No. 16-250-cv

In the United States Court of Appeals for the Second Circuit

PENSION FUNDS,
Plaintiff,

ARKANSAS TEACHERS RETIREMENT SYSTEM, WEST VIRGINIA INVESTMENT MANAGEMENT BOARD, PLUMBERS AND PIPEFITTERS PENSION GROUP,
(Caption continued on inside cover)

On Interlocutory Appeal From an Order Granting Class Certification by the United States District Court for the Southern District of New York
(No. 1:10-cv-3461-PAC, The Honorable Paul A. Crotty)

BRIEF OF LOUISIANA SHERIFFS' PENSION AND RELIEF FUND AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

Mark I. Gross
Jeremy A. Lieberman
POMERANTZ LLP
600 Third Avenue
New York, NY 10016
(212) 661-1100

Robert D. Klausner
KLAUSNER, KAUFMAN, JENSEN & LEVINSON
7080 Northwest 4th Street
Plantation, Florida 33317
(954) 916-1202

Rachel S. Bloomekatz
Deepak Gupta
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
rachel@guptawessler.com

Counsel for Amicus Curiae Louisiana Sheriffs' Pension and Relief Fund

August 26, 2016

(Caption continued from cover page)

ILENE RICHMAN, individually and on behalf of all others similarly situated, PABLO ELIZONDO, HOWARD SORKIN, individually and on behalf of all others similarly situated, TIKVA BOCHNER, EHSAN AFSHANI, LOUIS GOLD, THOMAS DRAFT, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

GOLDMAN SACHS GROUP, INC., LLOYD C. BLANKFEIN, DAVID A. VINIAR, GARY D. COHN,

Defendants-Appellants,

SARAH E. SMITH,

Defendant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus Louisiana Sheriffs' Pension and Relief Fund hereby states that it has no parent corporation and that no publicly held corporation owns 10% of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other authorities

INTEREST OF *AMICUS CURIAE*[1]

Louisiana Sheriffs' Pension and Relief Fund is a multi-employer, defined benefit pension system, providing service retirement, disability retirement, and death benefits to sheriffs, deputy sheriffs, tax collectors, and survivors of fallen officers in all 64 parishes of the state of Louisiana. The more than 25,000 active, deferred-vested, and retired participants in the Fund are exempt from participation in the Social Security System, thus making the benefits received from the Fund the sole source of their retirement security. The Fund is administered by a Board of Trustees that is solely responsible under Louisiana law for the management of the Fund. Among the primary duties of the Board is overseeing the investment of $3 billion in Fund assets in a broadly diversified portfolio.

The Fund, as a statutory fiduciary, has a direct interest in the outcome of this litigation. The Fund is an active shareholder advocate and has participated as lead plaintiff or as *amicus curiae* in a number of important securities-fraud and shareholder-derivative cases. The Trustees understand that while they are expected to encounter various types of market risks as a sophisticated institutional investor, assuming the risk of corporate misconduct is not among them. The Fund approaches any breach of the federal securities laws designed for the protection of

[1] All parties consent to the filing of this brief. No party or counsel for a party—nor any person other than *amicus curiae* and its counsel—authored this brief in whole or in part or contributed any money intended to fund its preparation or submission.

their members' benefits with the same seriousness and resolve with which its members enforce the criminal and penal laws of the United States and the State of Louisiana.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal is a veiled attempt to circumvent Supreme Court precedent and require the district court to consider the materiality of defendants' misstatements at the class-certification stage. The Supreme Court's decision in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds* completely forecloses this attempt, excising materiality from the class-certification inquiry in securities-fraud class actions predicated on the fraud-on-the-market presumption from *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). *See* 133 S. Ct. 1184, 1203 (2013). *Amgen* holds that, far from defeating class certification, "the potential immateriality of [the defendants'] alleged misrepresentations and omissions is *no barrier* to finding that common questions predominate." *Id.* (emphasis added). Adhering to that precedent, the district court rejected the defendants' attempt to litigate materiality under the guise of "price impact" evidence, which is permitted at the class-certification stage by *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2414 (2014) ("*Halliburton II*"). This Court should as well.

