in support of Cammer 5.***

B. The Lower Court's Ruling Regarding Defendants' Rebuttal Burden is Consistent with *Basic* and *Halliburton II*

The Supreme Court has already addressed the burden defendants must carry to rebut the *Basic* presumption and the Second Circuit properly adhered to that precedent in its ruling below. Justice Blackmun recognized in *Basic* that a defendant could only rebut the presumption of reliance based on, "[a]ny 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…" 485 U.S. at 248-249. Petitioners latched on to the "any showing" phrase and misguidedly interpreted it to mean that their rebuttal burden is "minimal" and thus inconsistent with a preponderance of the evidence standard of proof. However, by requiring a "showing" the *Basic* Court made clear that defendants cannot simply introduce unproven theory, but must make an evidentiary showing of proven fact. Moreover, Petitioners cannot focus on the phrase "any showing" in a vacuum. What they must accomplish when offering direct proof is set forth in the very same sentence--- their evidence must actually "***sever the link***." The Second Circuit recognized that the phrase ""[a]ny showing that severs the link" aligns more logically with imposing a burden of persuasion rather than a burden of production." Pet. App. at 44a. The Court's use of the word "any" simply suggests multiple possible routes of making the showing so long as the evidence "severs the link" between the alleged misrepresentation and the presumed fact of reliance. The link cannot be severed without evidence that breaks the chain of inferences giving rise to the presumption, and that break requires that a defendant actually show, *i.e.*, prove, severance. As the Second Circuit aptly noted, "[i]t would be inconsistent with *Halliburton II* to require that plaintiffs meet [their] 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. The presumption of reliance would also be of little value if it were so easily overcome." Pet. App. at 43a.

A mere suggestion or minimal evidence implying that the link does not or might not exist is undeniably insufficient--- defendants must entirely sever the link for a particular misrepresentation to rebut the presumption. This is no easy feat. Nor was it meant to be. Indeed, through examples, the *Basic* Court made apparent how compelling the rebuttal evidence needs to be, and how completely that evidence must sever the link. *See, e.g.*, *Basic*, 485 U.S. at 248 ("For example, if petitioners could show that the "market makers" were privy to the truth about the merger discussions here with Combustion, and thus that the market price would not have been affected by their misrepresentations, the causal connection could be broken: the basis for finding that the fraud had been transmitted through market price would be gone.").

Moreover, correspondence between Justices Brennan and Blackmun confirms that the Supreme Court viewed the rebuttal burden as virtually insurmountable. *See* Letter from Harry Blackmun to William Brennan at 2 (Jan. 15, 1988) Letter from William Brennan to Harry Blackmun (Jan. 27, 1988) in case files for each justice at the Library of Congress. In their correspondence, both justices agreed that the burden imposed on a defendant to rebut the presumption of reliance was, in Justice Blackmun's words "very burdensome to prove" and in Justice Brennan's words "impractical to use." *Id.*

The Supreme Court reaffirmed defendants' heavy burden in *Halliburton II*, making clear that the defendants must prove the absence of price impact. *Halliburton II*, 134 S. Ct. at 2405, 2414, 2417 (defendants can only "defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock."). It is insufficient for defendants to proffer any evidence, no matter how frail, to rebut the presumption. The evidence must be "direct" and "more salient" than that proffered by plaintiffs to trigger the presumption. *Id.* at 2416. As in *Basic*, the Court provides an example of how defendants can rebut the presumption:

> So for example, 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.

Id. at 2408 (internal citation omitted)(emphasis added). In other words, for evidence to be sufficiently "salient" to "sever the link"—defendants must either show, not merely suggest, that a misrepresentation did not impact the market price of the security or that plaintiff would have transacted in the security regardless of the fraud. Citing *Halliburton II,* the Second Circuit explained that a showing that severs the link only rebuts the presumption "because 'the basis for finding that the fraud had been transmitted through market price would be gone.'" Pet. App. at 43a (citing *Halliburton II*, 134 S. Ct. at 2415-16).

