No. 17-____

In the Supreme Court of the United States

PETRÓLEO BRASILEIRO S.A. – PETROBRAS, ET AL.,
Petitioners,

v.

UNIVERSITIES SUPERANNUATION SCHEME LIMITED, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), and *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (*Halliburton II*), this Court held that a plaintiff in a securities fraud action can invoke a rebuttable presumption of reliance on public misstatements, in lieu of showing that it actually relied on particular misstatements, but only if the plaintiff can show that new information had a "price impact" on the securities, such that investors can be presumed to rely on the alleged misstatements in relying on the integrity of the market price. The lower courts are deeply divided on what factors to weigh, and how to weigh them, in determining whether a plaintiff may be presumed to have relied on alleged misrepresentations under *Basic* and *Halliburton II*.

Does the legal standard to invoke *Basic*'s presumption of reliance at minimum require empirical evidence that a security generally reacted in a directionally appropriate manner to new material information—*viz.*, that its price went up on good news and down on bad news—or, as the Second Circuit ruled, can the presumption be based entirely on other factors unrelated to whether the alleged misstatement had price impact notwithstanding this Court's holding in *Halliburton II*?

2. Three circuits have held that Rule 23 requires proponents of class certification to show that class membership can be ascertained through administratively feasible means, while four circuits (including now the Second Circuit) have held it

does not. Among other things, the administrative feasibility requirement ensures that putative class members receive appropriate notice of their rights and that defendants can enforce class judgments and settlement releases without individualized mini-trials that defeat the efficiencies of class actions. In the case below, the record established no administratively feasible means to ascertain class membership because purchasers of globally traded notes have no way of knowing, without extensive discovery of third parties located around the world, whether they purchased in "domestic transactions," as required for a federal securities law claim under *Morrison v. National Australia Bank*, 561 U.S. 247 (2010).

Contrary to the Second Circuit's ruling below, do Rule 23 and due process require that class membership be ascertainable through administratively feasible means?

LIST OF PARTIES

The parties to the proceedings are listed in the caption of the decision of the United States Court of Appeals for the Second Circuit. App. 1a-6a.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6 Petitioners Petróleo Brasileiro S.A. – Petrobras ("Petrobras"), Petrobras Global Finance B.V. ("PGF"), Petrobras America Inc. ("PAI"), and Theodore M. Helms (collectively, the "Petrobras Defendants" or "Petrobras Petitioners") state that:

1. Petrobras is a publicly traded company organized under the laws of Brazil. Petrobras has no parent company and no publicly held corporation owns 10% or more of its shares. The Brazilian Federal Government owns 50.26% of the ordinary shares of Petrobras.

2. PGF is an indirectly controlled subsidiary of Petrobras. Petrobras has no parent company and no publicly held corporation owns 10% or more of its shares. The Brazilian Federal Government owns 50.26% of the ordinary shares of Petrobras.

3. PAI is an indirectly controlled subsidiary of Petrobras. Petrobras has no parent company and no publicly held corporation owns 10% or more of its shares. The Brazilian Federal Government owns 50.26% of the ordinary shares of Petrobras.

Petitioners BB Securities Ltd., Citigroup Global Markets Inc., J.P. Morgan Securities LLC, Itau BBA USA Securities, Inc., Morgan Stanley & Co. LLC, HSBC Securities (USA) Inc., MUFG Securities Americas Inc., Merrill Lynch, Pierce, Fenner & Smith Inc., Standard Chartered Bank, Bank of China (Hong Kong) Limited, Banco Bradesco BBI S.A., Banca IMI S.p.A., and Scotia Capital (USA) Inc. (collectively, the "Underwriter Defendants" or "Underwriter Petitioners") state that:

1. BB Securities Ltd. is a subsidiary of Brasilian American Merchant Bank – BAMB, which is a subsidiary of Banco do Brasil S.A., a publicly held company. Banco do Brasil S.A. has no parent company and no publicly held company owns 10% or more of its stock.

2. Citigroup Global Markets Inc. is a subsidiary of Citigroup Financial Products Inc., which, in turn, is a subsidiary of Citigroup Global Markets Holdings Inc., which, in turn, is a subsidiary of Citigroup Inc., a publicly held company. Citigroup Inc. has no parent company and no publicly held corporation owns 10% or more of its stock.

3. J.P. Morgan Securities LLC is a subsidiary of JPMorgan Broker-Dealer Holdings Inc., which is a subsidiary of JPMorgan Chase & Co., a publicly held company. JPMorgan Chase & Co. has no parent company and no publicly held corporation owns 10% or more of its stock.

4. Itau BBA USA Securities, Inc. is an indirect wholly-owned subsidiary of Itaú Unibanco Holding S.A., a publicly held company. Itausa - Investimentos Itaú S.A, a publicly held company, owns 10% or more of the stock of Itaú Unibanco Holding S.A. No publicly held company owns 10% or more of the stock of Itausa - Investimentos Itaú S.A.

5. Morgan Stanley & Co. LLC is a limited liability company whose sole member is Morgan Stanley Domestic Holdings, Inc., a corporation wholly owned by Morgan Stanley Capital Management, LLC, a limited liability company whose sole member is Morgan Stanley. Morgan Stanley is a publicly held corporation that has no parent corporation. Based on Securities and Exchange Commission Rules regarding beneficial ownership, Mitsubishi UFJ Financial Group, Inc., 7-1 Marunouchi 2-chome, Chiyoda-ku, Tokyo 100-8330, beneficially owns greater than 10% of Morgan Stanley's outstanding common stock.

6. HSBC Securities (USA) Inc. is a subsidiary of HSBC Markets (USA) Inc. HSBC Markets (USA) Inc. is a subsidiary of HSBC Investments (North America) Inc., which is an indirect subsidiary of HSBC Holdings PLC, a publicly held company. HSBC Holdings PLC has no parent company and no publicly held corporation owns 10% or more of its stock.

7. MUFG Securities Americas Inc. is a subsidiary of MUFG Americas Holdings Corporation ("MUAH"). MUAH is owned by The

Bank of Tokyo-Mitsubishi UFJ, Ltd. and Mitsubishi UFJ Financial Group, Inc., a publicly held company. The Bank of Tokyo-Mitsubishi UFJ, Ltd. is a subsidiary of Mitsubishi UFJ Financial Group, Inc. Mitsubishi UFJ Financial Group, Inc. has no parent company and no publicly held corporation owns 10% or more of its stock.

8. Merrill Lynch, Pierce, Fenner & Smith Incorporated is a subsidiary of NB Holdings Corporation. NB Holdings Corporation is a direct subsidiary of Bank of America Corporation, which owns all of the common stock of NB Holdings Corporation. Bank of America Corporation is a publicly held company whose shares are traded on the New York Stock Exchange. Bank of America Corporation has no parent company and no publicly held corporation owns 10% or more of Bank of America Corporation's shares.

9. Standard Chartered Bank is a subsidiary of Standard Chartered Holdings Limited, which, in turn, operates as a subsidiary of Standard Chartered PLC, a publicly held company. No publicly held corporation owns 10% or more of Standard Chartered PLC's shares.

10. Bank of China (Hong Kong) Limited is a wholly-owned subsidiary of BOC Hong Kong (Holdings) Limited. BOC Hong Kong (Holdings) Limited is 33.94% publicly owned and 66.06% owned by BOC Hong Kong (BVI) Limited, an indirect subsidiary of Bank of China Limited, a publicly held company. Bank of China Limited is 64.02% owned by Central Huijin Investment

Limited, a state-owned investment company established under the Company Law of the People's Republic of China, and no publicly held company owns 10% or more of its stock.

11. Banco Bradesco BBI S.A. is a subsidiary of Banco Bradesco S.A., a publicly held company. Banco Bradesco S.A. has no parent company and no publicly held corporation owns 10% or more of its stock.

12. Banca IMI S.p.A. is a subsidiary of Intesa Sanpaolo S.p.A., a publicly held company. No publicly held corporation owns 10% or more of Intesa Sanpaolo S.p.A.'s stock.

13. Scotia Capital (USA) Inc. is a U.S. registered broker-dealer and a subsidiary of The Bank of Nova Scotia, a publicly held company. The Bank of Nova Scotia has no parent company and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF AUTHORITIES	xi
OPINIONS BELOW...................................	1
JURISDICTION...	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE...................	1
REASONS FOR GRANTING THE PETITION...	11
I. THE COURT SHOULD PROVIDE THE LOWER COURTS WITH MUCH-NEEDED GUIDANCE ON THE EVIDENCE REQUIRED UNDER *BASIC* AND *HALLIBURTON II*..........................	12
A. The Decision Below Conflicts with *Halliburton II*...............	13

TABLE OF CONTENTS (cont'd)

		Page
B.	The Lower Courts Are in Disarray on the Proof Necessary to Invoke the *Basic* Presumption................	21
C.	This Issue Is Critically Important to the Functioning of the Financial Markets	28
II.	THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON WHETHER RULE 23 AND DUE PROCESS REQUIRE ADMINISTRATIVELY FEASIBILE MEANS OF ASCERTAINING CLASS MEMBERSHIP	29
A.	The Circuits Are Sharply Divided on the Administrative Feasibility Requirement	30
B.	The Due Process Concerns Implicated by the Circuit Split Are Exceptionally Important..............................	33
C.	This Case Is an Excellent Vehicle to Consider Ascertainability	38

TABLE OF CONTENTS (cont'd)

	Page
CONCLUSION	41
APPENDICES	
Opinion of the United States Court of Appeals for the Second Circuit decided July 7, 2017	1a
Opinion and Order of the United States District Court for the Southern District of New York filed February 2, 2016	66a
Order of the United States Court of Appeals for the Second Circuit filed August 24, 2017	112a
15 U.S.C. § 77K	118a
15 U.S.C. § 78j	126a
17 C.F.R. § 240.10b–5	127a
Fed. R. Civ. P. 23	128a

TABLE OF AUTHORITIES

Page(s)

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Absolute Activist Value Master Fund Ltd. v. Ficeto,
677 F.3d 60 (2d Cir. 2012) 8, 33-34

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 22

Basic Inc. v. Levinson,
485 U.S. 224 (1988) .... *passim*

Bell v. Ascendant Sols., Inc.,
No. CIV.A. 301CV0166N,
2004 WL 1490009
(N.D. Tex. July 1, 2004) 25-26

Bennett v. Sprint Nextel Corp.,
298 F.R.D. 498 (D. Kan. 2014)................... 26

Bersch v. Drexel Firestone, Inc.,
519 F.2d 974 (2d Cir. 1975) 36

Briseno v. ConAgra Foods, Inc.,
844 F.3d 1121 (9th Cir. 2017),
cert. denied, __ S. Ct. __,
2017 WL 1365592 (Oct. 10, 2017).............. 31, 32, 38

Cammer v. Bloom,
711 F. Supp. 1264 (D.N.J. 1989)................ 5, 22

TABLE OF AUTHORITIES (cont'd)

Page(s)

Camreta v. Greene,
563 U.S. 692 (2011) 40

Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC,
310 F.R.D. 69 (S.D.N.Y. 2015) 25

City Select Auto Sales Inc. v. BMW Bank of N. America Inc.,
867 F.3d 434 (3d Cir. 2017) 30-31

Comcast Corp. v. Behrend,
569 U.S. 27 (2013) 19, 20

Conagra Brands, Inc. v. Briseno,
__ S. Ct. __, 2017 WL 1365592
(Oct. 10, 2017) 3

EQT Prod. Co. v. Adair,
764 F.3d 347 (4th Cir. 2014) 31

Gariety v. Grant Thornton, LLP,
368 F.3d 356 (4th Cir. 2004) 21-22, 27

Halliburton Co. v. Erica P. John Fund, Inc.,
134 S. Ct. 2398 (2014) .... *passim*

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725 F.3d 349 (3d Cir. 2013) 30

TABLE OF AUTHORITIES (cont'd)

Page(s)

IBEW Local 98 Pension Fund v. Best Buy Co., 818 F.3d 775 (8th Cir. 2016) 24-25

In re BancorpSouth, Inc., No. 17-0508, 2017 WL 4125647 (6th Cir. Sept. 18, 2017) 25

In re Countrywide Fin. Corp. Sec. Litig., 273 F.R.D. 586 (C.D. Cal. 2009) 26

In re DVI, Inc. Sec. Litig., 639 F.3d 623 (3d Cir. 2011) 27

In re Enron Corp. Sec., 529 F. Supp. 2d 644 (S.D. Tex. 2006) 24

In re Montage Technlogy Grp. Ltd. Sec. Litig., No. 14-cv-00722-SI, 2016 WL 1598666 (N.D. Cal. Apr. 21, 2016) 25

In re Xcelera.Com Sec. Litig., 430 F.3d 503 (1st Cir. 2005) 24

Karhu v. Vital Pharm., Inc., 621 F. App'x 945 (11th Cir. 2015) 31

Krogman v. Sterritt, 202 F.R.D. 467 (N.D. Tex. 2001) 24

TABLE OF AUTHORITIES (cont'd)

Page(s)

Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp., 762 F.3d 1248 (11th Cir. 2014) 25, 27

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Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71 (2006) 28

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Mullins v. Direct Dig., LLC, 795 F.3d 654 (7th Cir. 2015) 32

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154 (3d Cir. 2001) 29

Petrie v. Elec. Game Card, Inc., 308 F.R.D. 336 (C.D. Cal. 2015) 26

Rikos v. Procter & Gamble Co., 799 F.3d 497 (6th Cir. 2015) 31-32

Siskind v. Sperry Ret. Program, 47 F.3d 498 (2d Cir. 1995) 37

TABLE OF AUTHORITIES (cont'd)

Page(s)

Unger v. Amedisys Inc.,
401 F.3d 316 (5th Cir. 2005) 25, 27

Statutes and Rules

15 U.S.C. § 77k 1

15 U.S.C. § 78j(b) 1

17 C.F.R. § 240.10b–5 (2017) 1

28 U.S.C. § 1254(1) 1

Fed. R. Civ. P. 23 .... *passim*

Fed. R. Civ. P. 23(f) 10, 26, 27

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19 J. Corp. L. 285 (1994) 23

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PETITION FOR A WRIT OF CERTIORARI

The Petrobras Defendants and the Underwriter Defendants respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit affirming, in part, the District Court's class certification order.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 862 F.3d 250 (App. 1a) and its order denying the petition for rehearing is unreported (App. 112a). The District Court's class certification order is reported at 312 F.R.D. 354 (App. 66a).

JURISDICTION

The decision of the Court of Appeals was issued on July 7, 2017. App. 1a. A petition for rehearing was denied on August 24, 2017. App. 112a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 15 U.S.C. § 77k; 15 U.S.C. § 78j(b); and 17 C.F.R. § 240.10b–5 (2017), are reprinted at App. 118a-127a.

STATEMENT OF THE CASE

This case raises two recurring issues of exceptional importance under the federal securities

laws and the law governing class actions, on which the lower courts are deeply divided: (1) the proof required to establish a presumption of reliance in securities fraud cases under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) and *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (*Halliburton II*); and (2) the requirement that class membership be ascertainable through administratively feasible means under Rule 23 of the Federal Rules of Civil Procedure.[1]

The rulings in this case will have a significant impact on the global financial markets, the ability of issuers to utilize those markets, and the due process rights of both plaintiffs and defendants in federal class actions. First, the Second Circuit's holding that securities fraud plaintiffs can be presumed to have relied on alleged misstatements without any showing that the price of the security reacts to news in a directionally appropriate manner effectively eliminates the element of reliance in Rule 10b–5 cases. The decision thus exposes companies whose securities trade in the United States to securities fraud suits even in the absence of *any* proof (direct or indirect) that any investor relied on any misstatements. Second, the Second Circuit's decision that a court can certify a class in the absence of any evidence that class members can readily ascertain their membership deepens a circuit split and implicates important due process concerns for both potential class

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[1] Because the claims against the Underwriter Defendants only implicate the ascertainability issue, they petition for certiorari only with respect to that issue.

members and defendants. Although this Court recently denied certiorari on a similar question, *Conagra Brands, Inc. v. Briseno*, __ S. Ct. __, 2017 WL 1365592 (Oct. 10, 2017), this case presents a significantly better vehicle for resolving the acknowledged circuit split.

1. This petition arises out of a decision certifying two sprawling classes in a securities class action filed against a foreign, state-controlled entity.

a. Petrobras is an oil and gas company whose operations are centered in, and that is majority owned by, Brazil. It has American depositary receipts listed on the New York Stock Exchange ("NYSE") and has issued over $40 billion in global bonds that are traded over four continents.

In 2014, Brazilian prosecutors conducting an unrelated investigation discovered that certain Brazilian construction companies had formed a cartel that engaged in a bid-rigging and kickback scheme. The prosecutors and the Brazilian courts found that the cartel victimized Petrobras (and numerous other companies) by diverting a portion of the amounts paid by those companies on construction contracts to pay bribes to political parties and corrupt executives. Petrobras itself did not make or receive any improper payments and cooperated with Brazilian law enforcement. Indeed, Petrobras has recovered some of the unlawfully diverted funds through restitution orders by the Brazilian courts.

Nonetheless, in the investigation's wake, Petrobras had to delay issuing its financial statements, causing the prices of certain of its securities to fall. When Petrobras ultimately accounted for the impact of the scheme, its securities prices increased.

b. In December 2014, a putative class action complaint was filed on behalf of Petrobras debt and equity investors in the Southern District of New York (Rakoff, J.). Plaintiffs asserted claims under the Securities Exchange Act of 1934 and Securities Act of 1933 against Petrobras and the underwriters of its debt securities, among others, alleging that Petrobras's public filings incorrectly accounted for the bribe amounts and made materially misleading statements regarding its ethics and internal controls. In adjudicating motions to dismiss, the District Court undertook individualized analysis of transactions by named plaintiffs to determine whether they purchased securities in "domestic transactions," as required for a federal securities law claim under *Morrison v. National Australia Bank*, 561 U.S. 247 (2010).

2. In October 2015, plaintiffs moved to certify two broad classes of Petrobras investors—an Exchange Act class and a Securities Act class—covering anyone who, within the applicable period, purchased Petrobras securities in "domestic transactions." Defendants opposed that motion, arguing, among other things, that plaintiffs failed to demonstrate that common questions predominated over individualized issues, that a class action was superior to other available

methods of adjudication, and that the proposed classes were ascertainable.

a. With respect to their fraud claims under the Exchange Act, which require proof of reliance, plaintiffs attempted to satisfy the predominance requirement by invoking the fraud-on-the-market presumption of reliance adopted by this Court in *Basic* and re-affirmed in *Halliburton II*.

In *Basic*, this Court allowed plaintiffs to satisfy the reliance element in a securities fraud case by invoking a rebuttable presumption that investors who purchase securities in an "efficient market"—meaning one that incorporates all public, material information into the price of securities—do so in reliance on the integrity of that price, and therefore in reliance on any material misstatements reflected in that price. 485 U.S. at 245-50. The Court adopted this presumption because "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class" would eliminate securities class actions, "since individual issues then would have overwhelmed the common ones." *Id.* at 242. The Court therefore adopted the presumption "out of considerations of fairness, public policy, and probability, as well as judicial economy." *Id.* at 245.

Plaintiffs here attempted to invoke *Basic*'s presumption of reliance by demonstrating that the markets for Petrobras securities were efficient, focusing on several factors proposed for that purpose by lower courts, including *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989). In

particular, plaintiffs offered evidence concerning (among other things) trading volume of the securities, the number of market makers and analysts for those securities, and Petrobras's eligibility to file a simplified registration form with the SEC. As plaintiffs' expert conceded, all of these so-called "non-empirical" factors were satisfied simply by virtue of Petrobras being a large company, and would be satisfied as to any large company.

Plaintiffs' expert did not offer empirical evidence that the price of Petrobras securities reflected the impact of new news or that there was a cause-and-effect relationship between the release of news and a directionally-appropriate movement in security price. Instead, as plaintiffs' expert conceded, he used a novel test that departed from the test this Court recognized as appropriate in *Halliburton II*—one that was not based on new material information and did not account for whether prices moved in a predictable direction consistent with the news released on particular dates. Accordingly, plaintiffs' test would be satisfied even if the security prices consistently moved *down* in response to *good news* and *up* in response to *bad news*, and even if the information at issue was not new at all and had already been absorbed by the market.

The Petrobras Defendants opposed the motion for class certification, arguing that plaintiffs could not establish market efficiency without providing empirical evidence of price impact, *viz.*, directionally appropriate price movement. If

plaintiffs could show this, then the alleged misstatements could be presumed to have affected the price of the securities, on which investors relied. But plaintiffs submitted no such evidence. In fact, the Petrobras Defendants submitted evidence showing that the misrepresentations at issue could not have inflated the price of Petrobras securities. The Petrobras Defendants also showed that plaintiffs' own evidence demonstrated that, in many instances, the change in Petrobras's securities prices coinciding with the announcement of news was contrary to what would have been expected had news been reflected in the price of the securities, and that, in other instances, the price of one Petrobras security moved up when Petrobras announced information while the price of another Petrobras security moved down in response to the same information—evidence inconsistent with price impact.

b. With respect to the securities not traded on an exchange, defendants further opposed certification on the ground that the highly individualized and administratively difficult procedures necessary for investors to determine whether they engaged in "domestic transactions," as required under *Morrison*, rendered the proposed classes inappropriate.

