

In The
Supreme Court of the United States

ERICA P. JOHN FUND, INC.
F/K/A ARCHDIOCESE OF MILWAUKEE
SUPPORTING FUND, INC.,

Petitioner,

v.

HALLIBURTON CO. AND DAVID J. LESAR,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

**BRIEF OF NATIONAL ASSOCIATION OF
SHAREHOLDER AND CONSUMER ATTORNEYS
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

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I. INTEREST OF *AMICUS CURIAE*

The National Association of Shareholder and Consumer Attorneys (“NASCAT”) is a nonprofit membership organization founded in 1988. NASCAT’s member law firms represent both institutional and individual investors in securities fraud and shareholder derivative cases throughout the United States. NASCAT and its members are committed to representing victims of corporate abuse, fraud and white collar criminal activity in cases with the potential to advance the state of the law, educate the public, modify corporate behavior and improve access to justice and compensation for those who have suffered injury at the hands of corporate wrongdoers. NASCAT advocates the principled interpretation and application of the federal securities laws – including the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (“Exchange Act”) – to protect investors from manipulative, deceptive and fraudulent practices and to ensure this nation’s capital markets operate fairly and efficiently.¹

Comprised of attorneys whose practice focuses in substantial part on the application of the federal

¹ In accordance with Supreme Court Rule 37.3(a), counsel for NASCAT represent that all parties in this case have filed letters with the Clerk giving blanket consent to the filing of *amicus curiae* briefs. Additionally, pursuant to Rule 37.6 of this Court, counsel for NASCAT represent that no counsel for a party authored this brief in whole or in part and no one other than NASCAT, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

securities laws, NASCAT has a deeply-rooted interest in the central issue this case presents: whether securities class plaintiffs attempting to invoke a classwide presumption of reliance premised on the fraud-on-the-market doctrine must, in addition to showing the market in which the subject security traded was “efficient” during the relevant period, demonstrate loss causation at the class certification stage, as the Fifth Circuit Court of Appeals demands. NASCAT agrees with Petitioner’s arguments against adoption of the Fifth Circuit’s misguided and doctrinally unsound standard. NASCAT writes separately to inform this Court of the serious burden plaintiffs already face, even without the errant loss causation requirement the Fifth Circuit has created, to trigger the fraud-on-the-market presumption at the class certification stage. Additionally, this brief emphasizes the important distinction between reliance – which, in class cases arising under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), is necessarily entwined with the fraud-on-the-market presumption – and loss causation, which is not.

II. SUMMARY OF ARGUMENT

For class plaintiffs asserting claims under Section 10(b) of the Exchange Act and Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder by the Securities and Exchange Commission (“SEC”), satisfying the predominance requirement of Rule 23 of the Federal Rules of Civil Procedure would prove a

virtually insurmountable hurdle without the class-wide presumption of reliance afforded by the fraud-on-the-market doctrine, which this Court endorsed in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Commensurate with the evidentiary benefit the presumption provides, investors bear the burden of demonstrating the availability of the presumption for class certification purposes. To do so, they must show the security at issue traded in an “efficient” market. The purpose of the market efficiency inquiry is to assess whether the market for the subject security possesses characteristics rendering it logical and reasonable to presume that defendants’ material misrepresentations were disseminated to investors through the price of the security and that investors, in relying on the integrity of the market price to purchase or sell the security, inherently relied on the misrepresentations.

Establishing market efficiency requires a fact-intensive analysis of some or all of the following well-accepted factors: (1) average weekly trading volume of the stock during the proposed class period; (2) number of securities analysts following and reporting on the stock during the proposed class period; (3) the existence of “market makers” and arbitrageurs, who react quickly to company-specific disclosures and drive the stock price accordingly; (4) whether the company was eligible to file a Form S-3 short-form securities registration statement, generally limited to corporations whose stock is actively traded and widely followed; (5) a causal relationship between new or unexpected company-related disclosures and a reaction of the price of the company’s stock; (6) the company’s market capitalization; (7) the “bid-ask

spread,” or the difference between the price investors are willing to pay for the stock and the price at which current shareholders are willing to sell their shares; and (8) the company’s “float,” or the percentage of shares not owned by company insiders.

Given the complexity involved in evaluating market efficiency, parties attempting to establish or refute its existence with respect to a particular security often proffer expert analysis – in the form of reports or affidavits – regarding the efficiency factors. Indeed, parties commonly rely on expert “event studies” assessing the causal relationship (or lack thereof) between new or unexpected company-related disclosures and reaction of the stock price – which comprises the keystone of the market efficiency analysis. Plaintiffs thus face a serious task and meaningful burden to justify the availability of the presumption of reliance.²

In light of the nature and function of the market efficiency inquiry, the Fifth Circuit’s requirement that, to trigger the fraud-on-the-market presumption, plaintiffs must make a factual showing sufficient to demonstrate loss causation is improper. The Fifth Circuit’s approach contravenes this Court’s jurisprudence regarding reliance and loss causation and imposes an unduly restrictive standard for plaintiffs to establish predominance under Rule 23. This Court

² While this brief generally refers to “stock,” the use of that term is not intended to suggest the market efficiency analysis does not, or cannot, apply to other securities.

therefore should reject the Fifth Circuit’s draconian standard and reverse that court’s decision overturning class certification in the case at bar.

III. ARGUMENT

A. This Court Has Endorsed A Rebuttable Presumption Of Reliance Premised On The Fraud-On-The-Market Doctrine, Which Allows Securities Class Plaintiffs To Meet The Predominance Requirement Of Rule 23.