The Court need only read the first page of the defendants' opening brief to recognize that their argument against class certification centers on materiality. *See*

Goldman Sachs Brief ("GS Br.") at 2 (arguing that alleged misstatements were "immaterial as a matter of law and thus could have no price impact"). At the core of the argument—highlighted by an extensive chart (at 35–37) and a footnote covering most of a page (at 5)—is their contention that "the statements on which Plaintiffs base their claims are too general to cause a reasonable investor to rely upon them and hence could have no price impact as a matter of law." *Id.* at 35 (internal quotation marks omitted). That is, regardless of evidence showing the price impact of the statements, the defendants contend that the Court must decertify the class *as a matter of law* because the statements lack materiality.

The defendants are wrong to claim that the alleged misstatements were immaterial and had no effect on the market. But their bigger problem in this appeal is that such a consideration is not even appropriate at class certification. Materiality is judged by an objective standard, so if a statement is immaterial to one class member, it "would be so equally for all investors composing the class." *Amgen*, 133 S. Ct. at 1191. And because materiality is an element of the securities-fraud claim, "the plaintiff class's inability to prove materiality would not result in individual questions predominating"; instead, the entire case would just fail. *Id.* Because a class is "entirely cohesive" as to materiality, the Supreme Court held that materiality *cannot* be considered at class certification: plaintiffs do not have to prove materiality, and defendants cannot rebut it. *Id.*

Critically, in reaching this conclusion, the Supreme Court rejected the same argument that the defendants make here: namely, that the defendants should be able to rebut materiality because it is an element of the *Basic* fraud-on-the-market presumption, and that presumption is needed to show that all class members relied on the misrepresentation just by trading in the market. GS Br. at 50. True, materiality is an element of *Basic*'s fraud-on-the-market presumption necessary to show classwide reliance. But even recognizing that, *Amgen* held that materiality is still an inquiry that must wait for summary judgment or a trial on the merits. 133 S. Ct. at 1204.

Nor can the defendants find shelter for their argument in *Halliburton II*'s holding that defendants are allowed to prove during class certification "that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply." 134 S. Ct. at 2416. *Halliburton II* allows defendants to introduce event studies and other such market evidence to demonstrate that a particular statement "did not in fact" have any price impact. *Id*. at 2414. It does not permit defendants to argue—as they do here—that a reasonable investor could not have relied on a particular statement, and hence that the statement could not have price impact "*as a matter of law*." GS Br. at 2 (emphasis added). Indeed, the Chief Justice did not mince words in *Halliburton II* when he explained why its holding did not abridge *Amgen*: "[P]rice

impact differs from materiality . . . . because materiality is a discrete issue that . . . can be wholly confined to the merits stage." 134 S. Ct. at 2416.

The same can be said of the defendants' "truth-on-the-market" defense, which—as the Supreme Court acknowledged—is just a specific variant of materiality. Moving from their argument that the alleged misstatements were "too general," the defendants next argue that the "truth" had already been disclosed through multiple news reports, so any price decline associated with the corrective statements the plaintiffs identify *must have* been due to other factors. GS Br. at 15, 51. But asserting that the "truth" had been sufficiently disclosed to the market is just another way of arguing that the alleged statements were immaterial. Given *Amgen*, courts across the country have correctly recognized (like the district court below) that such "truth-on-the-market" defenses are not properly decided at class certification. *See infra*, at 21–22. Accordingly, this Court must reject the defendants' backdoor attempts to litigate materiality in contravention of Supreme Court precedent.

ARGUMENT

I. The Supreme Court's decision in *Amgen* forecloses defendants' attempt to disprove materiality at the class-certification stage.

The Supreme Court's decision in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013), precludes consideration of the defendants' primary argument on appeal: that the class cannot be certified because the alleged

misstatements "were immaterial as a matter of law," GS Br. at 2, 34–41. Even if the defendants were right (which they are not) that "no reasonable investor would rely on such statements," *id.* at 2, *Amgen* holds that materiality is not a proper consideration during class certification. The district court, in short, got it right: the defendants' argument "that the statements at issue are not actionable as a matter of law" is simply "inappropriate at the class certification stage." SA 12 n.5.

