24-1409

United States Court of Appeals for the Third Circuit

SAN DIEGO COUNTY EMPLOYEES RETIREMENT ASSOCIATION; FRANK HALL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEE,

V.

JOHNSON & JOHNSON ET AL., DEFENDANTS-APPELLANTS.

On Petition for Permission to Appeal from an Order of the
United States District Court for the District of New Jersey (Quraishi, J.)
Granting Class Certification, No. 3:18-cv-01833-ZNQ-TJB

BRIEF FOR WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302

Lyle Roberts
Casey M. Determan
ALLEN OVERY SHEARMAN STERLING US LLP
1101 New York Avenue, NW
Washington, DC 20005
(202) 508-8108
lyle.roberts@aoshearman.com

Counsel for Amicus Curiae

William D. Marsh
ALLEN OVERY SHEARMAN STERLING US LLP
2601 Olive Street
17th Floor
Dallas, TX 75201
(214) 271-5348

DISCLOSURE STATEMENT

Washington Legal Foundation (WLF) has no parent company, issues no stock, and no publicly held company owns a ten percent or greater interest in it.

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INTEREST OF AMICUS CURIAE

WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide.[1] Founded in 1977, WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law. WLF often appears as an amicus before federal appellate courts over the proper scope of the federal securities laws. *See, e.g.*, *Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 594 U.S. 113 (2021). WLF believes that the decision below is erroneous and, if left to stand, will work severe prejudice to a defendant's ability to defeat class certification in securities fraud cases asserting claims under Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j) and Rule 10b-5 (17 C.F.R. § 240.10b-5).

SUMMARY OF ARGUMENT

The Panel's decision is a significant step backwards in the 40-year saga of the *Basic* presumption of reliance in securities fraud class actions. That presumption allows plaintiffs to assert, on a class-wide basis, that they were defrauded when they relied "on the integrity of the price set by the market" for the stock because a misrepresentation purportedly distorted that price. *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988). But a class action plaintiff may invoke the *Basic* presumption only

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[1] No party's counsel authored any part of this brief. Only WLF or its counsel contributed money to preparation or submission of this brief. WLF has filed a motion for leave to file an amicus brief.

if the stock traded in an "efficient market" in which the stock price "quickly and completely" absorbs "public information." *In re Merck & Co., Inc. Sec. Litig.*, 432 F.3d 261, 269 (3d Cir. 2005) (citation omitted). If that is not the case, the *Basic* presumption no longer makes sense as there would be no basis for presuming that the misrepresentation distorted the stock price.

The Panel's decision undermines *Basic*'s core premise by holding that whether a price movement is attributable to a fraudulent statement depends not on the market being presented with new facts, but whether the market was presented with "new signals" about previously disclosed facts. If allowed to stand, the Panel's erroneous decision will not only hamstring a defendant's ability to rebut the *Basic* presumption at class certification, but also could infect loss causation determinations, unduly expand class periods, and lead to outsized liability exposure for defendants that already face immense pressure to settle even meritless securities fraud class actions.[2]

The Court should rehear the case *en banc* to address the Panel's decision, which poses sweeping consequences for the rising number of federal securities class

[2] This brief addresses the Panel's failure to consider "efficient market" principles. WLF also fully supports the Petition's arguments that the Panel misapplied *Goldman*'s "mismatch" test. *See* Pet. 14-16.

actions filed in this Circuit and invites the type of abuse in securities fraud cases that Congress and the Supreme Court have worked to eliminate.

ARGUMENT

I. The Panel's decision ignores the "efficient market" principles that underlie the *Basic* presumption.

A. The *Basic* presumption applies only if a stock trades in an "efficient market" and a fraudulent statement impacts the stock price.

The *Basic* presumption allows a securities fraud plaintiff to claim reliance on the "integrity of the price set by the market," rather than show direct reliance on an allegedly fraudulent statement. *Basic*, 485 U.S. at 245. Most class action plaintiffs invoke the *Basic* presumption to satisfy Rule 23(b)(3)'s predominance requirement and establish reliance on a class-wide basis.