In *Basic*, this Court endorsed the fraud-on-the-market doctrine as a mechanism for securities class plaintiffs to establish a rebuttable presumption of reliance for Section 10(b) claims. Drawing on, *inter alia*, its prior jurisprudence regarding reliance in the securities context as well as considerations of policy and fairness, the Court upheld the lower courts’ application of the presumption of reliance in that case, declaring: “An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor’s reliance on any public material misrepresentations, therefore, may be presumed for purposes of a *Rule 10b-5* action.” 485 U.S. at 247.³

³ The Court has since reaffirmed its recognition of a rebuttable presumption of reliance based on the fraud-on-the-market
(Continued on following page)

Plaintiffs in *Basic* alleged defendants' material misrepresentations in failing to properly apprise investors of a proposed merger transaction had created a "depressed" market for Basic stock and plaintiffs sold their shares in reliance on those misrepresentations. 485 U.S. at 228, 242. In granting class certification, the district court applied the fraud-on-the-market presumption of reliance, concluding "that with reference to each public statement and its impact upon the open market for Basic shares, common questions predominated over individual questions." *Id.* at 242. The Sixth Circuit, *inter alia*, affirmed the district court's order granting class certification. The Court of Appeals observed that the fraud-on-the-market theory "is based on two assumptions: first, that in an efficient market the price of a stock will reflect all information available to the public; and, second, that an individual relies on the integrity of the market price when dealing in that stock." *Levinson v. Basic Inc.*, 786 F.2d 741, 750 (6th Cir. 1986) (citation omitted), *vacated on other grounds*, 485 U.S. 224 (1988). The court concluded, "Here, the defendants made public, material misrepresentations and the plaintiffs sold Basic stock in an impersonal, efficient market. Thus the class . . . has established the threshold facts for proving their loss." *Id.* at 751.

doctrine. See *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008).

On certiorari, this Court echoed the pronouncements of lower courts that had adopted the fraud-on-the-market presumption. The Court stated, “Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented [the named plaintiffs] from proceeding with a class action, since individual issues then would have overwhelmed the common ones.” *Basic*, 485 U.S. at 242; accord *Peil v. Speiser*, 806 F.2d 1154, 1160 (3d Cir. 1986) (“many courts have come to realize that, in certain situations, the requirement of showing direct reliance ‘imposes an unreasonable and irrelevant evidentiary burden’”) (quoting *Blackie v. Barrack*, 524 F.2d 891, 907 (9th Cir. 1975)). This Court further reasoned “our understanding of *Rule 10b-5*’s reliance requirement must encompass” the differences between “modern securities markets, literally involving millions of shares changing hands daily,” and “the face-to-face transactions” early fraud cases contemplated. *Basic*, 485 U.S. at 243-44.

The Court observed that the fraud-on-the-market doctrine “is based on the hypothesis that, in an open and developed securities market, the price of a company’s stock is determined by the available material information regarding the company and its business”; misleading statements therefore will “defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.” *Id.* at 241-42 (citation and internal quotation marks omitted). The Court further explained:

In face-to-face transactions, the inquiry into an investor's reliance upon information is into the subjective pricing of that information by that investor. With the presence of a market, the market is interposed between seller and buyer and, ideally, transmits information to the investor in the processed form of a market price. Thus the market is performing a substantial part of the valuation process performed by the investor in a face-to-face transaction. The market is acting as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price.

Id. at 244 (citation and internal quotation marks omitted). This Court therefore determined a presumption was warranted given the realities of open-market securities transactions, as requiring a plaintiff "to show . . . how he would have acted if omitted material information had been disclosed" or "if the misrepresentation had not been made" would "place an unnecessarily unrealistic evidentiary burden on the *Rule 10b-5* plaintiff who has traded on an impersonal market." *Id.* at 245.

The Court also found the presumption "is consistent with, and, by facilitating *Rule 10b-5* litigation, supports, the congressional policy embodied in the 1934 [Exchange] Act," as Congress had "expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance on the integrity of

those markets.” *Id.* at 245-46. Furthermore, observing that empirical studies “have tended to confirm Congress’[s] premise that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations,” the Court noted the general acceptance of the fraud-on-the-market theory by courts considering it as well as by commentators. *Id.* at 246-47.

Based on its acceptance (for securities law purposes) of the general economic principles underlying the fraud-on-the-market doctrine and the policy considerations favoring a presumption of reliance, this Court endorsed the application of the presumption where the market for a security is “impersonal” and “well-developed” and the security price reflects “most publicly available information.” *Id.* at 247. In other words, to trigger the fraud-on-the-market presumption of reliance, investors must demonstrate the market for the subject security was “efficient” during the period relevant to the litigation.

B. Availability Of The *Basic* Presumption Turns On Whether The Security At Issue Traded In An “Efficient” Market.

Courts generally regard a showing of market efficiency – *i.e.*, that the security at issue traded in an “efficient” market – as the central factor in deeming the presumption of reliance available to plaintiffs at class certification. *See, e.g., Schleicher v. Wendt*, 618

F.3d 679, 688 (7th Cir. 2010) (Easterbrook, C.J.) (“The district court assured itself that the market for Con-seco’s stock was thick enough to transmit defendants’ statements to investors by way of the price. That finding supports use of the fraud-on-the-market doctrine as a replacement for individual reading and reliance on defendants’ statements.”); *In re Mills Corp. Sec. Litig.*, 257 F.R.D. 101, 106 (E.D. Va. 2009) (“[T]o be entitled to the presumption, Plaintiffs need only demonstrate that the company’s shares traded in an efficient market.”); *Cheney v. CyberGuard Corp.*, 213 F.R.D. 484, 496-502 (S.D. Fla. 2003) (finding predominance under Rule 23(b)(3) via application of fraud-on-the-market doctrine, “since the evidence support[ed] the position that CyberGuard stock was traded in an efficient market”). Only where market efficiency exists “may a court presume reliance and avoid individualized inquiries.” *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 368 (4th Cir. 2004); see also *Schleicher*, 618 F.3d at 684; *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 507 (1st Cir. 2005); *Hayes v. Gross*, 982 F.2d 104, 107 (3d Cir. 1992); *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 198 (6th Cir. 1990).

This Court in *Basic* did not define an “efficient” market – beyond indicating it is “impersonal” and “well-developed” (or “open and developed”)⁴ – nor did

⁴ 485 U.S. at 241, 246-47 (citation and internal quotation marks omitted).

the Court endorse any particular method of determining market efficiency. *See* 485 U.S. at 246 n.24 (“We need not determine by adjudication what economists and social scientists have debated through the use of sophisticated statistical analysis and the application of economic theory. For purposes of accepting the presumption of reliance in this case, we need only believe that market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices.”); *id.* at 248 n.28 (“By accepting this rebuttable presumption, we do not intend conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price.”).⁵ Federal appellate courts, however, have expounded on the efficient market concept and its application in securities cases.