A. Because the class is "entirely cohesive" as to materiality, that issue must be left to the merits stage.

In *Amgen*, the Supreme Court resolved a circuit split "over whether district courts must require plaintiffs to prove, and must allow defendants to present evidence rebutting, the element of materiality before certifying a class action" for securities fraud under § 10(b) of the Securities Exchange Act and the Securities and Exchange Commission's Rule 10b-5. 133 S. Ct. at 1194. Given that materiality is part of the showing a plaintiff must make to invoke *Basic*'s fraud-on-the-market presumption of reliance, this Court, along with the Third Circuit, had held that a defendant could present evidence rebutting materiality prior to class certification. *See In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 484–85 (2d Cir. 2008); *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 631–32 (3d Cir. 2011). The Seventh and Ninth Circuits disagreed. *See Schleicher v. Wendt*, 618 F.3d 679, 687 (7th Cir. 2010); *Conn. Ret. Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1177 (9th Cir. 2011). The Supreme Court sided with the latter circuits.

In unambiguous language, the Supreme Court held that materiality is "not a prerequisite to class certification," so plaintiffs do not have to prove materiality and defendants are not allowed to rebut materiality at the class-certification stage. 133 S. Ct. 1191; *see also id.* at 1197 (plaintiffs are "not required to prove materiality of [defendant's] alleged misrepresentations and omissions at the class-certification stage"); *id.* at 1204 (evidence rebutting materiality is "correctly reserved . . . for summary judgment or trial"). Its reasoning was straightforward: the question of materiality will be the same for the entire class and, if the class ultimately failed to prove materiality, every class member's claim would fail, leaving no individualized inquiries. Therefore, the Court concluded that materiality was a perfect question for class resolution. *Id.*

The Court first reasoned that because materiality is based on an objective standard—"involving the significance of an omitted or misrepresented fact to a reasonable investor"—materiality can be "proved through evidence common to the class." *Id.* at 1195 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976)). The Court recognized that plaintiffs "certainly must prove materiality to prevail on the merits" of a § 10(b) claim. *Id.* at 1191. And, as the defendants emphasize (at 38–39), a district court can look at merits issues "to the extent . . . that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* But, it held, there was no need to resolve *this* merits

issue to ensure predominance. *See* 133 S. Ct. at 1195. As the Court explained, "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Id.* at 1191. And materiality, because it is "judged according to an objective standard," is a question that will be answered the same for all members of a class claiming § 10(b) securities fraud. *Id.*

The Court further reasoned that "there is no risk whatever that a failure of proof on the common question of materiality will result in individual questions predominating." *Id.* at 1196. Because materiality is an element of a § 10(b) claim, "a failure of proof on the issue of materiality would end the case." *Id.* at 1191. Unlike a plaintiff's failure to demonstrate other elements of the *Basic* presumption, "[i]n no event will the individual circumstances of particular class members bear on the [materiality] inquiry"; instead, as to materiality the class is "entirely cohesive." *Id.* Accordingly, "even a definitive rebuttal on the issue of materiality would not undermine the predominance of questions common to the class." *Id.* at 1204.

B. *Amgen* explicitly rejected the same arguments that Goldman Sachs makes here.

Critically, in reaching this decision, the Supreme Court rejected the precise arguments that the defendants assert in this appeal. The defendants contend that materiality must be considered at class certification because it is an element of the *Basic* fraud-on-the-market presumption. The defendants maintain (at 7) that,

because the statements are "too general for a reasonable investor to rely on . . . as a matter of law," the class cannot "sustain the *Basic* fraud-on-the-market presumption of classwide reliance." Without that presumption, they argue (at 37–38), "there can be no grounding for any contention that the investor indirectly relied on those misrepresentations through his reliance on the integrity of the market price."