The concurrences of six justices of the Supreme Court in *Halliburton II* cement the Court's intention to make defendants ***actually prove*** the absence of price impact; with defendants bearing a heavy burden to do so. Justice Ginsburg's concurring opinion, joined by Justices Breyer and Sotomayor, concluded that "the Court recognizes that "it is incumbent upon the defendant to show the absence of price impact." *Id*. at 2417 (emphasis added). Justice Ginsburg made clear that, "[t]he Court's judgment, therefore, should impose no heavy toll on securities-fraud plaintiffs with tenable claims. On that understanding, I join the Court's opinion." Even Justice Thomas, concurring in the judgment and joined by Justices Scalia and Alito, who would have overruled *Basic*, *id*. at 2418, acknowledged that the presumption "is virtually irrebuttable in practice." *Id*. at 2424. Justice Thomas recognized that defendant' burden is more than simply producing some evidence to burst the *Basic* presumption.

Under Petitioners' logic, they could meet their rebuttal burden with a minimal showing upon which the presumption immediately evaporates. ***This would shift the onus back to Respondents to show price impact and individual reliance without the benefit of any presumption.*** Such an outcome squarely contravenes *Halliburton II's* clear directive that plaintiffs are not required to directly prove price impact at class certification. *Id,* 2414-15 (for example, the Court stated that, "Far from a modest refinement of the *Basic* presumption, [requiring plaintiffs to prove price impact directly] would radically alter the required showing for the reliance element of the Rule 10b–5 cause of action.").

It is for this reason that the district court in *Halliburton* on remand following *Halliburton II,* agreed that the burden of persuasion shifted to defendants to rebut the *Basic* presumption. *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, 258–59 (N.D. Tex. 2015), *leave to appeal granted,* No. 15-90038, 2015 WL 10714013 (5th Cir. Nov. 4, 2015). Specifically, the court stated that:

> [R]elieving Halliburton of the burden of persuasion would eviscerate the *Basic* presumption because Halliburton could arguably satisfy its burden merely by having an expert opine that price impact was absent. Shifting the burden would require the Fund to prove price impact directly at class certification—a proposal the Supreme Court said would radically alter the reliance showing.
>
> In *Halliburton II,* the Court saw no reason to "artificially limit the [price impact] inquiry at the certification stage to indirect evidence," and authorized defendants to seek to defeat the *Basic* presumption at the class certification stage through direct as well as indirect price impact evidence. *Halliburton Co.,* 134 S. Ct. at 2417. By requiring plaintiffs to carry the burden of persuasion to show price impact at the class certification stage, this Court would, in effect, be requiring the Fund to prove price impact directly, a proposition the Supreme Court refused to adopt.

Id.

II. There is no Lower Court Confusion or Circuit Split

Petitioners suggest a sense of urgency in their bid to have the Supreme Court grant certiorari by asserting that there is lower court confusion regarding whether direct evidence of market efficiency is always required to trigger the *Basic* presumption; and a circuit split regarding defendants' burden in rebutting the *Basic* presumption.

Such assertions are belied by the very cases Petitioners cited to support their contention.

A. There is No Lower Court Confusion

Consistent with *Basic* and *Halliburton II,* district courts have nearly universally adopted the five *Cammer* factors (with many also adopting the *Krogman* factors) as the appropriate yardstick to analyze market efficiently, while recognizing that no one factor is outcome determinative, including *Cammer* 5. *See, e.g., Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 310 F.R.D. 69, 84 (S.D.N.Y. 2015) ("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."); *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 Comput. Sci. Corp. Sec. Litig.*, 288 F.R.D. 112, 120 (E.D. Va. 2012) (rejecting the argument that plaintiffs had failed to establish market efficiency because they had not submitted an event study); *Smilovits v. First Solar, 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); *Petrie v. Elec. Game Card, Inc.*, 308 F.R.D. 336, 349 (C.D. Cal. 2015)("The *Cammer* factors are "an analytical tool, not a checklist" of requirements); *Billhofer v. Flamel Techs.,*