In *Morrison*, this Court announced a transactional test that limits the reach of the federal securities laws to "transactions . . . on domestic exchanges" or "domestic transactions in other securities." 561 U.S. at 267. Among other things, these limits were necessary to prevent the

United States from becoming "the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets." *Id.* at 270. For securities that are not traded on a domestic exchange (like the Petrobras notes), courts have held that plaintiffs seeking to establish a "domestic transaction" must prove that: (1) irrevocable liability was incurred in the United States; or (2) title passed in the United States. *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012). That proof, in turn, depends on "facts concerning the formation of the contracts, the placement of purchase orders, the passing of title, or the exchange of money" for each particular transaction. *Id.* at 70.

In connection with their class certification motion, plaintiffs provided no evidence that this investor-by-investor and transaction-by-transaction determination could be made on a classwide basis, or could even be made at all. In fact, the record demonstrated otherwise: (1) plaintiffs themselves admitted that "determining whether a transaction occurred domestically can prove difficult," Joint Appendix (hereinafter "A-") A-6210, No. 16-1914 (2d Cir. July 21, 2016); (2) plaintiffs conceded that class members "are not identifiable at this stage," A-6046, and that the discovery necessary to obtain the identities would be "impracticable and unrealistic," A-6048; (3) plaintiffs could only sufficiently allege their own transactions were domestic after extensive investigation, including obtaining trading records from third parties; and (4) numerous sophisticated investors with millions of dollars of investments were unable to ascertain

whether their transactions were domestic without the benefit of third-party records.

3. Nonetheless, in February 2016, the District Court granted plaintiffs' class certification motion.

a. The District Court first held that plaintiffs had established that the markets for Petrobras securities were efficient and therefore invoked *Basic*'s presumption of reliance. Specifically, the court concluded that plaintiffs had demonstrated efficiency by citing non-empirical evidence about the size of the company, without the need for any empirical evidence that the securities prices moved predictably in response to unexpected news. In the alternative, the District Court held that, even if empirical evidence were required, plaintiffs' evidence was sufficient to invoke the presumption when combined with the non-empirical evidence. The court specifically found that plaintiffs' empirical evidence did not account for the direction of price movement. But the court held such evidence unnecessary as a matter of law.

b. With respect to the individualized issues raised by the *Morrison* inquiry, the District Court assumed, despite undisputed evidence to the contrary, that it is "highly likely" that documentation regarding whether a transaction is domestic is "routinely produced by the modern financial system" and is easily accessible to the court and putative class members, such that the resolution of *Morrison* issues requires only a post-verdict "bureaucratic" determination. App. 86a. The court did not address whether investors

could ascertain class membership from information they possessed or before a court verdict. The District Court therefore concluded that the proposed classes were "ascertainable and administratively manageable," and that a class action was the superior method of adjudication. App. 86a.

4. Defendants sought review under Rule 23(f), and the Second Circuit affirmed in part and vacated in part.

a. Regarding the *Basic* presumption, the Second Circuit observed that this Court has not defined an evidentiary standard for establishing market efficiency, but stated that it would not hold plaintiffs to an "onerous" burden for invoking the presumption. App. 63a. It therefore held as a matter of law that it is not "necessary" that plaintiffs show "that the price of the relevant securities predictably moved up in response to good news and down in response to bad news," before a presumption of reliance is invoked. App. 62a. Instead, the Second Circuit concluded that, even in the absence of any evidence that misstatements could inflate the share price, plaintiffs could be presumed to have relied on alleged false statements. App. 62a.

b. Regarding ascertainability, the Second Circuit held that Rule 23 does not include an "independent administrative feasibility requirement," but rather requires only that a class be definite and defined by objective criteria. App. 37a. It concluded that ascertainability is a "modest

threshold requirement," and that the "*practicality* of making the domesticity determination for each putative class member" is irrelevant, as long as such determinations are "objectively *possible*." App. 43a. In rejecting an administrative feasibility requirement, the Second Circuit acknowledged that it was joining one side of a direct split among circuit courts. App. 32a.

Applying this lower standard, the Second Circuit affirmed the District Court's ascertainability ruling, finding that the class definition contained sufficiently objective criteria.

c. Although the Second Circuit affirmed the District Court's ruling regarding ascertainability, it nevertheless held that the District Court "committed legal error by finding that Rule 23(b)(3)'s predominance requirement was satisfied without considering the need for individual *Morrison* inquiries regarding domestic transactions." App. 11a. The Second Circuit therefore vacated the predominance portion of the certification order and remanded the case to the District Court for consideration of that issue.

REASONS FOR GRANTING THE PETITION

This petition presents two questions of vital significance that have deeply divided the lower courts over many years: (1) the level of proof necessary to invoke the fraud-on-the-market presumption of reliance under *Basic* and *Halliburton II*, and (2) whether Rule 23 and due process require plaintiffs to prove that absent class

members can be ascertained in an administratively feasible manner.

These are fundamental questions that recur across a wide range of class actions and in nearly all securities litigation (class or otherwise), and therefore have significant economic and other policy consequences. The decision below deepens the lower courts' confusion on these issues, eviscerated the element of reliance in securities actions, and invited plaintiffs to file overbroad and unadministrable class actions, which serve no purpose other than to maximize settlement pressure at the cost of the due process rights of defendants and absent class members.

I. THE COURT SHOULD PROVIDE THE LOWER COURTS WITH MUCH-NEEDED GUIDANCE ON THE EVIDENCE REQUIRED UNDER *BASIC* AND *HALLIBURTON II*

The issue of the proof necessary to invoke the presumption of reliance under *Basic* and *Halliburton II* is vitally important to the functioning of the capital markets and has divided the lower courts. The decision below furthers this confusion, upsetting the careful balance crafted by the Court by dramatically lowering the threshold for class certification in securities fraud class actions. This issue therefore warrants the Court's review.

A. The Decision Below Conflicts with *Halliburton II*

The Court should review the decision below because it conflicts with the Court's ruling in *Halliburton II*. That decision reaffirmed the importance of the reliance element and held that a plaintiff can establish a rebuttable presumption of reliance by demonstrating "price impact"—either *directly* by showing the security price reflected the *particular* alleged misrepresentations, or *indirectly* by showing the security price *generally* reflects public, material information, which establishes an inference that the particular alleged misrepresentations had price impact. 134 S. Ct. at 2415. The Court further clarified that a defendant could then rebut that presumption through direct or indirect evidence.

The Second Circuit's ruling, however, upsets that balance—it holds that a plaintiff can receive the benefit of the *Basic* presumption without providing even indirect empirical evidence of "price impact," *i.e.*, that new news is reflected in the security's price. The court's decision further prevents a defendant from rebutting the presumption even with direct evidence concerning price impact, thereby eviscerating the reliance element. The decision "radically alter[s] the required showing for the reliance element of the Rule 10b–5 cause of action"—the precise outcome this Court cautioned against in *Halliburton II*. *Id.* at 2414. And, given the significant confusion in the lower courts on this issue, the decision of the Second Circuit, which has a preeminent role in

securities litigation, will have an immediate and profound impact on a high volume of securities class actions unless this Court intervenes.

1. In *Basic*, this Court "agree[d] that reliance is an element of a Rule 10b–5 cause of action," but, in light of the difficulties of proving actual reliance on a classwide basis, permitted plaintiffs to invoke a "presumption" of reliance ("subject to rebuttal") if they could show that they traded "in reliance on the integrity of the price set by the market" and "because of [defendants'] material misrepresentations that price had been fraudulently depressed." 485 U.S. at 243-45.

In other words, price impact—"[t]he fact that a misrepresentation 'was reflected in the market price at the time of [the] transaction' . . . is '*Basic*'s fundamental premise.'" *Halliburton II*, 134 S. Ct. at 2416. While *Basic* held that it was appropriate to "allow plaintiffs to rely on [an] indirect proxy for price impact"—by permitting them to demonstrate "market efficiency and the other prerequisites for invoking the presumption . . . rather than requiring them to prove price impact directly" with respect to the particular misrepresentations at issue—the Court has been clear that, in the absence of any evidence of price impact, the "fraud-on-the-market theory and presumption of reliance collapse." *Id.* at 2414-16. This is so because, without a showing that a misrepresentation would impact the price of the security, there is "no grounding for any contention that [the] investor[] indirectly relied on th[at] misrepresentation[] through [his] reliance on the

integrity of the market price." *Id.* at 2414 (alterations in original) (citation omitted).

At the same time, the Court has permitted defendants to "seek to defeat the *Basic* presumption at [the class certification] stage through direct as well as indirect price impact evidence," and has reiterated that "[a]ny showing that severs the link between the alleged misrepresentation and … the price received (or paid) by the plaintiff … will be sufficient to rebut the presumption of reliance." *Id.* at 2415-17. This is so "because 'the basis for finding that the fraud had been transmitted through market price would be gone,'" and (with it) the basis for presuming that plaintiffs "purchased the stock in reliance on the defendant's misrepresentation." *Id.* at 2414-16.

Halliburton II therefore made clear that "[t]he *Basic* presumption does not eliminate th[e] [reliance] requirement but rather provides an alternative means of satisfying it" without "alter[ing] the elements of the Rule 10b–5 cause of action." *Id.* at 2412. And "essential" to that showing of reliance is a demonstration of price impact. *Id.* at 2416. Thus, the reliance element continues to "ensure[] that there is a proper connection between a defendant's misrepresentation and a plaintiff's injury." *Id.* at 2407.

2. The Second Circuit's fundamental error in the decision below was to focus on "efficiency" as an *end* in itself, and thus to excuse plaintiffs from offering any empirical proof of even indirect price impact. Moreover, the Second Circuit not only

eliminated the "essential precondition," *id.* at 2416, to the presumption of reliance in the first place, it also deprived defendants of the ability to introduce empirical evidence to rebut the presumption of reliance.

a. The Second Circuit noted that the "Supreme Court has . . . declined to define a precise evidentiary standard for *market efficiency*," and stated that the Court has recognized the existence of "[d]ebates about the precise *degree* to which stock prices accurately reflect public information." App. 63a (first emphasis added). But left open in *Halliburton II* was the speed and extent to which the market price of a security must reflect material news—not whether the price must reflect that news in a predictable direction at all. Indeed, when making this observation the Court cited the Amicus Brief of Financial Economists, which made clear that: "Current Disagreements Among Economists Over The Efficiency Of Securities Markets Do Not Undermine The Modest Assumption That Securities Prices Generally Respond To Information Reasonably Promptly, *In A Predictable Direction*." Brief of Financial Economists as Amici Curiae in Support of Respondents at 9, *Halliburton II*, 2014 WL 526436 (Feb. 5, 2014) (emphasis added).

Halliburton II thus held that plaintiffs must offer evidence that the price of a security reflected material news. Critically, here the question is not the degree to which prices accurately reflect information, but whether—as a general matter—news was reflected in the price at all, such that a

person who relies on the integrity of the price can be presumed to rely on the alleged misstatement.

Halliburton II explained that: "market efficiency [is] nothing more than [a] prerequisite[] for an indirect showing of price impact." 134 S. Ct. at 2416. The Second Circuit overlooked this important point. In its view, "the central question . . . [is whether] the weight of the evidence tip[s] in favor of the finding that the market . . . was efficient," App. 61a, not whether plaintiffs had indirectly shown price impact. In short, the Second Circuit lost sight of the question it was supposed to answer.

Under the Second Circuit's approach, a market can be labeled "efficient" and a plaintiff can establish reliance without any showing "that the price of the relevant securities predictably moved up in response to good news and down in response to bad news," App. 62a; *i.e.*, without showing a cause-and-effect relationship between material news and security price movement. The "efficiency" label is thus no longer an "imperfect proxy for price impact," *Halliburton II*, 134 S. Ct. at 2414; it is no proxy at all. But this means that "*Basic*'s critical fiction falls apart." *Id.* at 2423 (Thomas, J., concurring in judgment). Under the Second Circuit's ruling, a plaintiff can establish reliance by showing that he purchased a security and that generally the security had *any* price reaction on days with news, even if the reaction was in the *wrong direction*.

But under such circumstances there is no basis to presume that a "fraud had been transmitted through [the] market price," such that a plaintiff could be presumed to have purchased "in reliance on the defendant's misrepresentation," and "the fraud-on-the-market theory underlying the presumption completely collapses." *Id.* at 2414-16.

The impact of the Second Circuit's decision will not be felt in securities class action lawsuits alone. The presumption of reliance applies in individual actions as well. *See id.* at 2411. Indeed, this case involves numerous separate opt-out actions where plaintiffs eschewed any allegation of actual reliance.

If left unreviewed, the decision below will have broad impact, inviting plaintiffs to skip past any showing, direct or indirect, that they detrimentally relied on an alleged misrepresentation.

b. The Second Circuit's decision also eviscerates *Halliburton II*'s holding that if the plaintiff establishes price impact indirectly, the defendant can then rebut the presumption through a "direct . . . showing that the alleged misrepresentation did not actually affect the stock's market price." *Id.* at 2416.

The Second Circuit's misreading of *Halliburton II* is illustrated by its dismissal of the utility of standard "directional event studies." App. 65a. Despite this Court's extensive discussion in *Halliburton II* of "event studies" as "evidence of the *existence* of price impact," 134 S. Ct. at 2415, the

Second Circuit rejected the requirement that plaintiffs submit evidence permitting a finding of generalized price impact because, in its view, "[e]vent studies offer the seductive promise of hard numbers and dispassionate truth, but methodological constraints limit their utility in the context of single-firm analyses." App. 64a. Citing only a single law-review article, the court not only excused plaintiffs from any obligation to provide event studies, it implied that those same "methodological constraints" also make a rebuttal based on an event study of "limit[ed] . . . utility." App. 64a. In effect, the court made the *Basic* presumption "largely irrebuttable." *Halliburton II*, 134 S. Ct. at 2424 (Thomas, J., concurring in judgment).

3. The Second Circuit's conclusions that a plaintiff's burden in proving market efficiency "is not . . . onerous" and does not require directionally appropriate empirical evidence, App. 61a-63a, further conflict with this Court's repeated admonitions that "plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23" prior to class certification, *Halliburton II*, 134 S. Ct. at 2412, and that a district court must perform a "rigorous analysis" demonstrating that all of Rule 23's requirements are satisfied before certifying a class, *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013).

The non-empirical factors and non-directional analysis relied upon by plaintiffs below would be satisfied for any large, publicly traded company.

Geoffrey C. Rapp, *Proving Markets Inefficient: The Variability of Federal Court Decisions on Market Efficiency in* Cammer v. Bloom *and Its Progeny*, 10 U. Miami Bus. L. Rev. 303, 322 (2002) ("[T]he *Cammer* factors . . . are clearly biased towards suggesting efficiency for large companies traded on major national exchanges."). All large companies have securities with high trading volume, are covered by many analysts, have many market makers, and are eligible to file a simplified securities form. Thus, in the case of every large company, it could be said—as the Second Circuit said here—that such factors "logically appear in, or contribute to, an efficient securities market." App. 63a-64a. A non-directional test for "efficiency," such as the test used here, will inevitably be met for all large companies, even if a security trades *inefficiently*. *See* A-5104 (plaintiffs' expert admitting indirect factors relied upon by district court would be satisfied for all large companies); David Tabak, *Use and Misuse of Event Studies to Examine Market Efficiency* 7, NERA Economic Consulting (2010) (empirical test used below "may not be able to fully distinguish an efficient market from an inefficient one").

By allowing a district court to rest its certification decision on an ad-hoc assessment of vague factors, rather than demanding a finding that the evidence supports securities prices moving in the direction suggested by news, the Second Circuit supplanted a standard that is intended to be based on "rigorous analysis," *Comcast*, 569 U.S. at 33, with one that will be easily satisfied in most cases. The court thus dramatically upset the

balance this Court established in *Halliburton II* by transferring the burden to *defendants* to *disprove* price impact, rather than requiring plaintiffs to "actually prove" either direct or indirect price impact, which necessarily includes demonstrating directionally appropriate price movement. 134 S. Ct. at 2412.

B. The Lower Courts Are in Disarray on the Proof Necessary to Invoke the *Basic* Presumption

This issue merits review for a second reason: in the 29 years since *Basic*, district courts have struggled with the standard that plaintiffs must meet to avail themselves of the presumption of reliance. The courts regularly state that plaintiffs must show an "efficient market," but differ greatly as to how market efficiency must be established.

In *Basic*, the Court held that "in order to invoke the presumption" of reliance, "a plaintiff must allege and prove . . . that the shares were traded on an efficient market." 485 U.S. at 248 n.27. But *Basic* did not address how a plaintiff could prove that the securities traded in an efficient market such that it could be presumed to have relied on a misrepresentation. *See, e.g.*, Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, 167 (2009) (*Basic* "sent [lower] courts off on a long journey without a particularly good compass"); App. 63a (the "Supreme Court has . . . declined to define a precise evidentiary standard for market efficiency"); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 368

(4th Cir. 2004) (*Basic* "offers little guidance for determining whether a market is efficient").

1. Without guidance from this Court, lower courts have generated a vast array of factors that can be considered in assessing market efficiency. But, without clear standards, courts have made highly consequential decisions regarding "class certifications dependent upon the court's gestalt judgment or overarching impression" rather than based on a consistent and well-founded formula. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997).

a. One year after *Basic*, a court in the District of New Jersey identified five factors to determine whether a market was efficient: (1) trading volume of the security, (2) number of analysts that cover the company, (3) number of market makers for the security, (4) whether the company is eligible to file a simplified security registration statement based on its size and filing history, and (5) whether the plaintiff demonstrates a cause-and-effect relationship between the release of new public information and corresponding movement in stock price. *Cammer*, 711 F. Supp. 1264. However, *Cammer* did not explain how these factors were to be weighed, either individually or collectively, in deciding whether a plaintiff had proven market efficiency in a way that can give rise to a presumption of price impact.

The *Cammer* test, while still influential in the lower courts, has been frequently criticized. Commentators have recognized that the first four

factors, which do not rely on empirical evidence of price impact, are not "accept[ed] as [a] reliable means [of] distinguishing efficient from inefficient prices" in "the finance profession." Alon Brav & J.B. Heaton, *Market Indeterminacy*, 28 J. Corp. L. 517, 535-36 (2003). Commentators have called certain of these factors "imprecise," and stated they "certainly do not show or prove market efficiency" or "do not even go to the market behavior of a stock." Paul A. Ferillo et al., *The "Less Than" Efficient Capital Markets Hypothesis: Requiring More Proof from Plaintiffs in Fraud-on-the-Market Cases*, 78 St. John's L. Rev. 81, 128 (2004). And others have noted that the first four factors are highly correlated and therefore "cannot be considered as independent efficiency indicators." Brad M. Barber et al., *The Fraud-on-the-Market Theory and the Indicators of Common Stocks' Efficiency*, 19 J. Corp. L. 285, 293 (1994).

b. Lower courts have compounded the uncertainty associated with the *Cammer* test by piling on even more imprecise factors, which likewise do not provide evidence of price impact,[2] including: (6) the market capitalization of the company, (7) the average difference between bid and ask prices for the security, (8) the company's "float," or portion of shares in public hands, (9) the

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[2] *See, e.g.*, *Barber*, *supra*, at 290; Victor L. Bernard et al., *Challenges to the Efficient Market Hypothesis: Limits to the Applicability of Fraud-on-the-Market Theory*, 73 Neb. L. Rev. 781, 805 (1994); Grigori Erenburg et al., *The Paradox of "Fraud-on-the-Market Theory": Who Relies on the Efficiency of Market Prices?*, 8 J. Empirical Legal Stud. 260, 289, 291-92 (2011).

stock exchange where the securities trade, (10) the portion of securities held by institutional investors, (11) whether the security is covered by credit rating agencies, and (12) the company's registration status, among other factors. *See, e.g.*, *Krogman v. Sterritt*, 202 F.R.D. 467, 474 (N.D. Tex. 2001); *In re Enron Corp. Sec.*, 529 F. Supp. 2d 644, 694 n.78 (S.D. Tex. 2006).

As with the *Cammer* factors, however, courts have not explained how these factors are to be weighed or by what standard they are to be evaluated. This case law has thus "invited an ad hoc approach informed by expert testimony, but [that is] in fact largely unconstrained." Langevoort, *supra*, at 167.

c. The inevitable result of this proliferation of factors, and accompanying lack of guidance on their weight, has been significant confusion across the district courts.

"[T]he case law" in this area "is inconsistent and largely self-referential: X number of market makers is not enough but Y is, or Z days' speed of adjustment is too slow, largely because some other court said so." Langevoort, *supra*, at 172-73. Some courts have viewed the fifth, cause-and-effect factor as the most important, while others have dismissed it as unnecessary. *Compare In re Xcelera.Com Sec. Litig.*, 430 F.3d 503, 512 (1st Cir. 2005) ("In the absence of such a [cause-and-effect] relationship, there is little assurance that information is being absorbed into the market and reflected in its price."), *and IBEW Local 98 Pension Fund v. Best*

Buy Co., 818 F.3d 775, 782 (8th Cir. 2016) (considering only cause-and-effect empirical evidence under *Halliburton II* to reverse class certification), *with Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248, 1256 (11th Cir. 2014) (cause-and-effect factor is not an "unwavering evidentiary requirement"); *compare also Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC*, 310 F.R.D. 69, 86 (S.D.N.Y. 2015) (empirical evidence that unexpected corporate events have price impact is not necessary), *with In re Montage Technlogy Grp. Ltd. Sec. Litig.*, No. 14-cv-00722-SI, 2016 WL 1598666, at *8 (N.D. Cal. Apr. 21, 2016) (such evidence is the "most important" factor).

