No. 09-56965

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONNECTICUT RETIREMENT PLANS AND TRUST FUNDS,

Plaintiff-Appellee,

v.

AMGEN INC., ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California
(Hon. Philip S. Gutierrez, Presiding)
No. 07-2536

[PROPOSED] BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA

AS AMICI CURIAE IN SUPPORT OF APPELLANTS SEEKING REVERSAL AND REMAND

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CORPORATE DISCLOSURE STATEMENT

Amici curiae the Securities Industry and Financial Markets Association, the Chamber of Commerce of the United States of America, and the Pharmaceutical Research and Manufacturers of America state that they have no parent corporations and that no publicly held corporation owns ten percent or more of their stock.

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INTEREST OF AMICI CURIAE

The amici curiae are the Securities Industry and Financial Markets Association ("SIFMA"), the Chamber of Commerce of the United States of America (the "Chamber"), and the Pharmaceutical Research and Manufacturers of America ("PhRMA"). Each has a significant interest in the interpretation and enforcement of the federal securities laws and the rules governing class actions in private securities cases.

SIFMA brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. As regular participants in the securities markets, the members of SIFMA have a continuing interest in the administration of the federal securities laws. SIFMA has participated as amicus curiae in the appeal of many securities class actions, including in this Court. [1]

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[1] See, e.g., *In re Infineon AG Securities Litig.*, No. 09-15857 (9th Cir. Sept. 9, 2009) (not yet calendared for argument); *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031 (9th Cir. 2008) (No. 08-55865); *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920 (9th Cir. 2003) (No. 01-16725). For more information about SIFMA and a list of its filings as amicus curiae, visit http://www.sifma.org/regulatory/amicus_briefs.html.

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of three million companies and professional organizations of every size, in every industry sector, and from every region of the country. Chamber members transact business throughout the United States and a large number of countries around the world. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber has participated as amicus curiae in various class action appeals, including recently in this Court.[2]

PhRMA is a voluntary, nonprofit association that represents the country's leading research-based pharmaceutical and biotechnology companies. PhRMA's members invent and develop medicines that save lives and improve the quality of life for millions of patients around the world. PhRMA's members have invested hundreds of billions of dollars in the last decade to develop new medicines – including over $45 billion last year alone. PhRMA serves as the pharmaceutical industry's principal policy advocate, advancing policies that foster continued medical innovation, and has participated as amicus curiae in appeals involving

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[2] See, e.g., *In re Infineon AG Securities Litigation*, No. 09-15857 (9th Cir. Sept. 9, 2009) (not yet calendared for argument) (on the brief with SIFMA); *Dukes v. Wal-Mart Stores, Inc.*, Nos. 04-16688 and 04-16720 (Mar. 9, 2009) (reheard en banc Mar. 24, 2009).

issues of significance to the pharmaceutical industry.[3] The issues in this case are especially significant to PhRMA members because many of them have borne the expense and burden of defending against securities-fraud class actions in recent years, which raise the already substantial cost and risks of developing new medicines.

ARGUMENT

In certifying a class to proceed in this private securities case, the district court committed three legal errors requiring reversal:

(I) The district court failed to make the definitive findings and determinations required to certify a class under Rule 23 because of misplaced caution against inquiries into the merits of a plaintiff's case.

(II) The district court failed to require the plaintiffs to make an initial showing that was sufficient to justify invoking the presumption of reliance permitted by the "fraud-on-the-market" doctrine approved in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

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[3] See, e.g., *Caraco Pharmaceutical Laboratories v. Forest Laboratories, Inc.*, 527 F.3d 1278 (Fed. Cir. 2008) (No. 2007-1404); *Colacicco v. Apotex, Inc.*, 521 F.3d 253 (3d Cir. 2008) (No. 06-3107), *vacated*, 129 S. Ct. 1578 (2009). For more information, see PhRMA, *Pharmaceutical Industry Profile 2010*, at http://www.phrma.org/files/attachments/ Profile_2010_FINAL.pdf.

(III) The district court denied the defendants an adequate opportunity to rebut the plaintiff's proposed use of the fraud-on-the-market doctrine. We discuss each of these issues in greater detail below.

I. A DISTRICT COURT MUST FULLY DETERMINE ALL ISSUES NECESSARY TO GRANT OR DENY CLASS CERTIFICATION EVEN WHEN THOSE ISSUES BEAR ON THE MERITS OF THE CASE.

