No. 11-1085

In the Supreme Court of the United States

AMGEN INC., ET AL., PETITIONERS

v.

CONNECTICUT RETIREMENT PLANS AND TRUST FUNDS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether, in a private action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, a plaintiff that invokes the fraud-on-the-market presumption of reliance must prove materiality in order for the suit to be maintained as a class action.

2. Whether, in such a case, the district court must allow the defendant at class certification to present evidence that the truth had reached the market and neutralized the defendant's alleged misstatements.

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INTEREST OF THE UNITED STATES

The United States, through the Department of Justice and the Securities and Exchange Commission (SEC), administers and enforces the federal securities laws. This case concerns the requirements for class certification in a private securities-fraud action in which the named plaintiff invokes the fraud-on-the-market presumption to establish the element of reliance. Meritorious private securities-fraud actions, including class actions, are an essential supplement to criminal prosecutions and SEC enforcement actions. The United States therefore has a substantial interest in this Court's resolution of the questions presented.

STATEMENT

1. Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful for any person "[t]o use or employ, in connection with the purchase or sale of any security * * * , any manipulative or deceptive device or contrivance in contravention of" rules promulgated by the SEC. 15 U.S.C. 78j(b). Under SEC Rule 10b-5, which implements Section 10(b), it is unlawful for any person, in connection with the purchase or sale of a security, "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. 240.10b-5(b).

This Court long has construed Section 10(b) to provide a private right of action. *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341 (2005) (citing cases). In order to recover in a private action under Section 10(b) and Rule 10b-5(b), a plaintiff must prove the following elements: (1) a material misrepresentation or omission by the defendant; (2) the defendant's scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) the plaintiff's reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation. *Id.* at 341-342; see, *e.g.*, *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309, 1317 (2011).

Proof of reliance establishes the "requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 243 (1988); see *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008). The "traditional (and most direct) way a plaintiff can demonstrate reliance" on a defendant's misrepresentation is to

show that he was aware of and purchased stock "based on that specific misrepresentation." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011). In *Basic*, however, this Court recognized an alternative approach, known as the "fraud-on-the-market" presumption, to proving the reliance element of a private Section 10(b) claim. 485 U.S. at 241-247. The Court observed that "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented [the plaintiffs] from proceeding with a class action, since individual issues then would have overwhelmed the common ones." *Id.* at 242. The Court further explained that a requirement of individualized proof "would place an unnecessarily unrealistic evidentiary burden" on securities-fraud plaintiffs who "traded on an impersonal market." *Id.* at 245.

The Court in *Basic* held that reliance may be presumed if a plaintiff shows that the defendant's material misrepresentation was transmitted to the plaintiff through the market price of the stock and the plaintiff purchased stock based on that price. 485 U.S. at 245-247; see *Erica P. John Fund*, 131 S. Ct. at 2185. This approach to proving reliance rests on the theory that "the market price of shares traded on well-developed markets reflects all publicly available information," including "any public material misrepresentations." *Basic*, 485 U.S. at 246-247. Because the market "transmits information to the investor in the processed form of a market price," a court may presume that an investor relies on the public misstatements when he "buys or sells stock at the price set by the market." *Erica P. John Fund*, 131 S. Ct. at 2185 (quoting *Basic*, 485 U.S. at 244, 247); see *Basic*, 485 U.S. at 244 (explaining that

"the market is performing a substantial part of the valuation process performed by the investor in a face-to-face transaction" (citation omitted)).

The fraud-on-the-market presumption is not a procedural rule specifically directed to the class-certification inquiry. Rather, the presumption is a substantive securities-law rule that governs the means by which private Section 10(b) plaintiffs can establish the reliance element of their claims, and it may be invoked in both individual and class actions. An important practical consequence of the fraud-on-the-market presumption, however, is to facilitate class certification by allowing the reliance element of a Section 10(b) suit to be proved through evidence common to all class members. That mode of proof increases the likelihood that "questions of law or fact common to class members [will] predominate" in the suit as a whole. Fed. R. Civ. P. 23(b)(3); see *Erica P. John Fund*, 131 S. Ct. at 2184.

A defendant may rebut the presumption of reliance through "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." *Basic*, 485 U.S. at 248. As an example, the Court in *Basic* hypothesized a situation where "the truth" had entered the market "and dissipated the effects of the misstatements"—a rebuttal known as the truth-on-the-market defense. *Id.* at 248-249. The Court stated that "[p]roof of that sort is a matter for trial." *Id.* at 249 n.9.

2. Respondent is the lead plaintiff in a putative securities-fraud class action against Amgen, Inc., a pharmaceutical manufacturer, and several of its officers and directors (petitioners in this Court). Pet. App. 15a-16a. Respondent alleged that petitioners had made a series

of material misstatements and omissions about the safety, efficacy, and marketing of two of Amgen's flagship drugs. *Id.* at 16a; Consolidated Am. Class Action Compl. ¶¶ 1, 43, 128-177 (Oct. 1, 2007) (Compl.). Respondent further alleged that these misstatements and omissions had artificially inflated the price of Amgen's stock; that respondent and other members of the putative class had purchased the stock at the inflated price; and that they had suffered financial loss when the truth came to light and Amgen's stock price declined. *Id.* ¶ 202. Respondent also alleged that the market for Amgen securities was efficient and incorporated publicly available information into the price, and that all class members therefore had "suffered similar injury through their purchase of Amgen's securities at artificially inflated prices." *Id.* ¶¶ 199-200.

Respondent moved to certify a class of all persons who had purchased Amgen stock between April 22, 2004, and May 10, 2007. Pet. App. 16a. The district court granted that motion. *Id.* at 15a-50a. The court rejected petitioners' contention that respondent was required to prove the materiality of the alleged misstatements in order to satisfy the requirements of Federal Rule of Civil Procedure 23. *Id.* at 31a-38a.[1] The court also held that petitioners could not invoke the truth-on-the-market defense as a ground for resisting class certification. *Id.* at 40a-44a.