Yet for the *Basic* presumption to make sense, the alleged misrepresentation must impact the company's stock price. Otherwise, a plaintiff cannot be said to have been deceived by the market price. If the alleged misstatement "had no price impact, then *Basic*'s fundamental premise 'completely collapses, rendering class certification inappropriate.'" *Goldman*, 594 U.S. at 119 (citation omitted). Accordingly, to invoke the *Basic* presumption, a plaintiff must show, as an "indirect proxy for price impact," that the misrepresentation was "publicly known" and "material" and that the "stock traded in an efficient market" that would have quickly reacted to the alleged misstatement. *Halliburton Co. v. Erica P. John Fund Inc. (Halliburton II)*, 573 U.S. 258, 268 (2014).

Plaintiffs often resort to "inflation-maintenance" price impact theories, alleging that a misstatement did not cause an artificial rise in the stock price, but prevented a stock price from falling. The price drop after correction of the alleged misstatement therefore reflects "inflation maintained by the earlier misrepresentation." *Goldman*, 594 U.S. at 123. Even assuming "inflation maintenance" is a valid price-impact theory,[3] "a sharp drop in share price alone is not enough for a class to be certified." *In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 605, 612 (7th Cir. 2020) ("[P]rice *reaction* (the simple movement of the price in response to a given statement) is quite different from the legal concept of price *impact.*"). After all, a stock drop exists in every securities fraud class action, so a stock drop does nothing to distinguish cases in which a misrepresentation impacted the stock price from those where it did not. Instead, as Judge Chung recognized in her cogent dissent, the stock drop must reflect the market reaction to learning that the alleged misstatement was false. *See* Dissent 12 ("[E]ven where a price drop is associated with a disclosure, the disclosure must still be new and corrective to create an inference of a misrepresentation's price impact.").

[3] *Goldman* expressly declined to address the validity of inflation-maintenance theories. 594 U.S. at 120 n.1.

B. In an "efficient market," only new information impacts the stock price.

A plaintiff must show that the security traded in an "efficient market" to invoke the *Basic* presumption, which assumes that "an efficient market will reflect all of the company's public statements, including misrepresentations," *Goldman*, 594 U.S. at 113, and that "public information is absorbed into a firm's stock price . . . 'in the period immediately following disclosure.'" *Merck*, 422 F.3d at 269 (citation omitted). If a market is not efficient, an alleged misstatement cannot be assumed to have distorted the market price. *See id*. at 270 n.8.

As a corollary, if a plaintiff relies on a "corrective disclosure" as the source of price impact, the corrective disclosure must disclose new information. That is because "disclosure of confirmatory information—or information already known by the market—will not cause a change in the stock price." *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1310 (11th Cir. 2011). If a defendant shows that the corrective disclosure does not reveal new information, then the defendant has "sever[ed] the link" between the alleged misstatement and the stock drop. Dissent 6-9; *see also*, *e.g.*, *In re FibroGen Sec. Litig.*, 2024 WL 1064665, at *12 (N.D. Cal. Mar. 11, 2024) ("[F]inding of 'back-end' price impact requires proof that the information disclosed . . . was . . . new (unknown to the market prior to July 15).").

C. The Panel erroneously held that information need not be new to impact the stock price.

Johnson & Johnson established that the plaintiffs' so-called corrective disclosures lacked any materially new information. *See* Pet. 10-11. Virtually all the content of these disclosures was long disclosed and widely known and, in any event, did nothing to reveal any falsity in the company's statements. *See id*. Nevertheless, the Panel erroneously held that the disclosure of this already public information (and thus presumed incorporated into the stock price) can still cause a price impact that supports the *Basic* presumption. The majority reasoned that it "need not decide whether J&J's assertion that a disclosure must be new is correct" because "disclosures based on public information may nevertheless communicate a *new signal* to the market in certain situations." Op. 8 (emphasis added). The Panel found that the alleged corrective disclosures sent "new signals" to the market that impacted the stock price, even if they did not reveal new information.

