APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS,
THIRD CIRCUIT

No. 24-1409

SAN DIEGO COUNTY EMPLOYEES RETIREMENT ASSOCIATION; Frank Hall, Individually and on behalf of all others similarly situated,

v.

JOHNSON & JOHNSON; ALEX GORSKY; JOAN CASALVIERI; TARA GLASGOW; CAROL GOODRICH,

Appellants

Argued March 11, 2025

Filed: July 30, 2025

On Appeal from the United States District Court for the District of New Jersey (D.C. No. 3:18-cv-01833), U.S. District Judge: Honorable *Zahid N. Quraishi*.

OPINION[*]

Before: *SHWARTZ*, *RESTREPO*, and *CHUNG*, Circuit Judges.

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[*] Robert N. Hochman withdrew as counsel on May 30, 2025, prior to the issuance of this opinion.

[*] This disposition is not an opinion of the full court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

SHWARTZ, Circuit Judge.

Defendants Johnson & Johnson and several of its individual employees ("J&J") appeal the District Court's order granting Lead Plaintiff San Diego County Employees Retirement Association's motion for class certification.[1] Because the District Court did not err in concluding that common issues predominate as to the reliance element of Plaintiff's securities fraud claim, we will affirm.

I

Plaintiff filed a putative class action against J&J asserting, among other things, violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. Plaintiff alleges that J&J made false and misleading statements and omissions ("alleged misrepresentations") between February 2013 and October 2018 to conceal from the public and regulators the presence of asbestos in its talc products.[2] The alleged misrepresentations that survived J&J's motion to dismiss include "statements regarding the safety and asbestos[-]free nature of [J&J's] Talc Products" as well as J&J's quality assurance procedures and commitment to safety. A0488.

Plaintiff asserts that these alleged misrepresentations "maintained artificial inflation in the price of J&J securities" that was ultimately "dissipated through a series of partial disclosures of the relevant truth about J&J's talc." A0413. The FAC alleged that

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[1] This Opinion uses "Plaintiff" to refer to the Lead Plaintiff and the other Plaintiffs named in the complaint.

[2] We express no opinion about whether any of J&J's alleged misrepresentations were false or misleading.

six partial disclosures from September 2017 to December 2018, resulted in "statistically significant declines" in J&J's stock price. A0413-14 (FAC ¶ 421).[3]

Plaintiff moved for class certification. Before the District Court (and us), the parties dispute only whether common questions of reliance on J&J's alleged mis-

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[3] The September 27, 2017 disclosure was a press release from the law firm Bernstein Liebhard LLP, which discussed, among other things, documents unsealed in *Ingham v. Johnson & Johnson*, No. 1522-CC10417 (Mo. Cir. Ct. filed Aug. 20, 2015), a product liability suit against J&J, and announced that the firm was representing women alleging that their ovarian cancer was caused by asbestos in J&J talc products.

The January 30, 2018 disclosure was a Law360 article that discussed testimony in *Lanzo v. Cyprus Amax Minerals Co.*, No. L-7385-16 (N.J. Super. Ct. Law Div. filed Dec. 22, 2016), a product liability suit against J&J and affiliates, and a 1975 report in which a former J&J supplier allegedly said it found asbestos in J&J talc products.

The February 5, 2018 disclosure was a Mesothelioma.net blogpost that discussed, among other things, the anticipated release of J&J documents showing the presence of asbestos in J&J talc products and J&J's efforts to conceal this fact from the public.

The February 7, 2018 disclosure was a press release from the law firm Beasley Allen that discussed, among other things, the anticipated production of "never-before-seen documents" from J&J and its talc supplier indicating the presence of asbestos in J&J talc products. A3112.

The July 12, 2018 disclosure was the announcement of a $4.69 billion verdict against J&J in *Ingham*, the first product liability suit where a jury found that asbestos in J&J talc products caused the plaintiffs' ovarian cancer.

The December 14, 2018 disclosure was a report, consisting of two Reuters articles, that asserted, among other things, that J&J's talc products were "sometimes tainted with carcinogenic asbestos and [ ] J&J kept that information from regulators and the public." A1829.

representations predominate over individual questions. The District Court examined the six disclosures that Plaintiff contends partially corrected J&J's alleged misrepresentations and concluded as to each that J&J did not rebut the presumption that Plaintiff relied upon J&J's representations when purchasing the stock because the corrective disclosures and market reaction thereto provided a basis to infer that J&J's alleged misrepresentations impacted the price Plaintiff paid for the stock. As a result, the Court granted the motion and certified a class of all persons who purchased J&J stock between February 22, 2013, and December 13, 2018.

J&J appeals.

II[4]

We begin by setting forth the legal standard for analyzing whether reliance issues predominate for class certification purposes under *Federal Rule of Civil Procedure 23* in securities fraud cases, and then apply it to this case.

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[4] The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1292(e) and Federal Rule of Civil Procedure 23(f).

"We review a class certification order for abuse of discretion, which occurs if the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 358 (3d Cir. 2015).

Our dissenting colleague states that we have resolved factual questions. To be clear, we did not. Rather, we examined the factual record to determine whether the District Court abused its discretion in certifying the class. *Id.* Although the District Court could have been more fulsome in explaining how the facts led it to certain conclusions, the facts are present and support these conclusions.

A

Federal Rule of Civil Procedure 23 sets forth the requirements for a matter to proceed as a class action. The only requirement at issue here is "predominance." Fed. R. Civ. P. 23(b)(3). A plaintiff satisfies the predominance requirement by establishing that "the questions of law or fact common to class members predominate over any questions affecting only individual members." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) (citation omitted). A plaintiff meets this requirement if it demonstrates that the elements of the putative class's claim "are capable of proof at trial through evidence that is common to the class rather than individual to its members." *Reinig v. RBS Citizens, N.A.*, 912 F.3d 115, 127 (3d Cir. 2018) (internal quotation marks omitted). We must therefore consider the elements of Plaintiff's securities fraud claim. The elements are: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014) ("*Halliburton II*") (internal quotation marks omitted).

J&J argues that Plaintiff has not established the predominance of common questions as to the reliance element. The "most direct[ ] way to prove reliance is to show that [the plaintiff] was aware of a defendant's misrepresentation and engaged in a transaction based on that misrepresentation." *Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys.*, 594 U.S. 113, 118 (2021) (internal quotation marks omitted). The Supreme Court, however, has recognized that "requiring proof of direct reliance 'would place an unnecessarily unrealistic

evidentiary burden on [a securities fraud] plaintiff who has traded on an impersonal market.'" *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 461 (2013) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988)). The Court has thus "held that a plaintiff may ... invoke a rebuttable presumption of reliance based on the fraud-on-the-market theory," which is based on the "fundamental premise ... that an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction." *Goldman*, 594 U.S. at 118 (internal quotation marks omitted).

To invoke this presumption, a plaintiff must prove that: "(1) the alleged misrepresentation was publicly known; (2) the misrepresentation was material; (3) the stock traded in an efficient market; and (4) the plaintiff traded the stock between the time the misrepresentation was made and when the truth was revealed." *Id.* (internal quotation marks omitted). The first three elements "are directed at price impact—whether the alleged misrepresentations affected the market price in the first place."[5] *Halliburton II*, 573 U.S. at 278 (internal quotation marks omitted).

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[5] Price impact is distinct from loss causation. In assessing price impact, a court asks whether an alleged misrepresentation affected the stock's market price at the time plaintiff purchased it. *See Goldman*, 594 U.S. at 119. Loss causation concerns whether "the corrected truth of the [defendant's] former falsehoods actually caused the stock price to fall and resulted in the [plaintiff's] losses," not "whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809, 812 (2011) ("*Halliburton I*") (internal quotation marks omitted). Loss causation need not be proven at the class certification stage. *See, e.g., id.* at 812–13.

J&J concedes that Plaintiff satisfies the elements to invoke the presumption of reliance but argues that J&J has rebutted it. A defendant may rebut the presumption at the class certification stage by proving by a preponderance of the evidence that the alleged "misrepresentation had no price impact" at all. *Goldman*, 594 U.S. at 119 (citing *Halliburton II*, 573 U.S. at 283).

"[I]n cases proceeding under the inflation-maintenance theory ... price impact is the amount of price inflation maintained by an alleged misrepresentation—in other words, the amount that the stock's price would have fallen without the false statement." *Goldman*, 594 U.S. at 123 (internal quotation marks omitted). In determining whether the alleged misrepresentation maintained inflation, and thus had price impact, a court asks whether a "truthful substitute" for the alleged misrepresentation would have affected the stock price. *Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 77 F.4th 74, 100 (2d Cir. 2023) (internal quotation marks omitted).[6] In determining whether a defendant has proven a lack of price impact, courts "should be open to all probative evidence—qualitative as well as quantitative—aided by a good dose of common sense." *Goldman*, 594 U.S. at 122 (alterations and internal quotation marks omitted).

J&J asserts "there can be no price impact unless an alleged corrective disclosure contains information that is both new and corrective" and that the corrective

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[6] *See also, e.g., In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 258 (2d Cir. 2016) ("[O]nce a company chooses to speak, the proper question for purposes of our inquiry into price impact is not what might have happened had a company remained silent, but what would have happened if it had spoken truthfully." (emphasis omitted)).

disclosures identified in Plaintiff's complaint contained information that was already public and thus not new. J&J Br. at 29. We need not decide whether J&J's assertion that a disclosure must be new is correct, because its argument ignores the fact that disclosures based on public information may nevertheless communicate a new signal to the market in certain situations.[7] For instance, re-publication of information by a more credible source to a broader audience may convey to the market that the information is particularly significant or worthy of monitoring.[8] *See Allegheny Cnty. Emps.' Ret. Sys. v. Energy Transfer LP*, 623 F. Supp. 3d 470, 500–01 (E.D. Pa. 2022). Similarly, a disclosure that compiles and expertly analyzes stray bits of publicly available information can also communicate new, value-relevant information.[9] Relatedly,

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[7] "[P]ublic information is absorbed into a firm's stock price" "quickly and completely," though not simultaneously, "in the period immediately following disclosure." *In re Merck & Co., Inc. Sec. Litig.*, 432 F.3d 261, 269 (3d Cir. 2005) (internal quotation marks and citations omitted).

[8] If a corrective disclosure is not fully assimilated into the stock price (for any reason), a re-publication of the same information that is more credible (for any reason) would be capable of influencing a stock price. *See, e.g.*, *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 167–68 (2d Cir. 2000).

[9] *See, e.g.*, *Pub. Emps. Ret. Sys. of Miss. v. Amedisys, Inc.*, 769 F.3d 313, 323 (5th Cir. 2014) (holding, on a motion to dismiss, that the district court erred in finding as a matter of law that a Wall Street Journal article "based on publicly available Medicare records," was not a corrective disclosure, because (1) "it is plausible that complex [Medicare] data understandable only through expert analysis may not be readily digestible by the marketplace," (2) the raw data was "difficult to obtain," (3) the "analysis required significant professional expertise," and (4) "various independent analysts [ ] characterized the article as 'new news' "); *In re Nektar Therapeutics Sec. Litig.*, 34 F.4th 828, 839-40 (9th Cir. 2022) (recognizing, on a motion to dismiss, that "if the

a disclosure will not "correct" the market price unless it is "conveyed to the public with a degree of intensity and credibility sufficient to counter-balance effectively any misleading information created by the alleged misstatements," *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 167 (2d Cir. 2000) (internal quotation marks omitted), including statements by a defendant denying the truth of the information in the corrective disclosures, *see, e.g.*, *In re Signet Jewelers Ltd. Sec. Litig.*, No. 16-6728, 2019 WL 3001084, at *16 (S.D.N.Y. July 10, 2019) ("Where, as here, a purported 'disclosure' is accompanied by a corporate denial, it is no 'disclosure' at all, since such a denial is counteractive, misleading, and can cause investors to doubt the contents of the purported disclosure."); *cf. Alaska Elec. Pension Fund v. Pharmacia Corp.*, 554 F.3d 342, 350 (3d Cir. 2009) ("Just as we require investors to act upon public information indicating fraud, so, too, do we allow them to rely upon corporate statements discounting the possibility of malfeasance.").

B

Mindful of these principles, we turn to the disclosures. As a threshold matter, we observe that each disclosure contained information relating to J&J's

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report 'required extensive and tedious research involving the analysis of far-flung bits and pieces of data,' then '[t]he time and effort it took to compile this information make it plausible that the posts provided new information to the market, even though all of the underlying data was publicly available.' " (quoting *In re BofI Holding, Inc. Sec. Litig.*, 977 F.3d 781, 797 (9th Cir. 2020))); *Norfolk Cnty. Ret. Sys. v. Cmty. Health Sys., Inc.*, 877 F.3d 687, 697 (6th Cir. 2017) (holding, on a motion to dismiss, that a consulting firm's report that "used publicly available [hospital] admissions data" to conclude that defendant improperly inflated inpatient admissions "quite plausibly came as news to investors").

alleged misrepresentations concerning the presence of asbestos in its talc product, its commitment to safety, or its potential asbestos-related liability. Thus, unlike in *Goldman*, 594 U.S. at 123, there is no mismatch between the subject of the alleged misrepresentation and the content of the disclosures.[10] Therefore, market reaction to the disclosures is capable of shedding light on the price impact of the alleged misrepresentations. *See Glickenhouse & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 415 (7th Cir. 2015); *cf. Goldman*, 594 U.S. at 123.