District courts remain uncertain about the extent to which they must determine an issue at the time of class certification when that issue overlaps with the merits of a claim or defense. That uncertainty hampered the district court in this case. Like other courts of appeals, the Court should resolve any doubts that exist and clarify that district courts must determine all issues necessary to grant or deny class certification even when those issues bear on the merits of the case.

This Court has given mixed signals about the standard a district court should use to resolve factual and legal questions presented at the class certification stage when those issues overlap with the merits of claims or defenses. For example, because of language in a 1974 Supreme Court decision on class actions, this Court has said that: "Although some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits to the class

certification stage."[4] It has said that a court may not put the plaintiff to preliminary proof of its claim and that a court may certify a class even if a plaintiff might be unable to prove its allegations.[5] This Court has also said, however, that a trial court must conduct a rigorous analysis of class certification questions[6] and that, if a district court "had rejected [the defendant's] arguments regarding commonality solely because they overlapped with 'merits issues,' that would have been error."[7]

The district court decision in this case reflected these competing instructions and eschewed requiring the plaintiff to make a sufficient showing on the certification requirements out of excessive caution about reaching issues that overlap with the merits. In describing the legal standards for class certification, the district court said it must conduct a rigorous analysis and must have sufficient information to form a reasonable judgment, but it also must take the substantive allegations of the complaint as true and may not put the plaintiff to preliminary

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[4] *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983), citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-178 (1974); *Staton v. Boeing Co.*, 327 F.3d 938, 954 (9th Cir. 2003) (quoting *Moore*).

[5] *Blackie v. Barrack*, 524 F.2d 891, 901 & n.17 (9th Cir. 1975). See also *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union v. ConocoPhillips Co.*, 593 F.3d 802, 808-809 (9th Cir. 2010) ("While the court may not put the plaintiff[s] to preliminary proof of [their] claim[s], it does require sufficient information to form a reasonable judgment.").

[6] *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 961 (9th Cir. 2005).

[7] *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1172 n.2 (9th Cir. 2007), *vacated and reh'g en banc granted*, 556 F.3d 919 (9th Cir. Feb. 13, 2009).

proof of its claim.[8] This caution was particularly evident when the court refused to require the plaintiff to establish the applicability of the fraud-on-the-market theory with anything more than proof of an efficient market for Amgen's stock and when it refused to consider the defendants' rebuttal arguments.[9]

This case therefore presents an important opportunity to clarify that district courts must fully address all legal and factual issues necessary to make findings and determinations on class certification questions notwithstanding that some issues also could recur during final consideration of the merits. This has been the strong trend in the other federal courts of appeals. For example, the Second Circuit recognized that it had been less than clear on the standards for class certification[10] and, in an exhaustive opinion, issued this specific guidance:

> (1) a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met;

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[8] Order Granting Plaintiff's Motion for Class Certification, (Aug. 12, 2009) (ER-1, Tab 2) ("Order"), at 4-5 (citing, among other cases, *Blackie*, *Staton*, and *Chamberlan*).

[9] Order at 15, 19 (ER-1, Tab 2) (referring to "precedent that counsels against inquiries into the merits of a plaintiff's case at the class certification stage," refusing to consider defense arguments because they "concern the merits of the case," and agreeing that "now is an inappropriate time to consider Defendants' contentions").

[10] See *In re Initial Public Offerings Sec. Litig*., 471 F.3d 24, 33 (2d Cir. 2006) ("we readily acknowledge that, until now, our Court has been less than clear as to the applicable standards for class certification, and on occasion … we have used language that understandably led [the district judge] astray."); see also *Oscar Private Equity Invs. v. Allegiance Telecom, Inc*., 487 F.3d 261, 266 (5th Cir. 2007) ("There is widespread confusion on this point.").

> (2) such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met;
>
> (3) the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement;
>
> (4) in making such determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement; and
>
> (5) a district judge has ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits.[11]

Many other appellate courts have admonished their trial courts not to shy away from a class certification question because it overlaps with a merits issue.[12]

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[11] *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 41 (emphasis and paragraph breaks added). See also *Teamsters Local 445 Freight Div. Pension, Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008) ("Today, we dispel any remaining confusion and hold that the preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements.").