Likewise, in urging the Supreme Court to adopt the Second and Third Circuits' approach, the petitioners in *Amgen* argued that defendants had to be able to present evidence rebutting materiality at class certification because materiality is an element of *Basic*'s fraud-on-the-market presumption, and without that presumption that all class members relied on the fraudulent statements simply by trading in the marketplace, the class could not satisfy Rule 23(b)(3)'s predominance requirement. Quoting the same language from *Basic* as the defendants do here (at 6), the petitioners argued that "any showing that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff . . . will be sufficient to rebut [*Basic*'s] presumption of reliance." Petitioners' Opening Br. in *Amgen* at 16, 2012 WL 3277030. And, the petitioners argued, a lack of materiality does just that: "If a misstatement is not material, there is no basis for presuming a market-price distortion upon which plaintiffs could have commonly relied, and thus the reliance question cannot be resolved for all class members 'in one stroke.'"

Id. at 23 (quoting *Wal-Mart Stores Inc. v. Dukes*, 563 U.S. 338, 349 (2011)). Because a "successful rebuttal of materiality . . . eliminates the 'causal connection' that is essential to the fraud-on-the-market theory," petitioners argued that it "prevents proof of classwide reliance—a prerequisite to class certification—[and] courts must consider it at the certification stage." Petitioners' Reply Br. in *Amgen* at 18, 2012 WL 5246241.

Various *amici* in *Amgen* presented substantially similar arguments, asserting that because materiality and price impact are closely related, a failure of materiality dooms classwide reliance on the market price. *See*, *e.g.*, Brief of the Chamber of Commerce/PhRMA as *Amicus Curiae* at 18, 2012 WL 3555290 ("[I]f the misrepresentation was immaterial or did not distort the market price, there is no basis for presuming that the class indirectly relied on the misrepresentation by relying on the market price. Materiality and price-impact rebuttal are thus closely related."); Brief of Former SEC Commissioners as *Amicus Curiae* at 8, 2012 WL 3555291 ("*Basic* thus stands firmly for the proposition that the fraud-on-the-market theory does not apply—and that plaintiffs are not entitled to a presumption of reliance—unless they can demonstrate that the alleged misrepresentations were material in the sense that they had an impact on the price of the shares they traded. This Court's recognition that price impact is an essential predicate to the

application of the fraud on the market theory is evident in every facet of *Basic*'s discussion of the fraud-on-the-market theory.").

The Supreme Court directly rejected this argument that materiality, because it is tied to price impact and is an element of the *Basic* presumption, must be adjudicated at class certification. Importantly, as the defendants emphasize (at 39), *Amgen* recognized that "[b]ecause immaterial information, by definition, does not affect market price, it cannot be relied upon indirectly by investors who, as the fraud-on-the-market theory presumes, rely on the market price's integrity." 133 S. Ct. at 1195. But, the Court explained, "[c]ontrary to [petitioner's] argument, the key question in this case is not whether materiality is an essential predicate of the fraud-on-the-market theory; it indisputably is." *Id.* "Instead, the pivotal inquiry is whether proof of materiality is needed to ensure [predominance]." *Id.* And, the Supreme Court held, "the answer to this question is clearly 'no.'" *Id.*

Even if materiality is part of *Basic*'s fraud-on-the-market presumption, that does *not* mean that it has to be proven (or that defendants can rebut it) at class certification because it remains a *common question*. *See id.* In short, not all elements of the *Basic* presumption—specifically materiality—are at issue during class certification. The defendants (somehow) contend that "[no]thing in *Amgen* prevent[s] this Court from holding . . . that no reasonable investor would have relied on Defendants' challenged general statements"—i.e., that the statements

were immaterial—"and hence that no class can be certified." GS Br. at 39. But *Amgen* holds just the opposite: materiality cannot be considered at class certification. *See* 133 S. Ct. at 1191.