Reviewing the District Court's analysis of each disclosure, we conclude that it did not err in rejecting J&J's argument that the disclosures' contents and market reaction thereto prove an absolute lack of price impact. Each disclosure could have communicated new, value-relevant information to investors[11] and was

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[10] *See In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 513 (2d Cir. 2010) ("A misrepresentation is the proximate cause of an investment loss if the risk that caused the loss was within the zone of risk concealed by the misrepresentations." (emphasis and internal quotation marks omitted)).

[11] The September 27, 2017 disclosure communicated that information revealed during a then-recent trial spurred active interest in pursuing claims alleging that asbestos in J&J talc caused ovarian cancer. Although articles published days earlier alleged a link between asbestos in J&J talc and ovarian cancer and quoted certain unsealed documents, the September 27 article communicated something new to the marketplace, namely that Bernstein Liebhard viewed the total body of unsealed documents as sufficiently credible and compelling to merit the filing of additional suits making similar claims.

The January 30, 2018 disclosure repeated testimony from the *Lanzo* trial one day earlier concerning a 1975 J&J report that allegedly revealed the presence of asbestos in talc products. Though the trial testimony was public, what happened in one particular courtroom may not have become simultaneously

known in the marketplace and it may take more than one day for the information to be incorporated into a stock price. *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 635 (3d Cir. 2011) (recognizing that even in an efficient market, information may take two days to be incorporated into the market price), *abrogated on other grounds by Amgen*, 568 U.S. 455.

The February 5 and February 7, 2018 disclosures discussed the expected revelation of "never-before-seen" documents allegedly indicating J&J's knowledge of asbestos in its talc products. A3112. J&J contends that these disclosures could not have contained new information because their authors described them as sourced from public information. The February 5, 2018 disclosure's "head writer" described it as gleaned in part "from public trials (like *Lanzo*)," A5193-94, while a principal at the firm that authored the February 7, 2018 disclosure said some of the "documents or information" therein had already "been used in public trials," A5203. These statements, without more, fail to establish that the market had already priced in this information and rendered the February 2018 disclosures stale: a single reference in a prolonged public trial, for example, would be too opaque of a disclosure for the market to understand and price in. J&J therefore gives us no reason to conclude the information contained in the February 2018 disclosures was not new to the market in that it was presented in an intelligible manner for the first time.

The July 12, 2018 disclosure contained new information because (1) although the evidence adduced and arguments made at trial were technically public, the jury's conclusion expressed in the verdict—i.e., that J&J's products caused harm—would have provided new information suggesting the falsity of the alleged misrepresentations Plaintiff identified, and (2) a large jury verdict might provide a new signal to the market about future liability and hence the risks the company faced from the alleged misrepresentations at issue in this suit. *See, e.g.*, *In re Omnicom*, 597 F.3d at 513 (noting that where misrepresentations conceal a "zone of risk," losses within this zone may be "proximately cause[d]" by the misrepresentations).

The December 14, 2018 disclosure provided new, value-relevant information to the market for multiple reasons. First, it reflected a robust synthesis and analysis of thousands of pages of

followed by a stock price decline for which there was no other explanation but the disclosure itself.[12]

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information obtained from a variety of difficult-to-understand sources, including a J&J-hosted document dump and lengthy public trials. *See, e.g.*, *In re Nektar*, 34 F.4th at 839–40 (recognizing that "if the report 'required extensive and tedious research involving the analysis of far-flung bits and pieces of data,' then '[t]he time and effort it took to compile this information make it plausible that the posts provided new information to the market, even though all of the underlying data was publicly available' " (quoting *In re BofI*, 977 F.3d at 797)); *see also Amedisys*, 769 F.3d at 323 & n.3 (news article synthesizing public information may constitute new information where (1) "it is plausible that complex [Medicare] data understandable only through expert analysis may not be readily digestible by the marketplace," (2) the raw data was "difficult to obtain," (3) its analysis required "significant professional expertise," and (4) "various independent analysts [ ] characterized the [article] as 'new news' "). Second, that the report was published by a major news organization and republished by others provides an additional reason to conclude that it provided a new signal to the marketplace. *See Ganino*, 228 F.3d at 167 (noting that the "degree of intensity and credibility" associated with an informational disclosure affects its assimilation by the market (internal quotation marks omitted)); *Energy Transfer LP*, 623 F. Supp. 3d at 500–01.

[12] The September 27, 2017 disclosure was followed by a stock price decline that was not statistically significant. However, the absence of a statistically significant decline after the disclosure is not a barrier to a finding that the press release affected the stock price. *See, e.g.*, *Bing Li v. Aeterna Zentaris, Inc.*, 324 F.R.D. 331, 344–45 (D.N.J. 2018), *aff'd sub nom. Vizirgianakis v. Aeterna Zentaris, Inc.*, 775 F. App'x 51 (3d Cir. 2019) (nonprecedential).

The January 30, February 5, and February 7, 2018 disclosures were followed by statistically significant stock price declines and J&J provided no alternative explanation for such market reactions.

The July 12, 2018 disclosure was also followed by a statistically significant stock price decline for which J&J provided no alternative explanation. That the confidence level with which this

In light of this evidence, the District Court did not clearly err in determining that, for each of the six disclosures, the market reacted negatively to information about J&J's talc-related representations. Because J&J has not offered any other evidence to suggest that its alleged misrepresentations had no price impact, we conclude that J&J has failed to "sever[ ] the link between the alleged misrepresentation and ... the price ... [Plaintiff]" paid for the security, and therefore has failed to rebut the presumption of reliance. *Goldman*, 594 U.S. at 118 (quoting Basic, 485 U.S. at 248). Accordingly, the District Court did not err in concluding that common issues predominate as to the reliance element of Plaintiff's securities fraud claim.

III

For the forgoing reasons, we will affirm.

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drop was statistically significant was slightly below 95% is no barrier to finding that the news impacted the stock price. *See, e.g.*, *id.* (finding that plaintiff's expert's failure to find a post-disclosure price reaction at the 95% confidence level did not preclude court from finding original misrepresentation had a price impact).

The December 14, 2018 disclosure was followed by a nearly 10% stock price drop, which was also statistically significant. *See* A3741-42, A3956. J&J asserts that the post-disclosure stock price movement was due to factors such as reputational damage and increased litigation risk, and that losses caused by such factors are not chargeable to the alleged fraud. *See, e.g.*, A3754, A4781; J&J Br. at 46-50. This argument fails. Revelation of J&J's alleged fraud would foreseeably result in reputational damage and increased legal exposure for the company.

CHUNG, Circuit Judge.

In my view, the District Court erred by failing to make the findings necessary to conclude that J&J failed to rebut the *Basic* presumption of reliance in accordance with the Supreme Court's guidance in *Goldman Sachs Grp. Inc. v. Ark. Teacher Retirement Sys.*, 594 U.S. 113 (2021) and *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Specifically, the District Court did not properly determine whether J&J met its "burden of persuasion to prove a lack of price impact by the preponderance of the evidence," *Goldman*, 594 U.S. at 114, since, for many of the alleged disclosures, the District Court did not assess evidence introduced by J&J showing that the disclosures did not contain newly public information and were not corrective. Because these factual findings were required,[1] but were not made, and because they should not be made in the first instance here, I would vacate and remand to the District Court.

A. *The Alleged Misrepresentations*

Plaintiffs allege that from the 1970s through the 2010s, J&J and its executives made statements, and otherwise worked to maintain a public fiction, that J&J's talc products were safe and asbestos-free. This

[1] *Ark. Teacher Ret. Sys. v. Goldman Sachs Grp., Inc.*, 11 F.4th 138, 143 (2d Cir. 2021) (remanding for the district court to more thoroughly assess the "nature of Goldman's alleged misrepresentations" because such an assessment "raise[s] fact-intensive issues better evaluated by the district court in the first instance"); *Ark. Teacher Ret. Sys. v. Goldman Sachs Grp., Inc.*, 77 F.4th 74, 93–94 (2d Cir. 2023) (the district court's "rel[iance] on [a] subject-matter match to use the back-end price drop as a proxy for front-end inflation" is a "factual finding" that we review for "clear error.").

fiction allegedly allowed J&J's stock to trade at a higher price than it would have had the public known the truth about J&J's talc products. Plaintiffs allege that J&J continued that fiction during the class period by making several misrepresentations that "maintained artificial inflation in the price of J&J securities." App. 413. They further assert that this price inflation was eventually "dissipated through a series of partial disclosures of the relevant truth about J&J's talc." App. 413.

Plaintiffs identify two categories of inflation-maintaining misrepresentations: (1) statements that talc is safe and does not contain asbestos ("safety misrepresentations"), and (2) statements that J&J is committed to investing in research and development to improve its talc products ("R&D misrepresentations"). Only the former category of misrepresentations is at issue here. *See* Oral Arg. Trans. at 41–42 (conceding that the corrective disclosures do not relate to J&J R&D misrepresentations); *In re Williams Sec. litigation-WCG Subclass*, 558 F.3d 1130, 1140 (10th Cir. 2009) ("To be corrective, the disclosure need not precisely mirror the earlier misrepresentation, but it must at least relate back to the misrepresentation and not to some other negative information about the company.").

Some of these safety misrepresentations describe J&J's talc products as non-carcinogenic or asbestos-free based upon alleged compliance with FDA regulations, rigorous testing, and careful selection of the mines from which J&J sources its talc.[2] Other

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[2] For example, one of the purported safety misrepresentations identified by Plaintiffs is a January 7, 2014 statement on J&J's "Our Safety & Care Commitment" website explaining, "[f]ew ingredients have demonstrated the same performance, mildness

safety misrepresentations speak to J&J's belief, in response to ongoing litigation, that its talc products are, and always have been, safe.[3] The first inflation-maintaining safety misrepresentation identified was made on January 7, 2014, while the first R&D misrepresentation was made in February 2013.

B. *Demonstrating and Rebutting Reliance Through Price Impact*

1. *Demonstrating Price Impact Indirectly*

Basic established that:

> [A] plaintiff must make the following showings to demonstrate that the presumption of reliance applies in a given case: (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, 573 U.S. at 268. "The first three prerequisites" of *Basic*'s four-part reliance framework demonstrate "price impact" because they speak to

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and safety profile as cosmetic talc;" "[o]ur talc is carefully selected, processed and tested to ensure that [it] is asbestos free, as confirmed by regular testing conducted since the 1970s;" and "our confidence in using talc is based on a long history of safe use and more than 30 years of research by independent researchers, scientific review boards and global regulatory authorities." App. 305.

[3] In response to lawsuits alleging that J&J's talc products caused mesothelioma and ovarian cancer, J&J and its executives made several public statements defending the safety of its talc. For instance, on February 23, 2016, a J&J spokeswoman asserted, "[w]e sympathize with the plaintiff's family but firmly believe the safety of cosmetic talc is supported by decades of scientific evidence." App. 323 ¶ 295; *see also*, App. 329 ¶ 302, and App. 340 ¶ 315.

"whether the alleged misrepresentations affected the market price in the first place." *Id.* at 278 (quoting *Halliburton I*, 563 U.S. at 814).

Price impact is somewhat more difficult to prove for inflation-maintenance-theory plaintiffs because, as the Supreme Court recognized in *Goldman*, such "[p]laintiffs typically try to prove the amount of inflation indirectly" by: (1) "point[ing] to a negative disclosure about a company and an associated drop in its stock price; [(2)] alleg[ing] that the disclosure corrected an earlier misrepresentation; and then [(3)] claim[ing] that the price drop is equal to the amount of inflation maintained by the earlier misrepresentation."[4] *Goldman*, 594 U.S. at 123 (citations omitted). The amount of such inflation demonstrated by the first two prerequisites is the misrepresentation's "price impact" on a plaintiff's stock purchase price ("original price"). *Id.* at 123 (quoting *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 415 (7th Cir. 2015)) (price impact is "the amount that the stock's price would have fallen 'without the false statement'").