[12] See, e.g., *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 17 (1st Cir. 2008) ("It would be contrary to the rigorous analysis of the prerequisites established by Rule 23 before certifying a class to put blinders on as to an issue simply because it implicates the merits of the case." (internal quotation marks omitted)); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 268 ("A district court still must give full and independent weight to each Rule 23 requirement, regardless of whether that requirement overlaps with the merits."); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001) ("because the determination of a certification request invariably involves some examination of factual and legal issues underlying the plaintiffs' cause of action, a

These courts have stressed the need for definite conclusions on all class certification issues based on the following considerations, among others:

• A decision to certify a class, especially in a private securities case, exerts enormous and undue settlement pressure on a defendant, even if the defendant believes it has a meritorious defense.[13] The consequences of proceeding to summary judgment or trial include a risk of massive, if not ruinous, monetary liability, as well as heavy costs to conduct document and deposition discovery and to engage experts. Similar factors led to Rule 23(f) permitting interlocutory appeal of a class certification decision,[14] and here they weigh in favor of requiring trial

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court may consider the substantive elements of the plaintiffs' case"); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) ("[I]f some of the considerations under Rule 23(b)(3), such as 'the difficulties likely to be encountered in the management of a class action,' overlap the merits–as they do in this case, where it is not possible to evaluate impending difficulties without making a choice of law, and not possible to make a sound choice of law without deciding whether Bridgeport authorized or ratified the dealers' representations–then the judge must make a preliminary inquiry into the merits.").

The Sixth Circuit is also considering these issues in a Rule 23(f) appeal because the district court resisted addressing merits issues at the class certification stage as the district court here did. See *Ross v. Abercrombie & Fitch Co.*, 257 F.R.D. 435, 440-441 (S.D. Ohio 2009), *appeal docketed* No. 09-4028 (6th Cir. Aug. 25, 2009).

[13] *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 262, 267 (certifying a class of purchasers of securities enabled by the fraud-on-the-market doctrine has "lethal force"; we "cannot ignore the *in terrorem* power of certification, continuing to abide the practice of withholding until 'trial' a merit inquiry central to the certification decision").

[14] Fed. R. Civ. P. 23 advisory committee's note, 1998 Amendments ("An order granting certification … may force a defendant to settle rather than incur the costs

courts to make complete, careful, and adequately supported determinations on each class certification prerequisite.

• Class certification decisions do not predetermine issues on the merits. The trial judge remains free to alter or amend a certification decision,[15] and the ultimate trier of fact is not bound by findings made for a certification decision.[16]

• Rule 23 expressly requires the district court to make findings and determinations.[17]

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of defending a class action and run the risk of potentially ruinous liability."); *Chamberlan v. Ford Motor Co*., 402 F.3d 952, 960 (holding that settlement pressure is one rationale for Rule 23(f) review requiring the Court to "consider whether [the defendant] has sufficiently demonstrated that the damages claimed would force a company of its size to settle without relation to the merits of the class's claims." (citation and internal quotation marks omitted)).

[15] See Fed. R. Civ. P. 23(c)(1)(C); *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."). See also *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union v. ConocoPhillips Co.*, 593 F.3d 802, 809-810.

[16] *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 41 ("[T]he determination as to a Rule 23 requirement is made only for purposes of class certification and is not binding on the trier of facts, even if that trier is the class certification judge."); see also *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 n.19 (3d Cir. 2008); accord *Blades v. Monsanto Co.*, 400 F.3d 562, 566-567 (8th Cir. 2005).

[17] See Fed. R. Civ. P. 23(b)(3), 23(c)(1)(A); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 ("the decision to certify a class calls for findings by the court, not merely a threshold showing by a party, that each requirement of Rule 23 is met" (emphasis added) (internal quotation marks omitted)).

• The language in the Supreme Court's *Eisen* opinion does not bar a court from considering merits issues needed to make an informed judgment under Rule 23.[18]

The Court should join these other courts of appeals and remove any uncertainty the district courts have about the appropriate standard for making class certification decisions. As part of its rigorous analysis, a trial court should make definitive determinations on every class certification issue even if it overlaps with a merits issue.

II. PROOF OF AN EFFICIENT MARKET IS NOT SUFFICIENT ON ITS OWN TO TRIGGER A PRESUMPTION OF CLASSWIDE RELIANCE UNDER THE FRAUD-ON-THE-MARKET DOCTRINE.

A second issue in this appeal concerns the amount and type of showing a plaintiff must make as an initial matter to obtain a presumption of reliance from the fraud-on-the-market theory at the class certification stage. This issue addresses the proof a plaintiff must provide as a threshold matter, even if a defendant comes

[18] See *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 33-34; *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 ("[N]othing in the 1966 amendments to Rule 23, or the opinion in *Eisen*, prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that rule and exercise the discretion it confers. Plaintiffs cannot tie the judge's hands by making allegations relevant to both the merits and class certification."); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 ("*Eisen* simply restricts a court from expanding the Rule 23 certification analysis to include consideration of whether the proposed class is likely to prevail ultimately on the merits."); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 317 & n.17 (agreeing with cases interpreting *Eisen* only to restrict the court from ruling on merits issues that have no bearing on Rule 23).

forward with no rebuttal facts or arguments (the third part of this brief addresses the question of rebuttal).