But the Panel failed to recognize that the absorption of information in an "efficient market" does not depend on how the information is disseminated (intensity, method, mode, etc.), so long as the dissemination is public. Thus, a purported "new signal" to the market based on previously disclosed facts, no matter how that signal is conveyed, cannot establish a distortion of the stock price caused by an alleged misstatement. That is true even if the "new signal" leads to a stock price reaction. In sum, the "new signal" exception created by the Panel cannot be squared with "efficient market" principles, has no basis in prior precedent, and fails to recognize that negative publicity from republication of stale, but unflattering, information can generate a market reaction completely divorced from any correction of the misstatement.[4]

II. The Panel's decision injects confusion that bleeds into related loss causation and class period determinations.

The Panel's erroneous decision destabilizes well-established law on loss causation. "Loss causation"—"*i.e.*, that the misrepresentation caused the stock price drop"—is an element of a securities fraud claim that every plaintiff must adequately plead and prove. *Merck*, 432 F.3d at 274. In "fraud-on-the-market" cases, a plaintiff typically shows loss causation through allegations that the "share price fell significantly after the truth became known," *i.e.*, after a corrective disclosure. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). While loss causation and price impact are distinct concepts, they "overlap" significantly. *Allstate*, 966 F.3d at 608.

Above all, a plaintiff cannot establish that a corrective disclosure caused a stock drop unless the corrective disclosure revealed new information. *See, e.g.*, *Merck*, 432 F.3d at 270-71 (publication of publicly available information did not

[4] The Panel's case law from other circuits says no different. Those cases generally asked whether the market was in fact already aware of the information (*i.e.*, whether the information was new). That is not the question the Panel attempted to address. The majority was very explicit that it "need not decide" questions about whether the corrective disclosures revealed new information. Op. 9. That was error.

constitute corrective disclosure); *Tchrs.' Ret. Sys. of La. v. Hunter*, 477 F.3d 162, 187-88 (4th Cir. 2007) (negative characterization of previously known information did not constitute corrective disclosure); *Meyer v. Greene*, 710 F.3d 1189, 1198 (11th Cir. 2013) ("[A] corrective disclosure 'obviously must disclose *new* information.'") (citation omitted). Moreover, to the extent that plaintiffs plead the existence of an efficient market (as the plaintiffs did here), they "cannot contend that the market is efficient for purposes of reliance and then cast the theory aside when it no longer suits their needs for purposes of loss causation." *Meyer*, 710 F.3d at 1198-99.

Nothing in existing case law even hints that a plaintiff can establish loss causation if a corrective disclosure does not reveal new information but otherwise sends a "new signal" to the market. Indeed, courts recognize that a stock drop after a *confirmatory* disclosure is more logically attributed to investor fear following negative news rather than a correction of the alleged misstatement itself. For instance, the Fourth Circuit in *Hunter* held that the stock price drop following a lawsuit based on publicly available information "more logically occurred," not due to the market reacting to the correction of the alleged misstatement, but "because the market feared that a lawsuit launched by a founder and former CEO of the corporation portended a period of instability and discord that could disrupt the corporation's operations." 477 F.3d at 187-88.[5]

The Panel's error also could improperly lengthen class periods and result in unwarranted expansion of classes and any associated liability. When initially filed, securities class action complaints typically are sourced exclusively from publicly available materials and filed after the final alleged corrective disclosure identified in the complaint. Yet under the Panel's reasoning, there is no logical end to the class period in these types of cases. A plaintiff could characterize any subsequent news story or event touching on the subject matter of an alleged misstatement as a "new signal" that led to a stock price decline and assert that it extends the class period.

Indeed, that is effectively what the Panel held in concluding that a press release from a plaintiffs' firm inviting "the filing of additional suits" caused a price impact that resulted from the alleged misstatements. Op. 10 n.11. But it would make no sense to allow a class period to extend beyond the date a securities fraud lawsuit

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[5] *See also Meyer*, 710 F.3d at 1200 (stock decline logically attributed to "'changed investor expectations' after an investor who wielded great clout in the industry voiced a negative opinion about the company"); *In re Arcimoto Inc., Sec. Litig.*, 2022 WL 17851834, at *6 (E.D.N.Y. Dec. 22, 2022) ("[I]diosyncratic" market reactions to "publications that merely characterize information already circulating in a negative way cannot prove loss causation."); *In re Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 554 (S.D.N.Y. 2008) (plaintiff's loss causation theory failed to acknowledge "potential effect from WSJ Article's highly negative tone"), *aff'd*, 597 F.3d 501 (2d Cir. 2010).

is filed, which itself establishes that the market purportedly learned the truth of the alleged misstatement from a corrective disclosure at an earlier date. *See Alich v. Opendoor Techs. Inc.*, 2024 WL 839146, at *15 (D. Ariz. Feb. 28, 2024) ("If investors were ready to bring a securities fraud action in October 2022, Opendoor cannot have corrected any misimpressions about the algorithm's unfailing capabilities in November 2022."), *vacated in part on other grounds*, 2024 WL 2153529 (D. Ariz. May 14, 2024). If left unaddressed, however, the Panel's decision would allow plaintiffs to improperly extend class periods in this manner, increasing the potential damages (and settlement leverage) associated with any given case.