Some courts have found three instances of price response insufficient to establish efficiency, while others have found only one instance to be sufficient. *Compare Regions*, 762 F.3d at 1257 (certifying class after finding that stock price responded to single instance of unexpected information), *with Unger v. Amedisys Inc.*, 401 F.3d 316, 325 (5th Cir. 2005) (declining to certify class after finding three instances of price response).

Such discrepancies abound. *Compare Best Buy*, 818 F.3d at 782-83 (finding defendants rebutted presumption of reliance by showing no front-end price impact), *with In re BancorpSouth, Inc.*, No. 17-0508, 2017 WL 4125647, at *1 (6th Cir. Sept. 18, 2017) (stating that to rebut presumption defendants must show no front-end price impact *and* no back-end price impact upon a corrective disclosure); *compare Bell v. Ascendant Sols., Inc.*,

No. CIV.A. 301CV0166N, 2004 WL 1490009, at *4 (N.D. Tex. July 1, 2004) (declining to certify class where proof of market efficiency did not account for direction of price movements), *aff'd and remanded*, 422 F.3d 307 (5th Cir. 2005), *with Petrie v. Elec. Game Card, Inc.*, 308 F.R.D. 336, 354-56 (C.D. Cal. 2015) (certifying class in the same circumstance).

As a result, similar factual circumstances have often yielded different determinations of market efficiency, leading to inconsistent outcomes on class certification motions based on similar evidence. *See generally* Rapp, *supra*.

2. Circuit court decisions applying *Basic* and *Halliburton II* are relatively sparse, because class certification orders are not subject to interlocutory appeal unless discretionary review is granted under Rule 23(f). Despite the district courts' requests for clarity on the standards required to show market efficiency and price impact, the circuit courts that have addressed the issue, while recognizing this Court's lack of guidance, have steadfastly declined to provide that clarity.[3]

a. Instead, they have left it to the district courts, noting the factors that have been considered

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[3] *See, e.g.*, *Bennett v. Sprint Nextel Corp.*, 298 F.R.D. 498, 507-08 (D. Kan. 2014) ("In the absence of any guidance from the [Tenth] Circuit, the Court will apply the *Cammer* factors . . . ."); *In re Countrywide Fin. Corp. Sec. Litig.*, 273 F.R.D. 586, 610 (C.D. Cal. 2009) ("The Ninth Circuit has employed the *Cammer* analysis[], but has offered relatively little additional guidance on how to apply the *Basic* presumption.").

by district courts themselves, but refusing to explicitly endorse them or to say what those factors must show, just as the Second Circuit did here. *See* App. 58a ("This Court 'has not adopted a test for . . . market efficiency.'"); *Regions*, 762 F.3d at 1254-55 ("we have not adopted any sort of mandatory analytical framework" for "determining whether the market for a particular stock is efficient"); *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 634 n.16 (3d Cir. 2011) ("[T]he *Cammer* factors may be instructive depending on the circumstances."), *abrogated on other grounds by Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013); *Unger*, 401 F.3d at 323 (*Cammer* factors have been used by "many courts throughout the country," but "do[] not represent an exhaustive list"); *Gariety*, 368 F.3d at 368 (stating that "a court should consider factors such as, *among others*, whether the security is actively traded, the volume of trades, and the extent to which it is followed by market professionals," without specifying the "other" factors (emphasis added)). And, having issued those rulings, the circuit courts cannot be counted on to grant further discretionary Rule 23(f) petitions to address the issue again.

b. This case therefore represents an increasingly rare opportunity for this Court to resolve the confusion that has persisted in the lower courts for almost 30 years by defining a clear and consistent standard for proving market efficiency and price impact in order to invoke a presumption of reliance.

C. This Issue Is Critically Important to the Functioning of the Financial Markets

As Congress and the Court have recognized, securities litigation can impose overwhelming costs and burdens on companies, which are ultimately borne by investors. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80-81 (2006) (these costs can "injure 'the entire U.S. economy'"). Notwithstanding this Court's ruling in *Halliburton II*, the number of class actions filed, and the cost to companies of responding to them, has only increased.[4]

1. Companies now pay billions of dollars every year to settle securities class actions.[5] These payments, as well as the burdens of defending against securities litigation, drain the national economy: "new corporate investments are deterred, the efficiency of the capital markets is reduced, and the competitiveness of the American economy declines." Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection* 32 (Wash. Legal Found., Critical Legal Issues Working Paper No. 128, 2005).

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[4] *Securities Class Action Filings – 2016 Year in Review*, Cornerstone Research (2017), http://securities.stanford.edu/research-reports/1996-2016/Cornerstone-Research-Securities-Class-Action-Filings-2016-YIR.pdf.

[5] *Securities Class Action Settlements – 2016 Review and Analysis*, Cornerstone Research (2017), http://securities.stanford.edu/research-reports/1996-2016/Settlements-Through-12-2016-Review.pdf.

2. Class certification is a crucial inflection point. "[C]ertifying [a] class may place unwarranted or hydraulic pressure to settle on defendants" and "an adverse certification decision will likely have a dispositive impact on the course and outcome of the litigation." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001).

The NYSE lists more than 2,400 of the largest companies, representing a total market capitalization of $27 trillion.[6] The Second Circuit's decision inevitably undermines the U.S. capital markets by making every public company located or listed here subject to significant class action fraud suits even in the absence of any proof that any investor relied on any misstatements. This Court's review is necessary to ensure that the critically important issue of class certification in securities class actions is decided in a consistent and principled fashion.

II. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON WHETHER RULE 23 AND DUE PROCESS REQUIRE ADMINISTRATIVELY FEASIBILE MEANS OF ASCERTAINING CLASS MEMBERSHIP

This petition also presents the Court with an ideal vehicle to resolve a deep and entrenched split among the circuit courts on whether putative class

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[6] Jeffrey C. Sprecher, Chairman, NYSE, *2016 Letter to Shareholders* (Mar. 27, 2017), http://ir.theice.com/annual-and-quarterly-reports/2016-letter-to-shareholders.

membership must be ascertainable through administratively feasible means. This question recurs in class actions and is presented in a particularly clear fashion in this case.

A. The Circuits Are Sharply Divided on the Administrative Feasibility Requirement

As the Second Circuit acknowledged, "[m]ost [] circuit courts of appeals have recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable, often characterized as an ascertainability requirement," but those "[c]ourts ascribe widely varied meanings to that term." App. 29a.

1. Three circuits require plaintiffs to establish a reliable and ready method for identifying class members prior to class certification.

In the Third Circuit, there must be "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Hayes v. Wal–Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013). That mechanism must not rely on "the say-so of putative class members" and must not require "extensive and individualized fact-finding." *Id.* at 356. This "eliminates 'serious administrative burdens that are incongruous with the efficiencies expected in a class action.'" *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012). The Third Circuit recently adhered to the "administrative feasibility" requirement. *See City Select Auto Sales Inc. v.*

BMW Bank of N. America Inc., 867 F.3d 434, 439 (3d Cir. 2017).

The Fourth Circuit has similarly held that a plaintiff must demonstrate that "the members of [the] proposed class [are] 'readily identifiable.'" *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (citing 7A Charles Alan Wright et al., Federal Practice & Procedure § 1760 (3d ed. 2005) ("[T]he requirement that there be a class will not be deemed satisfied unless . . . it is administratively feasible for the court to determine whether a particular individual is a member.")). The Eleventh Circuit has likewise held that "to establish ascertainability, the plaintiff must propose an *administratively feasible* method by which class members can be identified." *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 946-50 (11th Cir. 2015) (emphasis added).

2. In contrast, at least the Sixth, Seventh, and Ninth Circuits have allowed class actions to proceed even if plaintiffs *cannot* propose a reliable means of identifying class members.[7] *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1123 (9th Cir. 2017) (rejecting argument that "class representatives must demonstrate that there is an 'administratively feasible' means of identifying absent class members"), *cert. denied*, __ S. Ct. __, 2017 WL 1365592 (Oct. 10, 2017); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 524-25 (6th Cir. 2015)

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[7] Though the Second Circuit described the Eighth Circuit as in agreement with these circuits, its doctrine remains uncertain.

(same); *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 672 (7th Cir. 2015) ("declin[ing] [defendant's] invitation to adopt a heightened ascertainability requirement").

Each of these courts has acknowledged the circuit split, and has directly rejected other courts' standards. *See ConAgra*, 844 F.3d at 1126-27 ("recogniz[ing]" Third Circuit's contrary ruling, but "soundly reject[ing]" its justifications); *Rikos*, 799 F.3d at 524-25 ("[w]e see no reason to follow" the Third Circuit); *Mullins*, 795 F.3d at 662-63 ("declin[ing]" to adopt "Third Circuit's approach" and disapproving of heightened ascertainability requirement used by Eleventh Circuit).

Instead, these circuit courts have held that ascertainability only requires "defining classes clearly and with objective criteria." *Mullins*, 795 F.3d at 672.

3. The Second Circuit's holding below that Rule 23 does *not* include an "independent administrative feasibility requirement," App. 37a, and instead "requires only that a class be defined using objective criteria that establish a membership with definite boundaries," App. 31a, aligns the Second Circuit with the Sixth, Seventh, and Ninth Circuits and conflicts with the decisions of the Third, Fourth, and Eleventh Circuits.

B. The Due Process Concerns Implicated by the Circuit Split Are Exceptionally Important

The requirement that class membership be ascertainable by administratively feasible means serves the fundamental and Constitutional function of protecting the due process rights of both defendants and putative class members. The Second Circuit's decision thus raises exceptionally important issues concerning these rights and well-established principles of fundamental fairness.

1. In *Morrison*, this Court emphasized the international nature of the securities markets and held that the federal securities laws provide a cause of action only for those who purchased securities on domestic exchanges or in domestic transactions. The Court reasoned that this limitation rested on "longstanding" international comity principles and prevented the United States from becoming "the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets." 561 U.S. at 255, 270.

Under *Morrison*, determining whether an investor has a claim under the federal securities laws with respect to securities not traded on a domestic exchange requires transaction-by-transaction analysis of where counterparties incurred irrevocable liability or where title passed. *See Absolute Activist*, 677 F.3d at 67. Thus, to bring a claim under federal securities laws, the investor must make an individualized showing that

may depend, among other things, on permutations of "facts concerning the formation of the contracts, the placement of purchase orders, the passing of title, or the exchange of money." *Id.* at 70.

a. In this case, Petrobras—a Brazilian entity—issued global notes that traded over-the-counter across four continents. In addition to the United States, the notes were offered for sale in Brazil, Chile, Peru, the Netherlands, the United Kingdom, Switzerland, Dubai, Hong Kong, Japan, and Singapore. A-3022–27.

b. There is no administratively feasible means for investors in Petrobras notes, the court, or defendants to ascertain whether the notes were purchased in "domestic transactions." In the modern securities markets, transactions occur virtually instantaneously in markets located worldwide, and their course may depend on permutations of time, liquidity, and such happenstance factors as where a trader or other intermediary happens to be when picking up the phone or checking a Bloomberg machine and agreeing to purchase securities. An investor is unlikely to know, even contemporaneously, all the facts relevant to determining whether a transaction is "domestic."

As plaintiffs themselves admitted, "determining whether a transaction is domestic . . . is sometimes difficult to apply and prone to yield inconsistent results," and "while it is feasible to determine temporally when a 'meeting of the minds' occurs, it can be significantly more difficult to pinpoint the

location of such a 'meeting' on a map." A-4872. Plaintiffs further admitted that evidence with respect to domesticity would reside in the hands of third parties, ECF No. 189 at 20, No. 16-1914 (2d Cir.), and numerous investors and their investment advisors also admitted that they did not have the requisite information. ECF No. 74, Exs. 1-19, No. 16-1914 (2d Cir.). In SEC filings, plaintiffs asserted that "investors typically do not know which exchange their order is directed through, assuming it even occurs on an exchange." A-3533–34. That same finding was credited by the SEC in a report to Congress, which noted that "[d]etermining the location of non-exchange-based transactions has proved quite complicated." SEC, *Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934*, at 33 n.121 (2012), https://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf.

Indeed, the District Court had to undertake a series of complex and highly individualized inquiries before it could determine—even on a motion to dismiss—whether named plaintiffs purchased securities in "domestic transactions," and was unable to identify a document from which putative class members could make that determination on their own.

2. The Second Circuit's decision relieving plaintiffs of the burden to demonstrate an administratively feasible means of determining class membership eviscerates the rights of defendants and putative class members.

a. The Second Circuit's ruling eliminates the ability of putative class members to make fundamental decisions affecting their rights. Under the decision, investors who do not opt out will be bound by the class action judgment even if they did not know—and could not readily ascertain—that they were class members. Any class notice to purchasers in "domestic transactions" is also inadequate because investors lack the basis to determine whether they are members. Moreover, under the Second Circuit's analysis, ascertaining class membership would require, *at minimum*, extensive inquiry into third-party records unavailable without discovery.

Nonetheless, the Second Circuit now requires investors to make their decision whether to opt-out or participate in a class action when they have no way to ascertain—through their own knowledge or otherwise—whether they are class members who would benefit from and be bound by a judgment or settlement.

b. The Second Circuit's decision likewise impermissibly infringes on defendants' due process rights by creating "fail safe" classes whereby defendants who receive "a judgment for the defendants . . . or a settlement deemed to be inadequate [to certain investors]," *Bersch v. Drexel Firestone*, *Inc.*, 519 F.2d 974, 996 (2d Cir. 1975), will have no administratively feasible means to apply that verdict to future claims by all non-opt-out class members. Petrobras notes trade worldwide, and fora exist worldwide for investor claims. If the investors themselves do not have

personal knowledge of whether they purchased in domestic transactions, and that information cannot be ascertained, then nothing stops an investor who is disappointed with the United States class resolution from asserting a claim elsewhere.[8] The burden would then shift to *defendants* to prove—in courts all over the world—that the transaction was "domestic," such that the plaintiff's claim is barred by the class resolution.

The inability to ascertain class membership in an administratively feasible manner also violates the principles of "fundamental fairness [that] require[] that a defendant named in a suit be told promptly the number of parties to whom it may ultimately be liable for money damages." *Siskind v. Sperry Ret. Program*, 47 F.3d 498, 503 (2d Cir. 1995).

c. In addition to raising important due process concerns, the Second Circuit's decision exacerbates the precise problems that this Court sought to avert in *Morrison*. The Second Circuit upheld the certification of a *worldwide* class of investors who purchased in "domestic transactions" *and* held that plaintiffs need not show it was feasible to ascertain which investors actually purchased domestically. The Second Circuit's ruling thus invites any

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[8] For example, under the Second Circuit's ruling, a lawsuit filed in the Netherlands against Petrobras on January 23, 2017—on behalf of a group of investors who acquired shares or bonds issued by Petrobras "outside the United States" and who allegedly suffered damages—could serve as a vehicle for investors dissatisfied with the U.S. class outcome to try for a better resolution in the Netherlands.

plaintiff's lawyer to identify a single off-exchange domestic purchaser and file in U.S. court on behalf of a broad purported class. Under the Second Circuit's approach, no one need worry until later (if at all) whether class members can be ascertained. Yet the named plaintiff can demand billions of dollars of damages on behalf of the purported worldwide class of "domestic" purchasers, and pressure defendants to settle, as they typically do. The Court should intervene to address this distortion of *Morrison*'s teachings.

C. This Case Is an Excellent Vehicle to Consider Ascertainability

The substantive context and procedural background of this case make it an ideal vehicle for the Court to address this essential issue.

1. This Court recently declined to review the circuit split on ascertainability in *ConAgra*, 844 F.3d at 1121, but that result does not militate against granting certiorari.

a. *ConAgra* was a consumer class action, where the class definition covered purchasers of a particular consumer product and was thus readily understood by the court, absent class members, and defendants. As the Ninth Circuit observed, the risk that absent class members would not receive adequate notice and be unable to determine their membership status was "purely theoretical." *Id.* at 1129. In this case, where the "domestic" nature of the relevant transactions is often unknown and unknowable by the putative class member, the

"administrative feasibility" requirement is essential to ensuring adequate class notice and due process protections.

b. Similarly, *ConAgra* concerned the administrative feasibility of ascertaining class membership where the evidence of membership principally consisted of affidavits submitted by individuals affirming that they purchased the relevant product during the class period. Here, the putative class members *have never known*—even at the time of purchase—whether post-*Morrison* jurisprudence would deem their transactions "domestic."

This case also presents "fail safe" concerns not present in consumer class actions where the issue is whether individuals purchased the relevant product. If they did, they are in the class; if they did not, they have no claim. Here, by contrast, a potential plaintiff unsatisfied with the class result can bring suit in a foreign court on the same transaction and force the defendant to attempt to prove the transaction was "domestic."

Finally, unlike in class actions like *ConAgra*—where the class is confined to a known volume of products the defendant sold—there is no way to determine in advance the number of investors who engaged in "domestic transactions," and no way for a defendant to estimate its exposure.

2. That the Second Circuit remanded the case for the District Court to determine whether Rule 23's separate predominance requirement was

satisfied does not militate against this Court's review of the ascertainability ruling.

First, the Second Circuit's sweeping holding on ascertainability is not shielded from review simply because the court vacated a portion of the class certification order on other grounds. *See Camreta v. Greene*, 563 U.S. 692, 704 (2011) (Court will grant review for a "'policy reaso[n] … of sufficient importance to allow an appeal' by the winner below" (citation omitted)).

Further, unlike the predominance element of Rule 23, the ascertainability requirement protects the parties' due process rights. If no administratively feasible means exist to ascertain class membership, plaintiffs will unknowingly relinquish their rights to participate in or opt out of the class action, and defendants will have no way to estimate the magnitude of the claims and will be unable to enforce a class verdict or settlement release.

The Second Circuit effectively abdicated the essential gatekeeping function over class certification by holding—contrary to several other circuits—that Rule 23 and due process do not require an administratively feasible means to ascertain class membership.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

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November 1, 2017

APPENDIX

In the
United States Court of Appeals
for the Second Circuit

August Term, 2016

(Argued: November 2, 2016 Decided: July 7, 2017)

Docket No. 16-1914-cv

IN RE PETROBRAS SECURITIES

UNIVERSITIES SUPERANNUATION SCHEME LIMITED, EMPLOYEES RETIREMENT SYSTEM OF THE STATE OF HAWAII, NORTH CAROLINA DEPARTMENT OF STATE TREASURER,

Plaintiffs-Appellees,

PETER KALTMAN, individually and on behalf of all others similarly situated, DIMENSIONAL EMERGING MARKETS VALUE FUND, DFA INVESTMENT DIMENSIONS GROUP INC., on behalf of its series Emerging Markets Core Equity Portfolio, Emerging Markets Social Core Equity Portfolio and T.A. World ex U.S. Core Equity Portfolio, DFA INVESTMENT TRUST COMPANY, on behalf of its series The Emerging Markets Series, DFA AUSTRIA LIMITED, solely in its capacity as responsible entity for the Dimensional Emerging Markets Trust, DFA International Core Equity Fund and DFA International Vector Equity Fund by Dimensional Fund Advisors Canada ULC

solely in its capacity as Trustee, DIMENSIONAL FUNDS PLC, on behalf of its sub-fund Emerging Markets Value Fund, DIMENSIONAL FUNDS ICVC, on behalf of its sub-fund Emerging Markets Core Equity Fund, SKAGEN AS, DANSKE INVEST MANAGEMENT A/S, DANSKE INVEST MANAGEMENT COMPANY, NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, NEW YORK CITY POLICE PENSION FUND, BOARD OF EDUCATION RETIREMENT SYSTEM OF THE CITY OF NEW YORK, TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT PENSION FUND, NEW YORK CITY DEFERRED COMPENSATION PLAN, FORSTA AP-FONDEN, TRANSAMERICA INCOME SHARES, INC., TRANSAMERICA FUNDS, TRANSAMERICA SERIES TRUST, TRANSAMERICA PARTNERS PORTFOLIOS, JOHN HANCOCK VARIABLE INSURANCE TRUST, JOHN HANCOCK FUNDS II, JOHN HANCOCK SOVEREIGN BOND FUND, JOHN HANCOCK BOND TRUST, JOHN HANCOCK STRATEGIC SERIES, JOHN HANCOCK INVESTMENT TRUST, JHF INCOME SECURITIES TRUST, JHF INVESTORS TRUST, JHF HEDGED EQUITY & INCOME FUND, ABERDEEN EMERGING MARKETS FUND, ABERDEEN GLOBAL EQUITY FUND, ABERDEEN GLOBAL NATURAL RESOURCES FUND, ABERDEEN INTERNATIONAL EQUITY FUND, each a series of Aberdeen Funds, ABERDEEN CANADA EMERGING MARKETS FUND, ABERDEEN CANADA SOCIALLY RESPONSIBLE GLOBAL FUND, ABERDEEN CANADA SOCIALLY RESPONSIBLE