The First Circuit has observed that the efficient market hypothesis began as “an academic attempt” to determine whether “an ordinary investor” can “beat

⁵ An “open” market “is one in which anyone, or at least a large number of persons, can buy or sell.” *Freeman*, 915 F.2d at 198 (citation and internal quotation marks omitted). A “developed” market “is one which has a relatively high level of activity and frequency, and for which trading information (e.g., price and volume) is widely available.” *Id.* (citation and internal quotation marks omitted). A developed market is “principally a secondary market in outstanding securities” and “usually, but not necessarily, has continuity and liquidity (the ability to absorb a reasonable amount of trading with relatively small price changes).” *Id.* at 198-99 (citation and internal quotation marks omitted).

the stock market,” *i.e.*, “can such an investor make trading profits on the basis of new information?” *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 8 (1st Cir. 2005). Where a market is efficient, “the answer is ‘no,’ because the information that would have given the investor a competitive edge and allowed the investor to ‘beat’ the market is already reflected in the market price.” *Id.* Consequently, there is “no ‘bargain’ from which an investor can benefit.” *Id.*; *see also* Burton G. Malkiel, *The Efficient Market Hypothesis and Its Critics*, 17 J. ECON. PERSP. 59, 60 (2003) (defining “efficient financial markets” to mean “such markets do not allow investors to earn above-average returns without accepting above-average risks”).

Echoing other courts and commentators, the First Circuit further explained that the concept of market efficiency contemplates three “competing” versions: “weak, semi-strong, and strong,” each of which “makes a progressively stronger claim about the kind of information that is reflected in stock price.” *PolyMedica*, 432 F.3d at 10 n.16. The weak form holds “an efficient market is one in which historical price data is reflected in the current price of the stock, such that an ordinary investor cannot profit by trading stock based on the historical movements in stock price.” *Id.* The semi-strong form conceives an efficient market as “one in which all publicly available information is reflected in the market price of the stock, such that an investor’s efforts to acquire and analyze public information (about the company, the industry, or the economy, for instance) will not

produce superior investment results.” *Id.* The strong form views an efficient market as “one in which stock price reflects not just historical price data or all publicly available information, but all possible information – both public and private.” *Id.*

Lower courts have observed that the fraud-on-the-market doctrine endorsed in *Basic* rests on the semi-strong form, which comprises the “prevailing definition of market efficiency.” *Id.* Under the semi-strong market efficiency standard, in an efficient market, “the market price has integrity[;] . . . it adjusts rapidly to reflect all new information.” *Gariety*, 368 F.3d at 367 (alteration and ellipsis in original) (citation and internal quotation marks omitted); see also *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1129-30 (7th Cir. 1993) (Easterbrook, J.) (“We call a market ‘efficient’ because the price reflects a consensus about the value of the security being traded – not necessarily because the price captures the true value of the firm’s assets but because the price is the best available device to assess the significance of additional bits of information.”).

To trigger the *Basic* presumption of reliance, then, plaintiffs must demonstrate that the market price of the security at issue reflects publicly available information – in other words, the market for the security possesses “‘informational efficiency.’” *PolyMedica*, 432 F.3d at 19; see also *Schleicher*, 618 F.3d at 682 (“*Basic* concluded that the price of a well-followed and frequently traded stock reflects the public information available about a company”); *Freeman*, 915

F.2d at 197 (“The fraud on the market theory rests on the assumption that the price of an actively traded security in an open, well-developed, and efficient market reflects all the available information about the value of a company.”). Moreover, in an informationally efficient market, the price of a security “rapidly reflects *new* information in price.” *Freeman*, 915 F.2d at 199 (emphasis added) (citation and internal quotation marks omitted); *see also In re Nature’s Sunshine Prods. Inc. Sec. Litig.*, 251 F.R.D. 656, 661 (D. Utah 2008) (the fraud-on-the-market theory “assumes that in an efficient market, all the available information about the company is quickly reflected in the price at which people are willing to buy and sell the stock”); *In re DVI Inc. Sec. Litig.*, 249 F.R.D. 196, 210 (E.D. Pa. 2008) (“In considering the efficiency of the market for a security, courts often focus on whether the security’s price reacted quickly to significant corporate events and disclosures.”).

Notably, the viability of the fraud-on-the-market doctrine does not turn on “perfect” efficiency, an unrealistic notion. Rather, the core principle underlying the efficient market hypothesis – that the market price of a security reflects available public information and therefore possesses “integrity” – reasonably allows for a presumption of reliance regardless of market imperfections because whatever anomalies exist in the market are insignificant and do not allow market participants to exploit them effectively. *See Malkiel, Efficient Market Hypothesis*, 17 J. ECON. PERSP. at 72 (“Any truly repetitive and exploitable pattern that can be discovered in the stock market

and can be arbitrated away will self-destruct.”); *Eckstein*, 8 F.3d at 1129 (“The price in an open and developed market **usually** reflects all available information, because the price is an outcome of competition among knowledgeable investors.”) (emphasis added); *Peil*, 806 F.2d at 1161 n.10 (“The ‘fraud on the market’ theory rests on the assumption that there is a **nearly** perfect market in information, and that the market price of stock reacts to and reflects the available information.”) (emphasis added); *In re Res. Am. Sec. Litig.*, 202 F.R.D. 177, 190 (E.D. Pa. 2001) (“Commentators have noted that an efficient market cannot be perfectly efficient.”) (citing Richard A. Booth, *The Efficient Market, Portfolio Theory, and the Downward Sloping Demand Hypothesis*, 68 N.Y.U. L. REV. 1187, 1195 (1993)). Moreover, that “[i]t takes some amount of time for new information to get incorporated into the price of a security” does not render a market inefficient. *Res. Am.*, 202 F.R.D. at 190.