3. The court of appeals affirmed. Pet. App. 1a-13a. The court held that a plaintiff seeking to establish reliance through the fraud-on-the-market presumption is

[1] The district court also held that respondent was not required to prove loss causation in order to obtain class certification. Pet. App. 38a-40a. This Court subsequently reached the same conclusion in *Erica P. John Fund*, 131 S. Ct. at 2186.

not required to prove materiality at class certification because "proof of materiality is not necessary to ensure that the question of reliance is common among all prospective class members' securities fraud claims." *Id.* at 12a. The court explained:

> If the misrepresentations turn out to be material, then the fraud-on-the-market presumption makes the reliance issue common to the class, and class treatment is appropriate. But if the misrepresentations turn out to be immaterial, then *every* plaintiff's claim fails on the merits (materiality being a standalone merits element), and there would be no need for a trial on each plaintiff's individual reliance. Either way, the plaintiffs' claims stand or fall together—the critical question in the Rule 23 inquiry.

Id. at 8a-9a.

The court of appeals further explained that, for these purposes, the question whether alleged misstatements were material differs from the questions "whether the securities market was efficient and whether the defendant's purported falsehoods were public," which must be resolved at the class-certification stage. Pet. App. 9a. Unlike materiality, the existence of an efficient market and the public dissemination of false statements "are not elements of the merits of a securities fraud claim. Thus, if the plaintiffs failed to prove those elements, they could not use the fraud-on-the-market presumption, but their claims would not be dead on arrival; they could seek to prove reliance individually. That scenario, however, would be inappropriate for a class proceeding." *Ibid.* (citation omitted).

The court of appeals also held that the "district court correctly refused to consider Amgen's truth-on-the-market defense at the class certification stage." Pet.

App. 12a-13a. The court observed that such a defense "is a method of refuting an alleged misrepresentation's *materiality*" and therefore is a "merits issue to be reached at trial or by summary judgment." *Id.* at 13a.

SUMMARY OF ARGUMENT

When a named plaintiff in a securities-fraud class action seeks to establish reliance through the fraud-on-the-market presumption, the plaintiff need not prove materiality to obtain class certification, and the defendant may not defeat certification by presenting evidence supporting a truth-on-the-market defense.

A. A named plaintiff seeking certification of a class must meet the requirements for class cohesion set out in Federal Rule of Civil Procedure 23. As relevant here, Rule 23(b)(3) requires that common questions of law or fact predominate over issues specific to individual class members. In securities-fraud cases, that inquiry often focuses on whether the element of reliance can be established through proof common to the plaintiff class.

To establish reliance, the named plaintiff in this case invoked the fraud-on-the-market presumption. Under that presumption, when the defendant makes public material misstatements in an efficient market, the misstatements are reflected in the stock's price, and it is presumed that the investor relies on the misstatements when he buys stock at the market price. See *Basic Inc.* v. *Levinson*, 485 U.S. 224, 244-247 (1988). The application of Rule 23(b)(3) in this case turns on whether respondent's failure to establish materiality at the class-certification stage creates a significant risk that individualized reliance inquiries will prove necessary as the case proceeds.

B. A class plaintiff invoking the fraud-on-the-market presumption need not prove materiality to establish that

the common issues predominate. A plaintiff must demonstrate that the market is efficient and that the defendant's statements were public. If a class was certified without inquiry into those factors, and the court subsequently determined that the market was not efficient or that the statements were not public, the reliance element of the plaintiffs' claims would depend on proof specific to individual class members, causing individual issues to predominate.

A failure to demonstrate materiality at the class-certification stage creates no similar risk. Because materiality is determined under a "reasonable investor" standard, it can be proved or disproved through evidence common to the class. And if petitioners' statements are ultimately found *not* to be material, judgment can be entered for petitioners on that basis, without the need for individualized reliance inquiries. There is consequently no basis for requiring this merits showing at class certification, because the class stands or falls together on the element of materiality. Failure to prove materiality does not show that individual issues predominate; it shows that the whole class loses on the merits. Thus, while a plaintiff must prove materiality to successfully establish fraud-on-the-market reliance at summary judgment or at trial, it need not do so at class certification.

C. Class certification is not the appropriate time to litigate a truth-on-the-market defense. Such a defense is a means of disproving materiality by showing that, in light of neutralizing disclosures, reasonable investors would not have regarded particular false statements as significant to their investment decisions. At summary judgment or at trial, petitioners' truth-on-the-market defense can be adjudicated based on proof that is com-

mon to all class members. And if the defense is successful, judgment can be entered for petitioners on the merits, without the need for further inquiry into individual plaintiffs' reliance.

Petitioner's policy concerns about abusive class actions do not justify supplementing the requirements of Rule 23. Congress sought to combat abusive securities-fraud actions by enacting legislation that heightened pleading standards and altered how securities-fraud class actions are litigated. The court of appeals appropriately declined to use Rule 23 to test the merits of respondent's claim. The judgment below should be affirmed.

ARGUMENT

A PRIVATE SECURITIES-FRAUD PLAINTIFF THAT INVOKES THE FRAUD-ON-THE-MARKET PRESUMPTION OF RELIANCE NEED NOT PROVE MATERIALITY TO OBTAIN CLASS CERTIFICATION, AND A DEFENDANT MAY NOT DEFEAT CERTIFICATION BY PRESENTING EVIDENCE THAT THE TRUTH REACHED THE MARKET

A named plaintiff seeking class certification in a securities-fraud case must establish that all of the prerequisites in Federal Rule of Civil Procedure 23 have been met. Contrary to petitioners' contention, respondent need not prove materiality to show that common questions of law and fact predominate over individual ones. Because materiality is based on a "reasonable investor" standard, the question whether petitioners' alleged misstatements were material can be resolved through common proof and will have a single answer for all members of respondent's proposed class. In addition, failure to decide the question of materiality at the class-certification stage creates no danger that individual issues will come to predominate over common ones as

the suit is litigated to its conclusion. If a class is certified and it is ultimately determined that petitioners' alleged misrepresentations were *not* material, all members of the plaintiff class will lose on the merits, and no individualized reliance inquiry will be necessary. Deferring resolution of the materiality issue until summary judgment or trial therefore does not create the risk of variegated proof that concerned the Court in *Basic*.