III. The Panel's decision impacts a rising number of securities fraud class actions filed in this Circuit and invites abuse.

The Panel's decision impacts a rising number of securities fraud class actions filed in this Circuit. Historically, the Third Circuit has seen the third-most securities class actions—more than the next two circuits combined.[6] And this Circuit is catching up with the Second and Ninth Circuits, which collectively saw their filings decline nearly 20% in the first half of 2025 compared to the second half of 2024,

[6] *Securities Class Action Clearinghouse: Heat Maps & Related Filings*, Stanford Law School, https://perma.cc/NHD6-JAAW.

while filings in this Circuit increased more than 300% in the first half of 2025 compared to the second half of 2024.[7]

Both Congress and the Supreme Court have recognized that securities fraud class actions are uniquely prone to abuse. *See Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007) ("As a check against abusive litigation by private parties, Congress enacted the Private Securities Litigation Reform Act of 1995"). While *Basic* allows a plaintiff to bring a securities fraud claim on behalf of a class, the Supreme Court has revisited *Basic* on multiple occasions to reaffirm that a defendant can defeat class certification by "sever[ing] the link" between an alleged misstatement and any purported price impact. *See Goldman*, 594 U.S. 113; *Halliburton II*, 573 U.S. 258; *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011). These decisions have erected important guardrails around the *Basic* presumption to disincentivize meritless lawsuits brought for "*in terrorem*" settlement value. *Halliburton II*, 573 U.S. at 296, n.7 (Thomas, J., concurring).

The Panel's decision removes those guardrails, making it far too easy for plaintiffs to satisfy *Basic*'s price-impact requirement, along with other negative

[7] *Securities Class Action Filings: 2025 Midyear Assessment*, Cornerstone Research at 17 (July 30, 2025), https://perma.cc/S6R7-6853.

effects on loss causation and class length. It is imperative that the full Court intervene now to correct the Panel's errors.

Dated: September 19, 2025

Respectfully submitted,

/s/ Lyle Roberts
Lyle Roberts
Casey M. Determan
ALLEN OVERY SHEARMAN STERLING US LLP
1101 New York Avenue, NW
Washington, DC 20005
(202) 508-8108
lyle.roberts@aoshearman.com

William D. Marsh
ALLEN OVERY SHEARMAN STERLING US LLP
2601 Olive Street, 17th Floor
Dallas, TX 75201
(214) 271-5348

Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because it contains 2600 words (as determined by Microsoft Word 365), excluding the parts of the motion exempted by Rule 32(f). This brief also complies with the typeface and type-style requirements of Rules 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in a proportionally spaced 14-point typeface, Times New Roman, using Microsoft Word 365. This brief complies with Third Circuit Local Appellate Rule 31.1(c) in that the text of the electronic brief is identical to the text in the paper copies.

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Dated: September 19, 2025

/s/ Lyle Roberts

Lyle Roberts
ALLEN OVERY SHEARMAN
STERLING US LLP
1101 New York Avenue, NW
Washington, DC 20005
(202) 508-8108
lyle.roberts@aoshearman.com

Counsel for Amicus Curiae

CERTIFICATE OF ADMISSION

I certify that I am a member in good standing of the Bar of this Court in accordance with Third Circuit Local Appellate Rule 46.1.

Dated: September 19, 2025

<u>/s/ Lyle Roberts</u>

Lyle Roberts
ALLEN OVERY SHEARMAN STERLING US LLP
1101 New York Avenue, NW
Washington, DC 20005
(202) 508-8108
lyle.roberts@aoshearman.com

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2025, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are Filing Users and that service will be accomplished electronically by the Notice of Docket Activity in accordance with the Third Circuit Local Appellate Rule 113.4.

Dated: September 19, 2025

/s/ Lyle Roberts
Lyle Roberts
ALLEN OVERY SHEARMAN
STERLING US LLP
1101 New York Avenue, NW
Washington, DC 20005
(202) 508-8108
lyle.roberts@aoshearman.com

Counsel for Amicus Curiae