INTERNATIONAL FUND, ABERDEEN CANADA
FUNDS EAFE PLUS EQUITY FUND AND
ABERDEEN CANADA FUNDS GLOBAL EQUITY
FUND, each a series of Aberdeen Canada Funds,
ABERDEEN EAFE PLUS ETHICAL FUND,
ABERDEEN EAFE PLUS FUND, ABERDEEN
EAFE PLUS SRI FUND, ABERDEEN EMERGING
MARKETS EQUITY FUND, ABERDEEN FULLY
HEDGED INTERNATIONAL EQUITIES FUND,
ABERDEEN INTERNATIONAL EQUITY FUND,
ABERDEEN GLOBAL EMERGING MARKETS
EQUITY FUND, ABERDEEN GLOBAL ETHICAL
WORLD EQUITY FUND, ABERDEEN GLOBAL
RESPONSIBLE WORLD EQUITY FUND,
ABERDEEN GLOBAL WORLD EQUITY
DIVIDEND FUND, ABERDEEN GLOBAL
WORLD EQUITY FUND, ABERDEEN GLOBAL
WORLD RESOURCES EQUITY FUND,
ABERDEEN EMERGING MARKETS EQUITY
FUND, ABERDEEN ETHICAL WORLD EQUITY
FUND, ABERDEEN MULTI- ASSET FUND,
ABERDEEN WORLD EQUITY FUND,
ABERDEEN LATIN AMERICA EQUITY FUND,
INC., AAAID EQUITY PORTFOLIO, ALBERTA
TEACHERS RETIREMENT FUND, AON HEWITT
INVESTMENT CONSULTING, INC., AURION
INTERNATIONAL DAILY EQUITY FUND, BELL
ALIANT REGIONAL COMMUNICATIONS INC.,
BMO GLOBAL EQUITY CLASS, CITY OF
ALBANY PENSION PLAN, DESJARDINS
DIVIDEND INCOME FUND, DESJARDINS
EMERGING MARKETS FUND, DESJARDINS
GLOBAL ALL CAPITAL EQUITY FUND,
DESJARDINS OVERSEAS EQUITY VALUE
FUND, DEVON COUNTY COUNCIL GLOBAL

EMERGING MARKET FUND, DEVON COUNTY
COUNCIL GLOBAL EQUITY FUND, DGIA
EMERGING MARKETS EQUITY FUND L.P.,
ERIE INSURANCE EXCHANGE, FIRST
TRUST/ABERDEEN EMERGING OPPORTUNITY
FUND, GE UK PENSION COMMON
INVESTMENT FUND, HAPSHIRE COUNTY
COUNCIL GLOBAL EQUITY PORTFOLIO,
LONDON BOROUGH OF HOUNSLOW
SUPPERANNUATION FUND, MACKENZIE
UNIVERSAL SUSTAINABLE OPPORTUNITIES
CLASS, MARSHFIELD CLINIC, MOTHER
THERESA CARE AND MISSION TRUST, MTR
CORPORATION LIMITED RETIREMENT
SCHEME, MYRIA ASSET MANAGEMENT
EMERGENCE, NATIONAL PENSION SERVICE,
NPS TRUST ACTIVE 14, OHIO PUBLIC
EMPLOYEES RETIREMENT SYSTEM,
WASHINGTON STATE INVESTMENT BOARD,
ABERDEEN LATIN AMERICAN INCOME FUND
LIMITED, ABERDEEN GLOBAL EX JAPAN
PENSION FUND PPIT, FS INTERNATIONAL
EQUITY MOTHER FUND, NN INVESTMENT
PARTNERS B.V., acting in the capacity of
management company of the mutual fund NN
Global Equity Fund and in the capacity of
management company of the mutual fund NN
Institutioneel Dividend Aandelen Fonds, NN
INVESTMENT PARTNERS LUXEMBOURG S.A.,
acting in the capacity of management company
SICAV and its Sub-Funds and NN (L) SICAV, for
and on behalf of NN (L) Emerging Markets High
Dividend, NN (L) FIRST, AURA CAPITAL LTD.,
WGI EMERGING MARKETS FUND, LLC, BILL
AND MELINDA GATES FOUNDATION TRUST,

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM, TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP, LOUIS KENNEDY, individually and on behalf of all others similarly situated, KEN NGO, individually and on behalf of all others similarly situated, JONATHAN MESSING, individually and on behalf of all others similarly situated, CITY OF PROVIDENCE, individually and on behalf of all others similarly situated, UNION ASSET MANAGEMENT HOLDING AG,

Plaintiffs,

v.

PETRÓLEO BRASILEIRO S.A. PETROBRAS, BB SECURITIES LTD., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, BANK OF CHINA (HONG KONG) LIMITED, BANCA IMI, S.P.A., SCOTIA CAPITAL (USA) INC., THEODORE MARSHALL HELMS, PETROBRAS GLOBAL FINANCE B.V.,PETROBRAS AMERICA INC., CITIGROUP GLOBAL MARKETS INC., ITAU BBA USA SECURITIES, INC., J.P. MORGAN SECURITIES LLC, MORGAN STANLEY & CO. LLC, MITSUBISHI UFJ SECURITIES (USA), INC., HSBC SECURITIES (USA) INC., STANDARD CHARTERED BANK, BANCO BRADESCO BBI S.A.,

Defendants-Appellants,

JOSE SERGIO GABRIELLI, SILVIO SINEDINO PINHEIRO, PAULO ROBERTO COSTA, JOSE CARLOS COSENZA, RENATO DE SOUZA

DUQUE, GUILLHERME DE OLIVEIRA ESTRELLA, JOSE MIRANDA FORMIGL FILHO, MARIA DAS GRACAS SILVA FOSTER, ALMIR GUILHERME BARBASSA, MARIANGELA MOINTEIRO TIZATTO, JOSUE CHRISTIANO GOME DA SILVA, DANIEL LIMA DE OLIVEIRA, JOSE RAIMUNDO BRANDA PEREIRA, SERVIO TULIO DA ROSA TINOCO, PAULO JOSE ALVES, GUSTAVO TARDIN BARBOSA, ALEXANDRE QUINTAO FERNANDES, MARCOS ANTONIO ZACARIAS, CORNELIS FRANCISCUS JOZE LOOMAN, PRICEWATERHOUSECOOPERS AUDITORES INDEPENDENTES,

Defendants.

Before:

HALL, LIVINGSTON, *Circuit Judges*, AND GARAUFIS, *District Judge*.*

Appeal from an order of the United States District Court for the Southern District of New York (Rakoff, *J.*) certifying two classes under Federal Rule of Civil Procedure 23(b)(3): one asserting claims under the Securities Exchange Act of 1934 (the "Exchange Act"), and the second asserting claims under the Securities Act of 1933 (the "Securities Act"). Appellants assert two challenges.

First, Appellants challenge both class definitions insofar as they include all otherwise eligible persons who purchased debt securities in "domestic transactions," as defined in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010). Because the district court must verify the domesticity of individual over-the-counter transactions in globally traded notes, Appellants argue that both classes fail to satisfy the requirements for certification under Rule 23. We hold that the district court committed legal error by failing to address the need for such *Morrison* inquiries in its analysis of predominance under Rule 23(b)(3). We therefore vacate this portion of the district court's order and remand for further

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* Judge Nicholas G. Garaufis, of the United States District Court for the Eastern District of New York, sitting by designation.

proceedings. In addition, we clarify the narrow scope of the "implied" Rule 23 requirement of "ascertainability."

Second, Appellants assert that the district court erred in finding that the Exchange Act class was entitled to a presumption of reliance under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). We find no abuse of discretion in the district court's blended analysis of direct and indirect evidence of market efficiency. We therefore affirm as to this issue.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

JEREMY A. LIEBERMAN, Mark I. Gross, Emma Gilmore, John A. Keho & Brenda F. Szydlo (*on the brief*), Pomerantz LLP, New York, NY, *for the Plaintiffs-Appellees*.

LEWIS J. LIMAN, Jared Gerber & Mitchell A. Lowenthal (*on the brief*), Cleary Gottlieb Steen & Hamilton LLP, New York, NY, *for Defendants-Appellants Petróleo Brasileiro S.A. — Petrobras, Theodore Marshall Helms, Petrobras Global Finance B.V., and Petrobras America Inc.*

JAY B. KASNER, Boris Bershteyn, Scott D. Musoff & Jeremy A. Berman (*on the brief*), Skadden,

Arps, Slate, Meagher & Flom LLP, New York NY, *for Defendants-Appellants BB Securities Ltd., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Bank of China (Hong Kong) Limited, Banca IMI, S.p.A., Scotia Capital (USA) Inc., Citigroup Global Markets Inc., Itau BBA USA Securities, Inc., J.P. Morgan Securities LLC, Morgan Stanley & Co. LLC, Mitsubishi UFJ Securities (USA), Inc., HSBC Securities (USA) Inc., Standard Chartered Bank, and Banco Bradesco BBI S.A.*

GARAUFIS, *District Judge*:

This expedited appeal arises out of an order entered in the United States District Court for the Southern District of New York (Rakoff, *J.*) certifying two classes in this securities fraud action against Petróleo Brasileiro S.A. – Petrobras ("Petrobras") and various other defendants. *See In re Petrobras Sec. Litig.* (the "*Certification Order*"), 312 F.R.D. 354 (S.D.N.Y. 2016).

Petrobras is a multinational oil and gas company headquartered in Brazil and majority-owned by the Brazilian government. Though Petrobras was once among the largest companies in the world, its value declined precipitously after the exposure of a multi-year, multi-billion-dollar money-

laundering and kickback scheme, prompting a class action by holders of Petrobras equity and debt securities ("Plaintiffs") against multiple defendants ("Defendants"): Petrobras and certain wholly owned subsidiaries (the "Subsidiaries"; collectively with Petrobras, the "Petrobras Defendants"[1]); former officers and directors of the Petrobras Defendants; several underwriters of Petrobras debt securities (the "Underwriter Defendants"[2]); and Petrobras's independent auditor.

The district court certified two classes (the "Classes") for money damages under Federal Rule of Civil Procedure 23(b)(3): the first asserts claims under the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78a *et seq.*; and the second asserts claims under the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. §§ 77a *et seq.*[3]

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[1] The Petrobras Defendants include Petrobras itself, along with two wholly owned subsidiaries (Petrobras Global Finance B.V. and Petrobras America Inc.) and Petrobras's United States Representative (Theodore Marshall Helms).

[2] The Underwriter Defendants include the following underwriters of Petrobras debt securities: BB Securities Ltd., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Bank of China (Hong Kong) Limited, Banca IMI, S.p.A., Scotia Capital (USA) Inc., Citigroup Global Markets Inc., Itau BBA USA Securities, Inc., J.P. Morgan Securities LLC, Morgan Stanley & Co. LLC, Mitsubishi UFJ Securities (USA), Inc., HSBC Securities (USA) Inc., Standard Chartered Bank, and Banco Bradesco BBI S.A.

[3] Plaintiffs- Appellees are the three class representatives in the underlying action: Universities Superannuation Scheme Limited (representing the Exchange Act Class); and the

On appeal, the Petrobras Defendants and the Underwriter Defendants (collectively, "Appellants") contest the *Certification Order* on two grounds.

First, Appellants challenge both class definitions insofar as they include all otherwise eligible persons who purchased Petrobras debt securities in "domestic transactions." Because Petrobras's debt securities do not trade on a domestic exchange, the district court must assess each class member's over-the-counter transactions for markers of domesticity under *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010). Appellants assert that the need for such assessments precludes class certification, particularly in light of concerns over the availability and content of the necessary transaction records. We first address Appellants' arguments regarding the "implied" Rule 23 requirement of "ascertainability," taking this opportunity to clarify the scope of the contested ascertainability doctrine: a class is ascertainable if it is defined using objective criteria that establish a membership with definite boundaries. That threshold requirement is met here. However, we next hold that the district court committed legal error by finding that Rule 23(b)(3)'s predominance requirement was satisfied without considering the need for individual *Morrison* inquiries regarding domestic transactions. We

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Employees Retirement System of the State of Hawaii and the North Carolina Department of State Treasurer (jointly representing the Securities Act Class).

therefore vacate this portion of the *Certification Order*.

Second, with regard to the Exchange Act Class, the Petrobras Defendants[4] challenge the district court's finding that Plaintiffs were entitled to a presumption of reliance under the "fraud on the market" theory established in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). We find no abuse of discretion in the district court's determination that Plaintiffs met their burden under *Basic* with a combination of direct and indirect evidence of market efficiency. We therefore affirm as to this issue.

For the reasons set forth below, we AFFIRM IN PART and VACATE IN PART the judgment of the district court and REMAND the case for further proceedings consistent with this opinion.

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[4] The Underwriter Defendants are not named as defendants with respect to Plaintiffs' Exchange Act claims. They therefore limit their arguments on appeal to the first issue described in text, concerning putative class members' proof of "domestic transactions."

BACKGROUND

We provide here a brief summary of the proceedings below as relevant for the issues on appeal. For additional background on Plaintiffs' allegations and causes of action, see the district court's prior orders. *See In re Petrobras Sec. Litig.* (the "*July 2015 Order*"), 116 F. Supp. 3d 368, 373–77 (S.D.N.Y. 2015) (summarizing the original consolidated complaint); *In re Petrobras Sec. Litig.* (the "*December 2015 Order*"), 150 F. Supp. 3d 337 (S.D.N.Y. 2015) (discussing new allegations in the amended pleadings).[5]

I. Factual Background

A. Plaintiffs' Allegations of Corruption at Petrobras

Plaintiffs' claims arise out of a conspiracy that began in the first decade of the new millennium, at which time Petrobras was expanding its production capacity. The company used a competitive bidding process for major capital expenditures, including the

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[5] As compared to the original consolidated complaint, the operative pleading at the time of this appeal (the Consolidated Fourth Amended Complaint, filed November 30, 2015) adds allegations concerning Defendants' continued misconduct in 2015; provides additional details regarding the locations of the named plaintiffs' transactions in Petrobras securities; and omits certain causes of action that were dismissed in earlier proceedings. *See July 2015 Order*, 116 F. Supp. 3d at 386–89 (dismissing claims asserted under Brazilian law based on a finding that they were subject to mandatory arbitration).

construction and purchase of oil refineries. Over a period of several years, a cartel of contractors and suppliers coordinated with corrupt Petrobras executives to rig Petrobras's bids at grossly inflated prices. The excess funds were used to pay billions of dollars in bribes and kickbacks to the corrupt executives and to government officials. In addition, the inflated bid prices artificially increased the carrying value of Petrobras's assets. Plaintiffs allege that Petrobras knew about the kickback cartel, and was complicit in concealing information from investors and the public.

Brazil's Federal Police discovered the scheme during a money-laundering investigation, and ultimately arrested a number of the individuals involved. As details of the scandal emerged, Petrobras made corrective disclosures that, according to Plaintiffs, significantly understated the extent of incorrectly capitalized payments and inflated asset values. Even so, the value of Petrobras's securities declined precipitously. Plaintiffs allege that, "[a]t its height in 2009, Petrobras was the world's fifth-largest company, with a market capitalization of $310 billion"; by early 2015, its worth had allegedly declined to $39 billion. 4th Am. Compl. ¶ 2.

B. Petrobras Securities

Petrobras's common and preferred shares trade on a Brazilian stock exchange, the BM&F BOVESPA. The company sponsors American

Depository Shares (“ADS”)[6] that represent its common and preferred shares. Those ADS are listed and trade on the New York Stock Exchange (“NYSE”).

In addition, Petrobras has issued multiple debt securities (the “Notes”; collectively with ADS, “Petrobras Securities”) underwritten by syndicates of domestic and foreign banks. The Notes do not trade on any U.S. exchange. Investors trade Notes in over-the-counter transactions, whether in connection with an initial debt offering or in the global secondary market.

II. Procedural History

In December 2014 and January 2015, Petrobras investors filed five putative class actions asserting substantially similar claims against Petrobras and other defendants. The district court consolidated those actions in February 2015 and certified the Classes in February 2016. The district

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[6] American Depository Shares “represent an interest in the shares of a non- U.S. company that have been deposited with a U.S. bank.” *Investor Bulletin: American Depository Receipts*, Office of Inv’r Educ. & Advocacy, SEC 1 (Aug. 2012), https://www.sec.gov/investor/alerts/adr- bulletin.pdf. ADS “allow U.S. investors to invest in non- U.S. companies” and also “give non- U.S. companies easier access to the U.S. capital markets. Many non- U.S. issuers use [ADS] as a means of raising capital or establishing a trading presence in the U.S.” *Id.*

court also presided over several individual actions involving similar claims.[7]

A. Plaintiffs' Causes of Action

As relevant for this appeal, Plaintiffs assert a cause of action under the Exchange Act against the Petrobras Defendants, and three causes of action under the Securities Act against various Petrobras and Underwriter Defendants.

1. Claims Under the Exchange Act

Plaintiffs' Exchange Act claims are brought against Petrobras and the Subsidiaries on behalf of holders of Petrobras ADS and Notes. Plaintiffs assert that, during the class period of January 22, 2010, to July 28, 2015, the Petrobras Defendants made two types of false and misleading statements in violation of Section 10(b) of the Exchange Act and Rule 10b-5. *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b–5. First, the Petrobras Defendants produced financial statements with inflated asset values. Second, they assured Petrobras investors that the company adhered to ethical management principles and maintained strict financial controls to prevent fraud and corruption.

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[7] *See, e.g.*, *In re Petrobras Sec. Litig.*, 193 F. Supp. 3d 313, 315 (S.D.N.Y. 2016) (By the time of the *Certification Order*, "no fewer than 27 substantial entities, such as pension funds, institutional investors, and others, had 'opted out' of the class action and brought their own, individual actions.").

2. Claims Under the Securities Act

Plaintiffs rely on similar factual allegations in their claims under the Securities Act, brought on behalf of Petrobras Noteholders. Plaintiffs allege that the Petrobras Defendants and the Underwriter Defendants made materially false representations in registration statements and other documents connected with offerings of Petrobras Notes in May 2013 and March 2014 (the "Offerings"), thereby establishing liability under Sections 11, 12(a)(2), and 15 of the Securities Act. *See* 15 U.S.C. §§ 77k, 77l(a)(2), 77o.

B. The Certification Order

On February 2, 2016, the district court granted Plaintiffs' motion to certify two classes under Rule 23(b)(3), one asserting claims under the Exchange Act and the other asserting claims under the Securities Act. *Certification Order*, 312 F.R.D. 354.

Because Petrobras Notes do not trade on any U.S.-based exchange, Noteholders in both Classes are only entitled to assert claims under the Exchange Act and the Securities Act if they can show that they acquired their Notes in "domestic transactions." *Morrison*, 561 U.S. at 267. To ensure compliance with *Morrison*, the district court limited both class definitions to "members [who] purchased Notes in domestic transactions." *Certification Order*,

312 F.R.D. at 360. The Exchange Act Class is defined, in relevant part,[8] as:

> [A]ll purchasers who, between January 22, 2010 and July 28, 2015, . . . purchased or otherwise acquired [Petrobras Securities], including debt securities issued by [the Subsidiaries] on the [NYSE] or pursuant to other domestic transactions, and were damaged thereby.

Id. at 372.

The Securities Act Class is defined, in relevant part, as:

> [A]ll purchasers who purchased or otherwise acquired [Notes] in domestic transactions, directly in, pursuant and/or traceable to [U.S.-registered public offerings on May 15, 2013, and March 11, 2014] . . . , and were damaged thereby.[9]

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[8] Both class definitions exclude "Defendants, current or former officers and directors of Petrobras, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which Defendants have or had a controlling interest." *Certification Order*, 312 F.R.D. at 372–73.

[9] This definition applies to claims under Sections 11 and 15 of the Securities Act. The class definition as to claims under Section 12(a)(2) is identical, except that it limits class

Id. The Securities Act Class definition is temporally limited to purchases made "before Petrobras made generally available to its security holders an earnings statement covering a period of at least twelve months beginning after the effective date of the offerings." *Id.* This language conforms to the limitations inherent in Section 11, given the absence of any allegation that Plaintiffs relied on any such earnings statement.[10] *See* 15 U.S.C. § 77k(a).

III. The Instant Appeal

On June 15, 2016, a panel of this Court granted Appellants' timely filed petition for permission to appeal the *Certification Order* under Federal Rule of Civil Procedure 23(f) and Federal Rule of Appellate Procedure 5(a). On August 2, 2016, a separate panel granted Appellants' motion for a stay pending resolution of this expedited interlocutory appeal.

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membership to purchasers who acquired Notes *directly in* one of the U.S.- registered Offerings. *Certification Order*, 312 F.R.D. at 372. Unlike claims under Sections 11 and 15, class membership with regard to Section 12(a)(2) does not extend to those who acquired a Note "pursuant and/or traceable to" one of the Offerings. *Id.*

[10] Prior to the *Certification Order*, the district court had already dismissed all Section 11 claims "based on purchases of the 2014 Notes made after May 15, 2015," the date on which Petrobras filed earning statements "covering the twelve-month period following the effective date of the 2014 Notes' offering." *December 2015 Order*, 150 F. Supp. 3d at 344 (citing 15 U.S.C. § 77k(a)).

DISCUSSION

A plaintiff seeking certification of a Rule 23(b)(3) class action bears the burden of satisfying the requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—as well as Rule 23(b)(3)'s requirements: (1) that "the questions of law or fact common to class members predominate over any questions affecting only individual members" (the "predominance" requirement); and (2) that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" (the "superiority" requirement). Fed. R. Civ. P. 23(a), (b)(3); *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 117 (2d Cir. 2013) ("To certify a class, a district court must . . . find that each [Rule 23] requirement is 'established by at least a preponderance of the evidence.'" (quoting *Brown v. Kelly*, 609 F.3d 467, 476 (2d Cir. 2010))). This Court has also "recognized an implied requirement of ascertainability in Rule 23," which demands that a class be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015) (internal quotation marks and citations omitted).

Appellants do not challenge the district court's findings with regard to the class certification elements under Rule 23(a). Rather, they assert two arguments under Rule 23(b)(3). Appellants first argue that both Classes fail to satisfy ascertainability, predominance, and superiority

because putative class members must establish, on an individual basis, that they acquired their securities in "domestic transactions." The Petrobras Defendants assert a second predominance challenge specific to the Exchange Act Class: they argue that the district court erred in finding that Plaintiffs successfully established a class-wide presumption of reliance under the "fraud on the market" theory.