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[4] Importantly, "the question here—whether there is a basis to infer that the back-end price equals front-end inflation—is a different question than loss causation, and, in light of *Goldman*, requires a closer fit (even if not precise) between the front- and back-end statements." *Arkansas Tchr.*, 77 F.4th at 99. Specifically, under *Goldman*, whether a disclosure can be said to have corrected an earlier misrepresentation depends upon, among other things, whether "there is a mismatch between the contents of the misrepresentation and the corrective disclosure." *Goldman*, 594 U.S. at 123. A mismatch can occur where the corrective disclosure is "highly detailed" but the misrepresentation is "more generic," as well as where the disclosure does not "bear[ ] on the same subject" as the misrepresentation. *Arkansas Tchr.*, 77 F.4th at 102.

2. *Rebutting Reliance when Price Impact is Demonstrated by the Goldman-Basic Framework*

Defendants seeking to rebut *Basic*'s presumption of reliance may do so by "severing the link between the alleged misrepresentation" and the original price with evidence showing that the alleged misrepresentation had no price impact. *Id.* at 118 (quoting *Basic*, 485 U.S. at 248), 123. This is because "[i]n the absence of price impact, *Basic*'s fraud-on-the-market theory and presumption of reliance collapse." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 278 (2014) ("*Halliburton II*"). If a misrepresentation's effect was not reflected in the original price, "then there is no grounding for any contention that the investor indirectly relied on that misrepresentation through his reliance on the integrity of the market price." *Id.*

When a plaintiff demonstrates reliance indirectly through the *Goldman* framework, a defendant can show a lack of price impact and rebut the presumption of reliance by showing: (1) that the disclosure has no newly publicly known information with an associated price drop; or (2) that the disclosure does not relate to and correct a prior misrepresentation. Either showing will "sever the link" between a misrepresentation and the original price because it prevents a finding of price impact and, hence, rebuts reliance.

a. *Severing the Link - Correctiveness*

One way defendants can "sever[ ] the link" is by demonstrating that a negative disclosure identified by plaintiffs did not "correct[ ] an earlier misrepresentation." *Goldman*, 594 U.S. at 118, 123. Whether a disclosure corrects an earlier misrepresentation is critical to price impact because correctiveness connects

the disclosure to the earlier misrepresentation, allowing a price drop caused by the disclosure to serve as a proxy for the artificial price inflation caused by the prior misrepresentation. *See id.* at 123; *see also Arkansas Tchr.*, 77 F.4th at 98 ("By expressly and specifically negating the alleged false statement, the truthful substitute for the lie was identified by the corrective disclosure itself."). Without such a connection, however, there is no reason to conclude that the price drop caused by a disclosure reveals anything about the price inflation caused by an earlier misrepresentation. *See In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 611 (7th Cir. 2020) (quoting *Halliburton II*, 573 U.S. at 269); *Arkansas Tchr.*, 77 F.4th at 102; *cf. Goldman*, 594 U.S. at 123 (noting that "back-end price drop" is not equal to "front-end inflation"—and therefore, not indicative of price impact—where "there is a mismatch between the [genericness of the] contents of the misrepresentation and the corrective disclosure"). Therefore, when defendants demonstrate, by a preponderance of the evidence, that a disclosure is not corrective of a prior misrepresentation, they can show a lack of price impact, rebutting *Basic*'s presumption of reliance. *See Halliburton II*, 573 U.S., at [].

b. Severing the Link – No Newly Publicly Known Information

A defendant can also "sever the link between the alleged misrepresentation" and the original price by demonstrating that the information communicated by a disclosure is not new.[5] This is because a "negative

[5] J&J also offered evidence that some of the disclosures had no "associated drops in its stock price" as another way to sever the link. *Goldman*, 594 U.S. at 123. The District Court did make these necessary findings, and I agree with the Majority Opinion that its

disclosure about a company" that exclusively contains *old* information cannot correct the price of an earlier misrepresentation since that earlier-disclosed information has already been incorporated into a company's stock price by the efficiency of the market.[6] *See MacPhee v. MiMedx Grp., Inc*., 73 F.4th 1220, 1243 (11th Cir. 2023) (quoting *FindWhat Inv. Grp. v. FindWhat.com*, 658 F.3d 1282, 1311 n.28 (11th Cir. 2011)) ("[B]ecause a corrective disclosure must reveal a previously concealed truth, it obviously must disclose new information, and cannot be merely confirmatory.").[7] In other words, the drop in price must be associated with the new information in a disclosure.

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findings were not clearly erroneous. Therefore, I do not address that method of rebuttal here.

[6] *See generally* Majority Opinion at 6. *Basic*'s presumption of reliance is rooted in the efficient market hypothesis, namely, that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." 485 U.S. at 246. "As a result, if the securities in question trade on an efficient market, then the market itself provides the causal connection between a misrepresentation and the price of the stock." *In re Allstate*, 966 F.3d at 605.

[7] Several courts, post *Goldman*, have read *Goldman* to require a corrective disclosure to contain *new* information, though non-precedentially. *See In re FibroGen Sec. Litig.*, 2024 WL 1064665, at *12 (N.D. Cal. March 11, 2024); *accord Pardi v. Tricida, Inc.*, No. 21-CV-00076-HSG, 2024 WL 4336627, at *7 (N.D. Cal. Sept. 27, 2024); *In re Qualcomm Inc. Sec. Litig.*, No. 17CV121-JO-MSB, 2023 WL 2583306, at *13 (S.D. Cal. Mar. 20, 2023); *Ferris v. Wynn Resorts Ltd.*, No. 218CV00479APGDJA, 2023 WL 2337364, at *10 (D. Nev. Mar. 1, 2023); *In re Apache Corp. Sec. Litig.*, No. 4:21-CV-00575, 2024 WL 532315, at *10 (S.D. Tex. Feb. 9, 2024); *Ramirez v. Exxon Mobil Corp.*, No. 3:16-CV-03111-K, 2023 WL 5415315, at *14 (N.D. Tex. Aug. 21, 2023).

Plaintiffs here rely on a recognized theory that each disclosure in a series of disclosures can have its own partially corrective effect. *Meyer v. Greene*, 710 F.3d 1189, 1197 (11th Cir. 2013) ("[A] plaintiff need not rely on a single, complete corrective disclosure; rather, it is possible to show that the truth gradually leaked out into the marketplace 'through a series of partial disclosures' ") (quoting *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 261 (5th Cir. 2009)). To the extent that a successive disclosure merely reiterates information from a prior disclosure, however, its associated price drop likewise cannot be a proxy for price impact. *See FindWhat Inv. Grp.*, 658 F.3d at 1311 n.28 (explaining that a corrective disclosure "obviously must disclose new information"); *see also Goldman*, 594 U.S. at 123 (a stock price reaction to a disclosure of information already in the market is not indicative of "the amount of inflation maintained by the earlier misrepresentation.").

A disclosure is not "new" to the market until it is publicly known. *Basic* requires that the alleged misrepresentation be "publicly known" to be incorporated into a stock's purchase price by an efficient market. *Halliburton II*, 573 U.S. at 268. It follows that a corresponding negative disclosure must also be "publicly known" for an efficient market to adjust a stock's price in response. *See Schleicher v. Wendt*, 618 F.3d 679, 682, 685 (7th Cir. 2010) (in an efficient market, "[w]hen someone makes a false (or true) statement that adds to the supply of available information, that news passes to each investor *through the price of the stock*" because "if information were there, sophisticated traders would use it, [and] prices would adjust" (emphasis added)). This requires that the information disclosed be more than merely publicly *accessible. See*, *e.g.*, *Pub. Emps. Ret. Sys. of*

Mississippi, Puerto Rico Tchrs. Ret. Sys. v. Amedisys, Inc., 769 F.3d 313, 318 (5th Cir. 2014) (detailed expert analysis of three years' worth of previously publicly accessible Medicare data published in Wall Street Journal was, itself, new and corrective). Where a defendant offers evidence that information was accessible, but does not offer evidence that this accessibility led to it being publicly known and thus incorporated into a stock's price by an efficient market, that evidence is insufficient to rebut the presumption of reliance.[8]

In short, a defendant can sever the link reflected by price impact if the defendant demonstrates that a disclosure contains newly publicly known information associated with a price drop.

C. *J&J's Attempt to Rebut the Presumption Was not Adequately Analyzed*

1. *Findings Missing from the District Court and Majority Opinions*

J&J attempted to rebut the presumption of reliance through the two methods described above: (1) arguing that the disclosures were not new,[9] and (2) arguing

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[8] The Majority Opinion states that it "need not decide whether ... a disclosure must be new" because some forms of old information can still be corrective, such as "a re-publication that more potently conveys information" or an expert analysis of previously publicly accessible information. Opinion at 8. I believe these examples speak more to situations where information may not be publicly known. *Halliburton II*, 573 U.S. at 277–278 (under *Basic*, information that is not "publicly known" cannot affect the stock's market price). I disagree with the Majority Opinion that recognition that a disclosure must be publicly known means that disclosures might not have to be new. Instead, I would say that a disclosure is not "new" to the market until it is publicly known.

[9] As noted above, J&J also offered evidence that some of the disclosures had no "associated drops" in price as another way to

that the disclosures were not corrective of prior misrepresentations. The District Court largely declined to address either argument squarely and, in fact, repeatedly stated that it would not consider whether J&J's evidence demonstrated that disclosures were not corrective nor resolve whether the disclosures were new.[10]

In explicitly declining to address correctiveness, the District Court relied on the Northern District of Texas's opinion in *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, 261–62 (N.D. Tex. 2015). In that opinion, applying *Halliburton II* on remand, the Northern District of Texas noted that correctiveness largely overlapped with "the merits of

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sever the link, and I agree with the Majority Opinion that the District Court's findings were not clearly erroneous.

[10] *See*, *e.g.*, App. 67 (explaining, for the February 5 and February 7, 2018 disclosures, that "the Court need not determine whether the disclosures are corrective at this stage"); App. 68 (holding, for the July 12, 2018 *Ingham* verdict, "[t]hough the parties dispute whether the verdict constitutes a corrective disclosure, the Court declines to resolve that dispute on this motion for class certification."); App. 65–66 (holding, for the January 30, 2018 disclosure, that "[n]otwithstanding the parties' dispute over" whether specific information in the disclosure was new, "the Court nevertheless concludes that Defendants cannot show that the [disclosure] had no impact to J&J stock price" because "[h]ere the analysis turns on whether Defendants can 'sever the link' between the statement and the stock price by a preponderance of the evidence and not how [new] the information was" in a disclosure); App. 67 (noting Defendants' position that the July 12, 2018 verdict contained no new information, and Plaintiff's argument that "the *Ingham* verdict was the first trial containing allegations that the asbestos in talc caused ovarian cancer," and then declining to weigh in and instead holding, "[t]he Court is not persuaded that the verdict had no impact at all on the stock price.").

the allegations" and concluded that it could not consider the issue at the class certification stage due to the Supreme Court's statements in *Amgen and Halliburton II*. 309 F.R.D. at 261–62. But in *Goldman*, the Supreme Court instructed that, even when a class certification question "overlaps with" a merits issue, a court may still address the question so long as the court confines itself to resolving only what is necessary to determine whether Rule 23 is satisfied. 594 U.S. 122, n. 2.[11] There, the Supreme Court remanded specifically for consideration of the "overlap[ping]" issue of correctiveness. *Id.* at 123–24. Accordingly, "[f]ollowing *Goldman*," courts are now considering questions related to correctiveness at the class certification stage. *Ark. Tchr.*, 77 F.4th at 81.[12] *See supra* note 7.

For all six disclosures, the District Court held that J&J had failed to rebut *Basic*'s presumption of reliance because (1) Plaintiffs had identified a drop in J&J's

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[11] Quoting *Allstate*, 966 F.3d at 608 (recognizing that "materiality and price impact are overlapping concepts" but noting, "a district court may not use the overlap to refuse to consider the evidence" and "the district court must use the evidence to decide the price impact issue, while resisting the temptation to draw what may be obvious inferences for the closely related issues that must be left for the merits, including materiality.")

[12] *Basic*'s second prerequisite, materiality, is an element of securities fraud and is not properly considered at the class certification stage. *Halliburton I*, 563 U.S. at 810. In contrast, correctiveness is not a merits question. Considering correctiveness, though, will likely require a district court to analyze evidence that is highly relevant to, and overlaps with evidence of, materiality. *Ark. Tchr.*, 77 F.4th at 81 (noting that correctiveness evidence "is often also highly relevant to the closely related merits question of whether the misrepresentation would have been material to a shareholder's investment calculus—which, under other Supreme Court guidance, a court may not resolve at class certification.").

stock price after the publication of each disclosure, and (2) J&J provided no evidence showing that the publication of the disclosures had not caused J&J's stock price to drop.[13] The Majority Opinion adopts this reasoning and states that each disclosure "could have communicated new, value-relevant" information to investors and "was followed by a stock price decline for which there was no other explanation but the disclosure itself." Opinion at 10–11. These are essentially findings that each disclosure had "an associated price drop."