The plaintiff argued it needed to prove only an efficient market for Amgen stock. The defendants argued that a plaintiff must allege and prove market efficiency plus several additional factors, including elements listed in a footnote in *Basic*, such as materiality of the alleged misrepresentations. Wary of treading on merits considerations, the district court held that, "to trigger the presumption of reliance, Plaintiff need only establish that an efficient market exists."[19]

This decision was legally flawed. When considering the fraud-on-the-market doctrine to presume reliance on the market price of a security for purposes of class certification, a district court must determine, and the lead plaintiff has the burden of establishing, that the market for the corporate defendant's stock was efficient and that the market operated efficiently during the putative class period to incorporate the statements challenged in the case into the stock price. This is the appropriate outcome for two main reasons.

First, requiring plaintiffs to demonstrate that the market operated efficiently to reflect the public statements at issue in the case is necessary in light of recent empirical studies and economic literature. A growing body of studies shows that, at certain times, some actively traded securities do not obey the rules of an efficient

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[19] Order at 16 (ER-1, Tab 2).

market and, as a result, investors do not necessarily rely on the market price to reflect all publicly available information.

Several leading economists have expressed increasing doubts about the validity of the efficient market hypothesis, which is the foundation for the fraud-on-the-market doctrine, in certain market conditions. This is a sample of their conclusions:

> [N]ew studies of security prices have reversed some of the earlier evidence favoring the [efficient market hypothesis]. With the new theory and evidence, behavioral finance has emerged as an alternative view of financial markets. In this view, economic theory does not lead us to expect financial markets to be efficient. Rather, systematic and significant deviations from efficiency are expected to persist for long periods of time.[20]
>
> The growing academic literature documenting violations of the efficient market hypothesis, along with the accumulated research on "irrationality" of some investors, should prompt scholars, practitioners and regulators to examine the implications of these developments on securities law in general, and on the unchallenged applicability of fraud-on-the-market theory in particular.[21]
>
> Our findings raise serious questions about the standards used by the courts in granting motions for class action status and about the economic appropriateness of routinely presuming universal reliance on market efficiency when certifying broad classes consisting of all investors who traded during the class period.[22]

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[20] Andrei Shleifer, *Inefficient Markets: An Introduction to Behavioral Finance* 2 (2000).

[21] Frederick C. Dunbar & Dana Heller, *Fraud on the Market Meets Behavioral Finance*, 31 Del. J. Corp. L. 455, 471 (2006) (citing and discussing many studies).

[22] Grigori Erenburg et al., *The Paradox of "Fraud-on-the-Market Theory": Who Relies on the Efficiency of Market Prices?* 5 (April 9, 2009), *available at*

The authors of the final study also examined whether several of the factors frequently used by district courts to evaluate market efficiency[23] can reliably identify firms where the presumption of reliance for all investors is supported by empirical evidence. In general, they concluded that the factors exhibited little relation to even the weak form of market efficiency. For some factors, the evidence was neutral or contrary to market efficiency.[24]

Other commentators observed that "the market price of a security will not be uniformly efficient as to all types of information" and that courts should not "presume that a particular security exhibits the same efficiency characteristics for all types of information." For example, prices might adjust quickly to information about stock splits, block trades, or a takeover announcement and not react quickly to changes in quarterly earnings announcements.[25]

These studies validate the concerns Justice White presciently identified in *Basic*, when he warned that, "with no staff economists, no experts schooled in the

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http://www.ssrn.com/abstract=1138018. See also Justin Fox, *The Myth of the Rational Market* (2009).

[23] The paper considered five factors from *Cammer v. Bloom*, 711 F. Supp. 1264, 1286-1287 (D.N.J. 1989), and *Krogman v. Sterritt*, 202 F.R.D. 467 (N.D. Tex. 2001).

[24] Grigori Erenburg et al., *The Paradox of "Fraud-on-the-Market Theory": Who Relies on the Efficiency of Market Prices*? 24-29 (April 9, 2009).