I. Standard of Review

"We review a district court's conclusions as to whether the requirements of Federal Rule of Civil Procedure 23 were met, and in turn whether class certification was appropriate, for abuse of discretion."[11] *In re Vivendi*, *S.A. Sec. Litig.*, 838 F.3d

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[11] We note that although we have sometimes stated in the past that we "apply[] a 'noticeably less deferential' standard when the district court has denied class certification," *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) (quoting *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 224–25 (2d Cir. 2006)), this language apparently arose from a misreading of earlier Second Circuit cases. Moreover, it is out of step with recent Supreme Court authority.

The first case to suggest that we apply a different standard to denials of class certification was *Lundquist v. Security Pacific Automotive Financial Services Corp.*, 993 F.2d 11, 14 (2d Cir. 1993) (per curiam). *Lundquist* cited *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993), and *Abrams v. Interco Inc.*, 719 F.2d 23, 28 (2d Cir. 1983), for the proposition that "we are noticeably less deferential to the district court when that court has denied class status than when it has certified a class." *Id.* But *Abrams* and *Robidoux* do not support this proposition. *Abrams* states, in relevant part: "Abuse of discretion can be found far more readily on appeals from the denial *or grant* of class action status than where the issue is, for example, the

223, 263 (2d Cir. 2016) (citations omitted). "While we review the district court's construction of legal standards *de novo*, we review the district court's

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curtailment of cross- examination or the grant or denial of a continuance," because "courts have built a body of case law with respect to class action status." 719 F.2d at 28 (emphasis added) (citation omitted). *Robidoux* repeated that "abuse of discretion can be found more readily on appeals from the denial of class status *than in other areas*, for the courts have built a body of case law with respect to class action status." 987 F.2d at 935 (emphasis added) (citing *Abrams*, 719 F.2d at 28).

Thus, neither *Abrams* nor *Robidoux* applied a different standard to denials versus grants of class certification. Rather, both cases stated that this Court is more likely to find abuse of discretion in appeals involving the *issue* of class certification—whether certification was granted or denied—when compared with *other types of legal issues*. It appears that *Lundquist* misinterpreted that comparison. In sum, no Second Circuit case provides any reasoning or justification for the idea that we review denials of class certification with more scrutiny than grants.

The Supreme Court has never drawn a distinction between the standard used to review district court denials or grants of class certification. *See, e.g.*, *Tyson Foods*, *Inc. v. Bouaphakeo*, — U.S. —, 136 S. Ct. 1036, 1045–46 (2016). Recent Supreme Court class certification cases emphasize that courts must "conduct a rigorous analysis" to determine whether putative class plaintiffs meet Rule 23's requirements. *Comcast Corp. v. Behrend*, — U.S. —, 133 S. Ct. 1426, 1432 (2013); *see also Wal- Mart Stores*, *Inc. v. Dukes*, 564 U.S. 338, 351 (2011). That said, we need not decide the issue here. We take this opportunity, however, to point out the distinction as one that need not and ought not be drawn. Should the resolution of this issue prove determinative of the outcome in a future matter, the question can likely be resolved by this Court's protocol for the circulation of opinions at that time.

application of those standards for whether the district court's decision falls within the range of permissible decisions." *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) (citing *Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010)). "To the extent that the district court's decision as to class certification is premised on a finding of fact, we review that finding for clear error." *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 130–31 (2d Cir. 2010)(citing *In re Initial Pub. Offering Sec. Litig.* ("*In re IPO*"), 471 F.3d 24, 40–41 (2d Cir. 2006)); *see also In re Vivendi*, 838 F.3d at 263.

II. "Domestic Transactions" as a Condition for Class Membership

The two certified Classes include all claims arising out of Petrobras Notes purchased in "domestic transactions" during the class period, thereby capturing the broadest membership possible under *Morrison*. Appellants argue that the difficulties inherent in assessing putative class members' transaction records make the Classes uncertifiable for several reasons, the most important of which, for our purposes, are (1) the ascertainability doctrine, which has seen recent developments in this Circuit and others; and (2) predominance. We hold that both class definitions satisfy the ascertainability doctrine as it is defined in this Circuit. We further hold, however, that the district court erred in conducting its predominance analysis without considering the need for individualized *Morrison* inquiries. On that basis, we vacate the district court's certification decision and remand for further proceedings.

A. Extraterritoriality and Federal Securities Law

1. Defining "Domestic Transactions": *Morrison* and *Absolute Activist*

"It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison*, 561 U.S. at 255 (internal quotation marks and citation omitted). Based on that presumption against extraterritoriality, the Supreme Court held in *Morrison* that the reach of U.S. securities law is presumptively limited to (1) "transactions in securities listed on domestic exchanges," and (2) "domestic transactions in other securities." *Id.* at 267 (discussing Section 10(b) of the Exchange Act); *see also id.* at 268 (noting that "[t]he same focus on domestic transactions is evident in the Securities Act").[12]

As noted in the margin, we assume that a purchase of Petrobras ADS qualifies under *Morrison*'s first prong as long as the transaction

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[12] The district court applied *Morrison*'s extraterritoriality analysis to Plaintiffs' claims under both the Exchange Act and the Securities Act. *See July 2015 Order*, 116 F. Supp. 3d at 386. In addition, all parties appear to have proceeded under the assumption that *Morrison* applies to ADS in the same manner that it applies to common stock. Appellants have not challenged these conclusions on appeal, and we therefore see no need to address them.

occurs on the NYSE, a "domestic exchange." *See City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 180–81 (2d Cir. 2014) (holding that mere *listing* on a domestic exchange is not sufficient to establish domesticity if the relevant securities transaction did not *occur* on a domestic exchange). The Notes, however, do not trade on any domestic exchange.[13] Therefore, to assert claims under federal securities laws, Noteholders must show in some other manner that the Notes they hold were acquired in a "domestic transaction."

This Court's decision in *Absolute Activist* elaborated on that standard: for "securities that are not traded on a domestic exchange," a transaction is considered "domestic if [1] irrevocable liability is incurred or [2] title passes within the United States." *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012). In other words, for a transaction to qualify as domestic, either (1) the purchaser must have "incurred irrevocable liability within the United States to take and pay for a security, or . . . the seller [must have] incurred irrevocable liability within the United States to deliver a security," or (2) legal title to the security must have transferred in the United States. *Id.* at 68.

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[13] "[A]lthough the Notes were listed or intended to be listed on the [NYSE], they did not *trade* there. . . . [M]ere listing, without trading, is insufficient to satisfy *Morrison*'s first prong." *December 2015 Order*, 150 F. Supp. 3d 337, 339–40 (emphasis added) (citing *City of Pontiac*, 752 F.3d at 179–81).

The location or residency of the buyer, seller, or broker will not necessarily establish the situs of the transaction. *Id.* at 68–69. Rather, plaintiffs demonstrate the location where irrevocable liability was incurred or legal title transferred by producing evidence "including, but not limited to, facts concerning the formation of the contracts, the placement of purchase orders, . . . or the exchange of money." *Id.* at 70.

2. The District Court's Pre-Certification *Morrison* Inquiries

Before certifying the Classes, the district court twice adjudicated *Morrison*-based challenges to Plaintiffs' claims. When the class action was first consolidated, the court dismissed, without prejudice, all Securities Act claims based on Plaintiffs' failure "to allege that they purchased the relevant securities in domestic transactions." *July 2015 Order*, 116 F. Supp. 3d at 386.

Plaintiffs responded with new allegations and documentary evidence regarding Notes transactions for each of the four putative named plaintiffs. Defendants once again moved to dismiss. The district court found that two of the named plaintiffs had adequately pleaded domestic transactions based on their acquisition of Notes directly from U.S. underwriters in the Offerings. *December 2015 Order*, 150 F. Supp. 3d at 340. For example, one plaintiff's "traders in Raleigh, North Carolina purchased Notes on May 13, 2013, and March 10, 2014, from underwriters in New York, New York." *Id.* The district court found that this plaintiff had

alleged "the kinds of facts required by *Absolute Activist*, including New York area code phone numbers on the confirmations sent by representatives of the underwriters." *Id.* at 340 n.5.

The district court determined that the other two named plaintiffs had failed to satisfy the *Morrison* inquiry and dismissed their Securities Act claims. *Id.* at 340–43. One plaintiff, for example, presented a confirmation slip stating that Petrobras Notes had been purchased "in U.S. dollars and that the Notes were held in '[s]afekeeping of securities abroad, depository country: U.S.A.'" *Id.* at 341 (quoting the 4th Am. Compl.). According to the district court, this "language suggests that the purchase occurred *outside* the United States because it refers to the United States as 'abroad.'" *Id.* (emphasis added). The district court similarly found insufficient an allegation that an investment manager "located in the United Kingdom[] instructed its U.S. affiliate, located in Chicago, Illinois, to transfer Petrobras Notes to [the plaintiff entity,] located in the United Kingdom." *Id.* The court noted that "a 'transfer,' rather than a purchase, [was] all that [was] alleged. Moreover, the allegations suggest that irrevocable liability was incurred in the United Kingdom," where both the plaintiff and the investment manager were located, "rather than in the United States." *Id.*

In an attempt to preserve those claims, Plaintiffs offered two alternative methods for establishing domestic transactions as a matter of law. First, Plaintiffs argued that a securities transaction should qualify as "domestic" if *beneficial*

title is transferred when the transaction is settled through a domestic securities depository, such as the Depository Trust Company ("DTC") located in New York City. *Id.* The district court disagreed, finding that "[t]he mechanics of DTC settlement are actions needed to *carry out* transactions, but they involve neither the substantive indicia of a contractual commitment necessary to satisfy *Absolute Activist*'s first prong nor the formal weight of a transfer of [legal] title necessary for its second." *Id.* at 342 (emphasis added); *see also id.* ("[T]he Second Circuit has [] indicated that domestic 'actions needed to carry out transactions, and not the transactions themselves,' are insufficient to satisfy *Morrison*." (quoting *Loginovskaya v. Batratchenko*, 764 F.3d 266, 275 (2d Cir. 2014))). The district court also expressed concern that, "assuming the parties are correct that most securities transactions settle through the DTC or similar depository institutions, the entire thrust of *Morrison* and its progeny would be rendered nugatory if all DTC-settled transactions necessarily fell under the reach of the federal securities laws." *Id.*

Finally, Plaintiffs proposed a method for constructively establishing the domesticity of Notes transactions: "allegations that a plaintiff purchased Notes 'on the offering date and at the offering price' [should be] sufficient to demonstrate irrevocable liability because all the underwriters who sold in the initial offerings only did so in the United States." *Id.* at 342 (quoting the 4th Am. Compl.). The district court rejected this theory, noting that certain documents related to the Offerings "imply that some

underwriters *did* initially offer the Notes outside the United States." *Id.* (emphasis added).[14]

B. Ascertainability

"Most [] circuit courts of appeals have recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable," often characterized as "an 'ascertainability' requirement." *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 995 (8th Cir. 2016) (internal quotation marks and citation omitted) (collecting cases). "[C]ourts ascribe widely varied meanings to that term," however. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124 n.3 (9th Cir. 2017) (describing two versions of the ascertainability requirement); *see generally* Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 Yale L.J. 2354, 2366–88 (2015) (describing different conceptions of ascertainability and critiquing the proffered justifications).

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[14] The district court resolved similar factual and legal questions in the related individual actions. *See In re Petrobras Sec. Litig.*, 152 F. Supp. 3d 186, 192–93 (S.D.N.Y. 2016) (finding that several "plaintiffs [had] failed to adequately allege they purchased Notes in domestic transactions" and granting leave to amend); *Internationale Kapitalanlagegesellschaft mbH v. Petróleo Brasileiro S.A. (In re Petrobras Sec. Litig.)*, No. 15 CIV. 6618 (JSR), 2016 U.S. Dist. LEXIS 46570 (S.D.N.Y. Mar. 24, 2016) (granting in part a motion to dismiss after analyzing various allegations, trade confirmations, trade memoranda, and investment manager employment records).

In *Brecher v. Republic of Argentina*, we offered our first and, thus far, only affirmative definition [15] of the implied ascertainability requirement:

> [T]he touchstone of ascertainability is whether the class is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member. A class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case.

Brecher, 806 F.3d at 24–25 (internal quotation marks and citations omitted). Based on this language, Appellants argue for a "heightened" ascertainability requirement under which any proposed class must be "administratively feasible," over and above the evident requirements that a class be "definite" and "defined by objective criteria," and separate from Rule 23(b)(3)'s requirements of predominance and superiority.

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[15] We cursorily defined ascertainability in the negative in a 2006 opinion, noting that "ascertainability [] is an issue distinct from the predominance requirement." *In re IPO*, 471 F.3d at 45. We did "not further define[]" ascertainability's "content" until *Brecher*, however. 806 F.3d at 24.

We take this opportunity to clarify the ascertainability doctrine's substance and purpose. We conclude that a freestanding administrative feasibility requirement is neither compelled by precedent nor consistent with Rule 23, joining four of our sister circuits in declining to adopt such a requirement. The ascertainability doctrine that governs in this Circuit requires only that a class be defined using objective criteria that establish a membership with definite boundaries. Applying that doctrine, we determine that ascertainability is not an impediment to certification of the Classes as currently defined.

1. The Proceedings Below and Arguments on Appeal

In its *Certification Order*, the district court rejected Defendants' argument that, "because of the nuances of the 'domestic transaction' standard, determining [class membership] and damages will be an *administratively unfeasible* task for this Court, for putative class members who receive notice of the action, and for future courts facing claims from class members who have not properly opted out." 312 F.R.D. at 363–64 (emphasis added) (footnote omitted).

Appellants renew that argument on appeal, packaged as a challenge to the district court's finding "that the *Morrison* determination is 'administratively feasible.'" *Id.* at 364 (quoting *Brecher*, 806 F.3d at 24). Appellants cite heavily to cases from the Third Circuit, which has formally adopted a "heightened" two-part ascertainability

test under which plaintiffs must not only show that "the class is 'defined with reference to objective criteria,'" but also that "there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Byrd v. Aaron's Inc.*, 784 F.3d 154, 166 (3d Cir. 2015), *as amended* Apr. 28, 2015 (quoting *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013)); *see also Carrera v. Bayer Corp.*, 727 F.3d 300, 305 (3d Cir. 2013); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-95 (3d Cir. 2012).

With all due respect to our colleagues on the Third Circuit, we decline to adopt a heightened ascertainability theory that requires a showing of administrative feasibility at the class certification stage. The reasoning underlying our decision in *Brecher* does not suggest any such prerequisite, and creating one would upset the careful balance of competing interests codified in the explicit requirements of Rule 23. In declining to adopt an administrative feasibility requirement, we join a growing consensus that now includes the Sixth, Seventh, Eighth, and Ninth Circuits. *See Briseno*, 844 F.3d at 1123; *Sandusky*, 821 F.3d at 995–96; *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015), *cert. denied*, — U.S. —, 136 S. Ct. 1493 (2016); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657–58 (7th Cir. 2015), *cert. denied*, — U.S. —, 136 S. Ct. 1161 (2016); *see also Byrd*, 784 F.3d at 177 (Rendell, *J.*, concurring) ("suggest[ing]" that the Third Circuit "retreat from [its] heightened ascertainability requirement" by eliminating the administrative feasibility prong).

2. Our Decision in *Brecher v. Republic of Argentina*

Brecher was one of several opinions in which we assessed a class action initiated by holders of Argentinian bonds "[a]fter Argentina defaulted on between $80 and $100 billion of sovereign debt in 2001." *Brecher*, 806 F.3d at 23 (listing prior decisions). The district court originally "certified a class under a continuous holder requirement, *i.e.*, the class contained only those individuals who [] possessed beneficial interests in a particular bond series issued by the Republic of Argentina from the date of the complaint [] through the date of final judgment." *Id.*

When the district court granted summary judgment to the plaintiffs, we vacated in part after finding that the district court's method of calculating aggregate damages had likely produced impermissibly inflated awards. *See Seijas v. Republic of Argentina*, 606 F.3d 53, 58–59 (2d Cir. 2010); *Hickory Sec., Ltd. v. Republic of Argentina*, 493 F. App'x 156, 160 (2d Cir. 2012) (summary order). On remand, the district court "modif[ied] the class definition by removing the continuous holder requirement and expanding the class to all holders of beneficial interests in the relevant bond series[,] without limitation as to time held." *Brecher*, 806 F.3d at 24. The defendants appealed once again.

We concluded that, without the continuous holder requirement, the modified class was unascertainable. *Id.* at 26. We first defined the elements of ascertainability, explaining that a

proposed class: (1) must be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member"; and (2) must be "defined by objective criteria that are administratively feasible," such that "identifying its members would not require a mini-hearing on the merits of each case." *Id.* at 24 (citations omitted). These requirements operate in harmony: "the use of objective criteria cannot alone determine ascertainability when those criteria, taken together, do not establish the definite boundaries of a readily identifiable class.[16]" *Id.* at 25 (footnote in original as n.2).

Turning to the facts of the case, we expressed concern that the class was insufficiently bounded:

> The secondary market for Argentine bonds is active and has continued trading after the commencement of this and other lawsuits. . . . Further, all bonds from the same series have the same trading number identifier (called a CUSIP/ISIN), making it practically impossible to trace purchases and sales of a particular beneficial interest. Thus, when it becomes necessary to determine who holds bonds that fall inside (or outside) of the class, it will be

[16] "Of course, 'identifiable' does not mean 'identified'; ascertainability does not require a complete list of class members at the certification stage." *Brecher*, 806 F.3d at 25 n.2 (citation omitted).

> nearly impossible to distinguish between them once traded on the secondary market without a criterion as to time held.

Id. at 25–26 (citations omitted). We concluded that "[t]his case presents [] a circumstance where an objective standard—owning a beneficial interest in a bond series without reference to time owned—is insufficiently definite to allow ready identification of the class or the persons who will be bound by the judgment." *Id.* at 25 (footnote omitted).

As this summary clarifies, we reached our decision in *Brecher* by asking whether the class was defined by objective criteria that made the class's membership sufficiently definite, not whether the class was administratively feasible.[17] *See*, *e.g.*, *id.* at 26 ("The lack of a defined class period . . . makes the modified class *insufficiently definite* as a matter of law." (emphasis added)). The opinion's language about "administrative feasibility" and "mini-hearings" was not strictly part of the holding, and was not intended to create an independent element of the ascertainability test; rather, that language conveyed the *purpose* underlying the operative requirements of definiteness and objectivity. That is, a class must be "sufficiently definite *so that* it is

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[17] The Ninth Circuit highlighted this distinction in their survey of the circuit case law on ascertainability. *Briseno*, 844 F.3d at 1126 n.6 ("[A]dministrative feasibility played no role in the [*Brecher*] decision, which instead turned on the principle that a class definition must be objective and definite.").

administratively feasible for the court to determine whether a particular individual is a member"; a class must be "defined by objective criteria" *so that* it will not be necessary to hold "a mini-hearing on the merits of each case." *Id.* at 24 (emphasis added) (citations omitted).

This interpretation finds further support in the district court cases we cited in *Brecher*'s articulation and application of the ascertainability standard. *Compare Bakalar v. Vavra*, 237 F.R.D. 59, 65 (S.D.N.Y. 2006) (declining to certify a class seeking recovery of artworks traceable to a particular estate—an objective criterion—because the movants were unable to *identify* the specific artworks, and were therefore also unable to identify "the owners, possessors or individuals who participated in transfers of such works"), *with Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014) (acknowledging the challenge of identifying individuals who purchased a particular brand of olive oil during the class period, but finding the class ascertainable because "ascertainability . . . is designed only to prevent the certification of a class whose membership is *truly indeterminable*" (emphasis added) (internal quotation marks and citations omitted)), *and Charron v. Pinnacle Grp. N.Y. LLC*, 269 F.R.D. 221, 229 (S.D.N.Y. 2010) (finding that ascertainability was satisfied because the proposed class was "defined by objective criteria—namely, whether a given apartment is rent-regulated" and "owned by the [defendant corporation]; and whether the putative Class member is a tenant" on a fixed date—"thus allowing

the Court to readily identify Class members without needing to resolve the merits of Plaintiffs' claims").[18]

3. Ascertainability and Rule 23

Having concluded that our decision in *Brecher* did not create an independent administrative feasibility requirement, we now consider whether such a requirement is compulsory under Rule 23, or at least complementary to the requirements enumerated therein. We find that it is

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[18] *Weiner v. Snapple Beverage Corp.*, No. 07 CIV. 8742 (DLC), 2010 WL 3119452 (S.D.N.Y. Aug. 5, 2010), which was also cited in *Brecher*, appears to have treated administrative feasibility as an independent requirement alongside objective criteria and definite class membership. *See id.* at *12 (finding that "Plaintiffs [] failed to prove that it would be administratively feasible to ascertain the members of the putative class" because "the process of verifying class members' claims would be extremely burdensome for the court or any claims administrator"). That language was pure dicta, however: the district court denied class certification on predominance grounds, *see id.* at *10–11, and discussed superiority and ascertainability only to show that, even if predominance had been satisfied, "*potentially* serious impediments to class certification [would] remain," *id.* at *12 (emphasis added).