A. Whether To Certify A Fraud-On-The-Market Class Depends Solely On Whether The Plaintiffs Have Met The Requirements Of Rule 23

1. In order to certify a case as a class action, a federal district court must determine that the proposed class satisfies the requirements imposed by Federal Rule of Civil Procedure 23. See, *e.g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2548 (2011); *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010). Under Section (a) of Rule 23, the named plaintiff must show: (1) numerosity, *i.e.*, that "the class is so numerous that joinder of all members is impracticable"; (2) commonality, *i.e.*, that "there are questions of law or fact common to the class"; (3) typicality, *i.e.*, that "the claims or defenses of the representative parties are typical of the claims or defenses of the class"; and (4) adequacy of representation, *i.e.*, that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

The party seeking certification also must establish that the proposed class fits into one of the categories described in Section (b) of Rule 23. See *Wal-Mart*, 131 S. Ct. at 2551. Section (b) provides that a class action may be maintained if: (1) prosecuting separate actions would risk adversely affecting class members or the opposing party; (2) "the party opposing the class has acted or re-

fused to act on grounds that apply generally to the class" and "final injunctive relief or corresponding declaratory relief is appropriate" on a class-wide basis; or (3) "questions of law or fact common to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b). Rule 23 "does not set forth a mere pleading standard"; rather, the named plaintiff must "affirmatively demonstrate his compliance with the Rule." *Wal-Mart*, 131 S. Ct. at 2551; see *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613-614 (1997); *General Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 160 (1982).

The district court's Rule 23 analysis may "entail some overlap with the merits of the plaintiff's underlying claim," because the court may need to "probe behind the pleadings" to consider how the plaintiff's claim will be proved. *Wal-Mart*, 131 S. Ct. at 2551-2552 (quoting *Falcon*, 457 U.S. at 160). "If something about 'the merits' also shows that individual questions predominate over common ones, then certification may be inappropriate." *Schleicher* v. *Wendt*, 618 F.3d 679, 685 (7th Cir. 2010). But so long as the relevant merits determinations "affect[] investors in common" and "can be made on a class-wide basis," a court may not deny class certification based on its view that the defendant will ultimately prevail. *Id.* at 687; see Fed. R. Civ. P. 23(c)(1) advisory committee's note (2003) ("[A]n evaluation of the probable outcome on the merits is not properly part of the certification decision."). Regardless of the plaintiff's perceived likelihood of success, Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the

specified criteria to pursue his claim as a class action." *Shady Grove*, 130 S. Ct. at 1437.

2. At issue in this case is the requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. To satisfy Rule 23(b)(3), a plaintiff must establish that the elements of the cause of action are "capable of proof at trial through evidence that is common to the class rather than individual to its members." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-312 (3d Cir. 2008).

In this case, as in many private securities-fraud cases, several of the elements are susceptible to common proof. See, *e.g.*, *Amchem*, 521 U.S. at 625 ("Predominance is a test readily met in certain cases alleging consumer or securities fraud."). Respondent has alleged that petitioners made material misstatements and omissions that inflated Amgen's stock price; that Amgen's stock price declined when the truth came to light; and that the members of the class (*i.e.*, persons who had purchased Amgen stock between the initial misstatements and omissions and the later corrections) suffered economic loss as a result. Compl. ¶¶ 128-177; see Pet. App. 16a-19a. Whether petitioners made material misstatements or omissions, whether they acted with scienter, and whether the misstatements and omissions inflated the stock price are questions common to all class members. See *Schleicher*, 618 F.3d at 681. For that reason, petitioners do not dispute that respondent has satisfied the commonality requirement in Rule 23(a)(2). See Pet. App. 24a.

The parties disagree, however, about the application of Rule 23(b)(3) to the element of reliance in this case. See *Erica P. John Fund, Inc.* v. *Halliburton Co.,* 131 S. Ct. 2179, 2184 (2011) ("Whether common questions of law or fact predominate in a securities fraud action often turns on the element of reliance."); see also Pet. Br. 4. To establish reliance, respondent invoked the fraud-on-the-market presumption. Compl. ¶¶ 199-200. Petitioners contend (Br. 19) that, "[b]ecause materiality is an indispensable predicate of the fraud-on-the-market theory, * * * Rule 23 requires that it * * * be proved before class certification."

Although individual securities-fraud plaintiffs may seek to use the fraud-on-the-market presumption to establish reliance, the presumption has particular practical significance in the class-action context. "Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented [private securities-fraud plaintiffs] from proceeding with a class action, since individual issues would have overwhelmed the common ones." *Basic*, 485 U.S. at 242. The application of Rule 23(b)(3) to this case turns on whether the failure to assess materiality at the class-certification stage creates a significant risk that individualized reliance inquiries will ultimately become necessary, causing issues specific to individual plaintiffs to predominate over issues common to the class.

As we explain below, and as the court of appeals correctly recognized, deciding materiality at summary judgment or trial creates no danger that individual issues will come to predominate as the litigation proceeds. Because materiality is a separate element of *every* private Section 10(b) claim (whether or not the plaintiff invokes the fraud-on-the-market presumption), an eventu-

al determination that petitioners' alleged misstatements were not material would provide an independent ground for judgment in petitioners' favor, obviating any need for the sort of individualized reliance inquiry to which the Court referred in *Basic*. Materiality therefore is not the sort of threshold question that must be decided at the class-certification stage in order to ensure that Rule 23(b)(3)'s predominance requirement is satisfied.