But finding that a disclosure had an associated price drop is not conclusive as to either method of rebuttal because, even where a price drop is associated with a disclosure, the disclosure must still be new and corrective to create an inference of a misrepresentation's price impact. This means that to find price impact, or the lack thereof, the District Court must still address both the newness *and* the correctiveness of the disclosure.

The District Court made no correctiveness findings and only made newness findings as to two disclo-

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[13] The District Court found that Defendants failed to "sever the link" because they "ha[d] not identified another explanation for the price decline." App. 65 (regarding September 27, 2017 disclosure); *see also* App. 67 (same, regarding February 5 and 7 disclosures); App. 68 (noting price drop following the July 12, 2018 disclosure and stating that the disclosure "does not preclude a finding that the announcement of the verdict itself would not affect J&J's stock price"); App. 68–69 (holding, for the December 14, 2018 disclosure, that "Defendants' various arguments as to why the disclosure does not contain any new information may make it less likely that the disclosure impacted the stock price, but the Court finds that it does not suffice to rebut the presumption of price impact by a preponderance of the evidence.").

sures.[14] Absent such findings, it is impossible to determine whether the District Court clearly erred in concluding that J&J failed to show that the disclosures had "price impact," and thus failed to rebut *Basic*'s presumption of reliance.

Take as an example the July 12, 2018 *Ingham* verdict. J&J tried to rebut the presumption of reliance by offering evidence that the disclosure was neither new nor corrective. As to newness, J&J argued that all of the asbestos and cancer information reflected by the verdict was old, having already been published in news coverage of the trial, and that the only new information released into the market on July 12, 2018 was the verdict itself. As to correctiveness, J&J asserted that the verdict itself was not corrective of any prior misrepresentation because it merely "conveyed ... that the jury accepted the plaintiffs' theory of the case." App. 1071. In contrast, Plaintiffs asserted that the disclosure was new and corrective as it "constitute[d] new fraud-related information" because the "verdict was the first jury trial where the personally injured plaintiffs alleged that asbestos in J&J's talc, rather than the talc itself, caused their ovarian cancer" App. 3921, and countered that trial coverage did not fully disclose the evidence of this at trial. The District Court expressly declined to resolve either newness or

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[14] *See supra* note 11 (noting the District Court's failure to assess correctiveness as to the February 5 and February 7, 2018 disclosures, and July 12, 2018 disclosures); *see also* App. 62 (declining to address whether the September 27, 2017 press release stating that "thousands of ovarian cancer plaintiffs planned to include asbestos allegations in their cases against J&J" was corrective of alleged J&J misrepresentations that talc was safe and asbestos free); App. 69 (same for December 14, 2018 *Reuters* article's analysis); App. 66 (same for the January 30, 2018 Law360 article's reference to a 1975 report).

correctiveness and instead found J&J did not meet its burden because it was "not persuaded that the verdict had no impact at all on the stock price." App. 68.

That is just a finding of an associated price drop, though, and does not answer the question of whether J&J rebutted a presumption of reliance because it does not address whether newly publicly known information in the disclosure related to and corrected a prior misrepresentation. If the District Court were to find that there was no new information conveyed by the verdict about asbestos and cancer, then the price reaction it noted would only be associated with the verdict itself. It would follow then that the verdict's associated price drop could only be a proxy for price impact if the verdict related to and were corrective of alleged safety misrepresentations. Therefore, if the District Court were to similarly find that the verdict did not correct any safety misrepresentation but rather corrected, for instance, the market's estimate of J&J's litigation costs based on prior verdicts,[15] then the price drop would reflect no information about any safety misrepresentation's price impact.

Despite the fact that the District Court declined to resolve whether the *Ingham* verdict made information newly publicly known, the Majority Opinion does. It finds that, "although the evidence adduced and arguments made at trial were technically public, the jury's conclusion expressed in the verdict, *i.e.*, that J&J's products caused harm - would have provided new information." Opinion at 11, n. 11. That might not be clearly erroneous had the District Court made that

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[15] *See*, *e.g.*, App. 258 (FAC citing August 2017 verdict of $417 million in talc ovarian cancer), App. 266 (FAC citing said verdict was "thrown out").

finding, but it did not. And coming to that conclusion in the first instance would seem to require analysis of record evidence like whether trial coverage disclosed that "J&J's products caused harm" - analysis that I believe is better conducted by the District Court.[16]

2. *Why Further Findings are Necessary Even if the District Court Did not Clearly Err in Analyzing the December 14 Disclosure*

Out of the six disclosures identified, the December 14, 2018 disclosure offered the most fulsome discussion of J&J's safety misrepresentations, and I agree with the Majority Opinion that the District Court did not err in concluding that it offered new information.[17] Even if I were to ignore the fact that there was no correctiveness analysis and agree with the Majority Opinion that there was price impact, that would not

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[16] The Majority Opinion leaves unresolved other factual questions that are necessary for evaluating J&J's attempt to rebut price impact. *See e.g.*, App. 66 (as to January 30, 2018 disclosure, District Court declining to resolve party dispute regarding newness because its finding of price reaction did not "turn[ ] on ... how public or widely disseminated the information was"); Opinion at 10, 10 n. 11 (disclosure "could have communicated new, value-relevant information to investors" because "what happened in one particular courtroom may not have become simultaneously known in the marketplace.").

[17] I am skeptical of J&J's argument that some of the corrective disclosures contained in the article are not "new" because they were based on sources that were publicly accessible. Op. Br. 3 (citing App. 5087). It is true that these sources were publicly accessible; however, they were buried in document dumps hosted on hard-to-navigate websites, *see*, *e.g.* asbestosandtalc.com; factsabouttalc.com. J&J did not offer evidence that, simply by being accessible on the websites prior to Plaintiffs' disclosures, the relatively few relevant documents buried therein were "publicly known."

provide grounds for affirmance of the District Court's order. As Plaintiffs conceded at oral argument, even if we conclude that the December 14, 2018 disclosure (the last disclosure identified by Plaintiffs) demonstrated price impact, we (and the District Court) must still assess the other, earlier disclosures to determine the applicable class period. This is because the corrective effect of these previous disclosures is unknown. As an example, assume that the January 30, 2018 disclosure newly corrected all prior safety misrepresentations. The FAC alleges this disclosure was followed by multiple new safety misrepresentations, the earliest of which occurred on February 5, 2018. *See* App. 364. If all subsequent misrepresentations went uncorrected until December 14, 2018, then the class would run from January 7, 2014[18] until January 30, 2018, and from February 5, 2018 until December 14, 2018. However, if the new misrepresentation on February 5, 2018, was corrected by a disclosure on February 7, 2018 (both of which are alleged in the FAC),[19] then that would result in a two-day class

[18] This highlights the problem with the District Court's opinion. Despite the fact that the first safety misrepresentation was not alleged to have been made until January 7, 2014, the District Court certified a class period beginning on February 22, 2013, a day on which an R&D misrepresentation was alleged to have been made. As noted above, Plaintiffs conceded that no corrective disclosure related to an R&D misrepresentation. *See* Oral Arg. Trans. at 41–42.

[19] The need for District Court findings is particularly salient here as part of the February 5, 2018 safety misrepresentation, is nearly identical to part of the content of a September 14, 2017 safety misrepresentation, and the rest *is identical* to a September 21, 2017 safety misrepresentation. If the September 2017 misrepresentations had already been corrected on January 31, 2018, did reasserting them on February 5, 2018 wholly cancel any corrective effect? *Compare MacPhee*, 73 F.4th at 1242 (sub-

period in February, followed by a new class period starting on April 12, 2018, the date of the next safety misrepresentation alleged in the FAC.

D. *Conclusion*

As the Supreme Court explained in *Goldman*, "a court has an obligation before certifying a class to 'determine that Rule 23 is satisfied, even when that requires inquiry into the merits.'" 594 U.S. at 122 (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013)). Here, the District Court's decision granting class certification did not make necessary findings as to whether J&J's evidence demonstrated that each disclosure was not corrective or newly publicly known. For that reason, I would vacate and remand so that the District Court can properly conduct a "searching" price impact analysis as to all of the purported corrective disclosures. *Arkansas Tchr.*, 77 F.4th at 102.

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sequent corrective disclosure corrects subsequent *new* misrepresentation). And if there was both a misrepresentation *and* a corrective disclosure on February 5, 2018, as the FAC alleges, and as the Majority Opinion finds, what part of the February 5, 2018 misrepresentation had not been corrected such that it was further corrected on February 7, 2018? That is the date of another corrective disclosure asserted by the FAC, and found by the Majority Opinion. Finally, as some of these misrepresentations are J&J's public statements regarding its litigation position, is J&J foreclosed from ever restating its position publicly when it is taking that position in pending or future cases?

APPENDIX B

UNITED STATES DISTRICT COURT,
D. NEW JERSEY

Civil Action No. 18-1833 (ZNQ) (TJB)

FRANK HALL, individually and
on behalf of all others similarly situated,

Plaintiff,

v.

JOHNSON & JOHNSON, *et al*.,

Defendants.

Signed December 28, 2023

Filed December 29, 2023

OPINION

QURAISHI, District Judge

THIS MATTER comes before the Court upon a Motion for Class Certification pursuant to Federal Rule of Civil Procedure 23 filed by Plaintiff, (ECF No. 180), and two Motions to Supplement the Class Certification Record filed by Defendants. (ECF Nos. 189, 192.)

This class action concerns allegations of securities fraud. Lead Plaintiff San Diego County Employees Retirement Association's ("Plaintiff") asserts that Defendant Johnson & Johnson ("J&J" or the "Company"), and several of its key officers and/or employees, including Alex Gorsky ("Gorsky"), Carol

Goodrich ("Goodrich"), Joan Casalvieri ("Casalvieri"), and Tara Glasgow ("Glasgow") (collectively with J&J, "Defendants") engaged in fraud under Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq*. (Am. Compl., ECF No. 33.) Plaintiff alleges that Defendants fraudulently inflated the value of J&J's stock by issuing false and misleading statements as part of a long-running scheme to conceal the truth from investors that the Company's talc products were contaminated with asbestos, and that Plaintiff and other investors relied on these material misrepresentations and omissions to their detriment.

The Court has carefully considered the parties' submissions and decides the Motions without oral argument pursuant to Federal Rule of Civil Procedure 78 and Local Civil Rule 78.1. For the reasons set forth below, Defendants' Motions to Supplement the Class Certification Record related to the alleged corrective disclosures on December 14, 2018; February 5, 2018; and February 7, 2018 (ECF Nos. 189, 192) will be **GRANTED**. Plaintiff's Motion for Class Certification (ECF No. 180) will be **GRANTED**.

I. BACKGROUND AND PROCEDURAL HISTORY

As the parties are familiar with this matter, the Court does not provide a detailed factual recitation. Instead, the Court includes certain relevant facts from its prior Opinion dated December 27, 2019 ("Prior Opinion") and discusses any additional facts in the analysis section below.

A. FACTUAL BACKGROUND

J&J is a multinational company engaged in research and development, manufacturing, and sale

of a broad range of healthcare products. (Am. Compl. ¶ 20.) J&J has three business segments: pharmaceutical, medical device, and consumer. (*Id.*) The products produced by the consumer segment include Baby Powder ("Baby Powder") and "Shower-to-Shower" ("Shower-to-Shower") (collectively, the "Talc Products"), which are both made from cosmetic talc. (*Id.* ¶¶ 48, 49.) Each of the individual defendants, on the other hand, is, or was, a senior J&J executive and, along with other personnel, allegedly helped perpetuate the Company's fraudulent scheme over its investors.

Put simply, Plaintiff alleges that Defendants concealed the truth about the asbestos in its Talc Products through a highly organized campaign of deceit and regulatory manipulation. According to Plaintiff, Baby Powder "stands out as a symbol of J&J's history and legacy" and has been described by the Company's executives as "an institution," "flagship product," and "sacred cow." (*Id.* ¶¶ 43, 47.) Plaintiff contends that the Talc Products "are contaminated with cancer-causing asbestos." (*Id.* ¶ 1.) Cosmetic talc is a naturally occurring mineral that is mined from rock and then ground into powder form. (*Id.* ¶ 49.) Talc can be naturally contaminated with different types of asbestos, such as chrysotile, tremolite, actinolite, anthophyllite, amosite, and crocidolite minerals, that develop as bundles of long, thin fibers that are flexible and easily separable, rather than as solid rock. (*Id.* ¶ 50.) Tremolite, actinolite, and anthophyllite minerals can also develop naturally as larger rocks, i.e., "non-asbestiform." (*Id.* ¶ 50 n.6.) The parties dispute the health risks, if any, posed by those minerals in their non-asbestos form, however, they agree that asbestos fibers can cause fatal cancers. (*Id.* ¶ 50 n.6; *see* ECF

No. 44-1, Memorandum of Law in Support of Defendants' Motion to Dismiss First Amended Class Action Complaint, at 5.)