In any event, our opinion in *Brecher* did not cite to *Weiner*'s fact- based analysis. We cited only to *Weiner*'s articulation of the legal standard for ascertainability, which quoted directly from *Charron*. *See Weiner*, 2010 WL 3119452, at *12 (quoting *Charron*, 269 F.R.D. at 229). Meanwhile, *Brecher* cited approvingly to *Ebin*, which explicitly disagreed with *Weiner*'s ascertainability analysis. *See Ebin*, 297 F.R.D. at 567 (*Weiner* "goes further than this Court is prepared to go, and, indeed, would render class actions against producers almost impossible to bring.").

neither. In pursuing this analysis, we are mindful that "[c]ourts are not free to amend [the Federal Rules of Civil Procedure] outside the process Congress ordered." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). "The text" of Rule 23 thus "limits judicial inventiveness." *Id.*

The heightened ascertainability test, as articulated by the Third Circuit and endorsed by Appellants, treats administrative feasibility as an absolute standard: plaintiffs must provide adequate "assurance that there can be 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Byrd*, 784 F.3d at 164–65 (quoting *Hayes*, 725 F.3d at 355); *cf. Mullins*, 795 F.3d at 663 ("When administrative inconvenience is addressed as a matter of ascertainability, courts tend to look at the problem in a vacuum, considering only the administrative costs and headaches of proceeding as a class action." (citation omitted)).

On its face, this test appears to duplicate Rule 23's requirement that district courts consider "the likely difficulties in managing a class action."[19] Fed.

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[19] Certain arguments that appeared in Appellants' briefs under the heading of ascertainability are properly construed as challenges to superiority. This includes, for example, due process concerns regarding notice to absent class members. *See* Fed. R. Civ. P. 23(c)(2)(B); *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 222 (2d Cir. 2012) ("Absent class members have a due process right to notice and an opportunity to opt out of [certain types of] class litigation," and "Rule 23 protects that right by providing a parallel statutory requirement of notice

R. Civ. P. 23(b)(3)(D). This apparent redundancy is misleading, however, because of a key difference in analytical orientation. Whereas ascertainability is an absolute standard, manageability is a component of the superiority analysis, which is explicitly comparative in nature: courts must ask whether "a class action is *superior to other available methods* for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added). We share the concern voiced by our sister circuits that heightened ascertainability and superiority could push in opposite directions. Though a court may not ignore concerns about the manageability of a putative class action, it may be that challenges of administrative feasibility are most prevalent in cases "in which there may be no realistic alternative to class treatment," *Briseno*, 844 F.3d at 1128 (agreeing with *Mullins*, 795 F.3d at 663–64), underscoring the importance of a comparative inquiry. This concern is particularly acute in light of our admonition that "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001), *overruled on other grounds by In re IPO*, 471 F.3d at 39–40 (internal quotation marks and citation omitted).

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and the opportunity to opt out for classes certified under subdivision (b)(3)." (citations omitted)).

The proposed administrative feasibility test also risks encroaching on territory belonging to the predominance requirement, such as classes that require highly individualized determinations of member eligibility. *See*, *e.g.*, *Mazzei v. The Money Store*, 829 F.3d 260, 272 (2d Cir. 2016) (internal quotation marks omitted), *cert. denied*, — U.S. —, 137 S. Ct. 1332 (2017). Like superiority, predominance is a comparative standard: "Rule 23(b)(3) [] does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof. What the rule does require is that common questions '*predominate* over any questions affecting only individual [class] members.'" *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 133 S. Ct. 1184, 1196 (2013) (quoting Fed. R. Civ. P. 23(b)(3); other quotation marks, citations, and alterations omitted).

We conclude that an implied administrative feasibility requirement would be inconsistent with the careful balance struck in Rule 23, which directs courts to weigh the competing interests inherent in any class certification decision. *Accord Briseno*, 844 F.3d at 1128 ("[A] freestanding administrative feasibility requirement" would "have practical consequences inconsistent with the policies embodied in Rule 23."); *Mullins*, 795 F.3d at 658 ("The policy concerns motivating the heightened ascertainability requirement are better addressed by applying carefully the explicit requirements of Rule 23(a) and especially (b)(3)."); *Byrd*, 784 F.3d at 177 (Rendell, *J.*, concurring) (concluding that the Third Circuit's "heightened ascertainability requirement . . . contravenes the purpose of Rule 23

and . . . disserves the public"); *see also* Shaw, 124 Yale L.J. at 2366 ("Rule 23 already safeguards the interests that the ascertainability requirement supposedly protects and adequately guards against the problems that the requirement supposedly forestalls.").

Our decision in *Brecher* did not create an administrative feasibility requirement, and we decline to adopt one now. The ascertainability requirement, as defined in this Circuit, asks district courts to consider whether a proposed class is defined using objective criteria that establish a membership with definite boundaries. This modest threshold requirement will only preclude certification if a proposed class definition is indeterminate in some fundamental way. If there is no focused target for litigation, the class itself cannot coalesce, rendering the class action an inappropriate mechanism for adjudicating any potential underlying claims. In other words, a class should not be maintained without a clear sense of who is suing about what. Ascertainability does not directly concern itself with the plaintiffs' ability to offer *proof of membership* under a given class definition, an issue that is already accounted for in Rule 23.[20]

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[20] This clarified conception of ascertainability supports, rather than supplants, the plain text of Rule 23. As we noted above in our discussion of *Brecher*, a class must be "sufficiently definite" and "defined by objective criteria" *so that* "it is administratively feasible for the court to determine whether a particular individual is a member" (a superiority concern) and *so that* "identifying [the class's] members would not require a

4. Application

The district court's analysis in the *Certification Order* is not precisely consistent with the ascertainability standard articulated in this opinion. The district court focused primarily on the types of feasibility concerns that we hold are not controlling of the ascertainability analysis, and effectively addressed ascertainability as a component of superiority. 312 F.R.D. at 363–64. Nonetheless, the district court's findings reflect an understanding that objective criteria would permit the identification of class members. We agree.

The Classes include persons who acquired specific securities during a specific time period, as long as those acquisitions occurred in "domestic transactions." *Id.* at 372. These criteria—securities purchases identified by subject matter, timing, and location—are clearly objective. The definition is also sufficiently definite: there exists a definite subset of Petrobras Securities holders who purchased those Securities in "domestic transactions"[21] during the

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mini- hearing on the merits of each case" (a predominance concern). *Brecher*, 806 F.3d at 24 (emphasis added) (citation omitted). So understood, the ascertainability requirement merely gives name to a particularly vexing type of class defect that would cause a proposed class to founder on the shoals of predominance, superiority, or both. Ascertainability provides a guiding principle for the otherwise murky analysis of classes that, though ostensibly defined by objective criteria, nonetheless present fatal challenges of determinability.

[21] As explained in the sections that follow, legal questions as to the "domesticity" of any given transaction—and the resulting

bounded class period. Appellants vigorously challenge the *practicality* of making the domesticity determination for each putative class member, but as we explain above, the ascertainability analysis is limited to narrower question of whether those determinations are objectively *possible*.

Unlike in *Brecher* or the cases cited therein, neither the parties nor the properties that are the subject of this litigation are fundamentally indeterminate. Finding no error in the district court's conclusion on this point, we reject Appellants' contention that the classes defined by the district court fail on ascertainability grounds.

C. Predominance

1. Legal Standard

A district court may only certify a class under Federal Rule of Civil Procedure 23(b)(3) if "questions of law or fact common to class members predominate over any questions affecting only individual members." This "predominance" requirement is satisfied if: (1) resolution of any material "legal or factual questions . . . can be achieved through generalized proof," and (2) "these [common] issues are more substantial than the issues subject only to

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individualized determinations of class member eligibility—go to the core of the predominance analysis, and are not properly analyzed as issues of ascertainability.

individualized proof." *Mazzei*, 829 F.3d at 272 (quoting *Myers*, 624 F.3d at 547).

The distinction between "individual" and "common" questions is thus central to the predominance analysis. As the Supreme Court has explained:

> An individual question is one where "members of a proposed class will need to present evidence that varies from member to member," while a common question is one where "the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized class-wide proof."

Tyson Foods, Inc. v. Bouaphakeo, — U.S. —, 136 S. Ct. 1036, 1045 (2016) (alteration omitted) (quoting 2 William B. Rubenstein, Newberg on Class Actions § 4:50, at 196–97 (5th ed. 2012)).

The predominance inquiry is a core feature of the Rule 23(b)(3) class mechanism, and is not satisfied simply by showing that the class claims are framed by the common harm suffered by potential plaintiffs. *Amchem Prods.*, 521 U.S. at 623–24 (noting that "predominance criterion is far more demanding" than the "commonality" requirement under Rule 23(a)); *see also Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 138 (2d Cir. 2015). Where individualized questions permeate the litigation, those "fatal dissimilarit[ies]" among putative class members "make use of the class-

action device inefficient or unfair." *Amgen*, 133 S. Ct. at 1197 (citation omitted); *see also* 7AA Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1778, at 141 (3d ed. 2005). ("[W]hen individual rather than common issues predominate, the economy and efficiency of class-action treatment are lost and. . . the risk of confusion is magnified." (footnote omitted)).

The predominance inquiry mitigates this risk by "ask[ing] whether the common, aggregation-enabling, issues in the case are *more prevalent or important* than the non-common, aggregation-defeating, individual issues." *Tyson Foods*, 136 S. Ct. at 1045 (emphasis added) (quoting Rubenstein, *supra*, at 195–96); *see also id.* (The "inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." (quoting *Amchem Prods.*, 521 U.S. at 623)). For this reason, the Supreme Court has emphasized district courts' "duty to take a 'close look' at whether common questions predominate over individual ones." *Comcast Corp. v. Behrend*, — U.S. —, 133 S. Ct. 1426, 1432 (2013) (quoting *Amchem Prods.*, 521 U.S. at 615); *see also Tyson Foods*, 136 S. Ct. at 1045 (2016) (The predominance requirement "calls upon courts to give *careful scrutiny* to the relation between common and individual questions in a case." (emphasis added)). This analysis is "more [] qualitative than quantitative," Rubenstein, *supra*, at 197 (footnote omitted), and must account for the nature and significance of the material common and individual issues in the case, *see Roach*, 778 F.3d at 405.

2. Application

A proper assessment of predominance in this action involves two predicate questions about the role of *Morrison* inquiries. First, is the determination of domesticity material to Plaintiffs' class claims? *See Amchem Prods.*, 521 U.S. at 623 (explaining that predominance "trains on the legal or factual questions that qualify each class member's case as a genuine controversy"). If so, is that determination "susceptible to generalized class-wide proof" such that it represents a "common" question rather than an "individual" one? *Tyson Foods*, 136 S. Ct. at 1045 (internal quotation marks and citation omitted). We find that the district court failed to meaningfully address the second question. That omission was an error of law, and we vacate the certification decision on that basis. Only by answering *both* predicate questions can the district court properly assess whether, in the case as a whole, common issues are "more prevalent or important" than individual ones. *Id.* (citation omitted).

With regard to the first question, "*Morrison* makes clear that [determining] whether [federal securities law] applies to certain conduct is a 'merits' question." *Absolute Activist*, 677 F.3d at 67 (quoting *Morrison*, 561 U.S. at 254). In other words, a putative class member only has a viable cause of action if the specific Petrobras Securities sued upon were purchased in a qualifying "domestic transaction." *City of Pontiac*, 752 F.3d at 179; *see also Morrison*, 561 U.S. at 273 (holding that securities fraud claims that lack a domestic

connection must be dismissed for "fail[ure] to state a claim on which relief can be granted").

The district court clearly recognized *Morrison*'s importance because the class definitions import *Morrison*'s unelaborated legal standard, namely that Petrobras Securities must have been purchased in "domestic transactions." *See Certification Order*, 312 F.R.D. at 372. Indeed, it appears that the district court consciously sought to certify encompassing classes that would extend as far as *Morrison* allows. *See id.* at 364 (rejecting a proposed limitation to the class definition because it "would cut off purchasers who have valid claims under *Morrison*'s second prong"). When it came to predominance, however, the district court did not mention *Morrison* at all. The court found that predominance was satisfied, explaining that, "with the exception of reliance[22] and damages, plaintiffs' claims rest almost exclusively on class-wide questions of law and fact centered around" Petrobras's alleged misconduct "and the effects of these actions and events on the market." *Id.* at 364. The court proceeded to discuss reliance and damages

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[22] As discussed in greater detail below, the Exchange Act claims include a reliance element that must be satisfied on an individual basis unless the plaintiffs establish a class- wide presumption of reliance under the "fraud on the market" theory. *See* Discussion Section III.A, *infra*.

in great detail, *id.* at 364–72, but made no mention of *Morrison.*[23]

The *Certification Order* is susceptible to two possible readings: either the district court implicitly held that *Morrison* inquiries constituted a common issue, or the court simply sidestepped the question. Either way, given the nature of the *Morrison* inquiries at issue, the district court cannot be said to have "give[n] careful scrutiny to the relation between [the] common and individual questions" central to this case. *See Tyson Foods*, 136 S. Ct. at 1045.

On the available record, the investigation of domesticity appears to be an "individual question" requiring putative class members to "present evidence that varies from member to member." *Id.* (citation omitted). As discussed above, a plaintiff may demonstrate the domesticity of a particular transaction by producing evidence "including, but not limited to, facts concerning the formation of the contracts, the placement or purchase orders, the passing of title, or the exchange of money." *Absolute Activist*, 677 F.3d at 70; *see also* Discussion Section II.A, *supra*. These transaction-specific facts are not

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[23] The district court did address *Morrison*- related issues when analyzing superiority. *Certification Order*, 312 F.R.D. at 363–64. Notably, the district court expressed its "confiden[ce] that the *Morrison* determination is administratively feasible." *Id.* at 364. We are unable to transplant those findings into the predominance context, however, because of substantive differences among the three inquiries. *See* Discussion Section II.B.3, *supra*.

obviously "susceptible to [] class-wide proof,"[24] nor did Plaintiffs suggest a form of representative proof that would answer the question of domesticity for individual class members. *See Tyson Foods*, 136 S. Ct. at 1045–46 (explaining that class plaintiffs may rely on representative samples to prove class-wide liability where they can show "that each class member could have relied on that sample to establish liability if he or she had brought an individual action").

In cases that have applied *Morrison* and *Absolute Activist*—including the district court's own experience adjudicating Petrobras-specific inquiries— factfinders have considered various types of evidence offered to prove the domesticity of various types of transactions. *See, e.g.*, *Loginovskaya*, 764 F.3d at 274–75 (finding that domestic wire transfers failed to satisfy *Absolute Activist* because they were "actions needed to carry out the transactions, and not the transactions themselves"); *In re Petrobras Sec. Litig.*, 152 F. Supp. 3d 186, 193 (S.D.N.Y. 2016) (explaining that the high-level documentation provided by various plaintiffs was insufficient to plead a domestic transaction); *December 2015 Order*, 150 F. Supp. 3d

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[24] As did the district court, we reject Plaintiff's argument that a securities transaction is "domestic" under *Morrison* and *Absolute Activist* if it settles through the DTC. *See December 2015 Order*, 150 F. Supp. 3d at 342. *See generally* Br. of the Depository Tr. Co. as *Amicus Curiae* Not in Support of Any Party, ECF No. 293 (describing the DTC's history and its procedures for settling securities transactions).

at 340–41 (finding that two proposed class representatives failed to plead domestic transactions in Petrobras Notes).

The district court suggested that the pertinent locational details for each transaction are likely to be found in the "record[s] routinely produced by the modern financial system," and "are highly likely to be documented in a form susceptible to the bureaucratic processes of determining who belongs to a Class." *Certification Order*, 312 F.R.D. at 364. Even if that fact is true, however, it does not obviate the need to consider the plaintiff-specific nature of the *Morrison* inquiry.

The two approved class representatives with Notes-based claims were both located in the United States, placed their Notes purchase orders in the United States, and procured their securities directly from United States underwriters as part of the initial Notes Offerings. *See December 2015 Order*, 150 F. Supp. 3d at 340. Appellants argue that those transactions are the easy case. As the Underwriter Defendants observe, the Classes as currently defined potentially "include[] numerous foreign and domestic entities that purchased securities from other foreign and domestic entities, possibly through foreign and domestic intermediaries, using different methods, under different circumstances, and reflected in different types of records (assuming any records of the purchases exist at all)." Underwriter Defs.' Br. at 3.

Significantly, the Classes include investors who purchased Notes in the initial Offerings, as well

as investors who purchased their Notes on the secondary market. *See Certification Order*, 312 F.R.D. at 372. Aftermarket purchasers asserting claims under Sections 11 and 15 of the Securities Act must not only establish that they acquired their Notes in a domestic secondary transaction, but must also show that the particular Notes they acquired are "traceable to" one of the U.S.-registered Offerings. *See id.* The *Certification Order* offers no indication that the district court considered the ways in which evidence of domesticity might vary in nature or availability across the many permutations of transactions in Petrobras Securities.

The need for *Morrison* inquiries nominally presents a common question because the need to show a "domestic transaction" applies equally to each putative class member. However, Plaintiffs bear the burden of showing that, more often than not, they can provide common *answers*. *Amgen*, 133 S. Ct. at 1196. In this case, the potential for variation across putative class members— who sold them the relevant securities, how those transactions were effectuated, and what forms of documentation might be offered in support of domesticity— appears to generate a set of individualized inquiries that must be considered within the framework of Rule 23(b)(3)'s predominance requirement. *See Tyson Foods*, 136 S. Ct. at 1045–46 (explaining that "[a]n individual question is one where members of a proposed class will need to present evidence that varies from member to member . . . ." (internal quotation marks and citation omitted)).

Consider, for instance, the Supreme Court's recent *Amgen* decision, which similarly involved class claims under Section 10(b) the Exchange Act. 133 S. Ct. 1184. Such claims require a showing that the defendants made a "*material* misrepresentation or omission." *Id.* at 1195. Materiality—like domesticity—is thus an "essential predicate" of an Exchange Act claim. *Id.* The *Amgen* Court held, however, that *proof* of materiality was not required for the purpose of satisfying predominance at the class certification stage. *Id.* Because materiality is determined objectively from the perspective of the "'reasonable investor,' materiality can be proved through evidence *common to the class*." *Id.* (emphasis added) (quoting *TSC Industries*, *Inc. v. Northway*, *Inc.*, 426 U.S. 438, 445 (1976)). "In no event will the individual circumstances of particular class members bear on the [materiality] inquiry." *Id.* at 1191. "Consequently, materiality is a common question for purposes of Rule 23(b)(3)." *Id.* at 1196 (internal quotation marks, alteration, and citation omitted).

In the present action, by contrast, it cannot be said that the class members' *Morrison* inquiries will "prevail or fail in unison." *Id.* The district court has already adjudicated several individualized *Morrison* inquiries, preserving some plaintiffs' claims and dismissing others. *See* Discussion Section II.A.2, *supra*. "[W]ithout *class-wide* evidence" of domesticity, "the fact-finder would have to look at every class member's [transaction] documents to determine who did and who did not have a valid claim." *Mazzei*, 829 F.3d at 272 (citing *Wal-Mart Stores*, *Inc. v. Dukes*, 564 U.S. 338, 350 (2011))

(affirming a finding that predominance was not satisfied because the class claims turned on individualized determinations of privity). The predominance analysis must account for such individual questions, particularly when they go to the viability of each class member's claims.[25]

Finally, we emphasize that district courts are authorized to implement management strategies tailored to the particularities of each case. In addition to modifying class definitions and issuing class-wide rulings, district courts can, for example, bifurcate the proceedings to home in on threshold class-wide inquiries; sever claims not properly adjudicated on a class-wide basis to isolate key common issues; or certify subclasses that separate class members into smaller, more homogenous groups defined by common legal or factual questions.[26] *See* Fed. R. Civ. P. 23(c)(4), (c)(5); *see*

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[25] An instructive example may be found in *Myers v. Hertz Corporation*, a case in which the class claims turned on a "complex, disputed issue" and "a number of subsidiary questions" concerning employee exemptions under the Fair Labor Standards Act. 624 F.3d at 548. We cautioned that "the predominance requirement [will only be] satisfied[] if the plaintiffs can show that some of [those] questions can be answered with respect to the members of the class as a whole through generalized proof and that those common issues are more substantial than individual ones." *Id.* at 549 (internal quotation marks and citations omitted).

[26] For instance, the district court might certify a subclass—or a separate class—of Petrobras ADS holders who purchased their securities on the NYSE, or of Petrobras Noteholders who

also In re Nassau Cty. Strip Search Cases, 461 F.3d 219, 227 (2d Cir. 2006); *In re Visa Check*, 280 F.3d at 141 (summarizing various class action "management tools" and collecting cases). While these options need not necessarily be exercised or even planned for prior to class certification, the possibility of post-certification procedural tailoring does not attenuate the obligation to take a "close look" at predominance when assessing the motion for certification itself.

For the foregoing reasons, we vacate the district court's certification of the Classes insofar as they include all otherwise eligible class members who acquired their Securities in "domestic transactions." We take no position as to whether, on remand, the district court might properly certify one or more classes that capture some or all of the Securities holders who fall within the Classes as currently defined.[27] Our purpose is merely to outline

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acquired their Notes directly through one of the initial Offerings.

[27] Moreover, our analysis is limited to the current record, and should not be taken as expressing an opinion on the wide range of conceivable circumstances in which plaintiffs may assert class claims in connection with foreign- issued securities that do not trade on a domestic exchange. For instance, a district court might find that the transaction records for a particular security among particular parties display certain common indicia of domesticity. Class plaintiffs may propose a mechanism for assembling a representative sample of the manner in which a given security will trade, with an emphasis on the domesticity factors highlighted in *Absolute Activist*. A district court could also carefully weigh the relationship between common and individual questions in the case and

the contours of the robust predominance inquiry that Rule 23 demands. We leave the adjudication thereof to the district court in the first instance.