Similarly, consistent with courts’ acceptance of the “informational efficiency” approach to defining whether a market is efficient, plaintiffs need not make a more demanding showing that the market for the security at issue embodies “fundamental value efficiency.” *PolyMedica*, 432 F.3d at 19 (rejecting fundamental value approach). The latter standard would require that the market “respond to information not only quickly but accurately, such that the market price of a stock reflects its fundamental value.” *Id.*; accord *In re Accredo Health, Inc., Sec.*

Litig., No. 03-2216 DP, 2006 U.S. Dist. LEXIS 97621, at *30-31 (W.D. Tenn. Mar. 7, 2006) (“the few cases that have addressed this issue have squarely rejected this fundamental value approach”) (citing cases); *In re VeriFone Sec. Litig.*, 784 F. Supp. 1471, 1479 n.7 (N.D. Cal. 1992), *aff’d*, 11 F.3d 865 (9th Cir. 1993).

As further detailed below, plaintiffs attempting to utilize the fraud-on-the-market presumption – thereby alleviating the burden of demonstrating actual reliance by each class member – must undertake the concomitantly serious task of establishing the efficiency of the relevant market at the class certification stage. The prevailing standard for assessing market efficiency imposes a meaningful burden for plaintiffs to carry.

C. Courts Assessing Market Efficiency At The Class Certification Stage Engage In A Fact-Intensive Analysis.

Resolution of the question of market efficiency – the analytical engine powering the fraud-on-the-market vehicle – is often the key determinant to class certification in a securities fraud case. Given the significance of the fraud-on-the-market presumption to plaintiffs’ ability ultimately to establish reliance at trial, “courts at the class certification stage probe the factual basis of the . . . presumption to make sure it will be a viable form of proof in a given case.” *In re New Motor Vehicles Canadian Exp. Antitrust*

Litig., 522 F.3d 6, 25 (1st Cir. 2008). Plaintiffs bear the burden at the class certification stage of demonstrating the existence of market efficiency, and the court does not “simply presume[] the facts in favor of an efficient market based on bare allegations raised in the plaintiff’s complaint.” *Xcelera.com*, 430 F.3d at 512 (citation and internal quotation marks omitted).

Market efficiency “is a complex issue that requires an analysis of numerous factors.” *Lehocky v. Tidel Techs., Inc.*, 220 F.R.D. 491, 505 (S.D. Tex. 2004). While expert analysis is not expressly required to demonstrate (or refute) market efficiency, it has become a regular part of the inquiry. *See In re Countrywide Fin. Corp. Sec. Litig.*, Lead Case No. CV-07-05295-MRP (MANx), 2009 U.S. Dist. LEXIS 129807, at *85 n.75 (C.D. Cal. Dec. 9, 2009) (“There is no requirement for expert testimony on the issue of market efficiency, but many courts have considered it when addressing [the *Basic* presumption], which may often benefit from statistical, economic, and mathematical analysis.”) (alteration in original) (citation and internal quotation marks omitted); *Lehocky*, 220 F.R.D. at 505 (“Federal courts typically look to expert testimony to decide th[e] [market efficiency] issue.”). Plaintiffs typically offer expert reports or affidavits to support the existence of market efficiency, with defendants often putting forth opposing experts. *See, e.g., PolyMedica*, 432 F.3d at 5-6 (where district court “went well beyond the four corners of the pleadings,

considering both parties' expert reports and literally hundreds of pages of exhibits focused on market efficiency," First Circuit held district court "was entitled to look beyond the pleadings in its evaluation of the applicability of the fraud-on-the-market presumption of reliance, and its resolution of the class-certification question"); *In re HealthSouth Corp. Sec. Litig.*, 257 F.R.D. 260, 272, 276 (N.D. Ala. 2009) (observing at class certification stage that while the court "did not accept the Defendants' suggestion that it hold an evidentiary hearing," the court "did consider hundreds if not thousands of pages of expert reports, affidavits, and exhibits, as well as extensive briefs" and "the focus of much of the written and oral debate centered on" whether fraud-on-the-market presumption applied).

Courts have avoided adopting a canonical set of factors as indicative of market efficiency (or a lack thereof), instead recognizing the determination demands "a fact-dominated inquiry." *PolyMedica*, 432 F.3d at 5. However, Courts of Appeals and district courts generally look to the criteria utilized in *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989), for guidance. *See, e.g., Miller v. Thane Int'l, Inc.*, 615 F.3d 1095, 1103 (9th Cir. 2010) ("*Cammer* sets out five well-recognized factors designed to help make the central determination of efficiency in a particular market.") (citation and internal quotation marks omitted); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 204 n.11 (2d Cir. 2008) (observing that the *Cammer* factors "have been routinely applied by district courts considering

the efficiency of equity markets”); *Xcelera.com*, 430 F.3d at 508 (in affirming grant of class certification, First Circuit approved of district court’s reliance on *Cammer*, “which tracks the definition [of market efficiency] we adopted in *PolyMedica*”); *Gariety*, 368 F.3d at 368 (citing *Cammer* factors); *Hayes*, 982 F.2d at 107 n.1 (noting *Cammer*’s “thorough analysis”).

In *Cammer*, the district court set forth criteria for judging whether the defendant company “traded in an efficient market.” 711 F. Supp. at 1285-86. As an initial matter, the court reasoned “[i]t would be illogical to apply a presumption of reliance merely because a security is traded within a certain ‘whole market’, without considering the trading characteristics of the individual stock itself.” *Id.* at 1281. The court stated that while the location where a stock trades – *e.g.*, on an over-the-counter-market or a national exchange – “might be relevant,” it “is not dispositive of whether the current price reflects all available information.” *Id.* at 1281 (internal quotation marks omitted). The court noted, however, “certain underlying characteristics” of an efficient market “more often than not will be associated with companies listed on national exchanges.” *Id.* at 1281 n.26.