[25] Jonathan R. Macey & Geoffrey P. Miller, *Good Finance, Bad Economics: An Analysis of the Fraud-on-the-Market Theory*, 42 Stan. L. Rev. 1059, 1083-1084 (1990).

efficient-capital-market hypothesis, no ability to test the validity of empirical market studies, [judges] are not well equipped to embrace novel constructions of a statute based on contemporary microeconomic theory."[26] The studies should also influence this Court's consideration of the appropriate application of the fraud-on-the-market theory. At a minimum, the growing data about exceptions to and gaps in the efficient market hypothesis militate against a trial court concluding that an efficient market was functioning for a security based on a superficial demonstration of trading volume and analyst coverage. The data call for a more robust demonstration that, in the particular case and time period and for the particular stock and statements alleged to be false, the market rapidly incorporated the information into the price.

Second, requiring a plaintiff to establish the relevance of the fraud-on-the-market theory in the particular circumstances of the case is more faithful to *Basic* than a requirement that a plaintiff need prove only an efficient market. The majority in *Basic* understood that a "presumption of reliance" for an entire class was a departure from traditional practice in fraud and Rule 10b-5 cases. The Court was prepared to adopt this exception but only if the named plaintiff was able to replace individualized proof of reliance with evidence to establish that an efficient

[26] *Basic*, 485 U.S. at 253 (White, J., concurring in part and dissenting in part) (internal quotation marks omitted).

market for the defendant's stock made reliance on stock price an adequate proxy for reliance on the disclosures at issue and provided the causal connection between the alleged misrepresentation, the plaintiffs' purchase or sale of stock, and the plaintiffs' injury.[27]

This kind of showing by necessity requires an inquiry into the specific circumstances of the case. To justify exempting a group of plaintiffs from individual proof of reliance, the causal connection must exist in the particular case, for the specific stock, and for the specific statement alleged to have been fraudulent. The plaintiff must establish that the market operated efficiently during the class period alleged in the complaint and that there is a sufficient foundation for presuming the necessary causal link between the public statements disputed in the case and the stock price.[28] These elements of the fraud-on-the-market doctrine are the minimum a plaintiff must demonstrate at the class certification stage to persuade a court that individual questions of reliance do not predominate.

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[27] *Basic*, 485 U.S. at 242-243.

[28] This Court has acknowledged the context-specific nature of the inquiry. *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920, 947-948 (9th Cir. 2003) ("the fraud-on-the-market theory is premised on the fact that a misrepresentation has affected the stock's price incongruently to the stock's true value. Only then is detrimental reliance presumed because a plaintiff traded stock relying on the integrity of the market price." (citation and internal quotation marks omitted)).

For these reasons, proof of an efficient market for a corporation's stock is not sufficient to meet the required threshold showing entitling a plaintiff to the reliance presumption at the class certification stage. The plaintiff must establish more. One additional factor that is essential to a plaintiff's initial burden is proof of the materiality of the specific misrepresentations alleged in the complaint. The opening brief of the defendants-appellants persuasively describes the precedents and reasons supporting this conclusion.[29]

In addition, a lead plaintiff has the burden of establishing, and the district court must determine, that the market for the corporation's stock operated efficiently during the alleged class period to reflect the statements challenged in the case. The plaintiff must prove that those alleged misrepresentations noticeably affected the price of the security.[30] The way a plaintiff will satisfy this burden will depend on the particular circumstances of the case, the nature of the market for the corporate defendant's stock, and the type of false statement alleged in the case. As described above, empirical studies are raising questions whether the market for every security is efficient at all times and whether the market efficiency for a specific security is different for different types of information. As a result, a

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[29] Amgen Br. 19-22, 30-35; see also *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 484 (2d Cir. 2008) (the plaintiff must establish materiality as a threshold matter at the class certification stage).

[30] See *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228 (5th Cir. 2009); but see *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474.

plaintiff in some cases might introduce evidence of market reaction to disclosures correcting the statements at issue in the complaint. A market that reacts swiftly to corrective disclosures is evidence of a strong causal nexus between the previously undisclosed misconduct and the market price. In other cases, a plaintiff might decide to introduce other empirical data demonstrating a causal connection between public disclosure of unexpected corporate events or financial releases and an immediate response in the stock price.

Requiring this kind of initial showing is especially important in this case. The statements alleged to be materially misleading are highly particularized types of information about drug companies such as whether a meeting of an FDA advisory committee set to discuss the safety of "erythropoiesis-stimulating agents" would not include one of Amgen's drug products.