III. "Fraud on the Market" and the Presumption of Reliance

The second issue on appeal concerns the district court's finding that the Exchange Act Class was entitled to a presumption of class-wide reliance on the market price of Petrobras's ADS and Notes. In reaching that conclusion, the district court found that Plaintiffs satisfied their burden of showing that the Petrobras Securities traded in efficient markets, as required under the "fraud on the market" theory established in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). The Petrobras Defendants challenge that finding, arguing that the district court erred in the relative weight it assigned to the parties' competing evidence. We find no error of law in the district court's blended consideration of direct and indirect evidence of market efficiency, nor do we find any clear error in the district court's factual analysis. We therefore affirm as to this issue.

A. The "Fraud on the Market" Theory

1. Legal Standard

Plaintiffs alleging claims under Section 10(b) of the Exchange Act must prove "(1) a material

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determine that any variation across plaintiffs is, on balance, insufficient to defeat predominance.

misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Halliburton Co. v. Erica P. John Fund, Inc.* (*"Halliburton II"*[28]), — U.S. —, 134 S. Ct. 2398, 2407 (2014) (citation omitted). The key element for the purpose of this appeal is reliance, the element that establishes a sufficient "connection between a defendant's misrepresentation and a plaintiff's injury." *Id.* (citation omitted).

On its face, the reliance element would appear to preclude class certification on predominance grounds: "[e]ach plaintiff would have to prove reliance individually," with the result that "common issues would not 'predominate' over individual ones." *Id.* at 2416 (citation omitted). The Supreme Court resolved that tension almost three decades ago in *Basic Inc. v. Levinson*, reasoning that "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price," and so "an investor's reliance on any public material misrepresentations [] may be *presumed* for purposes of a Rule 10b–5 action." 485 U.S. at 247 (emphasis added).

In 2014, the Court affirmed the continued vitality of the "fraud on the market" theory, and clarified that the so-called "*Basic* presumption

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[28] The case commonly referred to as *"Halliburton I"* is *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011).

actually incorporates two constituent presumptions:"

> First, if a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price.
>
> Second, if the plaintiff also shows that he purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased the stock in reliance on the defendant's misrepresentation.

Halliburton II, 134 S. Ct. at 2414. If a putative class successfully establishes the *Basic* presumption, "defendants must be afforded an opportunity . . . to defeat the presumption through evidence that [the] alleged misrepresentation [at issue in the plaintiffs' legal claim] did not actually affect the market price of the stock." *Id.* at 2417.

2. Market Efficiency and the *Cammer* Factors

"The fraud-on-the-market theory rests on the premise that certain well developed markets are efficient processors of public information," meaning that "the 'market price of shares' will 'reflect all publicly available information.'" *Amgen*, 133 S. Ct. at 1192 (quoting *Basic*, 485 U.S. at 246 (alteration omitted)).

This Court "has not adopted a test for the market efficiency of stocks or bonds." *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 204 n.11 (2d Cir. 2008). A test based on the so-called "*Cammer* factors" has been "routinely applied by district courts considering the efficiency of equity markets," and has also been applied, in modified form, "to bond markets with a recognition of the differences between the manner in which debt bonds and equity securities trade." *Id.*; *see also Cammer v. Bloom*, 711 F. Supp. 1264, 1286–87 (D.N.J. 1989) (articulating five factors); *Krogman v. Sterritt*, 202 F.R.D. 467, 478 (N.D. Tex. 2001) (describing three additional factors that are commonly included in *Cammer* analyses); *In re Enron Corp. Sec.*, 529 F. Supp. 2d 644, 747–49 (S.D. Tex. 2006) (applying the *Cammer* factors in modified form to debt securities).

All but one of the *Cammer* factors examine indirect indicia of market efficiency for a particular security, such as high trading volume, extensive analyst coverage, multiple market makers, large market capitalization, and an issuer's eligibility for simplified SEC filings. The fifth *Cammer* factor, however, invites plaintiffs to submit direct evidence, consisting of "empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price." *Cammer*, 711 F. Supp. at 1287; *see also Halliburton II*, 134 S. Ct. at 2415 ("[P]laintiffs [] can and do introduce evidence of the existence of price impact in connection with 'event studies'— regression analyses that seek to show that the market price of the defendant's stock tends to

respond to pertinent publicly reported events." (citation and emphasis omitted)).

B. Application

At the outset, the Petrobras Defendants assert an error of law: they challenge the district court's purported holding that Plaintiffs were entitled to the *Basic* presumption based solely on their *indirect* evidence of market efficiency. This argument mischaracterizes the district court's analysis. True, the court noted that "Petrobras was one of the largest and most-analyzed firms in the world throughout the Class Period," and explained that in instances where "the indirect [*Cammer*] factors overwhelmingly describe a large and well-functioning market for Petrobras securities, common sense suggests that the market would materially react to material disclosures." *Certification Order*, 312 F.R.D. at 367. The opinion did not stop there, however. The court proceeded with an "involved analysis" of Plaintiffs' empirical evidence—which Defendants disputed as to "almost every aspect"—and "ultimately conclude[d] that plaintiffs [had] satisfied the fifth *Cammer* factor." *Id.*; *see also id.* at 367–71. Anything to the contrary was, at most, a holding in the alternative. We therefore decline to reach the Petrobras Defendants' legal question—whether plaintiffs may satisfy the *Basic* presumption without *any* direct evidence of price impact—because the issue is not squarely presented for our review.

Having confirmed the *existence* of Plaintiffs' direct evidence of market efficiency, we turn to the

Petrobras Defendants' attack on the *quality* of that evidence. They argue, first, that the district court gave undue weight to Plaintiffs' empirical test, which measured the magnitude of responsive price changes in Petrobras Securities without considering the direction of those changes, and second, that the district court unduly discounted Defendants' rebuttal evidence. We find these arguments unpersuasive.

In the class certification proceedings, the parties' "experts [] sparred over whether any direct evidence of [*Cammer*'s] fifth factor existed." *Id.* at 367. Plaintiffs' expert ran multiple event studies and reported that "there were more likely to be big price movements on days when important Petrobras events occurred, demonstrating [that] the markets in Petrobras securities were responsive to new information." *Id.* at 367–68. Defendants responded with numerous challenges to "the execution and the sufficiency" of that test. *Id.* at 368. They specifically criticized the test's failure to examine directionality, that is, "whether the price of a security moved up or down as expected based on the precipitating market event." *Id.* at 369; *see also id.* at 370 (describing the defense expert's position that "in an efficient market, the price of a security should *always* move in response to the release of new value-relevant information that is materially different from expectations"). Plaintiffs' expert conducted supplementary analyses of directional price impact, but the district court accorded them "only limited weight" after Defendants highlighted certain methodological flaws. *Id.* at 369–70. As to the non-

directional analysis, the court declined to "let the perfect become the enemy of the good":

> In this case, where the indirect *Cammer* factors lay a strong foundation for a finding of efficiency, a statistically significant showing that statistically significant price returns are more likely to occur on event dates is sufficient as direct evidence of market efficiency and thereby to invoke *Basic*'s presumption of reliance at the class certification stage.

Id. at 371.

We find that the district court's conclusion "falls within the range of permissible decisions." *Roach*, 778 F.3d at 405 (citation omitted). The district court properly declined to view direct and indirect evidence as distinct requirements, opting instead for a holistic analysis based on the totality of the evidence presented. *See*, *e.g.*, *In re JPMorgan Chase & Co. Sec. Litig.*, No. 12 CIV. 03852 (GBD), 2015 WL 10433433, at *7 (S.D.N.Y. Sept. 29, 2015) ("Defendants' criticisms of Plaintiffs' event study distract[] from the central question: Does the weight of the evidence tip in favor of the finding that the market for JPMorgan's common stock was efficient during the Class Period?").

The Petrobras Defendants' contentions on appeal amount to an intensified reformulation of the claim we bypassed above: not only should putative class plaintiffs be required to offer direct evidence of

market efficiency, they argue, but the evidence must specifically consist of empirical data showing that the price of the relevant securities predictably moved up in response to good news and down in response to bad news. The gravamen of their claim is that plaintiffs would only be entitled to the *Basic* presumption after making a substantial showing of market efficiency based on directional empirical evidence alone, irrespective of any other evidence they may have offered.[29]

We reject this proposition. In short, the Petrobras Defendants are attempting to relabel a *sufficient* condition as a *necessary* one. We noted in *Bombardier* that "[a]n event study that correlates the disclosures of unanticipated, material information about a security with corresponding fluctuations in price has been considered *prima facie* evidence of the existence of such a causal relationship." *Bombardier*, 546 F.3d at 207–08 (citing *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 512–14, 516 (1st Cir. 2005)). We never suggested, however, that such evidence was the *only* way to prove market efficiency; indeed, we explicitly

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[29] The Petrobras Defendants' arguments focus on the class certification stage, but a class, once certified, bears the burden of establishing the *Basic* presumption at trial. *See Halliburton II*, 134 S. Ct. at 2414. It would be a strange standard indeed that imposed a stricter burden for class certification than on the final merits adjudication. Presumably, then, the Petrobras Defendants would require that direct evidence take precedence over indirect evidence both at the certification stage and with the ultimate finder of fact.

declined to adopt any particular "test for the market efficiency of stocks or bonds." *Id.* at 204 n.11.

The Supreme Court has similarly declined to define a precise evidentiary standard for market efficiency, but the Court's opinions consistently suggest that the burden is not an onerous one. *See Halliburton II*, 134 S. Ct. at 2410 ("Even the foremost critics of the efficient-capital-markets hypothesis acknowledge that public information generally affects stock prices," and so "[d]ebates about the precise *degree* to which stock prices accurately reflect public information are [] largely beside the point."); *id.* at 2417 (Ginsburg, *J.*, concurring) (interpreting the holding in *Halliburton II* as "impos[ing] no heavy toll on securities-fraud plaintiffs with tenable claims"); *Amgen*, 133 S. Ct. at 1192 ("[I]t is reasonable to presume that most investors . . . will rely on [a] security's market price as an unbiased assessment of the security's value in light of all public information."); *Basic*, 485 U.S. at 246 n.24 ("For purposes of accepting the presumption of reliance . . . , we need only believe that market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices."); *see also id.* at 246 ("The presumption is supported by common sense and probability.").

The Petrobras Defendants' proposed evidentiary hierarchy unreasonably discounts the potential probative value of indirect evidence of market efficiency. As noted above, all but one of the widely used *Cammer* factors focus on elements that would logically appear in, or contribute to, an

efficient securities market. Those factors would add little to the *Basic* analysis if courts only ever considered them after finding a strong showing based on direct evidence alone.

Indeed, indirect evidence is particularly valuable in situations where direct evidence does *not* entirely resolve the question. Event studies offer the seductive promise of hard numbers and dispassionate truth, but methodological constraints limit their utility in the context of single-firm analyses. *See generally* Alon Brav & J. B. Heaton, *Event Studies in Securities Litigation: Low Power, Confounding Effects, and Bias*, 93 Wash. U. L. Rev. 583 (2015); *see also id.* at 588 n.11 (collecting academic criticism of single-firm event studies). Notably, small sample sizes may limit statistical power, meaning that only very large-impact events will be detectable.[30] *See id.* at 589–605. In addition, it can be extremely difficult to isolate the price impact of any one piece of information in the

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[30] Brav and Heaton caution courts against misinterpreting studies that fail to find statistically significant price changes: "[W]hile a statistically significant reaction to a firm- specific news event is evidence that information was reflected in the price (absent confounding effects), the converse is *not true*—the failure of the price to react so extremely as to be [detectable] does *not* establish that the market is inefficient; it may mean only that the" effect size was not large enough to be detected in the available sample. Brav & Heaton, 93 Wash. U. L. Rev. at 602 (emphasis added). "While some courts have been sensitive to this distinction . . . , other courts have remained inattentive to this fact, which has generated inaccurate findings in some securities cases." *Id.* (footnote omitted).

presence of confounding factors, such as other simultaneously released news about the company, the industry, or the geographic region. *See id.* at 605–08. These methodological challenges counsel against imposing a blanket rule requiring district courts to, at the class certification stage, rely on directional event studies and directional event studies alone.

In sum, the district court properly considered a combination of direct and indirect evidence in reaching its conclusion that Petrobras ADS and Notes both trade in efficient markets. The court conducted a rigorous analysis of the parties' proffered evidence and objections. We find no abuse of discretion, and therefore affirm the district court's finding that Plaintiffs were entitled to a presumption of reliance on the market price of the Petrobras Securities. We caution that this determination is limited to the district court's class certification order, and is not binding on the ultimate finder of fact.

CONCLUSION

For the foregoing reasons, the district court's *Certification Order* is AFFIRMED IN PART and VACATED IN PART, and the case is REMANDED to the district court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PETROBRAS SECURITIES LITIGATION	14-cv-9662 (JSR) OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

Lead Plaintiff Universities Superannuation Scheme Ltd. ("USS") brings this putative class action against Brazilian oil company Petróleo Brasileiro S.A. - Petrobras ("Petrobras"); two of Petrobras' wholly-owned subsidiaries, Petrobras Global Finance, B.V. ("PGF") [1] and Petrobras America, Inc. ("PAI"); various former officers and directors of Petrobras and its subsidiaries (the "Individual Defendants"); [2] Petrobras' independent

[1] On February 12, 2014, PGF acquired the outstanding shares of another wholly-owned subsidiary of Petrobras, Petrobras International Finance Company S.A. ("PifCo").

[2] Specifically, the Individual Defendants include former Petrobras Chief Executive Officer ("CEO") Maria das Gracas Silva Foster, another former Petrobras CEO Jose Sergio Gabrielli, and various other current or former executives of Petrobras or associated companies, namely, Petrobras Chief Financial Officer ("CFO") Almir Guilherme Barbassa, Petrobras director Paulo Roberto Costa, Petrobras director Jose Carlos Cosenza, Petrobras director Renato de Souza Duque, Petrobras director Guillherme de Oliveira Estrella, Petrobras director Jose Miranda Formigli Filho, Petrobras director Silvio Sinedino Pinheiro, PifCo Chairman and CEO

auditor, PricewaterhouseCoopers Auditores Independentes ("PwC"); and the various underwriters of Petrobras's debt offerings (the "Underwriter Defendants").[3] Plaintiffs allege that Petrobras was at the center of a multi-year, multi-billion dollar bribery and kickback scheme, in connection with which defendants made false and misleading statements in violation of the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act").

The general details of this case are set forth in the Court's Opinion dated July 30, 2015, familiarity with which is here presumed. See Opinion dated July 30, 2015, at 2-14, ECF No. 194. Plaintiffs now move to certify two classes, one for their Securities Act claims and one for their

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Daniel Lima de Oliveira, PifCo director Jose Raimundo Brandao Pereira, PifCo CFO Sérvio Túlio da Rosa Tinoco, PifCo Chief Accounting Officer Paulo Jose Alves, PGF CEO and "Managing Director A" Gustavo Tardin Barbosa, PGF CFO and "Managing Director B" Alexandre Quintão Fernandes, PGF "Managing Director A" Marcos Antonio Zacarias, PGF "Managing Director B" Cornelis Franciscus Jozef Looman, and authorized Petrobras United States Representative Theodore Marshall Helms.

[3] Specifically, the Underwriter Defendants are: BB Securities Ltd., Citigroup Global Markets Inc., J.P. Morgan Securities LLC, Itau BBA USA Securities, Inc., Morgan Stanley & Co. LLC, HSBC Securities (USA) Inc., Mitsubishi UFJ Securities (USA), Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Standard Chartered Bank, Bank of China (Hong Kong) Limited, Banco Bradesco BBI S.A., Banca IMI S.p.A., and Scotia Capital (USA) Inc.

Exchange Act claims. Plaintiffs propose the following Class for their Securities Act claims (the "Securities Act Class"):

> As to claims under Sections 11, 12(a)(2), and 15 of the Securities Act of 1933, all purchasers who purchased or otherwise acquired debt securities issued by Petrobras, Petrobras International Finance Company S.A. ("PifCo"), and/or Petrobras Global Finance B.V. ("PGF") directly in, pursuant and/or traceable to a May 1U, 2013 public offering registered in the united States and/or a March 11, 2014 public offering registered in the United States. Excluded from the Class are Defendants, current or former officers and directors of Petrobras, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which Defendants have or had a controlling interest.

Plaintiffs' Memorandum of Law in Support of Motion for Class Certification at 1, ECF No. 256. Plaintiffs propose the following Class for their Exchange Act claims (the "Exchange Act Class"):

> As to claims under Sections 10(b) and 20(a) of the Exchange Act of 1934, all purchasers who, between January 22, 2010 and July 28, 2015, inclusive (the "Class Period") purchased or otherwise

> acquired the securities of Petroleo Brasileiro S.A. ("Petrobras"), including debt securities issued by Petrobras International Finance Company S.A. ("PifCo") and/or Petrobras Global Finance B.V. ("PGF") on the New York Stock Exchange (the "NYSE") or pursuant to other domestic transactions, and were damaged thereby. Excluded from the Class are Defendants, current or former officers and directors of Petrobras, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which Defendants have or had a controlling interest.

Id. Plaintiffs move to appoint four plaintiffs -- namely USS, North Carolina Department of State Treasurer ("North Carolina"), Employees' Retirement System of the State of Hawaii ("Hawaii"),and Union Asset Management Holding AG ("Union") -- as class representatives for the Securities Act Class, and one plaintiff, USS, as class representative for the Exchange Act Class. Plaintiffs also move to appoint Pomerantz LLP ("Pomerantz") as Class Counsel for both Classes.

Defendants oppose plaintiffs' class certification motion, arguing that plaintiffs have failed to satisfy the requirements of Rules 23(a) and 23(b)(3). The Court received briefing from the parties and held an evidentiary hearing on December 21, 2015. At the hearing, the Court heard

the testimony of competing expert witnesses: Dr. Steven Feinstein ("Feinstein") for plaintiffs and Dr. Paul Gompers ("Gompers") for defendants. See Transcript dated Dec. 21, 2015, ECF No. 414. Each of these experts also submitted two written reports apiece, all four of which the Court received in evidence. See Declaration of Emma Gilmore dated Oct. 23, 2015, Ex. A ("Feinstein Report"), ECF No. 264-1; Declaration of Emma Gilmore dated Nov. 23, 2015, Ex. H ("Feinstein Rebuttal Report"), ECF No. 338-8; Declaration of Jared Gerber dated Nov. 6, 2015, Ex. 27 ("Gompers Report"), ECF No. 294-5; Declaration of Jared Gerber dated Dec. 8, 2015, Ex. A ("Gompers Rebuttal Report"), ECF No. 355.

Having now fully reviewed the parties' submissions and evidence, the Court grants plaintiffs' motion for class certification, certifies a Securities Act Class and an Exchange Act Class, appoints North Carolina and Hawaii as class representatives for the Securities Act Class and USS as class representative for the Exchange Act Class, and appoints Pomerantz as Class Counsel for both Classes.

To prevail on their motion for class certification, plaintiffs must first satisfy the four requirements of Rule 23(a), commonly referred to as numerosity, commonality, typicality, and adequacy. See Fed. R. Civ. P. 23(a). The Court considers each in turn.

Rule 23(a)(1) provides that class may be certified only if "the class is so numerous that joinder of all members is impracticable." In the Second

Circuit, numerosity is usually presumed for classes larger than forty members. See Pennsylvania Public School Employee's Retirement System v. Morgan Stanley & Co., Inc., 772 F.3d 111, 120 (2d Cir. 2014). However, "the numerosity inquiry is not strictly mathematical but must take into account the context of the particular case." Id. Relevant factors include "(i) judicial economy, (ii) geographic dispersion, (iii) the financial resources of class members, (iv) their ability to sue separately, and (v) requests for injunctive relief that would involve future class members." Id.

Defendants do not dispute the statements in Feinstein's report that, on average during the Class Period, there were 756.1 million Petrobras common ADS outstanding and 741.8 million Petrobras preferred ADS outstanding and that the total face value of Petrobras bonds was $41.1 billion. Feinstein Report ¶¶ 33, 93, 193. On the basis of these figures, plaintiffs estimate that there are thousands of class members, dispersed across the globe. Defendants do not object to this assessment per se, but argue instead that the volume of "opt-out" individual actions filed against Petrobras demonstrates that the class includes sophisticated members with the resources to sue separately. See, e.g., New York City Employees Retirement System et al v. Petroleo Brasileirio S.A. -Petrobras et al, No. 15-cv-2192. Defendants also point to the fact that the Court has scheduled a joint trial of the instant action and the individual actions as evidence that a class action is not necessary in this instance. See Order dated Nov. 18, 2015, ECF No. 311 (setting common trial date for all cases related to the present action).

Defendants are correct that a significant volume of sophisticated plaintiffs have opted out of the present action, but they miss the point of these opt-outs. The Second Circuit has made clear that "the numerosity inquiry . . . must take into account the context of the particular case." Pennsylvania Public School Employee's Retirement System v. Morgan Stanley & Co., Inc., 772 F.3d 111, 120 (2d Cir. 2014). The context of this particular case is that Petrobras was among the world's largest companies during the Class Period. Defendants do not dispute that the billions of Petrobras securities traded vigorously around the world throughout the Class Period. In light of this, the volume of sophisticated opt-outs does not indicate that a class action is inappropriate or that the Classes are insufficiently numerous. Instead, the volume of opt-outs underscores just how vast the Classes are. Hundreds of opt-outs is a large number, but a conservative estimate would place the size of the proposed Classes in the thousands. Judicial economy will be served by a joint trial because of the similarities between the individual actions and the present action, but, contrary to defendants' suggestion, this would not extend to a joint trial for thousands upon thousands of individual actions. Accordingly, the Court concludes that the Classes satisfy the numerosity requirement of Rule 23(a)(1).