B. A Securities-Fraud Plaintiff Relying On The Fraud-On-The-Market Presumption Need Not Prove Materiality To Obtain Class Certification

1. At class certification, a securities-fraud plaintiff must make certain showings with respect to the fraud-on-the-market presumption in order to ensure that reliance can be established without the need for individualized proof. In this case, the courts below correctly "require[d] [respondent] to prove at the class certification stage that the market for Amgen's stock was efficient and that Amgen's supposed misstatements were public." Pet. App. 9a; see *Erica P. John Fund*, 131 S. Ct. at 2185; see also *Wal-Mart*, 131 S. Ct. at 2552 n.6 (identifying, as one example of a merits issue that must be resolved at the class-certification stage, the question whether shares involved in a private securities-fraud suit were traded on an efficient market).

Proof of those components at the class-certification stage is necessary to ensure that the class claims can be resolved without the need for individualized reliance inquiries. The plaintiff must show that the market was efficient with respect to the stock at issue so that the alleged misstatements or omissions would be reflected in the stock's price. Because "the market price of shares" in an efficient market "reflects all publicly available information," including any material information, proof of

market efficiency shows that the market will transmit a material misstatement through the stock's price. *Basic*, 485 U.S. at 246. The plaintiff also must show that the alleged misrepresentations were made publicly, because the market would not take into account information unknown to it. *Ibid.*; see *Erica P. John Fund*, 131 S. Ct. at 2185 (noting that "the alleged misrepresentations" must be "publicly known," because otherwise, "how would the market take them into account?"). When those prerequisites are satisfied, plaintiffs can establish "the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury," *Basic*, 485 U.S. at 243, through proof common to the class.[2]

Those determinations must be made at the class-certification stage, rather than deferred for later resolution at summary judgment or trial, in order to ensure that common questions will predominate as the case is litigated to its conclusion. If a class were certified and the plaintiffs ultimately failed to prove market efficiency or public dissemination of the alleged misrepresentations, the plaintiffs "could not use the fraud-on-the-

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[2] Petitioner contends (Br. 22-23) that at class certification, a securities-fraud plaintiff relying on the fraud-on-the-market presumption also must prove that the named plaintiff and the members of the putative class traded stock between the time of the alleged misrepresentation and the time the truth was revealed. That requirement is better understood as a limit on the definition of the class, rather than a fact that the named plaintiff must prove for each class member at class certification. Precise identification of the times when the alleged misrepresentation was made and the truth was subsequently revealed is also important to ensure that the named plaintiff has traded stock during the time the stock price allegedly was distorted by the defendant's misrepresentations, so that the named plaintiff's claim is typical of the class members' claims. See Fed. R. Civ. P. 23(a)(3).

market presumption, but their claims would not be dead on arrival; they could seek to prove reliance individually." Pet. App. 9a. At that point, however, "individual issues then would * * * overwhelm[] the common ones," and class certification would not be appropriate. *Basic*, 485 U.S. at 242; see Pet. App. 9a (efforts by class members "to prove reliance individually * * * would be inappropriate for a class proceeding"). In order to "affirmatively demonstrate [its] compliance with" Rule 23, *Wal-Mart*, 131 S. Ct. at 2551, respondent therefore was required to establish at the class-certification stage that the need for variegated proof of that sort would not arise at a later stage of the suit.

In this case, petitioners conceded that the market for Amgen stock was efficient, and they did not contest that the alleged misstatements were public. Pet. App. 5a-6a. Because "[t]he public information [wa]s reflected in the market price of the security" and the investors bought at the market price, the courts below correctly held that the case could proceed as a class action on the assumption that the investors "relie[d] upon [petitioners'] statements." *Stoneridge*, 552 U.S. at 159. That common path to proving reliance made class certification appropriate.

2. A plaintiff who invokes the fraud-on-the-market presumption need not establish materiality at the class-certification stage. The relevant question at class certification is whether the plaintiff has shown that common issues will predominate over issues specific to particular class members. See, *e.g.*, *Falcon*, 457 U.S. at 155 (the appropriateness of certification depends on whether "the issues involved are common to the class as a whole" and whether "they turn on questions of law applicable in

the same manner to each member of the class" (citation and internal quotation marks omitted)).

An alleged misstatement or omission is material if there is "a substantial likelihood" that it "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic*, 485 U.S. at 231-232 (quoting *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976)). The "role of the materiality requirement" is to "filter out essentially useless information that a reasonable investor would not consider significant." *Id.* at 234. The materiality standard "is an objective one" that focuses on "the significance of an omitted or misrepresented fact to a reasonable investor," not to any particular investor. *TSC Indus.*, 426 U.S. at 445.

For that reason, the issue "whether a statement is materially false is a question common to all class members." *Schleicher*, 618 F.3d at 687. With respect to the resolution of the materiality issue itself, "questions of law or fact common to class members" clearly will "predominate over questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Indeed, the determination whether petitioners' alleged misrepresentations were material will not require *any* inquiry into particular class members' investing histories or other personal circumstances.

Unlike materiality, some threshold questions must be resolved at the class-certification stage, even though the answers will be the same for all members of the proposed class, in order to ensure that common questions will predominate over individual ones during the subsequent course of the litigation. In *Basic*, for example, the district court could not appropriately have certified a class without first determining whether the fraud-on-

the-market presumption was a valid means of proving reliance in a Section 10(b) suit. Although the question "Is the fraud-on-the-market theory valid?" would necessarily have the same answer for all potential plaintiffs, the court in *Basic* was required to answer that question at the class-certification stage in order to determine whether reliance could be proved through evidence common to the class, or whether issues specific to individual plaintiffs would instead predominate. See 485 U.S. at 242. For similar reasons, respondent in this case was required to prove market efficiency and public dissemination at the class-certification stage, even though neither the efficiency of the market nor the public nature of the alleged misrepresentations would vary from investor to investor. See pp. 14-16, *supra*.