C. The defendants' "plausibility" argument fails.

In a last-ditch effort to distinguish *Amgen*, the defendants argue (at 39–40) that even though "*Amgen* held that plaintiffs 'are not required to *prove* materiality at the class certification stage,'" plaintiffs must still *"plausibly allege* materiality to survive dismissal and to invoke the presumption at class certification." Citing the Ninth Circuit's opinion that the Supreme Court affirmed in *Amgen* (at 40), the defendants argue that plaintiffs "need only allege materiality with sufficient plausibility to withstand a 12(b)(6) motion." *Amgen*, 660 F.3d at 1177. And, they contend, there are no such plausible allegations in the complaint. GS Br. at 40–41. The district court—in an opinion not reviewable now—already rejected such an argument in ruling on the defendants' Rule 12(b)(6) motion. JA 359. What is more, *Amgen* excised the examination of materiality from the class-certification stage because "the potential immateriality of [a defendant's] alleged misrepresentations and omissions is *no barrier* to finding that common questions predominate." 133 S. Ct. at 1203 (emphasis added). Even if the defendants had a "definitive rebuttal on the issue of materiality," it "would not undermine the predominance of questions common to the class." *Id.* at 1204. The defendants will have a chance at summary

judgment and trial to demonstrate immateriality, but *Amgen* held that it is not a permissible consideration at class certification. *See id.* The defendants' failed attempt to reconcile their argument with *Amgen* only shows that it is instead incompatible.

II. *Halliburton II* does not let defendants rebut "price impact" through demonstrating that statements were immaterial as a matter of law.

Nor can the defendants rely on *Halliburton II* to support their attempt to place materiality before the court at class certification. GS Br. at 28. In *Halliburton II*, the Supreme Court held that defendants "must be afforded an opportunity before class certification to defeat the [*Basic*] presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock." *Halliburton II*, 132 S. Ct. at 2414. Because materiality (which cannot be considered under *Amgen*) relates to price impact (which may be rebutted under *Halliburton II*), the defendants use price impact as a backdoor way to bring materiality before the Court. Specifically, the defendants argue that because the alleged misstatements in this case are "too general to cause a reasonable investor to rely upon them," (i.e., immaterial) they "could have no price impact as a matter of law," thereby thwarting class certification. GS Br. at 35. This Court, however, should reject the defendants' attempt to circumvent *Amgen*. As described above, under the Supreme Court's precedents materiality is an objective standard that asks whether a

reasonable investor would have relied on the alleged misstatements. Thus, materiality may be determined "as a matter of law," as defendants urge here, irrespective of what actually happened in the market. *Amgen*, 133 S. Ct. at 1198. By contrast, *Halliburton II* allows evidence of "actual[]" price impact—that "the misrepresentation did not *in fact* affect the stock price." 132 S. Ct. at 2414. This Court should not let defendants confuse the two.

Examining the reasoning in *Halliburton II* demonstrates that it does not allow defendants to use materiality as a way of rebutting price impact. In that case, Halliburton argued that evidence it had earlier introduced "also showed that none of its alleged misrepresentations had actually affected the stock price." 134 S. Ct. at 2406. "By demonstrating the absence of any 'price impact,' Halliburton contended, it had rebutted *Basic*'s presumption that the members of the proposed class had relied on its alleged misrepresentations simply by buying or selling its stock at the market price," thereby defeating Rule 23(b)'s predominance requirement *Id.* But the Fifth Circuit had held that such price impact evidence could not be used at class certification to rebut the *Basic* presumption. *See id.* at 2406. The Supreme Court disagreed, holding that Halliburton must be allowed to rebut the *Basic* presumption with such "price impact" evidence at the class-certification stage. *Id.* at 2414.