The court detailed five factors that might indicate market efficiency:

First, the court cited “an average weekly trading volume during the class period in excess of a certain number of shares,” explaining “an actively traded market, as evidenced by a large weekly volume of stock trades, . . . implies significant investor interest

in the company,” which in turn “implies a likelihood that many investors are executing trades on the basis of newly available or disseminated corporate information.” *Id.* at 1286. In that regard, “[t]urnover measured by average weekly trading of 2% or more of the outstanding shares would justify a strong presumption that the market for the security is an efficient one; 1% would justify a substantial presumption.” *Id.* at 1293 (quoting 4 ALAN R. BROMBERG & LEWIS D. LOWENFELS, BROMBERG AND LOWENFELS ON SECURITIES FRAUD AND COMMODITIES FRAUD § 8.6 (1988)).

Second, the existence of “a significant number of securities analysts” following and reporting on a company’s stock during the class period “would imply, for example, the [reports the company issued] were closely reviewed by investment professionals, who would in turn make buy/sell recommendations to client investors.” *Id.* at 1286. In that way, “the market price of the stock would be bid up or down to reflect the financial information contained in the . . . reports, as interpreted by the securities analysts.” *Id.*

Third, “[t]he existence of market makers and arbitrageurs would ensure completion of the market mechanism,” as those individuals “would react swiftly to company news and reported financial results by buying or selling stock and driving it to a changed price level.” *Id.* at 1286-87;⁶ *see also PolyMedica*, 432

⁶ Arbitrage is “[t]he simultaneous buying and selling of identical securities in different markets, with the hope of profiting from the price difference in those markets.” BLACK’S

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F.3d at 9. (“The capacity of arbitrageurs to seek out new information and evaluate its effects on the price of securities distinguishes them from ordinary investors, who lack the time, resources, or expertise to evaluate all the information concerning a security. . . . In an efficient market, then, an ordinary investor who becomes aware of publicly available information cannot make money by trading on it because the information will have already been incorporated into the market by arbitrageurs.”) (citations and internal quotation marks omitted).

Fourth, “it would be helpful” if the company whose stock is at issue “was entitled to file an S-3 Registration Statement in connection with public offerings or, if ineligible, such ineligibility was only because of timing factors rather than because the minimum stock requirements set forth in the instructions to Form S-3 were not met.” *Cammer*, 711 F. Supp. at 1287. Form S-3 is a short-form securities registration statement reserved for companies that meet requirements the SEC has established, including timely filing of SEC reports for the 12 calendar months preceding the filing of the S-3 and a market

LAW DICTIONARY 112 (8th ed. 2004). A market maker is “[o]ne who helps establish a market for securities by reporting bid-and-asked quotations.” *Id.* at 990. It is “typically a specialist permitted to act as a dealer, a dealer acting in the capacity of block positioner, or a dealer who, with respect to a security, routinely enters quotations in an interdealer communication system or otherwise and is willing to buy and sell securities for the dealer’s own account.” *Id.*

capitalization of at least \$75 million. *See* 17 C.F.R. § 239.13. “Generally speaking, it is the largest and most well known companies which register equity securities on Form S-3.” *Cammer*, 711 F. Supp. at 1271 n.5; *see also Lehocky*, 220 F.R.D. at 509 (“Only corporations whose stock is actively traded and widely followed are allowed to use Form S-3.”). As such, a company’s eligibility to file Form S-3 constitutes “an important factor” weighing in favor of finding that the market for the company’s stock is efficient. *Cammer*, 711 F. Supp. at 1285.⁷

Fifth, and finally, the court cited “a cause and effect relationship” between “unexpected” corporate events or financial disclosures and a rapid response in the price of the company’s stock, as that connection “is the essence of an efficient market and the foundation for the fraud on the market theory.” *Cammer*, 711 F. Supp. at 1287; *see also O’Neil v. Appel*, 165 F.R.D. 479, 502-03 (W.D. Mich. 1995) (“If a plaintiff can empirically demonstrate that stock prices regularly rose or fell in prompt response to market information, this fact would be significant in establishing an

⁷ “Even though the SEC relaxed its requirements for S-3 eligibility after the *Cammer* decision, courts continue to hold that S-3 eligibility is still an important factor in determining market efficiency,” as courts have found “the SEC permits an S-3 Registration Statement only on the premise that the stock is already traded on an open and efficient market, such that further disclosure is unnecessary.” *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, No. 05 Civ. 1898 (SAS), 2006 U.S. Dist. LEXIS 52991, at *35 (S.D.N.Y. Aug. 1, 2006) (footnote omitted) (citations and internal quotation marks omitted), *aff’d*, 546 F.3d 196 (2d Cir. 2008).

efficient market.”); *Krogman v. Sterritt*, 202 F.R.D. 467, 477 (N.D. Tex. 2001) (“[I]n an efficient market, a stock’s price remains relatively stable in the absence of news, and changes very rapidly as the market receives new and unexpected information.”).

Notwithstanding its enumeration of those factors, the court in *Cammer* cautioned against drawing “bright line tests,” such as “whether a company is listed on a national exchange or is entitled to register securities on SEC Form S-3,” to help determine whether the stock at issue “trades in an ‘open and efficient market.’” 711 F. Supp. at 1287. The court explained, “A well established and widely followed company may choose for any number of unrelated reasons not to list itself on a national exchange. Furthermore, there may be a company whose stock trades in an efficient market, but which just missed or recently failed to meet the qualifications for Form S-3 registrants.” *Id.* The factors identified in *Cammer* thus serve as useful guideposts for assessing whether the market for a particular stock is efficient, although, given the fact-intensive nature of the market efficiency analysis, the *Cammer* indicia are neither dispositive nor exhaustive. See *Xcelera.com*, 430 F.3d at 511; *Simpson v. Specialty Retail Concepts, Inc.*, 823 F. Supp. 353, 355 (M.D.N.C. 1993) (“It is not necessary that a stock satisfy all five factors in order for the market in that stock to be efficient. Furthermore, while the *Cammer* factors are instructive, they are by no means exhaustive.”) (citation omitted).