According to Plaintiff, in the 1970s, concerns about the safety of talc-based products and the potential for asbestos contamination began to surface, and as a result, J&J allegedly initiated a concerted effort to convince the public that talc was safe. (*Id.* ¶ 51.) Similarly, after public health researchers in the 1980's started to consider a potential association between talc powder usage and ovarian cancer, the Company's alleged scheme turned to quelling those concerns. (*Id.* ¶ 74.) To that end, the Company allegedly "lied to the public, influenced regulators, and purposely avoided testing methods that could detect the trace amounts of asbestos that the Company knew were present," (*id.* ¶ 51), and sought to preclude health organizations such as the National Toxicology Program ("NTP") and the World Health Organization ("WHO") from listing talc as a carcinogen, *id.* ¶¶ 82–84, 100–02.

Plaintiff alleges that J&J went to extreme lengths to defend its products, including updating the Company's website to address the safety of the Talc Products, and seeking to conceal negative data from the FDA. (*Id.* ¶¶ 227, 288, 299.) Plaintiff alleges that while the Company was engaged in its offensive tactics to conceal negative data regarding its talc from the public, J&J was repeatedly informed of, and internally discussed, the asbestos contamination in its Talc Products.

In 2013, J&J began facing lawsuits alleging a connection between ovarian cancer and talc, and that asbestos in its talc powder caused cancer. (*Id.* ¶¶ 120, 179–86, 192–201, 204, 213–22.) Plaintiff alleges that,

shortly thereafter, the Company began issuing numerous false and misleading statements—a continuation of its decade's long scheme—which form the basis of Plaintiff's instant claims. Plaintiff further alleges that the various misstatements made during the Class Period were aimed at preserving the public trust and precluding the discovery of the Company's longstanding misinformation campaign.

Despite the Company's efforts, throughout 2017 and 2018, it is alleged that the truth regarding asbestos in the Talc Products was slowly disclosed, and the Company's stock price began to decline. (*Id.* ¶¶ 184–237.) On September 21, 2017, a law firm issued a press release (the "Bernstein Release"), entitled "Talcum Powder Lawsuit Plaintiffs Claim Unsealed Documents Show Johnson & Johnson Knew of Talc-Asbestos Danger in 1970s, Bernstein Liebhard LLP Reports." (*Id.* ¶ 184.) The press release indicated that plaintiffs in the ovarian cancer lawsuits were looking to add asbestos allegations to their ovarian cancer claims. (*Id.*) In response to the news, J&J's stock price declined from a close of $130.94 on September 26, 2017, to a close of $129.75 on September 27, 2017, and an event study allegedly "determined that [the decline] was statistically significant" and "cannot be attributed to market and sector factors, or to random volatility, but rather was caused by new company-specific information." (*Id.* ¶ 185, 185 n.21.)

On January 30, 2018, testimony began in a New Jersey state court case (the "*Lanzo* Case" or "*Lanzo* trial") where the plaintiff, Stephen Lanzo, alleged that he developed mesothelioma as a result of exposure to J&J Baby Powder containing asbestos. In that connection, a Law360 article reported on product

liability plaintiffs' opening statements in the *Lanzo* trial that "asserted that Johnson & Johnson [was] aware that talc contained asbestos in the 1970s," and referenced a 1975 report that allegedly stated asbestos was found in J&J talc. (*Id.* ¶ 192.) In response, J&J's stock dropped 3% from a close of $142.43 on January 30, 2018, to a close of $138.19 on January 31, 2018. (*Id.* ¶ 193.) An event study allegedly determined that the decline was statistically significant. (*Id.*)

On February 5, 2018, Mesothelioma.net published an article anticipating use of "damaging internal company documents" during the *Lanzo* trial. (*Id.* 194.) Plaintiff alleges that following the publication of that article, the value of Company's stock declined over 5%, from a close of $137.68 on February 2, 2018, to a close of $130.39 on February 5, 2018, the following trading day, which an event study determined to be statistically significant. (*Id.* ¶ 195.)

On July 12, 2018, a jury in a Missouri product liability lawsuit (the *Ingham* case), the first trial where plaintiffs alleged that their ovarian cancer was caused by asbestos in the Talc Products, rather than talc itself, issued a $4.69 billion verdict in favor of the plaintiffs. (*Id.* ¶ 213.) Following the jury verdict, the Company's stock price declined 1%, which an event study determined to be statistically significant. (*Id.* ¶ 214.) Market commenters and financial analysists also contributed the decline to the jury verdict. (*Id.* ¶¶ 215–18.)

On December 14, 2018, Reuters published a highly detailed investigative report (the "Reuters article") entitled, "Powder Keg: Johnson & Johnson knew for decades that asbestos lurked in its Baby Powder." (*Id.* ¶ 223.) The article purportedly provided new

information regarding the Company's knowledge of asbestos contamination in the Talc Products, the Company's alleged offensive campaign to convince regulators that talc was not a carcinogen, the Company's unsuccessful efforts to remove asbestos from its talc, and its failure to use "essential" testing methods. (*Id.* ¶¶ 223–43.) Furthermore, the article allegedly included never-before-seen internal J&J documents that detailed the Company's knowledge of asbestos in the Talc Products and documented J&J's longstanding fraudulent cover-up scheme. (*Id.* ¶ 223.)

Following the publication of the Reuters article, J&J's stock price plummeted 10% from a closing price of $147.78 the prior day to a closing price of $133. (*Id.* ¶ 233.) An event study determined that the decline "was statistically significant." (*Id.*)

B. PROCEDURAL HISTORY

On February 8, 2019, plaintiff Frank Hall filed a putative class action complaint on behalf of all investors that purchased J&J securities between February 22, 2013 and February 7, 2018, alleging violations of Section 10(b) of the Securities Act of 1934 and Rule 10(b)(5) (Count 1) by all Defendants, and violations of Section 20(a) of the 1934 Act by defendants J&J, Gorsky, and Caruso (Count 2). (*See* ECF No. 1.) On February 28, 2019, the Court appointed San Diego County Employees Retirement Association as Lead Plaintiff. (*See* ECF No. 20.) An Amended Complaint was filed on February 28, 2019. (*See* ECF No. 33.) The new pleadings added Sandra Peterson, Carol Goodrich, Joan Casalvieri, Michael Sneed, and Tara Glasgow as defendants, and also extended the Class Period through December 2018. (*Id.*)

Subsequently, Defendants filed a motion to dismiss, arguing that Plaintiff had failed to state a claim under the applicable securities laws because: (1) the allegedly "new" information about the existence of asbestos in J&J's talc was immaterial; (2) alleged misrepresentations and omissions were either true or a non-actionable opinion; (3) Plaintiff had failed to allege a strong inference of scienter; (4) Plaintiff had not sufficiently alleged loss causation; and (5) Plaintiff's claims based on events occurring after February 7, 2018, (the end of the class period proposed in the initial Complaint) were not viable.

On December 27, 2019, this Court granted in part and denied in part Defendants' motion to dismiss the Amended Complaint. (*See* ECF No. 49.) Specifically, the Court found that Plaintiff's Section 10(b) and Rule 10b–5 claims are limited to those stemming from Defendants' statements regarding the safety of its talc products, the "asbestos-free" nature of its talc, and the Company's commitment to product safety, quality assurance, and research, and Plaintiff's claims based upon Defendants' alleged misstatements about the viability of the Product Liability lawsuits are dismissed. (*Id.*) Furthermore, because Plaintiff had not adequately alleged facts suggesting a strong inference of scienter as to defendants Caruso, Peterson, and Sneed, the Court dismissed those defendants from the lawsuit. (*Id.*)

On May 25, 2023, Plaintiff filed the instant Motion for Class Certification (*see* Pl.'s Mov. Br., ECF No. 180-1), which Defendants opposed. (*See* Defs.' Opp., ECF No. 181.) The parties also filed several sur-replies and supplemental submissions which the Court considers.

On May 26, 2023, Defendants filed two Motions to Supplement the Class Certification Record. (ECF Nos. 189, 192.) Plaintiff opposed both motions. (ECF Nos. 190, 197.)

II. LEGAL STANDARD

Federal Rule of Civil Procedure 23 governs class actions. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 590 (3d Cir. 2012). "[E]very putative class action must satisfy the four requirements of Rule 23(a) and the requirements of either Rule 23(b)(1), (2), or (3)." *Id.* at 590 (citing Fed. R. Civ. P. 23(a)-(b)). Plaintiff first bears the burden of showing that the proposed class satisfies the four requirements of Rule 23(a):

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). These four prongs are often referred to as numerosity, commonality, typicality, and adequacy. *See, e.g.*, *Erie Ins. Exch. v. Erie Indem. Co.*, 722 F.3d 154, 165 (3d Cir. 2013).

Plaintiff must also show that proposed class satisfies Rule 23(b)(1), (b)(2), or (b)(3). *Marcus*, 687 F.3d at 590. Here, Plaintiff argues that the putative class meets the requirements of Rule 23(b)(3). Under Rule 23(b)(3), a plaintiff must show the following:

> [Q]uestions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

Pursuant to Rule 23(c)(1)(A), a court "must determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A). The decision to certify a class or classes is left to the discretion of the court. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008), *as amended* (Jan. 16, 2009). "[T]he requirements set out in Rule 23 are not mere pleading rules." *Marcus*, 687 F.3d at 591 (alteration in original) (quoting *Hydrogen Peroxide*, 552 F.3d at 316). "The party seeking certification bears the burden of establishing each element of Rule 23 by a preponderance of the evidence." *Id.* "A party's assurance to the court that it intends or plans to meet the requirements is insufficient." *Hydrogen Peroxide*, 552 F.3d at 318.

The Third Circuit emphasizes that " '[a]ctual, not presumed[,] conformance' with Rule 23 requirements is essential." *Marcus*, 687 F.3d at 591 (alterations in

original) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167 (3d Cir. 2001)). "To determine whether there is actual conformance with Rule 23, a district court must conduct a 'rigorous analysis' of the evidence and arguments put forth." *Id.* (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). This "rigorous analysis" requires a district court to "resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits – including disputes touching on elements of the cause of action." *Id.* (quoting *Hydrogen Peroxide*, 552 F.3d at 307, 316). Therefore, a district court "may 'delve beyond the pleadings to determine whether the requirements for class certification are satisfied.' " *Hydrogen Peroxide*, 552 F.3d at 320 (quoting *Newton*, 259 F.3d at 167).

III. DISCUSSION

A. SCOPE OF THE MOTION FOR CLASS CERTIFICATION

At the outset, the Court must address the scope of Plaintiff's Motion for Class Certification, including whether to consider supplemental evidence related to the alleged corrective disclosures on February 5, 2018; February 7, 2018; and December 14, 2018.

1. First Motion to Supplement the Record

On May 26, 2023, Defendants filed a Motion to Supplement the Class Certification Record ("First Motion to Supplement"), which purportedly confirms that the December 14, 2018, Reuters article did not contain any new allegedly corrective information, and therefore, could not have impacted J&J's stock price. ("Defs.' First Motion to Supp. Mov. Br.", ECF No. 189.) Specifically, Defendants submit the Declaration

of Mark Lanier (the "Lanier Declaration"). (*Id.*) Lanier was the lead trial lawyer for the twenty-two plaintiffs in the *Ingham* product liability case tried in St. Louis, Missouri in June and July 2018, and according to Defendants, the Reuters article "discussed that case extensively, quoted Lanier, and attributed photos to him." (*Id.* at 1.) Lanier certifies that he was a "primary source" for the Reuters article, that he provided the article's author "with information and documents regarding the talcum powder products and related litigation," and that "[e]verything that [he] provided to [the author] was publicly available" prior to the article's publication. (*Id.* at 1–2.) According to Defendants, the Lanier Declaration "powerfully corroborates Defendants' proof that the Reuters article contained no *new* allegedly corrective information," because "as the lead trial lawyer in *Ingham* and a 'primary source' of the article, Lanier is uniquely positioned to verify that 'all the information and documents referenced in the Reuters article' had been previously publicly available, and that the article merely rehashed the product liability plaintiffs' arguments." (*Id.* at 2.)

Because Plaintiff, in response, does not challenge the Court's ability to consider this supplemental evidence when deciding the Motion to Certify the Class,[1] the Court grants Defendants' First Motion to Supplement. ("Pl.'s Opp. to First Motion to Supp.", ECF No. 190.) Plaintiff emphasizes only that if this "desperate" evidence is considered, Defendants'

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[1] The Court notes that while Plaintiff does challenge the timeliness of the Lanier Declaration in a footnote, the bulk of its argument is related to whether Lanier's testimony defeats certification with respect to the December 14, 2018 alleged corrective disclosure.

argument that the December 14, 2018, Reuters article contained no "new" corrective information, still falls short. (*Id.* at 1.) For example, Plaintiff highlights that Lanier acknowledges he does not have any "personal information" regarding "additional source interviews or documents" provided to Reuters in connection with the article, does not address the testimony of Professor Steven P. Feinstein, Ph.D., CFA, that the Reuters article revealed new and corrective information and caused the statistically significant price decline on December 14, 2018; does not address the admission by Defendants' own expert that the Reuters article revealed new information to the market; and fails to dispute evidence of price impact provided by J&J's statistically significant stock price decline following the Reuters article's publication. (*Id.* at 1, 8.) In short, because Plaintiff has not provided any basis for the Court to ignore this new evidence, Defendants' First Motion to Supplement is granted. That said, however, the Court will consider Plaintiff's substantive arguments challenging the Lanier Declaration when it evaluates the December 14, 2018, alleged corrective disclosure in connection with Plaintiff's Motion to Certify the Class.