As a starting point, the Court noted that defendants already could introduce price-impact evidence at the class-certification stage to counter plaintiffs' contention of market efficiency, one of the *Basic* prerequisites. *See id.* at 2414–15. In particular, the Court stressed the existing centrality of "event studies" during class certification in securities-fraud cases. *Id.* at 2415. "Event studies" are the most common form of price-impact evidence, and it is routine for defendants at the certification stage to submit multiple event studies looking at the impact of discrete events—including the alleged misrepresentations at issue—on the price of its stocks to refute the plaintiffs' claim of general market efficiency. *See id.*

Event studies are "regression analyses that seek to show that the market price of the defendant's stock tends to respond to pertinent publicly reported events." *Id.* As scholars recognize, "[a]n event study is an established tool in financial economics that can provide a probabilistic estimate as to whether a given item of news has affected securities prices." Merritt B. Fox, Halliburton II: *It All Depends On What Defendants Need to Show to Establish No Impact On Price*, 70 Bus. Law. 437, 442 (Spring 2015). Indeed, two law professors argued in an *amicus* brief in *Halliburton II* that an event study was the "best available tool" to evaluate price distortion because event studies can show whether a misrepresentation had an effect on stock price. *See* Brief of Law Professors as *Amici Curiae* at 24, 2014 WL 60721. The professors explained that if an event study showed no statistically significant effect,

"the market cannot be said to have relied on the misrepresentation." *Id.* at 26. The Supreme Court, in turn, placed great significance on event studies in *Halliburton II*. *See* Jill E. Fisch, *The Future of Price Distortion in Federal Securities Fraud Litigation*, 10 Duke J. Const. L. & Pub. Pol'y 87, 96 (2015). "After the Justices questioned the advocates at oral argument extensively about the nature of an event study, the *Halliburton II* opinion described an event study as direct evidence capable of 'show[ing] no price impact with respect to the specific misrepresentation challenged in the suit.'" *Id.* (citing Tr. of Oral Arg. 19–24 and quoting *Halliburton II*, 134 S. Ct. at 2398). Thus, the "most effective way for defendants . . . to show a misstatement was not the cause of the change in price . . . would be to use an event study and focus on the corrective disclosure to that misstatement." Leah Neupert, *A Court's Guide on How to Gut Precedent by Relying on It:* Halliburton II*'s Puzzling Effect on Securities-Fraud Class Actions*, 76 La. L. Rev. 225, 255–56 (2015).

Given that event studies and other such evidence are already allowed with respect to some of *Basic*'s prerequisites, the Court held that this kind of evidence must be allowed for the "purpose of rebutting the [fraud-on-the-market] presumption altogether." *Id.* "Under *Basic*'s fraud-on-the-market theory, market efficiency and the other prerequisites for invoking the presumption constitute an indirect way of showing price impact" of the alleged misstatement. *Id.* But, as the Chief Justice explained, it "makes no sense" that price-impact evidence can be

admitted at class certification to *indirectly* rebut the presumption of fraud on the market (*e.g.*, by showing that there is not an efficient market), but cannot be used *directly* to show that the alleged misrepresentation "did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply." *Id.* at 2415–16. As a result, *Halliburton II* found "no reason to artificially limit" the use of price-impact evidence if it could directly rebut the fraud-on-the-market presumption. *Id.* at 2417.

Importantly, the Court explained that its decision was consistent with *Amgen*: it in no way abridged that decision from the previous term. *Id.* at 2416. Indeed, the *Halliburton II* petitioners did not ask the Court to revisit their ability to rebut *materiality* at class certification; they wanted to prove the absence of "price impact." Petitioners' Br. in *Halliburton II* at 53, 2013 WL 6907610. As they explained, "the absence of price impact [as opposed to materiality] does *not* mean 'as a matter of law' that 'no claim would remain in which individual reliance issues could potentially predominate.'" *Id.* (quoting *Amgen*, 133 S. Ct. at 1196, 1199). And unlike an absence of materiality, "because a price-impact rebuttal would require each plaintiff to individually prove reliance . . . individual questions would overwhelm common ones." *Id.*

The Supreme Court agreed that "price impact differs from materiality," and thus decided to treat the two differently. The Court explained: "because materiality

is a *discrete issue* that can be resolved in isolation from the other [*Basic*] prerequisites, it can be wholly confined to the merits stage." *Halliburton II*, 134 S. Ct. at 2416. By contrast, "[t]he fact that a misrepresentation 'was reflected in the market price at the time of [the] transaction'—that it had price impact—is '*Basic*'s fundamental premise,'" and thus must be subject to rebuttal at class certification. *Id.* (quoting *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 813 (2011) ("*Halliburton I*")). Moreover, given that evidence of price impact necessarily will be before the district court to invoke the *Basic* presumption, the choice was "not between allowing price impact evidence at the class certification stage or relegating it to the merits"—such evidence is before the district court "in any event." *Id.* at 2417.