Courts addressing the market efficiency question generally consider some or all of the factors discussed in *Cammer* and sometimes look to others, including:

(1) the company's market capitalization, "calculated as the number of shares multiplied by the prevailing share price." *Krogman*, 202 F.R.D. at 478. That factor might indicate whether a market possesses efficiency "because there is a greater incentive for stock purchasers to invest in more highly capitalized corporations." *Id.*

(2) the bid-ask spread, comprising "the difference between the price at which investors are willing to buy the stock and the price at which current stockholders are willing to sell their shares." *Id.* A large bid-ask spread might indicate market *inefficiency* "because it suggests that the stock is too expensive to trade." *Id.*

(3) the float, or "the percentage of shares held by the public, rather than insiders." *Id.* The smaller the float, "the less likely it is that the security's price accurately reflects all available public information because insiders are more likely to have access to private information relating to the security." *Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 97 n.21 (D. Conn. 2010).

The *Cammer*-plus factors, taken together, "seek to evaluate the two core requirements for an efficient market: large numbers of rational and intelligent investors, and important current information that is almost freely available to all participants." *Menkes*, 270 F.R.D. at 97 (citation and internal quotation

marks omitted). However, while all of the above-referenced elements are relevant to the efficiency determination, the fifth *Cammer* factor – the causal relationship between company-related disclosures and a prompt response in the company’s stock price – is “in many ways, the most important.” *Xcelera.com*, 430 F.3d at 512.

Plaintiffs attempting to demonstrate a causal relationship between “unexpected corporate events or financial releases” and stock price reaction often employ an expert-generated “event study,” *i.e.*, “a regression analysis that examines the effect of an event” on the price of a company’s stock. *RMED Int’l, Inc. v. Sloan’s Supermarkets, Inc.*, No. 94 Civ. 5587 (PKL) (RLE), 2000 U.S. Dist. LEXIS 3742, at *22-23 (S.D.N.Y. Mar. 24, 2000), *aff’d*, 2000 U.S. Dist. LEXIS 4892 (S.D.N.Y. Apr. 17, 2000). More specifically, an event study analyzes “the association between news about a company (good, bad, or neutral) and stock price movements.” Madge S. Thorsen, *et al.*, *Rediscovering the Economics of Loss Causation*, 6 J. BUS. & SEC. L. 93, 109 (2005/2006). The event study “attempts to determine whether *new* information correlates with a price movement – including the price movement’s direction and, perhaps, magnitude.” *Countrywide*, 2009 U.S. Dist. LEXIS 129807, at *104 (emphasis added). That correlation allows for an inference “that the new information has caused the price movement.” *Id.*; *see also HealthSouth*, 257 F.R.D. at 281-82 (concluding plaintiffs’ expert’s event study demonstrated “that HealthSouth stock reacted

to the release of new, material information regarding HealthSouth and thus traded in an efficient market during the Class Period”).

An event study essentially involves “three inter-related stages.” Thorsen, *et al.*, *Rediscovering the Economics*, 6 J. BUS. & SEC. L. at 110. The first stage consists of a “review of all available public information, on a qualitative basis, to identify what investors would find ‘material.’” *Id.* That stage “is guided by economic principles, literature, and the experience of the researcher.” *Id.* The information “can come from analysts’ reports, press releases, securities filings, news articles (newspapers and daily publications, as well as more general publications), and Internet bulletin board postings to the extent they appear to represent informed investors’ perceptions.” *Id.* The second stage of the event study “involves identification of the relevant market and guideline (or peer group companies) and the construction of a ‘market model.’ How the relevant market moved is compared to the movement of the stock. How the peer companies’ stock moved is compared to the subject as well.” *Id.* That process generates “a market model that predicts the daily return of the security based on the daily returns of an appropriate mix of market indices and an industry index.” *Id.* The third stage of the study involves analysis of “the security’s returns on identified event days or series of days” by observing “what the market and industry indices predicted and what the security actually did.” *Id.* In other words, those statistical techniques “separate out the

impact of market and industry forces on the price so that the impact of all company-specific news (including news relating to the fraud) is isolated.” *Id.*

An event study thus is “premised on analyzing whether there are statistically significant price movements in reaction to company specific news, market forces, and industry forces.” *Id.* at 111. Notably, “analysis of a single day may not tell the whole story in some situations,” such as (1) “where the dissipating impact of bad news” on the price of the security “is muted by prior leakage” of that information; (2) “where the dissipating impact of leakage is itself muted by confounding inflationary events such as denials by management”; or (3) in “omissions cases, where had the truth been known, the price would have dropped, and statistically significant price increases will therefore not be manifest.” *Id.* To address those circumstances, “event studies may consider ‘event windows’ or several days over time, looking at joint statistical significance.” *Id.* As a general matter, then, “if there are bits and pieces of bad news that cumulate over time, the aggregate effect will need to be considered.” *Id.*

Courts have deemed such expert analysis useful in assessing market efficiency. *See In re NetBank, Inc., Sec. Litig.*, 259 F.R.D. 656, 673 n.9 (N.D. Ga. 2009) (observing that an event study “is the preferred and predominant method for assessing the . . . efficiency of any market”) (ellipsis in original) (citation and internal quotation marks omitted). Indeed, “[a]n event study that correlates the disclosures of

unanticipated, material information about a security with corresponding fluctuations in price has been considered *prima facie* evidence of the existence of such a causal relationship.” *Teamsters Local 445 Freight Div.*, 546 F.3d at 207-08 (citing *Xcelera.com*, 430 F.3d at 512-14, 516).

In *Xcelera.com*, for example, to demonstrate the cause-and-effect relationship between corporate information and stock price, plaintiffs’ expert “presented the results of a sophisticated event study analyzing how Xcelera stock price reacted to company-specific events,” listing “more than forty separate instances, thirty-six of which occurred during the Class Period, in which Xcelera stock price rose or fell . . . within one day of the release of company-specific information.” 430 F.3d at 512-13 (footnote omitted). The study also examined “how Xcelera’s stock price reacted to information in the industry and in the general stock market (the NASDAQ, which is the largest electronic, screen-based market in the world).” *Id.* at 512 n.10 (citation and internal quotation marks omitted).