S.A., 281 F.R.D. 150, 160 (S.D.N.Y. 2012)("These factors should be used as an analytical **tool** rather than as a **checklist"**). These holdings comport with both *Basic* and common sense, as there can be scenarios where an event study is impracticable, such as where a class period lasts for only a few days or a very short period, rendering the sample size too small for a proper event study. Moreover, as the D.C. Order recognized using an illustrative example, "[t]he 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." Pet. App. at 88a.

Neither the First Circuit's decision in *Xcelera*, nor the Fifth Circuit's decision in *Unger,* cited by Petitioners, actually holds that a plaintiff must always satisfy *Cammer* 5 with direct evidence to establish market efficiency. In *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 511-512 (1st Cir. 2005), defendants challenged three of the indirect *Cammer* factors, rendering the *Cammer* 5 test significantly more important in the analytical framework. In stark contrast, Petitioners have conceded that Respondents satisfied all seven indirect factors demonstrating market efficiency. In any event, though opining on the importance of *Cammer* 5, the First Circuit never stated that it must be satisfied in every case. Indeed, in affirming the district court's order certifying the class, the First Circuit stated, "[b]ecause there is no "magic number" of factors for determining efficiency, we leave it to the district court in the first instance to decide which factors and how many factors it will consider…" *Id.* at 518. In *Unger v. Amedisys Inc.*, 401 F.3d 316 (5th Cir. 2005), the Fifth Circuit made clear that plaintiff had not satisfied all of the indirect factors of efficiency. Moreover, the *Unger* court recognized that "[t]here is no requirement for expert testimony on the issue of market efficiency, *Id.* at 323 n. 6, and faulted the district court for using the factors "as a checklist rather than an analytical tool." *Id.* at 325.

The only other two cases Petitioners cite as purportedly supporting their "lower court confusion" argument also do not hold that a plaintiff must always satisfy *Cammer* 5 to prove market efficiency. Pet. at 20. For example, in *Best Buy,* the issue before the Eighth Circuit was whether defendants successfully rebutted the *Basic* presumption by demonstrating a lack of price impact. *Best Buy*, 818 F.3d 775. The court did not opine on the necessity of *Cammer* 5 but rather noted that, unlike here, plaintiffs' and defendants' experts *agreed* that the inflation of the stock resulted from a non-fraudulent press release. *Id.* at 783. The Eighth Circuit then held that defendants had presented "overwhelming evidence of no "front-end" price impact." *Id.* at 782. The *Freddie Mac* decision also does not support Petitioners' position. *In re Fed. Home Loan Mortg. Corp. (Freddie Mac) Sec. Litig.*, 281 F.R.D. 174 (S.D.N.Y. 2012). As the D.C. Order recognized, *Freddie Mac* pre-dated *Halliburton II* and, in any event, in contrast to the securities at issue here, the shares at issue there were "a limited series of preferred shares, which are traded in patterns significantly different from the trading patterns typical of common shares." Moreover, the district court's statements in *Freddie Mac* regarding the importance of *Cammer* 5 relied on the Second Circuit's decision in *Teamsters Local 445 Freight Div. Pension,* *Fund v. Bombardier Inc.*, 546 F.3d 196, 207 (2d Cir. 2008). However, the Second Circuit itself made clear in the Order here that *Cammer* 5 was an important part of the analysis in *Bombardier* only because "we concluded that certain of the indirect factors did not demonstrate market efficiency. Pet. App. at 38a.

Having failed to cite a single lower court decision holding that a plaintiff must *always* satisfy *Cammer* 5, Petitioners have failed to evidence any confusion from the lower courts regarding the necessity of *Cammer* 5. Indeed, all courts agree that it is a relevant analytical tool, but by no means a necessary one for demonstrating market efficiency.