III. A DISTRICT COURT MUST AFFORD THE DEFENDANT A FULL AND FAIR OPPORTUNITY AT THE CLASS CERTIFICATION STAGE TO REBUT THE ASSERTION OF THE FRAUD-ON-THE-MARKET DOCTRINE.

A third issue in the case concerns the scope of a defendant's ability to rebut a plaintiff's prima facie showing that the fraud-on-the-market theory applies to the case for class certification purposes. The defendants in this case contended that they could rebut the reliance presumption by showing that, at various points in time, securities market participants knew the truth about the defendants' public statements alleged to be false. The district court committed reversible error by

ruling that it would not consider these defense contentions until after class certification.[31] A defendant must have a full opportunity at the time of class certification to rebut a plaintiff's attempt to invoke the fraud-on-the market theory, and the trial court must address and resolve issues raised by the defendant when considering whether to certify a class.

This Court should reaffirm this conclusion for several reasons. First, a broad right of rebuttal was central to the Supreme Court's adoption of the fraud-on-the-market theory in *Basic*. That decision expressly recognized that a presumption would not be appropriate without affording the defendant a rebuttal opportunity.[32] Providing the defendant with an opportunity to develop and present material severing the causal link between the alleged misrepresentation and either the market price of the security or the plaintiff's decision to trade at a fair market price was a fundamental prerequisite to the Supreme Court's adoption of the fraud-on-the-market doctrine.[33]

Second, a broad right of rebuttal is an essential procedural protection for defendants that will increase the likelihood that courts will make solid and accurate decisions on class certification in private securities cases relying on the fraud-on-

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31 Order at 17-19 (ER-1, Tab 2).

32 See *Basic*, 485 U.S. at 245, 248 (referring to the decision of the court below to accept a presumption "subject to rebuttal by" defendants).

33 Id. at 248-249 (giving examples of circumstances that would sever the link).

the-market theory. As discussed in the first part of this brief, class certification proceedings have grown in importance since the Supreme Court decided *Basic*. The strong trend in the courts of appeals is that a district court must reach definitive assessments on each of the elements of class certification. The necessary corollaries are that, at the class certification stage and not just at trial, the defendant must have a chance to persuade the court that the presumption does not apply in the particular facts of the case and that the court needs to resolve issues that the defendant raises. Other appellate courts explicitly reached these same conclusions.[34]

The experience in the district courts shows the importance of affording defendants ample room to raise any issue that could sever the link between the alleged misrepresentation and the market price of the security. In some cases,

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[34] *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 485 (a district court must "make a 'definitive assessment' that the Rule 23(b)(3) predominance requirement has been met. This assessment cannot be made without determining whether defendants can successfully rebut the fraud-on-the-market presumption.… Hence, the court must permit defendants to present their rebuttal arguments 'before certifying a class....'" (quoting *In re Initial Public Offerings Sec. Litig.*,, 471 F.3d 24, 41)); see also *Oscar Private Equity Invs. v. Allegiance Telecom, Inc*., 487 F.3d 261, 270 ("The trial court erred in ruling that the class certification stage is not the proper time for defendants to rebut lead Plaintiffs' fraud-on-the-market presumption.").

courts find that the defendant has overcome use of the presumption and, in others, that the defendant has not adequately done so.[35]

For these reasons, a defendant should be allowed a full and fair opportunity to rebut the proposed use of the fraud-on-the-market doctrine to create a presumption of reliance at the class certification stage. A defendant should have wide latitude to do what the Supreme Court authorized: provide evidence and argumentation to demonstrate a break in the link between the alleged misrepresentation and either the market price of the security during the putative class period or the plaintiff's decision to trade at a fair market price.

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[35] See, e.g., *In re American Int'l Group, Inc. Sec. Litig.*, ___F.R.D.___, 2010 WL 646720 (S.D.N.Y. Feb. 22, 2010) (holding that defendant had rebutted the fraud-on-the-market presumption on some but not all issues by demonstrating flaws in plaintiff's expert's methodology for showing statistical significance of price decreases on the dates of two alleged corrective disclosures); *In re Juniper Networks, Inc. Sec. Litig.*, ___F.R.D.___, 2009 WL 335332, at *7 (N.D. Cal. Oct. 16, 2009) (finding that defendant had failed to rebut the presumption by pointing to a single corrective disclosure sent out by e-mail two days before the public disclosure alleged in the complaint).

CONCLUSION

For the reasons set forth above, the district court's order granting plaintiff's motion for class certification should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 5,299 words, exclusive of exempted portions.

/s/ Judith E. Coleman
Judith E. Coleman, Attorney

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 2, 2010.

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