2. Second Motion to Supplement the Record

Defendants' opposition to Plaintiff's Motion for Class Certification did not challenge the certification of claims related to the alleged corrective disclosures on February 5, 2018, and February 7, 2018. (Defs.' Opp. at 4.) While Defendants' opposition made it clear that they disputed the merits of those claims and alleged corrective disclosures, they only challenged the certification of claims related to the four corrective disclosures added by Plaintiff when it

amended the Complaint on February 28, 2019. (*Id.*) Those four corrective disclosures include those issued: September 27, 2017; January 30, 2018; July 12, 2018; and December 14, 2018. On May 26, 2023, however, Defendants filed a Motion to Supplement the Class Certification Record ("Second Motion to Supplement"). ("Defs.' Second Motion to Supp. Mov. Br.", ECF No. 192.) In this motion, Defendants ask the Court to consider "recently obtained evidence proving that Plaintiff's alleged corrective disclosures on February 5, 2018, and February 7, 2018, did not contain any new allegedly corrective information." (*Id.* at 1.)

Specifically, Defendants submit the Declaration of Terri Oppenheimer (the "Oppenheimer Declaration") in connection with the February 5, 2018, alleged corrective disclosure and the Ted G. Meadows, Esq. Declaration (the "Meadows Declaration") in connection with the February 7, 2018, alleged corrective disclosure. (*See* Ex. A to Second Motion to Supplement ("Oppenheimer Decl.") and Ex. B to Second Motion to Supplement ("Meadows Decl.").) Oppenheimer was the head writer of the Mesothelioma.net blog, and she wrote the February 5, 2018, blog post titled "Johnson & Johnson Mesothelioma Trial Likely to Expose Company Documents." (Oppenheimer Decl., ¶¶ 1, 4.) The Mesothelioma.net blog post is one of Plaintiff's alleged corrective disclosures, and it contends that the post publicly disclosed new information that revealed some or all of the "truth" that Defendants had allegedly concealed, and as a result impacted J&J's stock price. In her declaration, however, Oppenheimer certifies that the blog post "describe[d] the then-ongoing trial in *Lanzo v. Cyprus Amex Minerals Co. et al.*" against J&J, and that "the blog post was based entirely on public information

gleaned from conducting internet searches." (*Id.* ¶¶ 4–5.) As for Meadows, he is a principal at the law firm of Beasley, Allen, Crow, Methvin, Portis, and Miles, P.C. ("Beasley Allen"), and has represented plaintiffs in product liability litigation against Johnson & Johnson Consumer Inc. and Johnson & Johnson regarding talcum powder products, including Johnson's Baby Powder. (Meadows Decl. ¶ 1.) On February 7, 2018, Beasley Allen published a press release about the talcum powder product liability litigation, which included quotes attributed to Meadows. The Beasley Allen press release serves as one of Plaintiff's alleged corrective disclosures, because it contends that the release disclosed new information about Defendant's purported fraud that impacted J&J's stock price. According to Meadows, however, "[n]one of the statements in the Beasley Allen press release reflected, or were based on, any documents or information that were not publicly available before the publication of the press release, whether from having been used in public trials, on J&J's own website, or in other public forms." (*Id.* at ¶ 3.)

Unlike with the First Motion to Supplement, however, Plaintiff disputes the Court's basis to consider this evidence. Plaintiff argues that "Defendants have not even attempted to show excusable neglect or good cause for supplementing the record with arguments that could have been made and declarations that could have been obtained easily within the Court's ordered deadlines." ("Pl.'s Opp. to Second Motion to Supp.", ECF No. 197 at 3.) According to Plaintiff, Defendants filed the Second Motion to Supplement over one year after the Scheduling Orders' deadlines for class certification, and therefore, Defendants must show good cause and excusable neglect under

Rule 6(b)(1)(B). (*Id.* at 2.) Plaintiff highlights that pursuant to the Magistrate Judge's scheduling orders in this case, Defendants' opposition to Plaintiff's Motion for Class Certification was originally served on December 11, 2020. As such, Defendants were aware of the facts, arguments, and witnesses for nearly two years, and yet, they failed to supplement the record with the evidence from Oppenheimer and Meadows until December 22, 2021. Indeed, Plaintiff emphasizes that even Defendants' opposition did not challenge the February 5 and February 7, 2018, alleged corrective disclosures.

Here, while the Court is sympathetic to Plaintiff's argument of timeliness, it also cannot overlook its ability to accept new evidence, nor can it disregard the potential relevancy of the Oppenheimer and Meadows Declarations. First, it is generally accepted that new evidence relevant to class certification can be considered any time prior to final judgment. Indeed, Rule 23(c)(1)(C) states that "[a]n order that grants or denies class certification may be altered or amended *before final judgment.*" (Emphasis added). As such, courts have recognized that this means new evidence relevant to class certification can—and should be—considered at any time before final judgment. *See Zenith Labs., Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir. 1976) (finding that "a district court is obliged to take cognizance of a changed factual situation and may alter an earlier [certification] order accordingly"); *Bayshore Ford Truck v. Ford Motor Co.*, Civ. No. 99–741, 2010 WL 415329, *7 (D.N.J. Jan. 29, 2010) ("[N]ew evidence . . . supports the need for a re-examination of whether

continued class treatment is proper."). [2] Further, although Plaintiff argues that Defendants' motion is untimely, the Court fails to see how Plaintiff would be prejudiced by the Court's consideration of the Oppenheimer or Meadows Declarations. In that connection, Plaintiff's opposition to the Second Motion to Supplement substantively challenges the evidence obtained from Oppenheimer and Meadows, arguing that even when considered, Defendants fail to show a complete lack of price impact.

Second, the Court notes that Plaintiff does not challenge the relevancy of the statements made by Oppenheimer or Meadows. Rather, aside from challenging the timing of the application, Plaintiff simply argues that Defendants still fail to show a complete lack of price impact with respect to the February 5 and February 7 alleged corrective disclosures. It is irrefutable that the Oppenheimer and Meadows Declarations speak to a critical question in the Court's class certification decision: whether the alleged corrective disclosures were based entirely on public information. Recognizing the import of this question—and the potential impact of this new evidence—the Court concludes that it should consider the statements by Oppenheimer and Meadows in its class analysis. Accordingly, the Court grants the Second Motion to Supplement.

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[2] The Court also notes the practical reality of this new evidence. As Defendants argue in reply, if a class including the February 2018 disclosures is certified without the Court having considered the Oppenheimer or Meadows Declarations, Defendants will simply move to decertify the class. Thus, in order to conserve time and judicial resources, it behooves the Court and the parties to consider this evidence now at this juncture.

B. RULE 23(a) REQUIREMENTS

Having identified the scope of the record, the Court turns to the requirements of class certification. As set forth above, Rule 23(a) sets forth four prerequisites for class certification: (1) the class must be so numerous that joinder of all members is impractical ("numerosity"); (2) there must be questions of law or fact common to the class ("commonality"); (3) the claims of the representative parties must be typical of the claims of the class ("typicality"); and (4) the representative parties must fairly and adequately protect the interests of the class ("adequacy"). Fed. R. Civ. P. 23(a). As it relates to the six alleged corrective disclosures at issue, here, Defendants do not dispute that the requirements of numerosity, commonality, typicality, adequacy, and superiority under Rule 23(a) are all satisfied. (*See generally* Defs.' Opp.) Because Defendants raise no objections about whether the proposed class meets the Rule 23(a) requirements, the Court concludes that the proposed class meets those prerequisites. Accordingly, the Court will focus its discussion on Plaintiff's ability to satisfy the Rule 23(b)(3) requirements.

C. RULE 23(b)(3) REQUIREMENTS

As discussed, Plaintiff seeks to certify its class pursuant to Rule 23(b)(3). The requirements for Rule 23(b)(3) class certification are that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) (citing Fed. R. Civ. P. 23(b)(3)). These elements are commonly referred to as the "predominance" and "superiority" requirements.

Id. The Third Circuit has also recognized that "[a] plaintiff seeking certification of a Rule 23(b)(3) class must prove by a preponderance of the evidence that the class is ascertainable." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015), *as amended* (Apr. 28, 2015). Notably, however, Defendants do not challenge class certification with respect to superiority and ascertainability. (*See generally* Defs.' Opp.) Instead, Defendants argue simply that class certification in this case turns on the *Basic* presumption of reliance which exists under the predominance requirement. (*Id.* at 21.)

The predominance requirement is "a 'far more demanding' standard than the commonality requirement of Rule 23(a)." *Gonzalez v. Corning*, 885 F.3d 186, 195 (3d Cir. 2018) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997)). It "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Ferreras v. Am. Airlines, Inc.*, 946 F.3d 178, 185 (3d Cir. 2019) (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016)). "Predominance turns on the 'nature of the evidence' and whether 'proof of the essential elements of the cause of action requires individual treatment.' " *Williams v. Jani-King of Phila. Inc.*, 837 F.3d 314, 319 (3d Cir. 2016) (quoting *Hydrogen Peroxide*, 552 F.3d at 311).

"At the class certification stage, the predominance requirement is met only if the district court is convinced that 'the essential elements of the claims brought by a putative class are capable of proof at trial through evidence that is common to the class rather than individual to its members.' " *Reinig v. RBS Citizens, N.A.*, 912 F.3d 115, 127 (3d Cir. 2018)

(quoting *Gonzalez*, 885 F.3d at 195 (internal quotation omitted)). To assess this requirement, district courts "must look first to the elements of the plaintiffs' underlying claims and then, 'through the prism' of Rule 23, undertake a 'rigorous assessment of the available evidence and the method or methods by which [the] plaintiffs propose to use the evidence to prove' those elements." *Id.* at 128 (quoting *Marcus*, 687 F.3d at 600).

In this instance, Plaintiff seeks class certification on its Section 10(b) and Rule 10b-5 claim. To establish its securities claims, Plaintiff must establish "(1) a material misrepresentation or omission, (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." *City of Edinburgh Council v. Pfizer, Inc.*, 754 F.3d 159, 167 (3d Cir. 2014).

At the class certification stage, the Court need not consider materiality and loss causation, but must consider reliance. *See Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 473 (2013) (materiality); *Erica P. John Fund, Inc. v. Halliburton Co. (Halliburton I)*, 563 U.S. 804, 812–13 (2011) (loss causation); *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, 573 U.S. 258, 267 (2014) (reliance). To establish reliance, a plaintiff may invoke the rebuttable presumption set forth in *Basic, Inc. v. Levinson*, that all investors rely on the integrity of the market price when deciding whether to buy or sell stock. 485 U.S. 224, 246–47 (1988). The *Basic* presumption of reliance is based on the "fraud-on-the-market" theory, which provides that where a company's stock trades on an efficient

market, its stock price incorporates all material public information, including misrepresentations. *See id.* at 246–47. A plaintiff bears the burden to invoke the *Basic* presumption by showing: "(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*, 573 U.S. at 268. If the plaintiff meets that initial burden, the defendant may rebut the presumption by making "[a]ny showing that severs the link between the alleged misrepresentation and either the prices received (or paid) by the plaintiff, or his decision to trade at a fair market price." *Basic*, 485 U.S. at 248.

Here, Defendants challenge only one prerequisite to class certification under Rule 23(b)(3): whether common questions of reliance predominate over questions affecting only individual class members. (Defs.' Opp. at 21.) In that connection, they contend that the certification of claims related to the corrective disclosures on September 27, 2017; January 30, 2018; February 5 and 7, 2018; July 12, 2018; and December 14, 2018, is inappropriate because those corrective disclosures contained no "new" information, *i.e.*, any of the allegedly corrective information was already publicly available. (*Id.* at 23–45.) Accordingly, Defendants argue that the class period cannot begin before July 16, 2013, because the Court dismissed claims relating to each of the five alleged misstatements made prior to that date, and cannot extend past February 7, 2018, because individual questions of reliance predominate for alleged corrective disclosures on July 12, 2018, and December 14, 2018. (*Id.* at 45–46.)