The issue of materiality, however, raises no similar concern. If a class is certified and petitioners' alleged misrepresentations are ultimately found not to be material, there is no likelihood that individual issues will come to predominate in the subsequent course of the litigation. "[B]ecause materiality is an element of the *merits* of their securities fraud claim, the plaintiffs cannot both fail to prove materiality yet still have a viable claim for which they would need to prove reliance individually." Pet. App. 8a. Rather, "if the misrepresentations turn out to be immaterial, then *every* plaintiff's claim fails on the merits." *Ibid*. Because "the plaintiffs' claims stand or fall together" regardless of the ultimate resolution of the materiality question, *id*. at 8a-9a, that issue need not be decided at the class-certification stage of the case.

Petitioners assert that "without the [fraud-on-the-market] presumption, the class members would have to prove reliance individually." Br. 21. But the accuracy of

that statement depends on the *reason* the fraud-on-the-market presumption is inapplicable to a particular case. If the presumption is rendered inapplicable by the plaintiffs' failure to prove materiality, judgment can be entered for the defendant on that independent ground, obviating any need (and any opportunity) for the plaintiffs "to prove reliance individually." It is therefore "possible to certify a class under Rule 23(b)(3) even though all statements turn out to have only trivial effects on stock prices"; in such a case, "[c]ertification is appropriate, but the class will lose on the merits." *Schleicher*, 618 F.3d at 685.

There is also no merit to petitioners' contention (Br. 35) that the court below contravened this Court's decision in *Wal-Mart* by taking account of the fact that materiality is an element of respondent's merits claim. The court of appeals did not rely on any rigid view, of the sort specifically disapproved in *Wal-Mart* (see 131 S. Ct. at 2551-2552 & n.6), that merits issues are categorically irrelevant to the class-certification decision. Rather, the court carefully explained how the status of materiality as a separate merits element bears on the Rule 23(b)(3) inquiry. See Pet. App. 8a-9a. That approach was fully consistent with this Court's admonition that lower courts, in deciding whether class certification is appropriate, must address merits issues to the extent necessary to ensure that Rule 23's requirements are satisfied.[3]

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[3] Contrary to petitioners' contention (Br. 37), the court below cogently explained why materiality differs for these purposes from market efficiency and public disclosure, which must be proved at class certification. The court explained that, whereas a failure of proof on materiality allows judgment to be entered against all class members, a failure of proof on market efficiency or public disclosure

3. Petitioners contend that a plaintiff in a fraud-on-the-market case must prove materiality to obtain class certification "[b]ecause materiality is a predicate to the *Basic* presumption" and that "presumption [is] needed to satisfy Rule 23's prerequisites." Br. 9; see *id.* at 17-18, 38-40. Petitioners are mistaken.

Petitioners' core argument is that no class could properly be certified until respondent established that the class members could actually prove reliance through common evidence. But even in properly certified class actions, plaintiffs often ultimately fail to prove an element of their claims through common evidence because they cannot prove that element *at all*. The result in such a case is judgment for the defendant on the merits, which binds all class members and thereby serves a core purpose of the class-action mechanism. Unless the failure of *common* proof gives rise to a need for *individualized* proof, it does not cast doubt on the propriety of class certification.

Petitioners do not dispute that materiality is an objective inquiry and that proof of materiality therefore is the same for all class members. Indeed, petitioners agree (Br. 13 n.1) that whether an alleged misstatement is material depends on whether a "reasonable investor" would view the information as "as having significantly altered the total mix of information" available. *Ibid.* (quoting *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309, 1318, 1318 (2011)). Because materiality does not depend on any particular investor's subjective reaction to information, petitioners' alleged misstatements

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leaves open the possibility that some class members may have meritorious claims, so long as they can establish individualized reliance. See Pet. App. 8a-9a.

will by definition be material or immaterial for all class members.

Petitioners also make no meaningful effort to demonstrate that certification of a class without a determination as to materiality will create any risk that individual issues will predominate as the suit is litigated to judgment. In particular, petitioners do not attempt to rebut the court of appeals' explanation (Pet. App. 8a) that, if petitioners' alleged misrepresentations are ultimately found to be immaterial, there will be no need for individualized reliance inquiries.[4] Rather, petitioners appear to argue that, because the fraud-on-the-market presumption *as a whole* facilitates class certification by allowing reliance to be shown through common proof, and the Court in *Basic* described materiality as an essential predicate to the successful invocation of that presumption, a finding of materiality should be a prerequisite to class certification. See, *e.g.*, Pet. Br. 22 (arguing that any "matters that are logically connected to reliance * * * have to be proven at class certification" (emphasis omitted)).

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[4] Petitioners contend that a defendant's entitlement to judgment when plaintiffs fail to prove materiality "is irrelevant to whether individualized issues predominate on the distinct element of reliance." Br. 36. It is true that, even when a defendant's statements are found to be immaterial, some class members might possess evidence that they subjectively relied on the statements in making their own investment decisions. But since a failure of proof on materiality provides a sufficient ground for rejecting a private Section 10(b) claim, the court in such a case would have no occasion to admit or evaluate any plaintiff-specific evidence of direct reliance. The theoretical possibility of individualized reliance issues that will not actually be litigated cannot cause individual issues to predominate. Cf. Fed. R. Civ. P. 23(c)(1) advisory committee's note (2003) (court at class-certification stage considers "how the case will be tried").

Neither the text of Rule 23(b)(3) nor this Court's decisions construing the Rule support that approach to the predominance requirement. Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove*, 130 S. Ct. at 1437. Where (as here) a plaintiff invokes Rule 23(b)(3) as a basis for class certification, the court must conduct whatever threshold inquiries are necessary to determine whether "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3); see *Wal-Mart*, 131 S. Ct. at 2551-2552. Consistent with that understanding, respondent was required to establish market efficiency and public dissemination at the class-certification stage, even though both those facts would also be part of respondent's proof on the merits. The court below properly declined, however, to require proof of an additional element (materiality) that, while "logically connected" (Pet. Br. 22) to the overall reliance inquiry, has no independent bearing on the determination whether common issues of law or fact predominate.