Furthermore, in addition to a one-day stock price reaction window, the event study listed, “as a control, the effect of company-specific information over longer windows of two, three, and five days, respectively.” *Id.* at 513 n.11. The First Circuit rejected defendants’ argument that the multiple-day windows were “inconsistent with the requirement that an efficient market must rapidly reflect all publicly available information,” as the event study “capture[d] the

same-day reaction of Xcelera's stock price to company-specific events." *Id.*; see also *Lehocky*, 220 F.R.D. at 506 & n.19 (observing that plaintiffs' expert, in conducting an event study, "identified two-day periods in which information pertaining to Tidel was released to the public and separated those two days from other two day periods in which there was no public information pertaining to Tidel," and noting plaintiffs' expert and defendants' expert "agreed that the use of such two-day periods and segregation of those two day periods into 'information days' and 'non-information days' was appropriate").⁸

Plaintiffs' expert, through the event study, "concluded that the Xcelera market reacted strongly – both positively and negatively – to new information concerning the company (including, but not limited to, disclosures at issue in th[e] case)" and, conversely, "found that re-releases of old information, such as secondary announcements about acquisitions or new investments, resulted in only a modest stock price reaction or no reaction at all." *Xcelera.com*, 430 F.3d at 513. The expert further supported his event study with two affidavits and testimony at a two-day

⁸ Courts have not adopted a dispositive temporal threshold for establishing the prompt or rapid reaction of stock price to material news relating to a company. The absence of a uniform standard accords with the fact-specific nature of the market efficiency inquiry as well as this Court's refusal "conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price." *Basic*, 485 U.S. at 248 n.28.

hearing partially devoted to the findings of the study. *Id.* at 514.

Econometric analysis of the type employed in *Xcelera.com* has become routine in securities cases. *See, e.g., NetBank*, 259 F.R.D. at 673 (plaintiffs' expert submitted, *inter alia*, a 102-page event study containing, for each day within the period, "(1) the relevant date; (2) trading volume; (3) closing price; (4) percentage price change; (5) dollar amount price change; (6) NASDAQ bank index; (7) percentage index change; (8) predicted NetBank percentage change; (9) the residual, or actual minus predicted NetBank percentage change; (10) the dollar amount of the change in NetBank stock not explained by the NASDAQ bank index change; (11) whether there was a statistical significance between the NetBank and index change; and (12) the headlines of any news items issued on that date"); *In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 279-80 (S.D.N.Y. 2008) (court found market efficiency existed where, in addition to providing evidence related to the first four *Cammer* factors, plaintiffs proffered an expert who "conducted an event study comparing the day-to-day percentage change in Alstom's share prices that resulted from disclosures of new information and concluded that Alstom was over 6 times more likely to have a statistically significant stock return on a day with news

than on a day with no news”) (citation and internal quotation marks omitted).⁹

A party attempting to establish (or disprove) the efficiency of the relevant market might also submit a “serial correlation test,” which – while less common than an event study – offers “a statistical examination of the sequence of prices” of the subject stock during the class period “that tests for market efficiency by looking for trends in stock pricing.” *Lehocky*, 220 F.R.D. at 506. Where a market is efficient, “there should be no trends because the market should be reacting quickly to new information, and new prices are being set quickly based upon the new information.” *Id.* Conversely, a serial correlation in stock prices “lends to a finding of market inefficiency.” *Id.* at 506-07 (court further observed that plaintiffs’ expert’s testing indicated a serial correlation of -.02, “a strong, highly statistically significant indication that the market for Tidel common stock was efficient during the class period”). *Cf. Countrywide*, 2009 U.S. Dist. LEXIS 129807, at *105-06 (stating “the presence of serial correlation suggests inefficiency” but “is not itself determinative of inefficiency”).

As the foregoing discussion illustrates, securities plaintiffs seeking to invoke the fraud-on-the-market

⁹ These examples are not intended to endorse any particular factual threshold or level of analysis to demonstrate market efficiency. Rather, they simply illustrate the nature of the inquiry courts undertake and the types of information parties and their experts typically provide.

presumption of reliance already must carry a substantial burden at the class certification stage. As detailed below, by setting loss causation – an element of a Section 10(b) claim that is analytically distinct from reliance – as a foundational prerequisite of the fraud-on-the-market presumption, the Fifth Circuit has inordinately heightened the class certification hurdle. The Fifth Circuit’s conflation of reliance and loss causation arises from a misconception of the nature of the market efficiency analysis and a distortion of this Court’s prior jurisprudence, including *Basic*.

D. Market Efficiency And Loss Causation Are Distinct Concepts, And The Latter Should Not Be Conscripted As A Prerequisite To Triggering The Fraud-On-The-Market Presumption.

As explained above, market efficiency – universally recognized among courts as a foundational requirement to employing the fraud-on-the-market presumption – measures stock price reaction to new or unexpected information relating to the company at issue in the litigation. Whether a security trades in an efficient market determines whether plaintiffs are able to demonstrate reliance, or “transaction causation.” See *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (noting reliance is “often referred to” in fraud-on-the-market cases “as ‘transaction causation’”). Loss causation, on the other hand, refers to the “causal connection between the material

misrepresentation and the loss.” *Id.* at 342. It is a distinct element of a Section 10(b) claim. *Id.*; *see also Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 172 (2d Cir. 2005) (explaining that transaction causation “is akin to reliance,” meaning “that but for the claimed misrepresentations or omissions, the plaintiff would not have entered into the detrimental securities transaction,” while loss causation “is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff”) (citations and internal quotation marks omitted). Similar to the tort concept of proximate cause, which embodies the element of foreseeability, the loss causation requirement “is intended to fix a legal limit on a person’s responsibility, even for wrongful acts.” *Lentell*, 396 F.3d at 174 (citation and internal quotation marks omitted).