As to the start of the class period, Defendants submit that the alleged misstatements on February 22, 2013, April 25, 2013, and May 3, 2015, are "general value-oriented statements" that do not specifically address the Talc Products or make any specific claims about the Company's quality assurance process and procedures, and as such those statements were dismissed by the Court. (*Id.* at 45) (citing MTD Opinion at 31.) And the alleged misstatements on February 22, 2013, and May 3, 2013, which discuss the product liability cases, the Company's confidence in the products at issue, and the inability to predict the outcome of litigation, were also dismissed by this Court. (*Id.*) (citing MTD Opinion at 31.) As for the end date for the class period, Defendants contend that, as argued in further detail below, there was no price impact for the alleged corrective disclosures on July 12, 2018, and December 14, 2018, pursuant to Plaintiff's efficient market theory. (*Id.* at 46.) Thus, according to Defendants, Plaintiff's Motion to Certify Class should be denied in its entirety. (*See generally* Defs' Second Motion to Supp. ¶ 15)

Plaintiff, on the other hand, argues that it has established, and Defendants have failed to rebut, the fraud-on-the-market presumption of reliance. First, according to Plaintiff, Defendants' argument, at best, "present[s] a premature merits-based defense that cannot preclude certification, because it goes to whether entire claims should be dismissed, not whether individual reliance issues will predominate." (Pl.'s Reply at 9.) Second, Plaintiff argues that even considering the relevant evidence, Defendants have failed to prove a total absence of price impact. (*Id.* at 23–46.) In that regard, Plaintiff submits that the four corrective disclosures challenged by Defendants

revealed new information as to the seriousness and extent of the alleged fraud which could not have been previously reflected in the stock price. (*Id.* at 23.) Further, Plaintiff claims that because the Reuters article, which ends the Class Period, revealed new information about Defendants' fraudulent conduct, price impact is demonstrated for the entire Class Period. (*Id.*)

1. Truth-on-the-Market

First, as mentioned above, Plaintiff argues that Defendants' entire argument is a "thinly disguised 'truth-on-the-market' defense which is not properly considered or resolved at the class certification stage," and therefore, no obstacle exists to class certification. "The 'truth of the market' defense recognizes that a statement or omission is materially misleading only if the allegedly undisclosed facts have not already entered the market." *Winer Family Trust v. Queen*, Civ. No. 03-4318, 2004 WL 2203709, at *4 (ED. Pa. Sept. 27, 2004), *aff'd sub nom*, 503 F.3d 319 (3d Cir. 2007). In other words, the truth on the market defense is where "the market was already aware of the truth regarding defendants' misrepresentations at the time the class members purchased their shares, meaning the market price had already adjusted to the revelation of defendants' misstatements, and class members could not have relied on those misstatements in choosing to buy stock." *Arkansas Tchrs. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474, 485 (2d Cir. 2018). Plaintiff submits that courts have routinely held, however, that the truth-on-the-market defense is not appropriately resolved at the class certification stage. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 481 (2013); *In re Allstate Corp. Sec. Litig.*, 966

F.3d 595, 602 (7th Cir. 2020); *Washtenaw Cty. Employees' Ret. Sys. v. Walgreen Co.*, No. 15-3187, 2018 WL 1535156, at *4 (N.D. Ill. Mar. 29, 2018) ("Numerous courts have agreed that a 'truth on the market' defense cannot be used to rebut the presumption of reliance at the class-certification stage."); *In* re *Virtus Inv. Partners, Inc. Sec. Litig.*, Civ. No. 15-1249, 2017 WL 2062985, at *5 (S.D.N.Y. May 15, 2017); *In re Bridgepoint Educ., Inc. Sec. Litig.*, No. 12-1737, 2015 WL 224631, at *7 (S.D. Cal. Jan. 15, 2015).

Although the Court agrees with the well-settled premise that an assessment of materiality is inappropriate for class certification, it still must consider Defendants' evidence to the extent that it demonstrates there was no price impact for the challenged corrective disclosures under Plaintiff's efficient market theory. Indeed, as the Supreme Court acknowledged in *Goldman Sachs Grp., Inc. v. Arkansas Teacher Ret. Sys.*, courts at class certification "must take into account *all* record evidence relevant to price impact, regardless of whether that evidence overlaps with materiality or any other merits issue." 141 S. Ct. 1951, 1961 (2021) (emphasis in original). In that regard, the Supreme Court recognized that materiality and price impact are overlapping concepts, explaining that "evidence relevant to one will almost always be relevant to the other." *Id.* at 1961 n 2. That said, "a district court may not use the overlap to refuse to consider the evidence." *Id.* (quoting *In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 608 (7th Cir. 2020)). Instead, the district court must use the evidence to decide the price impact issue "while resisting the temptation to draw what may be obvious inferences for the closely related issues that

must be left for the merits, including materiality." *Id.* (quoting *In re Allstate*, 966 F.3d at 609).

Here, Defendants are not arguing about the "truth" of the information or about how a reasonable investor would consider the total mix of available information. Rather, Defendants contend that the allegedly corrective information was not new, and as such, it "did not actually affect the stock's market price" on the corrective disclosure dates. Because Defendants' evidence about the prior public availability of allegedly corrective information is necessarily probative of price impact, it must not be so quickly brushed aside. The Court therefore rejects Plaintiff's argument related to Defendants' supposed "truth-on-the-market defense."[3]

2. The Rebuttable Presumption of Reliance under *Basic*

A plaintiff may show reliance by invoking the *Basic* rebuttable presumption that all investors rely on the integrity of the market price when deciding whether to buy or sell stock. 485 U.S. 224, 246–47 (1988). To determine whether the market for a security is efficient, courts in the Third Circuit look to the factors identified in *Cammer v. Bloom* and *Krogman v. Sterritt.* 711 F. Supp. 1264 (D.N.J. 1989); 202 F.R.D. 467 (N.D. Tex. 2001). Plaintiff's expert comprehensively addressed and analyzed the *Cammer* and *Krogman* factors. (Pl.'s Mov. Br. at 17.) The

[3] The Court notes that Plaintiff appears to concede this argument as well. In a letter to the Court dated July 22, 2021, Plaintiff writes that it "agrees with defendants that *Goldman* clarified that the Court must consider all relevant evidence in assessing whether defendants have met their burden of proving a lack of price impact." (ECF No. 188).

expert opined that during the relevant period, J&J stock satisfied all of the *Cammer* and *Krogman* factors. (*Id.* at 18.) Notably, Defendants do not challenge market efficiency or whether Plaintiff is entitled to the presumption. Further, the Court, having reviewed Plaintiff expert's analysis regarding the *Cammer* and *Krogman* factors, finds that Plaintiff has adequately shown that J&J stock traded in an efficient market and has therefore established a rebuttable presumption of reliance.

2. Defendants' Burden to Rebut the Fraud-on-the-Market Presumption of Reliance

Defendants bear the burden of persuasion to rebut the presumption of reliance to prove a lack of price impact by a preponderance of the evidence. *Goldman*, 141 S. Ct. at 1963. At class certification, "[t]he district court's task is simply to assess all the evidence of price impact—direct and indirect—and determine whether it is more likely than not that the alleged misrepresentations had a price impact." *Id.* "In assessing price impact at class certification, 'court should be open to *all* probative evidence on that question—qualitative as well as quantitative—aided by a good dose of common sense.' " *Id.* at 1960 (citing *In re Allstate Corp. Sec. Litig.*, 966 F.3d at 613). Even if the evidence also relates to a merits question, like materiality, courts must nevertheless consider the evidence as it relates to price impact. *See id.* at 1960–61; *see also Halliburton II*, 573 U.S. at 284.

Importantly, the Supreme Court clarified that a defendant bears the burden to rebut the presumption by a preponderance of evidence, consistent with the Court's holdings in *Basic* and *Halliburton II*: "The defendant must 'in fact' 'seve[r] the link' between a

misrepresentation and the price paid by plaintiff—and a defendant's mere production of *some* evidence relevant to price impact would rarely accomplish that feat." *Goldman*, 141 S. Ct. at 1962 (emphasis in original). Thus, "defendant's burden of persuasion will have bite only when the court finds the evidence in equipoise—a situation that should rarely arise." *Id.*

Here, Defendants seek to rebut the presumption for all six of the alleged corrective disclosures by arguing that the disclosures contained no new information that was not already publicly available. Therefore, Defendants argue that (1) because the information was not new, then the disclosures could not have impacted the stock price and (2) Plaintiff's position runs contrary to the efficient market theory because "repetition of already public information cannot impact the stock price because it was fully incorporated into the price when first released." (Defs.' Sur-Reply, ECF No. 184 at 4).

Courts have considered a defendant's burden to overcome the *Basic* presumption where there are disclosures that allegedly contain no new information post-*Goldman.* In *Allegheny County Employees' Retirement System v. Energy Transfer LP*, the defendants argued that the "corrective disclosures themselves weren't 'new' news such that they would have an impact on the price in an efficient market." 623 F. Supp. 3d 470, 484 (E.D. Pa. 2022). The court did not accept the defendant's broad and sweeping argument that the *Basic* presumption is rebutted simply because information in the disclosures was already known. Rather, the court reviewed the disclosures individually to determine the impact, if any at all, the public information had on the disclosures. For

example, the court agreed that an October 27, 2018 article republished all the information contained in an October 21, 2018, article. *Id.* at 500–01. Notably, both articles contained information about events that took place a month prior in September 2018. *Id.* at 501. However, the court found that even though the October 27 article was essentially a reprint, it was nevertheless important because: (1) the story became more significant because it was deemed worthy of a reprint; (2) the reprint brought the story to a wider, national audience; and (3) the reprint heightened awareness to a particular issue, which increased the likelihood that investors would watch and monitor the issue more closely. *Id.* In short, the fact that the information was previously made public does not preclude the possibility that any later disclosure of that information could impact a stock's price.

In another post-*Goldman* case, *In re Qualcomm Inc. Securities Litigation*, a court agreed with the defendants' arguments that because "there was public information available . . . that mirrors the corrective disclosures makes it less likely that the corrective disclosures were actually curative." 2023 WL 2583306, at *13 (S.D. Ca. Mar. 20, 2023). The court provided that the "corrective disclosures [that] only repeated already public information . . . makes it less likely that Defendants' alleged misrepresentations inflated Qualcomm's stock price on the front end and the information in the disclosures caused the price drop on the back end." *Id.* In addition to considering the already public information, the court also analyzed the specific versus generic nature of the statements as well as the quantitative impact of the disclosures. *Id.* at *11–14. Viewing the evidence together, the court ultimately concluded that the defendants rebutted the *Basic* presumption.

3. Defendants' Ability to Rebut the Fraud-on-the-Market Presumption of Reliance

Under the above legal standards, the Court considers whether Defendants have rebutted the presumption by proving lack of price impact as to the six alleged corrective disclosures.

i. September 27, 2017 Alleged Corrective Disclosure

First, Defendants contend that the *Basic* presumption is rebutted for the September 27, 2017, corrective disclosure. (Defs.' Opp. at 38.) Defendants argue that the Bernstein Release (1) did not disclose any new allegedly corrected information and (2) J&J's stock price declined before the Bernstein Release, not in response to it. (*Id.* at 39–41.)

Specifically, Defendants argue that the information in the Bernstein Release "was already publicly available and 'impounded in the market price' as of September 27, 2017" because it was published in two Bloomberg articles on September 15, 2017, and September 21, 2017. (*Id.* at 39.) According to Plaintiff, however, the Bernstein Release "signaled to J&J investors that plaintiffs in ovarian cancer lawsuits throughout the country were looking to add asbestos allegations to their ovarian cancer claims." (FAC ¶ 184.) Defendants respond that the two Bloomberg articles already covered the fact that "J&J was facing additional claims based on allegations of asbestos contamination" and that "ovarian cancer plaintiffs in other J&J cases had stated publicly in court filings that they were 'currently investigating the link between our clients' ovarian cancers and talcum powder containing asbestos fibers." (Defs' Sur-Reply at 19.) Though the two Bloomberg articles

discuss J&J potentially facing claims relating to asbestos, it was the Bernstein Release that "disclosed that the thousands of ovarian cancer plaintiffs planned to include asbestos allegations in their cases against J&J." (Pl.'s Reply at 46.) The Bernstein Release was more than a republication of already known information as it signaled a new development to J&J investors.