Because *Halliburton II* allows price impact, not materiality, to be considered at class certification, it provides no help to the defendants here. Echoing the Chief Justice's opinion, the district court properly disregarded (for class-certification purposes) the defendants' argument that the alleged misstatements did not affect the price *as a matter of law* because the statements were too general for a reasonable investor to rely upon. Though defendants couched this as a "price impact" argument allowed by *Halliburton II*, the district court recognized it as a materiality argument in disguise. It bears no resemblance to the event studies and regression analyses that *Halliburton II* allows as evidence of whether the misstatements "in fact" affected the stock price. Nor is it the type of evidence that is already allowed before

the district court to prove (or disprove) market efficiency. Quite simply, proving a lack of materiality as a matter of law—because a court deems the statement one upon which reasonable persons cannot rely—is not the same as proving a lack of price impact as a matter of fact, based on market evidence. As the district court correctly held, "[p]roving a lack of price impact differs from proving a lack of materiality," and only the former is allowed at class certification. SA at 6.

Accordingly, following *Amgen* and *Halliburton II*, courts around the country have refused to consider materiality during class certification. *See*, *e.g.*, *Beaver Cty. Employees' Ret. Fund v. Tile Shop Holdings, Inc.*, No. 14-786, 2016 WL 4098741, at *8 (D. Minn. July 28, 2016) ("The materiality of the omissions does need to be proven to prevail on the merits, but such proof is not a prerequisite to class certification."); *In re Key Energy Servs., Inc. Sec. Litig.*, No. 4:14-CV-2368, 2016 WL 1305922, at *5 n.7 (S.D. Tex. Mar. 31, 2016) ("There is no requirement that materiality be resolved on the merits before class certification."); *In re NeuStar, Inc. Sec. Litig.*, No. 1:14CV885, 2015 WL 5674798, at *6 n.2 (E.D. Va. Sept. 23, 2015) (holding that a class settlement could be approved because "[t]his Court's finding of lack of materiality at the motion-to-dismiss stage does not preclude the fraud-on-the-market theory at class certification"); *In re NII Holdings, Inc. Sec. Litig.*, 311 F.R.D. 401, 408–09 (E.D. Va. 2015) ("At the class certification stage, . . . no proof of materiality is required."); *Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v.*

Regions Fin. Corp., No. CV 10-J-2847, 2014 WL 6661918, at *6 n.4 (N.D. Ala. Nov. 19, 2014) ("Clearly, under *Halliburton II,* the materiality of the defendants' alleged misrepresentations is reserved for trial on the merits."); *Aranaz v. Catalyst Pharm. Partners Inc.*, 302 F.R.D. 657, 668 (S.D. Fla. 2014) ("[A] plaintiff need not show materiality at the class certification stage."). Consistent with these cases and Supreme Court precedent, the district court here did not err in refusing to consider the defendants' materiality argument during class certification.

III. Defendants likewise cannot prove "truth on the market" as a matter of law during class certification.

Amgen likewise precludes the defendants' "truth-on-the-market" defense because it is simply another form of arguing materiality. On appeal, as before the district court, the defendants argue that "virtually all of the factual allegations" about Goldman Sachs' conflicts of interest at issue in the complaint "were prominently reported long before" the alleged corrective disclosures. GS Br. at 15. Because the truth was already known, defendants contend that the plaintiffs could not show that the stock's price decline was "caused by the market's *first* knowledge" that Goldman Sachs' statements regarding its conflict protections were untrue, *id.* at 51, and hence any decline in the stock price *must have* been caused by other factors, such as the announcement of a government investigation. *Id.* at 47. In short, they argue that because the truth was already known, the statements *had to be immaterial as a matter of law*, and the drop in price explained by other factors. The

district court, recognizing that the defendants' argument was just another way of arguing materiality, held that it was an inappropriate argument to consider at class certification. SA at 11, 12 n.5. The district court was right.