B. There is no Circuit Split

Petitioners also ask this Court to resolve an imaginary circuit split regarding their rebuttal burden, an argument they base on a mischaracterization of the Eighth Circuit's decision in *Best Buy*. No such circuit split exists. Petitioners incorrectly contend that the Order contradicts *Best Buy's* holding that pursuant to Rule 301 defendants have only a burden of production when rebutting the *Basic* presumption. *See, e.g.*, Pet. at 3, 9, 12, 13; *Best Buy*, 818 F.3d at 782 ("We agree with the district court that, when plaintiffs presented a *prima facie* case that the Basic presumption applies to their claims, defendants had the burden to come forward with evidence showing a lack of price impact. *See* Fed. R. Evid. 301 ("the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption")[2]). . It

2. There is no analysis or discussion of Rule 301 beyond this single statement. In fact, the district court's decision in *Best Buy*,

does not appear, however, that there was any dispute about the burden of persuasion in *Best Buy*. Moreover, the Eighth Circuit's ultimate holding was that the defendants' "overwhelming evidence of no 'front-end' price impact rebutted the *Basic* presumption" and plaintiffs "presented no contrary evidence of price impact." *Id*. at 782. In other words, any allocation of the burden of persuasion was of no consequence. The plain language from the relevant text in *Best Buy* evidences that the Eighth Circuit was merely citing Rule 301 as additional authority for the general proposition regarding rebuttal of presumptions, but was not addressing in any meaningful fashion the burden required for doing so. This passing reference to Rule 301 hardly constitutes a circuit split worth of this Court's review.

Indeed, the *Best Buy* decision actually supports the lower courts' analysis. *Best Buy* confirms that it is defendants' "burden [to produce] evidence to rebut the [*Basic*] presumption," and concluded that defendants met their burden with "strong evidence." Here, Petitioners provided no evidence at all. Considering both parties' experts, *Best Buy* found defendants' demonstrated "overwhelming evidence" rebutting price impact. *Id.* at *6. The District Court here similarly assessed both parties' experts but found that Petitioners had presented no rebuttal evidence—through either party's expert. *See* Pet. App. at 98a (Assessing Plaintiffs' expert: "Dr. Nye did not attempt to show price movement on the misstatement dates... because plaintiffs' case is premised on a price maintenance theory." Assessing Petitioners' expert: "the

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with which the Eighth Circuit expresses agreement, does not make any reference to Rule 301 or evidentiary burden at all.

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.").[3]

Moreover, the Second Circuit here directly addressed the *Best Buy* decision, noting:

> 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.

Pet. App. at 49a, n.36.

Indeed, in the nearly thirty years since *Basic*, no court has allowed defendants to utilize Rule 301 to eviscerate the presumption by merely proffering "any" admissible contrary evidence, no matter how flimsy.

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3. Indeed, given Petitioners' failure to proffer any evidence in the form of an event study or otherwise demonstrating lack of price impact, this case would present a poor vehicle for this Court to weigh in on the requisite evidentiary burden necessary to rebut *Basic's* presumption of reliance.

Not only is there no circuit split regarding defendants' rebuttal burden, but, other circuit courts have placed the burden of persuasion for rebuttal on defendants. For example, the Ninth Circuit's model jury instruction states:

> If you find that the plaintiff has proved by a preponderance of the evidence that (1) an active, open market for the [security] [securities] existed and (2) investors reasonably relied on that market as an accurate reflection of the current market value of the [security] [securities], you may find that the plaintiff has proved that [he] [she] [it] relied on the defendant's statements.
>
> If, however, the defendant proves by a preponderance of the evidence that (1) the plaintiff did not actually rely on the integrity of the market or (2) the alleged misrepresentation or omission did not affect the market price of the security, then the defendant has rebutted any presumption that the plaintiff relied on the market. In that event, the plaintiff must then prove that [he] [she] [it] justifiably relied directly on the alleged misrepresentation or omission.