At the class-certification stage of a securities-fraud suit, the pertinent question is not whether plaintiffs can actually establish the reliance (or any other) element of their claims, but whether those claims can be proved or disproved through evidence common to all class members. If a company makes a misstatement that is not material, *i.e.*, if there is no "substantial likelihood" that "a reasonable investor would consider it important," *Basic*, 485 U.S. at 231-232 (citation omitted), then the misstatement would not distort the stock's price.[5] And if

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[5] "Price distortion" can occur even if a company's false statement does not cause the price of its stock to increase, so long as the mis-

the misstatement has not distorted the stock's price, the fraud-on-the-market presumption cannot "provide[] the requisite causal connection between a defendant's misrepresentation" and any economic loss the plaintiff may have suffered. *Id.* at 243.

Accordingly, if a plaintiff cannot ultimately prove materiality, the plaintiff will not be able to establish reliance through the fraud-on-the-market presumption. That prospect does not suggest that individual issues will then predominate, however, since the plaintiffs' failure of proof on the separate element of materiality will result in judgment for the defendant, leaving the court with no individualized reliance inquiries to conduct. See Pet. App. 8a. Thus, while a plaintiff must prove materiality in order to *successfully* invoke the fraud-on-the-market presumption at summary judgment or at trial, it need not offer such proof at the class-certification stage to show that common issues will predominate.

Petitioners rely (Br. 15-18) on this Court's references to materiality in its discussion of the fraud-on-the-market presumption in *Basic*. See, *e.g.*, 485 U.S. at 245 (describing the presumption "that persons who had traded Basic shares had done so in reliance on the integrity of the price set by the market, but because of petitioners' material misrepresentations that price had been fraudulently depressed"). But that discussion concerns whether the theory behind the fraud-on-the-market pre-

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representation causes the stock to have a different price than it would have had if the truth had been known. Thus, misrepresentations that prevent or slow the fall of a price may be just as important to investors as misrepresentations that increase the price. *Schleicher*, 618 F.3d at 683-684. Price distortion is not the only method by which a plaintiff, including a federal law enforcement agency, may prove materiality. See Former SEC Comm'rs Br. 18-20.

sumption is substantively valid, not what must be established to obtain class certification in a fraud-on-the-market case. The Court's references to materiality simply reflect the fact that false or misleading statements will not distort the price of a stock unless the misstatements are material. See *id.* at 241-242, 244-245. Indeed, although the Court in *Basic* repeatedly used the phrase "material misrepresentations" in discussing the fraud-on-the-market presumption, *id*. at 244, 245, 246, 247, petitioners do not contend that a plaintiff must prove at class certification that any "misrepresentations" actually occurred—*i.e.*, that the statements alleged to be false were in fact false. Cf. *Schleicher*, 618 F.3d at 685 ("Falsehood and materiality affect investors alike.").

The *Basic* Court never suggested that a plaintiff must prove materiality to obtain class certification in a fraud-on-the-market case. To the contrary, the Court noted at the outset of its discussion that the case involved "several common questions of law and fact," including "the falsity or misleading nature of the three public statements," "the presence or absence of scienter," and "*the materiality of the misrepresentations*, if any." *Basic*, 485 U.S. at 242 (emphasis added). The Court therefore recognized that materiality, like falsity and scienter, is an issue common to all class members in a fraud-on-the-market case.[6]

[6] In footnote 27 of *Basic,* the Court noted that the court of appeals had required the plaintiff to "allege and prove" certain facts, including "that the misrepresentations were material," "in order to invoke the presumption" of reliance. *Basic*, 485 U.S. at 248 n.27. The courts of appeals that have required plaintiffs in fraud-on-the-market cases to prove materiality at class certification have based their holdings on that footnote. See, *e.g.*, *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 481 (2d Cir. 2008); *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 7 n.11 (1st Cir. 2005). But the footnote simply described

4. Petitioners' reliance (Br. 22) on *Erica P. John Fund* is misplaced. In that case, the Court held that a plaintiff need not prove loss causation in order to proceed with a class action using the fraud-on-the-market presumption, because proof of that element was not necessary to show that reliance was an issue common to class members. 131 S. Ct. at 2185-2187. The "fundamental premise" of the fraud-on-the-market presumption, the Court observed, is that "an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction." *Id.* at 2186. The Court further explained that proof of loss causation is not necessary to "establish the efficient market predicate to the fraud-on-the-market theory." *Ibid.*

Similarly here, once the named plaintiff shows the facts sufficient to establish the "efficient market predicate," then the named plaintiff has shown that individualized reliance inquiries will be unnecessary, and the named plaintiff need not prove materiality at class certification. Materiality is more closely related to reliance than is loss causation, because a plaintiff who cannot prove materiality cannot prove reliance on a distorted market price. See pp. 22-23, *supra*. As with loss causation, however, a plaintiff's failure to prove materiality will not engender any need for individualized inquiries

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what the lower court had held must be proved *at trial* to invoke the presumption. 485 U.S. at 248 n.27; see *Schleicher*, 618 F.3d at 687; see also Pet. App. 34a-35a. Indeed, the same footnote referred to the court of appeals' requirement of proof "that the defendant made public misrepresentations." 485 U.S. at 248 n.27. Petitioners do not contend, however, that proof of actual "misrepresentations" is required at the class-certification stage.

on the issue of reliance. Proof of materiality therefore is not a prerequisite for class certification.