A truth-on-the-market defense is, in essence, "'a method of refuting an alleged misrepresentation's *materiality*.'" *Amgen*, 133 S. Ct. at 1203 (quoting *Amgen*, 660 F.3d at 1177). In *Amgen* itself, the defendants presented a truth-on-the-market defense, but the Supreme Court considered it another iteration of the materiality argument. *See id*. Although the Court observed that *Basic*'s fraud-on-the-market presumption could be rebutted "by demonstrating that 'news of the [truth] credibly entered the market and dissipated the effects of [prior] misstatements,'" that evidence went to materiality, and hence was "'a matter for trial'" or summary judgment—not class certification. *Id*. at 1204 (quoting *Basic*, 485 U.S. at 248–49).[2]

Unsurprisingly, then, district courts nationwide have held that a "truth-on-the-market defense cannot be used to rebut the presumption of reliance at the class-certification stage because the defense is a method of refuting an alleged

[2] Recognizing in a footnote that *Amgen* precludes consideration of a "truth-on-the-market" defense at class certification, the defendants argue that they are not presenting such a defense but are instead arguing "price impact." GS Br. at 48–49, n.23. As explained *supra*, the defendants cannot sneak in an argument about materiality by calling it "price impact." They argue, in part, that the price impact of alleged corrective disclosures *must have* been due to news about government investigations—rather than news that Goldman Sachs' was violating its conflicts policies—because the revelation that Goldman was violating those policies *could not have* affected the price given previous disclosures. This is a truth-on-the-market defense that goes to materiality.

representation's *materiality*." *In re Bridgepoint Educ., Inc. Sec. Litig.*, No. 12-CV-1737, 2015 WL 224631, at *7 (S.D. Cal. Jan. 15, 2015) (internal quotation marks omitted). For example, on remand in *Halliburton II*, the district court held that "class certification is not the proper procedural stage for the Court to determine, *as a matter of law*, whether the relevant disclosures were corrective." *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, 260 (N.D. Tex. 2015) (emphasis added). It explained: "While it may be true that a finding that a particular disclosure was not corrective as a matter of law would 'sever the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff . . . ,' the Court is unable to unravel such a finding from the materiality inquiry." *Id.* (quoting *Halliburton II*, 134 S. Ct. at 2415–16). Accordingly, the district court examined the price impact of the disclosures on the stock (largely through event studies), but refused to conclude as a matter of law that the disclosures could not have been corrective. *See id.* at 273. The "'truth-on-the-market' defense, stripped down, is merely an argument that the alleged misrepresentation was immaterial in light of other information on the market." *Aranaz*, 302 F.R.D. at 668. The district court, accordingly, properly deferred the question to the merits stage.

CONCLUSION

For these reasons, the certification decision of the district court should be affirmed.

Respectfully submitted,

/s/ Rachel S. Bloomekatz

Rachel S. Bloomekatz
Deepak Gupta
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741

Mark I. Gross
Jeremy A. Lieberman
POMERANTZ LLP
600 Third Avenue
New York, NY 10016
(212) 661-1100

Robert D. Klausner
KLAUSNER, KAUFMAN, JENSEN
& LEVINSON
7080 Northwest 4th Street
Plantation, Florida 33317
(954) 916-1202

August 26, 2016

Counsel for Amicus Curiae Louisiana Sheriffs' Pension and Relief Fund

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 5,494 words (in Baskerville 14-point typeface) in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

/s/ Rachel S. Bloomekatz
Rachel S. Bloomekatz

August 26, 2016

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2016, I electronically filed the foregoing Brief for *Amicus Curiae* Louisiana Sheriffs' Pension and Relief Fund with the Clerk of the Court of the U.S. Court of Appeals for the Second Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ Rachel S. Bloomekatz
Rachel S. Bloomekatz