Ninth Circuit Manual of Jury Instructions: Civil § 18.5, at 422. (2007) (emphasis added).

The Second Circuit Order is also consistent with the plain language of Rule 301. Rule 301 states:

> 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.

(Emphasis added). In creating the fraud on the market presumption, the *Basic* court sought to effectuate the congressional intent underlying the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78a *et seq. See U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 174 (1993) (identifying the *Basic* presumption as a judicially created presumption pursuant to federal statute). As Rule 301 states, it is not meant to apply to a presumption created pursuant to federal statute, particularly where its application would thwart the policies underlying that presumption. *See* Mueller and Kirkpatrick, *Federal Evidence 4th* at 441 (noting that courts can and do give greater effect to a presumption in order to implement "statutory policy": "Rule 301 contains exempting language . . . that permits courts to accord to statutory presumptions (***and to court-made presumption implementing statutes***) an effect other than the one prescribed by Rule 301") (emphasis added). The Supreme Court has made clear that the *Basic* presumption is "a substantive doctrine of federal securities-fraud law" and thus outside the reach of Rule 301. *See Amgen Inc.*, 133 S. Ct. at 1193, 185 L. Ed. 2d 308. The preponderance of the evidence standard, applied to burdens of persuasion in civil litigation, is therefore the proper burden defendants must satisfy to rebut the *Basic* presumption.

Moreover, the Supreme Court made clear that plaintiffs can only invoke the *Basic* presumption when they satisfy four factors by a preponderance of the evidence (in sharp contrast to simple presumptions based on proof of a single factor): "(1) that the alleged misrepresentations were publicly known, (2) that they were material, (3) that the stock traded in an efficient market, and (4) that the plaintiff traded the stock between the time the misrepresentations were made and when the truth was revealed." *Halliburton II,* 134 S. Ct. at 2408. Further, to establish "that the stock traded in an efficient market," plaintiffs introduce substantial evidence regarding up to eight separate factors that courts have used as an analytical tool in evaluating market efficiency, as Respondents have done here. *See Cammer,* 711 F. Supp. at 1283; *Krogman*, 202 F.R.D. at 478.

It strains reason to posit that the Supreme Court intended that plaintiffs making such a substantial and complex showing would lose the benefit of the presumption simply because a defendant offered "some" rebuttal evidence, no matter how frail. To promote fairness and uphold the policies underpinning the relevant federal statutes, there should be parity in the respective burdens of proof to trigger, and rebut, the presumption. The Second Circuit therefore properly held, that "Rule 301 therefore imposes no impediment to our conclusion that the burden of persuasion, not production, to rebut the *Basic* presumption shifts to defendants." Pet. App. at 49a.

III. THE SECOND CIRCUIT'S HOLDINGS DO NOT PREJUDICE PETITIONERS.

Lastly, Petitioners have failed to establish that they suffer any prejudice as a result of the Order. Indeed, even if the Second Circuit had held that district courts must always consider *Cammer* 5 or that defendants' rebuttal burden is only one of production, and remanded back to the district court, the class would remain certified. That is because Respondents satisfied *Cammer* 5 and Petitioners failed to meet their rebuttal burden even under the minimal threshold they espouse.

A. Even if the Second Circuit had required *Cammer* 5 here, the Same Result would ensue

Ironically, though Petitioners seek review of the decision below, there is no actual dispute regarding the efficiency of the market for Barclays' ADS. ***At no point have Petitioners ever argued that any Cammer 5 analysis would warrant a finding that Barclays ADS did not trade in an efficient market***. Even at the District Court level, Petitioners' expert, Dr. James, simply quibbled with Dr. Nye's methodologies with regard to *Cammer* 5—but never his conclusions. Petitioners' chosen strategy of attacking the *Cammer* 5 journey but not the destination bespeaks their concession regarding the efficiency of the market for Barclays ADS. *In re Goldman Sachs Grp., Inc. Sec. Litig.*, 2015 U.S. Dist. LEXIS 128856 (S.D.N.Y. Sep. 24, 2015) ("Plaintiffs are correct that there is no real dispute concerning the market efficiency for Goldman's stock…While Defendants take issue with Dr. Finnerty's evaluation of the fifth *Cammer* factor … they do not otherwise suggest that the market for Goldman's stock was not efficient").