Wal-Mart confirms that the focus at class certification must be on compliance with Rule 23, not on the plaintiffs' prospects of ultimate success. See 131 S. Ct. at 2551. There, the named plaintiffs sued "about literally millions of employment decisions at once." *Id.* at 2552. The Court explained that "[w]ithout some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." *Ibid.* Because the plaintiffs had "provide[d] no convincing proof of a company-wide discriminatory pay and promotion policy," the Court held that the case was not suitable for class-wide resolution. *Id.* at 2556.

Here, the "glue" holding the plaintiffs together is the transmittal of the defendants' alleged public misstatements to them through the price set by an efficient market. In *Wal-Mart*, the absence of a company-wide policy of discrimination precluded class certification, but it did not foreclose the possibility that some class members could establish meritorious Title VII claims through individualized proof. If respondent had failed to prove market efficiency, the members of the proposed class in this case would be in an analogous position, free to prove actual reliance on an individualized basis, but unable to establish fraud-on-the-market reliance through evidence common to the class. The failure to prove materiality would have no similar effect, however, since it would compel rejection of *all* the class members' claims based on evidence and findings common to the class.

C. A Defendant May Not Present A Truth-On-The-Market Defense At Class Certification

1. Under Federal Rule of Civil Procedure 23, a district court has no "'authority to conduct a preliminary inquiry into the merits of a suit'" at class certification unless it is necessary "to determine the propriety of certification." *Wal-Mart*, 131 S. Ct. at 2552 n.6 (quoting *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)). Accordingly, the question whether a defendant may assert a particular defense at class certification, like the question whether a named plaintiff must prove materiality at that stage, depends on the relationship between that defense and the requirements of Rule 23.

Petitioners contend (Br. 40-45) that they should be permitted to "rebut the fraud-on-the-market theory" at class certification by establishing that the truth reached the market and neutralized their alleged misstatements. In their view, proof of such a defense is appropriate at class certification because it would eliminate "[t]he basis for finding that the fraud had been transmitted through [the] market price" and therefore show that reliance is not a common issue. *Id.* at 41 (quoting *Basic*, 485 U.S. at 248). Petitioners explain that, "[i]n the district court, Amgen sought to show that in light of all the information available to the market, the alleged Amgen misstatements could not be presumed to have altered the market price *because they would not have significantly altered the total mix of information made available*." *Id.* at 40-41 (emphasis added; citation and internal quotation marks omitted). As the italicized language makes clear, petitioners' theory is that their truth-on-the-market evidence would rebut the presumption of reliance by showing the alleged misstatements to be immaterial. See Pet. App. 13a (explaining that "the truth-on-the-market

defense is a method of refuting an alleged misrepresentation's *materiality*").

Petitioner's proposed defense was anticipated by the Court in *Basic*. After defining the fraud-on-the-market presumption of reliance, the Court noted that the presumption is rebuttable, and it explained various ways in which it could be disproved. *Basic*, 485 U.S. at 248-249. The Court stated that "[a]ny showing that severs the link between the alleged misrepresentations and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." *Id.* at 248. The Court observed that one way a defendant could disprove reliance would be to show that the truth had "credibly entered the market and dissipated the effects of the misstatements." *Id.* at 249. In that instance, the Court explained, "those who traded Basic shares after the corrective statements would have no direct or indirect connection with the fraud." *Ibid.*

2. A truth-on-the-market defense does not defeat predominance because it does not disprove the class members' common path to proving reliance or suggest that individual reliance issues will predominate. By proving market efficiency and public dissemination, the named plaintiff demonstrates that reliance can be established through common proof. See *Basic*, 485 U.S. at 244-245; see also *Erica P. John Fund*, 131 S. Ct. 2185. Proof that the truth entered the market does not cast doubt on the presumption that an efficient market "transmits information to the investor in the processed form of a market price." *Ibid.* (quoting *Basic*, 485 U.S. at 244). Rather, it shows that truthful information was also transmitted through the same market mechanisms,

and that the truthful information neutralized the defendant's misstatements.

Evidence that the truth neutralized the alleged misstatements affects all investors in common, and the district court could resolve the question whether the truth neutralized the misstatements "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. If (as petitioners contend) the neutralizing disclosures would have dissuaded a reasonable investor from attaching weight to petitioners' alleged misrepresentations, petitioners will ultimately be entitled to judgment on the ground of immateriality. As explained above, that disposition would obviate any need for individualized reliance inquiries. Petitioners' successful assertion of a truth-on-the-market defense at summary judgment or trial therefore would mean that all investors lose on the merits, not that the class members' claims are dissimilar or that individual issues predominate, and thus would confirm that the case was appropriate for class certification.

Indeed, the truth-on-the-market defense has the same underpinning as the fraud-on-the-market presumption of reliance: both rest on the premise that public statements made in an efficient market are transmitted to an investor through the stock price. The fraud-on-the-market presumption concerns the distorting effect of misstatements, while the truth-on-the-market defense concerns the neutralizing effect of truthful statements. Both theories, however, presume an efficient market, public statements, and investors purchasing stock in reliance on the integrity of the market price. See *In re Merck & Co., Inc. Sec. Litig.*, 432 F.3d 261, 271 (3d Cir. 2005) ("An efficient market for good news is an efficient market for bad news.").