Courts have expressed the differences between reliance and loss causation. Moreover, courts generally resist conflating those separate elements of a Section 10(b) claim. *See Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 552 (8th Cir. 2008) (explaining distinction between transaction causation, which courts presume “when an investor buys or sells stock at a price set by a liquid market in reliance on the integrity of that price,” and loss causation, as to which “plaintiffs must plead and prove that the loss was foreseeable and caused by the materialization of the concealed risk”); *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 648-49 (7th Cir. 1997) (noting allegation that investor “would not have

invested but for the fraud” addresses transaction causation, while for loss causation, investor must allege “that, but for the circumstances that the fraud concealed, the investment . . . would not have lost its value”) (ellipsis in original) (citation and internal quotation marks omitted); *see also Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1448 (11th Cir. 1997) (observing Eleventh Circuit’s cases “have not utilized the [fraud-on-the-market] theory to alter the loss causation requirement”).

Indeed, this Court, in *Dura*, held securities plaintiffs cannot establish loss causation simply by proving “that the price *on the date of purchase* was inflated because of the misrepresentation.” 544 U.S. at 342 (emphasis in original) (citation and internal quotation marks omitted). Plaintiffs in that case contended they properly pled loss causation by alleging “that the stock price on the date of purchase was inflated because of the misrepresentations or omissions and they would not have purchased the stock had they known about Defendants’ wrongdoing.” *In re Dura Pharms., Inc. Sec. Litig.*, No. 99cv0151-L(NLS), 2001 U.S. Dist. LEXIS 25907, at *31 (S.D. Cal. Nov. 2, 2001), *rev’d*, *Broudo v. Dura Pharms., Inc.*, 339 F.3d 933 (9th Cir. 2003), *rev’d*, 544 U.S. 336 (2005). Plaintiffs’ allegation thus corresponded more closely to transaction causation than to loss causation.

This Court, however, held plaintiffs did not adequately allege loss causation, reasoning “[n]ormally, in cases such as this one (*i.e.*, fraud-on-the-market cases), an inflated purchase price will not itself constitute or proximately cause the relevant economic

loss.” *Dura*, 544 U.S. at 342. Among the bases for its conclusion, the Court observed that “[j]udicially implied private securities fraud actions resemble in many (but not all) respects common-law deceit and misrepresentation actions” and the common law of deceit “has long insisted that a plaintiff . . . show not only that had he known the truth he would not have acted but also that he suffered actual economic loss.” *Id.* at 343-44. The Court thus recognized the meaningful distinction between reliance (or transaction causation) and loss causation in securities cases – and refused to merge those elements.

Residing at the core of transaction causation in fraud-on-the-market cases, the concept of market efficiency likewise differs in nature from loss causation. The market efficiency inquiry attempts to discern whether it is logical to presume that investors’ reliance on the price of the security in a given case is an adequate proxy for their reliance on the actual misstatements or omissions defendants disseminated. As such, the market efficiency analysis encompasses a general examination of the company involved, the market in which the company trades and the responsiveness of the price of the company’s securities to new or unexpected material information; the inquiry addresses how investors reacted ***at the time company-related statements were made.***

The loss causation inquiry, by contrast, entails an examination of whether investors suffered losses once the revelation of the “truth” concealed by the alleged misrepresentations ultimately emerged. *See Miller*,

615 F.3d at 1102 (“the loss causation inquiry assesses whether a particular misstatement *actually* resulted in loss”) (emphasis in original). The loss causation inquiry is thus inherently “historical and context-dependent.” *Id.* None of the criteria courts typically evaluate to assess market efficiency – including whether a causal relationship between new or unexpected material information and a company’s stock price movement exists – demands, or even countenances, the injection of loss causation as a *sine qua non* of invoking the fraud-on-the-market presumption.

Moreover, the substantive distinction between market efficiency and loss causation bears on the court’s inquiry at the class certification stage. As the animating force behind the fraud-on-the-market presumption, market efficiency is susceptible of examination at class certification because the court must determine whether the class as a whole can utilize the presumption to establish reliance at trial. The presumption coheres the class for predominance purposes; without it, the class is beset by individualized issues of reliance and cannot proceed. A market efficiency determination – which does not equate to a ruling that plaintiffs have proven the facts necessary to utilize the presumption at trial, *PolyMedica*, 432 F.3d at 7 n.10 – therefore is essential to a court’s decision on class certification. *See Castillo v. Envoy Corp.*, 206 F.R.D. 464, 471 (M.D. Tenn. 2002) (concluding “a preliminary determination as to the ‘availability’ or applicability of the presumption, which is distinct from its actual application, can be made at

th[e] [class certification] stage without dealing with the merits of the case”).

Loss causation, however, is purely a merits issue that does not overlap with Rule 23 requirements. Moreover, it is provable or disprovable on a classwide basis. *See, e.g., Schleicher*, 618 F.3d at 687 (“After a class has been certified, and other elements of the [Section 10(b)] claim have been established, the court will need to pin down *when* the stock’s price was affected by any fraud. That decision . . . can be made on a class-wide basis, because it affects investors in common.”) (emphasis in original); *accord In re Boston Scientific Corp. Sec. Litig.*, 604 F. Supp. 2d 275, 284 (D. Mass. 2009); *Ross v. Abercrombie & Fitch Co.*, 257 F.R.D. 435, 454-55 (S.D. Ohio 2009).

In light of the foregoing, and as analyzed in detail in Petitioner’s brief, the Fifth Circuit’s intertwining of loss causation and reliance distorts *Basic* and *Dura*. The Fifth Circuit’s rogue approach embodies a fundamental misunderstanding of the disparate roles market efficiency and loss causation play in fraud-on-the-market securities cases. Moreover, plaintiffs, who already bear a serious burden to show market efficiency as a prerequisite to triggering the fraud-on-the-market presumption, should not be saddled with the onerous additional requirement of demonstrating loss causation at the class certification stage.

IV. CONCLUSION

For the foregoing reasons, in addition to the arguments and authorities set forth in Petitioner's brief, this Court should reject the Fifth Circuit's improper requirement that securities plaintiffs demonstrate loss causation as a prerequisite to invoking the fraud-on-the-market presumption of reliance at the class certification stage. Consequently, this Court should reverse the Fifth Circuit's decision overturning class certification in this case.

Respectfully submitted,

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