Defendants' second, and more compelling argument, is that J&J's stock price opened on September 27, 2017, at $131.00 and closed at $129.75—a decline of $1.25. (Defs.' Opp. at 41) (citing Ex. 25, Kleidon Report ¶¶ 96–99.) The Bernstein Release was issued at 11:46 a.m. EST, and according to J&J's intraday trading history, 97% of the day's decline—$1.21 of $1.25—occurred before that time. (*Id.*) According to Defendants' expert, an intraday event study confirmed that the $0.04 decline in J&J's stock price *after* the Bernstein Release was issued was "not statistically significant." (*Id.*)

"[C]ourts generally require a party's expert to testify based on an event study that meets the 95% confidence standard" that a disclosure had a negative impact on a stock price, *Halliburton II Remand*, 309 F.R.D. at 262, but courts have also found that stock prices have been impacted when the confidence level was below 95%. See *Allegheny*, 623 F. Supp. 3d at 487 ("[I]t should be noted that even a lack of statistical significance is not invariably fatal to a plaintiff's case. Event studies have an inherent rate of error, and where the statistical evidence does not disprove a null value to the requisite confidence level, numerous courts have recognized that as a matter of logic such absence of proof is not proof of absence."); *Vizirgianakis v. Aeterna Zentaris, Inc.*, 775 F. App'x

51, 53 (3d Cir. 2019) ("And even were plaintiffs' study attempting to demonstrate a price impact, the district court reasoned that its failure to do so is not necessarily proof of the opposite."). Thus, "courts routinely reject the argument that a non-statistically significant stock price decline proves an absence of price impact." *Allegheny*, 623 F. Supp. at 487 (quoting *Monroe Cnty. Emps.' Ret. Sys. v. Southern Co.*, 332 F.R.D. 370 (N.D. Ga. 2019)).

Here, even though the price decline was not at the traditionally "statistically significant" standard, when considering the price decline in conjunction with the information published in the Release and that Defendants have not identified another explanation for the price decline, the Court concludes that Defendants have not rebutted the presumption.

ii. January 30, 2018 Alleged Corrective Disclosure

With respect to the Law360 article published on January 30, 2018, Defendants again contend that all of the allegedly corrective information was already publicly available. (Defs.' Opp., 41–43.) Plaintiff alleges that the January 30, 2018, Law360 article titled "No Asbestos in J&J Talc, NJ Jury Told In Mesothelioma Case," which reported on the first days of the *Lanzo* trial, was corrective because (1) it stated that plaintiffs in the product liability cases "have asserted that Johnson & Johnson . . . [was] aware that talc contained asbestos in the 1970s," and cited "a 1975 report in which the predecessor company allegedly said it found asbestos in the Johnson & Johnson powder" as evidence for this claim, and (2) the article described a statement by plaintiffs' attorney in *Lanzo* that "Johnson & Johnson 'got together with other companies that were selling talc

and they chose to call the asbestos something else.' " (FAC ¶ 192.) But, according to Defendants, all of this was previously disclosed in several articles published before January 30, 2018. (Defs.' Opp at 41–43.) Defendants identify the following sources containing the information Plaintiff alleges is corrective: (1) a January 16, 2018, article included allegations that J&J knew that its talc powder contained asbestos; (2) two articles published on January 29, 2018, one day before the Law360 article, reported on the opening statements made in the *Lanzo* trial and referenced how J&J called "asbestos something else"; and (3) lawyers referenced the 1975 report in the *Lanzo* trial opening statements that took place on January 29, 2018. (*Id.* at 42–43.)

It is clear that there is an overlap of information published in the Law360 article and the two January 29 articles. However, one piece of information missing from the January 29 articles, but referenced in the Law360 article, is the 1975 report. (Pl.'s Reply at 44.) The parties do not dispute that the 1975 report was discussed during the *Lanzo* trial opening arguments. Instead, the parties dispute whether the statements made during the trial can be considered public or "widely disseminated." (Defs' Opp. at 42; Pl.'s Reply at 44; Defs' Sur-Reply at 18.) Notwithstanding the parties' dispute over the public nature of the statements, the Court nevertheless concludes that Defendants cannot show that the Law360 article had no impact to J&J stock price. Even if the Court accepts Defendants' position that statements made during the *Lanzo* trial are public, it does not preclude a finding that an article analyzing the 1975 report a day after the trial could still affect the stock price. Here the analysis turns on whether Defendants can "sever the link" between the

statement and the stock price by a preponderance of the evidence and not how public or "widely disseminated" the information was. Accordingly, an article published on January 30, 2018, discussing a report made public only a day before during the opening statements of a trial may still impact a stock's price. The Court therefore finds that Defendants do not rebut the *Basic* presumption of reliance.

iii. February 5, 2018 and February 7, 2018 Alleged Corrective Disclosures

Next, as outlined above in connection with the Second Motion to Supplement, Defendants challenge the February 5 and February 7 alleged corrective disclosures. Though Defendants did not initially challenge these two disclosures, (Defs' Opp. at 45 n. 35), Defendants now contend that the Oppenheimer and Meadows Declarations prove that the alleged corrective disclosures did not contain any new allegedly corrective information. Again, Defendants attempt to rebut the presumption by arguing that there could be no price impact because there was nothing new in either disclosure. (*See generally* Defs.' Second Motion to Supp. Mov. Br.; Defs.' Reply to Second Motion to Supp.) However, as previously discussed, merely referencing information already made public does not itself preclude a finding that the disclosures cannot be certified.

Again, while the Court need not determine whether the disclosures are corrective at this stage, the Court must determine whether Defendants have met their burden to sever the link between the disclosures and the price impact. The February 5 blog post and the February 7 press release did analyze and report on statements made during the *Lanzo* trial about

forthcoming, damaging J&J documents. However, the Court is not persuaded that the February 5 and February 7 disclosures merely "repackaged" information that was already public. (Defs.' Reply to Second Motion to Supp. at 2.) While the information in the blog post and the press release might make price impact slightly less likely, the following facts undermine Defendants position: (1) Plaintiff's expert opines that a statistically significant decline followed both disclosures, (Pl.'s Opp. to Second Motion to Supp. at 17, 22); (2) news media, financial analysts, and J&J employees' reaction to the disclosures "belies any argument that the disclosure was devoid of new information", (*id.* at 18–20); and (3) Defendants have not offered any other explanation for the stock price drop other than the disclosures, nor did Defendants' expert analyze the cause of the price drop, (*id.* at 14). Accordingly, taking all of the evidence together, the Court finds that Defendants have not rebutted the *Basic* presumption.

iv. July 12, 2018 Alleged Corrective Disclosure

As to the July 12, 2018, alleged corrective disclosure, Defendants submit that the *Ingham* verdict did not disclose any new allegedly corrective information, nor was J&J's stock price decline on July 13, 2018 statistically significant. (Defs' Opp. at 43–45.) Defendants' position is that "the only new information [the verdict] conveyed was that the jury accepted the plaintiffs' theory of the case" because all information relating to the association between asbestos and ovarian cancer was already introduced during the course of the trial and reported on by various media outlets. (*Id.* at 43.) Plaintiff disagrees. Plaintiff argues that the *Ingham* verdict was the first

trial containing allegations that the asbestos in talc caused ovarian cancer and therefore the "multi-billion dollar verdict constitutes new fraud-related information." (Pl.'s Reply at 39.)

The Court is not persuaded that the verdict had *no* impact at all on the stock price. Similar to the January 30, 2018 article discussed above, here, the parties do not dispute that there was considerable evidence demonstrated throughout the trial relating to asbestos in talc. However, agreeing that the final verdict relates to the information presented at trial does not preclude a finding that the announcement of the verdict itself would not affect J&J's stock price. Though the parties dispute whether the verdict constitutes a corrective disclosure, the Court declines to resolve that dispute on this motion for class certification. *See Halliburton II Remand*, 309 F.R.D. 251, 261–62 (N.D. Tex. 2015) ("This Court holds that *Amgen* and *Halliburton I* strongly suggest that the issue of whether disclosures are corrective is not a proper inquiry at the certification stage. *Basic* presupposes that a *misrepresentation* is reflected in the market price at the time of the transaction.") (emphasis in original).

Further, Defendants attempt to characterize the stock price movement on July 13, 2018 as "not statistically significant" fails for the same reasons explained above for the September 27 disclosure. (Defs' Opp. at 44.) Here, the evidence showed that the confidence level for the July 13, 2018 stock price was 94.48%, just shy of the generally accepted standard. That, alone, is not enough to rebut the *Basic* presumption. Looking at the evidence altogether, the Court does not agree that Defendants have rebutted the presumption.

v. December 14, 2018 Alleged Corrective Disclosure

Finally, the parties dispute the December 14, 2018, alleged corrective disclosure. The majority of the parties' briefing focuses on this specific disclosure, and the parties rigorously contest whether the information in the Reuters article is new. However, before the Court provides a general summary of the parties' arguments, the Court emphasizes that the burden is on Defendants to establish a *lack* of price impact between the disclosure and a stock price decline. To satisfy this burden, Defendants must do more than produce evidence that is relevant to price impact; Defendants must "sever the link" between the disclosure and the stock price decline. *Goldman*, 141 S. Ct. at 1962–63.

Defendants contend that the market was well aware of the allegations that J&J knew of and covered up asbestos contamination "long before" they were published in the Reuters article. (Defs.' Opp. at 23.) According to Defendants, the allegations made against J&J in the Reuters article formed the basis for the claims in several trials predating publication of the article, including "*Herford* (10/6/17–11/6/17), *Lanzo* (1/29/18–4/11/18), and *Ingham* (6/6/18/–7/12/18)." (*Id.* at 23–24.) In addition, Defendants submit that the allegations found in the Reuters article were "reported widely and repeatedly in the press." (*Id.* at 24.) And, to the extent that the Reuters article states that it is based on fifty-six "internal documents" produced by J&J in connection with product liability litigation, Defendants claim that they, and their expert, have "traced every document linked or quoted" in the article, and that "100% were publicly available" by September 2018. (*Id.* at 26–27.)

It is Defendants' position that because the article did not contain anything "new," the allegedly corrective information in the article cannot have impacted J&J's stock price. (*Id.* at 33–36.)

Unsurprisingly, Plaintiff disagrees and argues that the Reuters article contains several additional new pieces of information, and contains Reuters' "findings and analysis from its independent investigation." (Pl.'s Reply at 24–27.) According to Plaintiff, it is the *analysis* in the article that constitutes new information, and Defendants cannot overcome their burden by tracing the documents linked in the article to documents that were already publicly available. (*Id.* at 32–33). Plaintiff also asserts that the report "kicked off a flurry of reaction" at J&J, including a team of lawyers and executives spending days working on a response and an $8 million increase to the J&J media budget to respond to the report. (*Id.* at 27.) Such actions, Plaintiff contends, "would hardly be necessary if the Reuters Report was nothing but stale information." (*Id.*)

Having reviewed all of the evidence surrounding the December 14, 2018, disclosure, the Court concludes that Defendants have not rebutted the presumption. It is not disputed that the Reuters article references previously disclosed documents. (*See generally id.*) As Plaintiff underscores, however, "the fact that some of the 56 linked documents" were found on a J&J website "hardly compares to Reuters' careful analysis. Indeed, Reuters painstakingly annotated the various documents linked, explaining and providing necessary context." (*Id.* at 33.) Defendants' various arguments as to why the disclosure does not contain any new information may make it less likely that the disclosure impacted the stock price, but the

Court finds that it does not suffice to rebut the presumption of price impact by a preponderance of the evidence.

D. CLASS DEFINITION

Rule 23(c)(1)(B) requires that the class-certification order or incorporated opinion indicate "(1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis." *Byrd*, 784 F.3d at 163 (citing *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 187–88 (3d Cir. 2006)). Therefore, the Court will certify a Rule 23(b)(3) class ("the Class"), defined as:

> All persons who purchased or otherwise acquired publicly traded J&J equity securities, as defined in 15 U.S.C. § 78c(11) and 17 C.F.R. § 240.3a11-1, between February 22, 2013 and December 13, 2018.

The following will be excluded from the class: defendants, present or former executive officers of defendants and members of their immediate families, present or former directors of defendants and members of their immediate families, any entity in which a defendant has a controlling interest, and the legal representatives, heirs, successors or assigns of any such excluded party.

Finally, SDCERA will be certified as Class Representative and Robbins Geller Rudman & Down LLP will be appointed as class counsel.

IV. CONCLUSION

For the reasons set forth above, Defendants' Motions to Supplement the Class Certification Record related to the alleged corrective disclosures on December 14, 2018; February 5, 2018; and February 7, 2018 will be **GRANTED**. Plaintiff's Motion for Class Certification will also be **GRANTED**. An appropriate Order will follow.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 24-1409

SAN DIEGO COUNTY EMPLOYEES RETIREMENT ASSOCIATION; FRANK HALL, Individually and on behalf of all others similarly situated

v.

JOHNSON & JOHNSON; ALEX GORSKY; JOAN CASALVIERI; TARA GLASGOW; CAROL GOODRICH,

Appellants

(D.C. Civ. No. 3:18-cv-01833)

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, HARDIMAN, SHWARTZ, *KRAUSE, RESTREPO, *BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, *CHUNG and BOVE, *Circuit Judges*

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the

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* Judges Cheryl A. Krause, Stephanos Bibas and Cindy K. Chung would grant the petition for rehearing by the en banc court.

circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Dated: October 7, 2025
Tmm/cc: All Counsel of Record