The conclusion that a defendant cannot assert a truth-on-the-market defense at class certification is consistent with *Basic*. The Court recognized that a defendant may rebut the presumption of reliance, but it did not say that rebuttal is always appropriate at class certification. To the contrary, after explaining that the fraud-on-the-market presumption might be rebutted by proof that the truth had "credibly entered the market and dissipated the effects of the misstatements" on the stock's price, the Court stated that "[p]roof of that sort is a matter for trial, throughout which the District Court retains the authority to amend the certification order as may be appropriate." 485 U.S. at 249 & n.29.[7]

3. Unlike the truth-on-the-market defense, some arguments can appropriately be presented by defendants at class certification. In this case, petitioners conceded market efficiency, Pet. App. 6a, but defendants in other securities-fraud cases have disputed that a market for a certain stock incorporated all public statements into the price. See *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 11-17 (1st Cir. 2005). If a market does not "transmit[] information to the investor in the processed form of a market price" the class members do not have a common path for receiving and acting on the defendant's alleged misstatements, and reliance will become an individualized issue. *Basic*, 485 U.S. at 244 (citation omitted). By

[7] Petitioners contend (Br. 42) that the Court's statement about a truth-on-the-market defense being a "matter for trial" should be discounted because it was premised on the district courts being authorized to grant conditional class certification. Petitioners are mistaken. The *Basic* Court never mentioned conditional certification; instead, the Court noted that the district court may "amend the certification order as may be appropriate" as the case develops, 485 U.S. at 249 n.29, and the district courts retain that authority today, see Fed. R. Civ. P. 23(c)(1)(C).

the same logic, a defendant could attempt to prove that the alleged misstatements were not made publicly, because if they were not "publicly known," the market would not "take them into account." *Erica P. John Fund*, 131 S. Ct. at 2185.

Petitioners argue at length (Br. 30-34) about what proof of market efficiency courts should require in determining whether to presume that a defendant's misstatements were transmitted to investors through the market price. Those arguments are beside the point because petitioners conceded market efficiency here. Whether or not the tests used by the courts of appeals reliably predict market efficiency in certain cases therefore is a question for another day. To the extent a defendant wishes to challenge market efficiency in a fraud-on-the-market case, all agree that it may do so at class certification. See *Wal-Mart*, 131 S. Ct. at 2552 n.6; *Erica P. John Fund*, 131 S. Ct. at 2185.

4. A central theme of petitioners' brief is that a securities-fraud plaintiff should be required to prove materiality at class certification, and defendants should be allowed to prove a truth-on-the-market defense at that point, in order to avoid certification of meritless class actions. Pet. Br. 20, 24-30, 43-45. But the federal courts are "bound to enforce" Rule 23, and they are not free to supplement or alter its requirements based on their own notions of fairness. *Amchem Prods.*, 521 U.S. at 620-622. The task for a lower court in ruling on a class-certification request is to apply Rule 23 according to its terms, not to devise requirements that the court deems commensurate to the burdens that class certification would place upon the defendant.

Meritorious private securities-fraud actions are "an essential supplement to criminal prosecutions and civil

enforcement actions" brought by the Department of Justice and the SEC. *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). The policy concerns petitioners raise are properly addressed to Congress, rather than to the courts. In fact, these concerns have been brought to Congress's attention, and Congress has acted on them. In the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, Congress responded to perceived abuses in private securities-fraud actions by, *inter alia*, imposing heightened pleading requirements for such actions, 15 U.S.C. 78u-4(b)(1)-(2) (2006 & Supp. IV 2010); mandating an automatic stay of discovery pending resolution of a motion to dismiss, 15 U.S.C. 78u-4(b)(3)(B); creating a safe harbor for forward-looking statements, 15 U.S.C. 78u-5; and making sanctions for abusive litigation mandatory, 15 U.S.C. 78u-4(c). See *Tellabs*, 551 U.S. at 319-322.

Congress then enacted the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227, which prevented plaintiffs from using state courts to circumvent the protections established in the PSLRA. See *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 80-83 (2006). Thus, Congress already has responded to the concerns petitioners raise, and "the means that Congress chose to deal with settlement pressure were to require more at the pleading stage and to ensure that litigation occurs in federal court under these special standards, rather than state court under looser ones." *Schleicher*, 618 F.3d at 686.

Petitioners are wrong to assert (Br. 24-27) that if they cannot litigate materiality at the class-certification stage, they will be unable to litigate it at all. If, after discovery, respondent cannot adduce evidence from

which a reasonable jury could infer that petitioners' misstatements were material, then petitioners will be entitled to summary judgment. Similarly, a defendant may raise a truth-on-the-market defense before trial. A court may grant summary judgment (or partial summary judgment) when a defendant demonstrates that no rational jury could conclude that the market was misled because the truth had effectively counterbalanced the misstatement. *Schleicher*, 618 F.3d at 687-688.[8] But, absent any sound reason to believe that a plaintiff's ultimate failure to prove materiality will cause individual issues to predominate, it puts "the cart before the horse" to require litigation of that common merits issue before any class can be certified. *Id.* at 687.

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[8] *E.g.*, *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1115-1116, 1119 (9th Cir. 1989) (defendants obtained summary judgment by "conclusively establish[ing] that all material information tending to undermine" the alleged misstatements "had credibly entered the market"), cert. denied, 496 U.S. 943 (1990); *In re Boston Sci. Corp. Sec. Litig.*, 708 F. Supp. 2d 110, 128-129 (D. Mass. 2010) (granting summary judgment because "the market had available sufficient corrective information to cure any arguably misleading statements or omissions"), aff'd, 649 F.3d 5 (1st Cir. 2011); *In re Andrx Corp.*, 296 F. Supp. 2d 1356, 1369 (S.D. Fla. 2003) (granting defendants summary judgment because the truth was "transmitted to the public with a degree of intensity and credibility sufficient to effectively counterbalance any misleading impression created by" the defendants' statements (citation omitted)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2012

APPENDIX

1. 15 U.S.C. 78j provides, in pertinent part:

Manipulative and deceptive devices

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

* * * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * * * *

2. 17 C.F.R. 240.10b-5 provides, in pertinent part:

Employment of manipulative and deceptive devices.

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

* * * * *

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order

to make the statements made, in the light of the circumstances under which they were made, not misleading * * *

* * * * *

3. Federal Rule of Civil Procedure 23 provides, in pertinent part:

Class Actions

(a) **Prerequisites**. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

  (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.

(b) **Types of Class Actions**. A class action may be maintained if Rule 23(a) is satisfied and if:

  (1) prosecuting separate actions by or against individual class members would create a risk of:

    (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds 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. 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.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses***. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

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