Even though Petitioners have never deigned to suggest that Barclays ADS did not trade in an efficient market, they ask the Supreme Court to review the decision below and to obligate the district court to review *Cammer* 5 as part of every market efficiency analysis--- no matter the circumstances--- only to have the district court in this case consider *Cammer* 5 and once again certify the Class. That the same result would ensue is a near certainty. Dr. Nye's event study overwhelmingly demonstrates cause and effect as it shows that Barclays' securities moved in a statically significant and directionally consistent manner, on nine out of fourteen earnings release event dates. The event study also shows that for the five dates on which Barclays' securities did not move in a statistically significant manner, the Company's earnings results were generally in line with market expectations, and/or the results were largely mixed, such that the insignificant returns are consistent with that expected in an efficient market.

Dr. Nye's event study thus clearly satisfies *Basic* and *Halliburton,* which simply require evidence sufficient to support the "modest premise" that stock prices reflect publicly available information, not prophecy. With no event study of their own and no suggestion that Barclays ADS did not trade in an efficient market, Petitioners provided no basis for the District Court to discredit Dr. Nye's event study and find the market for Barclays ADS' inefficient.

B. Petitioners have failed to rebut the *Basic* presumption under any standard

Petitioners base their argument to this Court on the faulty premise that they "presented evidence rebutting the fraud-on the-market presumption." Pet. at 3. They did not. Indeed, ***Petitioners did not proffer any evidence at all,*** much less "direct, more salient" evidence that "sever[ed] 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." *Halliburton II*, 134 S. Ct. at 2408.

Petitioners did not conduct any price impact analysis, either through their expert or otherwise, to rebut the presumption of reliance, implicitly acknowledging the futility of such analysis.

Instead, ignoring Respondents' theory of the case, Petitioners argued that Barclays' ADS did not react to the alleged misstatements. The District Court aptly noted that Petitioners had not met their burden because they failed to demonstrate a lack of price maintenance by the misrepresentations. Pet. App. at 98a-101a, (noting, among other things, that Petitioners failed to provide a regression model or event study to support their assertions).

Petitioners' only other rebuttal argument was that they "presented evidence that the decline in the price of Barclays' ADS was the result of investor concerns about the risk of a regulatory lawsuit and resulting fines, as opposed to alleged concerns about Barclays' financials or the LX business." Pet. at 29. As the D.C. Order recognized, however, "[a]gain, [defendants] 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." Pet. App. at 101a-103a. Instead, Petitioners offered a baseless ***hypothesis*** that the price decline resulted from investor concerns over regulatory scrutiny and litigation risk, which they illogically deemed unrelated to the fraudulent conduct alleged in this case, even though it is the very subject of the regulatory scrutiny and litigation risk to which they refer. Regardless, as the Second Circuit correctly noted, "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." Pet. App. at 52a.

The D.C. Order is consistent with the Supreme Court's directive that defendants must "sever the link" completely. If they cannot disprove that the disclosure of fraud at least partly caused the drop in price, then they have not met their rebuttal burden under *Basic* and *Halliburton II*.

Thus, while quibbling with the lower courts over the proper standard for establishing a lack of price impact, Petitioners fail to acknowledge that they have failed to show lack of price impact under ***any standard***. Supplanting theory and conjecture for fact does not satisfy Rule 301's requirements for rebutting presumptions. In other words, though correct, the District Court's application of the preponderance of the evidence standard was not outcome determinative in this case.

CONCLUSION

Having failed to provide any grounds for review, the Supreme Court should reject the Petition for a Writ of Certiorari.

Respectfully Submitted,

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