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." In the context of a securities class action, "[c]ommon questions of law and fact include whether certain statements were false and misleading, whether those statements violated the federal securities

laws, whether those statements were knowingly and recklessly issued, and ensuing causation issues." Pennsylvania Ave. Funds v. Inyx Inc., 2011 WL 2732544 at *4 (S.D.N.Y. July 5, 2011). Common questions of law and fact in this case include the truth of the bribery and kickback allegations against Petrobras, the accuracy of Petrobras's statements in connection with the allegations, the knowledge of individual defendants regarding these matters, and related causation issues. Defendants do not seriously challenge that common questions of law and fact exist here. Accordingly, the Court concludes that the commonality requirement is satisfied.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Defendants do not materially attack the typicality of North Carolina's or Hawaii's Securities Act claims, but they argue that, because the Court dismissed Union's and USS's Notes claims, Rule 23(a)(3) bars them from serving as class representatives for the Securities Act Class. Plaintiffs respond that Union's and USS's Exchange Act claims arise from the "same set of concerns" as the Securities Act claims, and so Union's and USS's claims are still typical of the Securities Act Class. NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co., 693 F.3d 145, 149 (2d Cir. 2012). However, the "same set of concerns" standard pertains to class standing, a distinct inquiry from typicality under Rule 23(a)(3). Id. at 158 n.9.

While the underlying thrust of plaintiffs' argument might still have some relevance to a Rule

23(a)(3) analysis in general -- because "a class representative can establish the requisite typicality under Rule 23 if the defendants 'committed the same wrongful acts in the same manner against all members of the class.'" Hevesi v. Citigroup, Inc., 366 F.3d 70, 82 (2d Cir. 2004) (citation omitted) -- here, Union and USS fail to clear even this relatively modest hurdle with respect to the Securities Act Class because they no longer have Securities Act claims. Indeed, although plaintiffs' proposed definition of the Securities Act Class does not explicitly require that class members have purchased Notes in domestic transactions, such a requirement must be part of any certified class definition. See Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010). Because neither Union nor USS adequately pleaded that they purchased Notes in domestic transactions, see Opinion and Order dated Dec. 21, 2015, at 12, ECF No. 374, they cannot be members of the Securities Act Class. And, while typicality does not require identity amongst class members' claims, it does demand that a class representative be a member of the Class. Accordingly, USS and Union cannot serve as class representatives for the Securities Act Class.

Turning to the Exchange Act Class, defendants argue that typicality also bars USS from serving as a class representative for the Exchange Act Class because USS's Notes claims were dismissed. But there is no dispute that USS is a member of the Exchange Act Class, although its claims are based only on its purchases of Petrobras equities. Defendants object that there are significant differences, including differences in price

movements, between Petrobras's debt and equity securities. But such variations are not relevant when the same alleged misconduct drives the claims based on debt and equity alike. The defendants allegedly "'committed the same wrongful acts in the same manner against all members of the class'" by participating in a bribery and kickback scheme and making false and misleading statements that impacted all members of the Exchange Act Class. Hevesi v. Citigroup, Inc., 366 F.3d 70, 82 (2d Cir. 2004) (citation omitted), see In re Enron Sec. Litig., 206 F.R.D. 427, 445-46 (S.D. Tex. 2002) ("[C]ourts have repeatedly concluded that stock purchasers can represent purchasers of debt instruments and vice versa in the same action.") (collecting cases). Accordingly, the Court concludes that the typicality requirement does not bar USS from serving as class representative for the Exchange Act Class solely because of its lack of Notes claims.

Defendants also argue that USS fails the typicality requirement because it faces unique defenses in four respects. First, defendants argue that USS is atypical because USS made some additional purchases of Petrobras securities in June 2015, after Petrobras had made corrective disclosures and plaintiffs had filed the Consolidated Amended Complaint in this case. But aside from the irrelevance of post-disclosure purchases to earlier reliance, see In re Monster Worldwide, Inc. Sec. Litig., 251 F.R.D. 132, 135 (S.D.N.Y. 2008), the Class Period for the Exchange Act Class runs through July 28, 2015, based on plaintiffs' allegations that Petrobras's earlier corrective disclosures were a "whitewash." See Opinion and Order dated Dec. 21,

2015, at 12-14, ECF No. 374.[4] Accordingly, USS's purchases of securities in June 2015 do not mean it will face atypical defenses.

Second, defendants argue that USS is atypical in that it alternated between purchases and sales throughout the class period. But such "in-and-out" trading is not atypical in a class that contains, by defendants' own admission, numerous sophisticated institutional investors. See Defendants' Joint Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification ("Def. Opp.") at 3, ECF No. 295. Moreover, plaintiffs claim that USS lost approximately $80 million, its in-and-out trading notwithstanding. See Class Plaintiffs' Reply Memorandum of Law in Further Support of Motion for Class Certification at 3, ECF No. 337.

Third, defendants claim that USS's trading decisions were based on atypical considerations. In particular, defendants claim that USS had special contact with Petrobras during the Class Period that affected its decisions, and also that USS followed a special investment strategy that "look[s] at extra financial factors" that "the market does not accurately reflect." Declaration of Jared Gerber

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[4] In their opposition to plaintiffs' motion for class certification, defendants reiterate their earlier request to shorten the periods for the claims in this case. The Court again denies this request for the reasons stated in its decision on defendants' motion to dismiss the Fourth Amended Complaint. See Opinion and Order dated Dec. 21, 2015, at 12-14, ECF No. 374.

dated Nov. 6, 2015, Ex. 4, ECF No. 294. Such general statements do not seriously call the typicality of USS's claims into question: it is common practice for money managers to claim they have some special strategy that will deliver insights -- and returns -- superior to the wider market. Likewise, the interactions with Petrobras that defendants point to -- communications with the company's investment relations team and operating personnel and a brief meeting with the Petrobras CEO. See Declaration of Emma Gilmore dated Nov. 23, 2015, Ex. A (Deposition of Christopher Shale) at 84:3-23, 108:10-14, ECF No. 338-1 -- are typical of the relationships between large institutional investors and companies like Petrobras. In a class so heavily populated by institutional investors, these sorts of interactions do not mean that USS is subject to atypical defenses.

Fourth, defendants claim that USS will face unique reliance defenses based on its May 25, 2015, vote against approving Petrobras's management reports and financial statements for 2014. These documents were part of Petrobras's alleged "whitewash" of the bribery and kickback scandal, which valued the total overcharges from the bribery scheme at $2.5 billion. See Fourth Amended Complaint ¶¶ 169, 176 ECF No. 342; Def. Opp. at 7. USS objected to the documents because it had "concerns regarding the reliability of the reported numbers." Declaration of Jared Gerber dated Nov. 6, 2015, Ex. 3, ECF No. 294. Such statements by plaintiffs may form part of a reliance defense, but any such defense will be typical of the Exchange Act Class because the Consolidated Amended Complaint in this case was filed on March 27, 2015, and alleged

that the bribery scheme cost an estimated $28 billion. Consolidated Amended Complaint ¶ 5, ECF No. 109. Indeed, defendants have already argued that plaintiffs cannot prove reliance on Petrobras's May 25, 2015, statements because of the filings in this case. See Defendants' Memorandum of Law in Support of their Motion to Dismiss the Third Consolidated Amended Complaint at 10-14, ECF No. 226. The Court takes no position on the merits of this issue at this stage, but it does conclude that disputes over class members' reliance on the alleged "whitewash" are typical of the Exchange Act class a whole. Accordingly, USS's claims and defenses against them are typical, and plaintiffs have satisfied the requirements of Rule 23(a)(3).

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "Adequacy 'entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation.'" In re Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 35 (2d Cir. 2009). Defendants argue that USS's interests are antagonistic to members of the Exchange Act Class whose claims are based on purchases of Notes or preferred ADS because USS no longer has Notes claims and sold its preferred ADS in October 2013. See Declaration of Jared Gerber dated Nov. 6, 2015, Ex. 16 at 1-2, ECF No. 294-2. However, even assuming that the date USS sold its preferred ADS would significantly alter its interests with respect to those securities, defendants have not sufficiently explained why the interests of

holders of common ADS like USS would be antagonistic to the interests of holder of Notes or preferred ADSs. The only theory of antagonism of which the Court is aware was presented during consideration of appointment of Lead Plaintiff and concerned the differing priority of securities in the event of bankruptcy. See Memorandum dated May 18, 2015, at 10 n.3, ECF No. 166. There is no evidence that the bankruptcy scenario is remotely likely or relevant. Because the same alleged misconduct drives plaintiffs' claims, regardless of whether they arise from purchases of Notes, common ADS, or preferred ADS, the interests of all members of the Exchange Act Class are aligned. See In re Enron Sec. Litig., 206 F.R.D. 427, 445-46 (S.D. Tex. 2002) ("[C]ourts have repeatedly concluded that stock purchasers can represent purchasers of debt instruments and vice versa in the same action.") (collecting cases). Moreover, the solution to USS's putative adequacy problem would not be to deny certification of the Exchange Act Class but rather to appoint another class representative alongside USS. For now, this course remains a solution in search of a problem. However, if, as the litigation proceeds, an Exchange Act Class member with claims based on Notes or preferred ADS purchases wishes to appoint a class representative dedicated to their interests, the Court will entertain her motion.

Defendants also argue that North Carolina, Hawaii, and USS are collectively inadequate class representatives because they suffer from a lack of cohesion. In particular, they rely on this Court's decision appointing USS Lead Plaintiff to criticize the appointment of three class representatives who,

defendants claim, are an "artificial grouping" and will not be able to cooperate effectively. See Memorandum dated May 18, 2015, at 4 ECF No. 166. Although the Court recognizes that there are costs associated with the appointment of multiple class representatives, the dangers are not the same as those presented by lawyers bundling unrelated clients together to win a lead plaintiff appointment under 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb) (directing court to adopt presumption that lead plaintiff is person or group of persons with "the largest financial interest in the relief sought by the class"). There is now a valid reason to appoint multiple class representatives because Lead Plaintiff USS is no longer a member of one of the Classes to be certified. Moreover, the proposed class representatives have already demonstrated that they can work together effectively: they managed the addition of three named plaintiffs, Hawaii, North Carolina, and Union, and produced a Joint Prosecution Agreement. See Order dated March 30, 2015, ECF No. 112. In light of this, the number of class representatives is not a barrier to their collective adequacy.

Defendants make other attacks on the competence and qualifications of the proposed class representatives and their counsel, but none has merit. First, defendants argue that USS has never led a U.S. securities class action before. However, experience is not a prerequisite to adequacy under Rule 23(a)(4).

Second, defendants claim that the volume of opt-outs should be seen as a vote of no confidence in

USS's leadership of the class. Defendants do not provide any support for this Interpretation of class members exercising their opt-out rights. Indeed, it is not uncommon for large institutions to opt out of class actions simply so that they can improve their bargaining position if, as usually occurs, settlement discussions begin. If anything, as explained above, the Court views the volume of opt-out plaintiffs as indirect evidence that a class action is appropriate in this case and that a sophisticated institutional investor like USS is needed as a class representative for the thousands of remaining class members.

Third, defendants claim that the proposed class representatives have exhibited "stark discovery failures." Def. Opp. at 9. But this Court almost never refers discovery disputes to Magistrate Judges, precisely so that the Court can remain apprised of any discovery defalcations, and to this end, the Court provides a mechanism for swift joint telephone conferences to resolve any such problems. If defendants felt that plaintiffs and their counsel were behaving so badly, they should have notified the Court sooner than their opposition to plaintiffs' motion for class certification. The argument thus smacks more of strategy than substance.

In any event, on the basis not only of USS's counsel's prior experience but also the Court's observation of its advocacy over the many months since it was appointed lead counsel, the Court concludes that Pomerantz, the proposed class counsel, is "qualified, experienced and able to conduct the litigation." In re Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 35 (2d Cir. 2009). There

is no real dispute that Pomerantz is an established firm with considerable class action experience, and the Court has now had multiple opportunities to observe Pomerantz's performance. The Court finds that the Pomerantz firm has both the skill and resources to represent the Classes adequately.

On the basis of the foregoing discussion, the Court concludes that the requirements of Rule 23(a)(4) are satisfied. With that, the Court concludes that plaintiffs have satisfied all four prongs of Rule 23(a).

In addition, of course, for plaintiffs to prevail on their motion for class certification, the action must meet one of the three alternative conditions of Rule 23(b). Plaintiffs argue that the requirements of Rule 23(b)(3) are satisfied. Rule 23(b)(3) requires that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" and that "the questions of law or fact common to class members predominate over any questions affecting only individual members."

The foregoing analysis under Rule 23(a) supports a finding that a class action is superior to other methods of adjudication. Petrobras was a massive company with investors around the globe. Notwithstanding Petrobras's size and its numerous and far-flung investors, the interests of the class members are aligned and the same alleged misconduct underlies their claims. Moreover, the thousands of individual class members who have not opted-out have a minimal interest in controlling the course of the litigation; there are significant efficiency gains to be reaped from concentrating the

litigation in a single forum; and the likely difficulties in managing the class action are readily surmountable. See Fed. R. Civ. P. 23(b)(3)(A), (C), (D). Defendants again point to the volume of actions brought by individual plaintiffs as evidence against the superiority of the class action form in this case. See Fed. R. Civ. P. 23(b)(3)(B). But the Court again disagrees: instead, the volume of opt-outs demonstrates the need for a class action in these circumstances. Otherwise, the Court risks the present stream of individual actions growing into an unmanageable flood.

Defendants raise two more specific arguments against the superiority of a class action in this case. First, defendants argue that plaintiffs must demonstrate "a probability that a foreign court will recognize the res judicata effect of a U.S. class action judgment" to satisfy superiority. In re Vivendi Universal, S.A., 242 F.R.D. 76, 95 (S.D.N.Y. 2007). The Court is not aware of any binding precedent that sets out such a requirement. In re Vivendi Universal, S.A., the case on which defendants rely for their position, was decided before Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010), which limited the reach of U.S. securities laws to securities traded on a U.S. exchange or purchased in domestic transactions. Morrison, 561 U.S. at 267. Morrison materially lessens the foreign res judicata concerns animating In re Vivendi Universal, S.A.. Moreover, In re Vivendi Universal, S.A. only concluded that res judicata concerns could be one consideration that could lead to the exclusion of foreign members from a class. In re Vivendi Universal, S.A., 242 F.R.D. 76, 95 (S.D.N.Y. 2007).

While defendants also propose including in the Class definitions lists of countries whose residents would be excluded from the Classes, see Defendants' Joint Supplemental Memorandum of Law in Further Opposition to Plaintiffs' Motion for Class Certification, App. A, ECF No. 389, defendants have not explained in any detail why these particular countries would not recognize a U.S. class action judgment in this case. Accordingly, the Court concludes that foreign res judicata concerns are not a bar to the superiority of a class action and declines to list any specific countries in the Class definitions.

Defendants also argue against superiority on so-called "ascertainability" grounds. The Second Circuit has framed ascertainability as a stand-alone "implied requirement" of Rule 23, and, to the extent defendants' arguments are addressed to ascertainability as distinct from superiority, the Court also considers them here. See Brecher v. Republic of Argentina, 806 F.3d 22, 24 (2d Cir. 2015). "[T]he touchstone of ascertainability is whether the class is 'sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.'" Id. However, "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and 'should be the exception rather than the rule.'" In re Visa Check/MasterMoney Antitrust Litigation, 280 F.3d 124, 140 (2d Cir. 2001).

Defendants point out that any putative class member must be able to show that they purchased Petrobras securities on an American exchange or in

a domestic transaction under Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010). Defendants argue that, because of the nuances of the "domestic transaction" standard, determining who is a class member and damages will be an administratively unfeasible task for this Court, for putative class members who receive notice of the action, and for future courts facing claims from class members who have not properly opted out.[5] To cut this supposed Gordian knot, defendants propose that the Exchange Act Class definition be amended to exclude off-exchange purchasers and that the Securities Act Class definition be rejected outright or amended to exclude aftermarket purchasers and purchasers from non-U.S. underwriters.

Amending the Class definitions in this way would cut off purchasers who have valid claims under Morrison's second prong, which holds that the securities laws apply to securities purchased in "domestic transactions." Morrison, 561 U.S. at 267. This would not be a faithful application of Morrison. Moreover, having recently evaluated whether the four proposed class representatives adequately pleaded that they purchased Petrobras securities in domestic transactions, see Opinion and Order at 5-6, ECF No. 374, the Court is confident that the Morrison determination is "administratively

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[5] Defendants also argue that the Classes are unmanageable because plaintiffs will need to provide notice to investors across four continents. In today's modern world, this is not an unfeasible task, as demonstrated by the fact that Petrobras successfully marketed its securities across four continents.

feasible." Brecher v. Republic of Argentina, 806 F.3d 22, 24 (2d Cir. 2015). Indeed, defendants themselves have elsewhere represented as much to the Court. See Defendants' Supplemental Memorandum of Law in Support of their Motion to Dismiss the Fourth Consolidated Amended Complaint and in Further Support of their Motion to Dismiss the Third Consolidated Amended Complaint at 6, ECF No. 351 ("Each of [Absolute Activist's tests] establishes, as the site of the transaction that is of congressional concern, a single location that—although subject to proof—can be easily determined based on recognized and readily understood standards."). The criteria identified by Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60 (2d Cir. 2012), as relevant to the determination of whether a transaction was domestic, are highly likely to be documented in a form susceptible to the bureaucratic processes of determining who belongs to a Class. For example, documentation of "the placement of purchase orders" is the sort of discrete, objective record routinely produced by the modern financial system that a court, a putative class member, or a claims administrator can use to determine whether a claim satisfies Morrison. Accordingly, the Court concludes that the proposed Classes are ascertainable and administratively manageable and that a class action is the superior method of adjudication under Rule 23(b)(3).

Rule 23(b)(3) also requires that "the questions of law or fact common to class members predominate over any questions affecting only individual members." "Class-wide issues predominate if resolution of some of the legal or factual questions

that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." UFCW Local 1776 v. Eli Lilly and Co., 620 F.3d 121, 131 (2d Cir. 2010). Here, plaintiffs submit, and defendants do not meaningfully contest, that, with the exception of reliance and damages, all elements of plaintiffs' claims are susceptible to generalized proof. The Court agrees: with the exception of reliance and damages, plaintiffs' claims rest almost exclusively on class-wide questions of law and fact centered around the alleged bribery and kickback scheme, Petrobras's alleged misstatements in connection with the scheme, the conduct of Petrobras's officers and employees, and the effects of these actions and events on the market.

It is true that, with respect to the Exchange Act Class, reliance is an element of plaintiffs' claims. But while reliance may be an individual phenomenon, here plaintiffs argue that reliance will be established on a common basis under a "fraud-on-the-market" theory. See Basic, Inc. v. Levinson, 485 U.S. 224, 241-42 (1988). "[T]o invoke the Basic presumption, a plaintiff must prove that . . . (3) the [security] traded in an efficient market." Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2413 (2014). The Second Circuit has not adopted a test for the market efficiency of stocks or bonds. See Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196, 204 n.11 (2d Cir. 2008). However, it has recognized that courts generally apply a set of eight factors, known as the

"Cammer factors." Id.; see Cammer v. Bloom, 711 F. Supp. 1264, 1286 (D.N.J. 1989) (setting out five factors); Krogman v. Sterritt, 202 F.R.D. 467, 478 (N.D. Tex. 2001) (considering three additional "Cammer" factors). To address these factors, plaintiffs submitted two expert reports from their witness Feinstein. Feinstein also testified at an evidentiary hearing on December 21, 2015. Defendants and their expert do not meaningfully dispute Feinstein's conclusions with respect to all but one of the Cammer factors (discussed below). The Court accepts Feinstein's testimony with respect to these other factors and concludes that they weigh in favor of finding that Petrobras equity and debt securities traded in efficient markets.

The Court first considers the application of the Cammer factors to the Petrobras equity markets. The Cammer factors are designed for equity markets and can be applied directly to the markets for Petrobras common and preferred ADS. The first Cammer factor considers the average weekly trading volume during the Class Period. Specifically, "average weekly trading of two percent or more of the outstanding shares would justify a strong presumption that the market for the security is an efficient one; one percent would justify a substantial presumption." Cammer, 711 F. Supp. at 1286 (citing Bromberg & Lowenfels, 4 Securities Fraud and Commodities Fraud, § 8.6 (Aug. 1988)). Feinstein reported that 14.1% of all common ADS and 6.61% of all preferred ADS outstanding traded on average in a given week during the Class Period. Feinstein Report ¶¶ 61, 171. This is well above the

2% threshold for a "strong presumption" of efficiency discussed in Cammer.

The second Cammer factor considers analyst coverage. Feinstein reported that over 50 analysts covered Petrobras's securities, inarguably a significant number. Id. ¶I 66, 173. There was also extensive news coverage of Petrobras during the Class Period. Id. ¶¶ 71, 176.

The third Cammer factor considers whether market makers existed for the securities at issue. Feinstein reported that there were at least 574 market makers for Petrobras common ADS and 147 market makers for Petrobras preferred ADS; these market makers included Goldman Sachs, JP Morgan, Citigroup, and Morgan Stanley. Id. ¶¶ 78, 181.

The fourth Cammer factor considers whether an issuer was eligible to file a Form S-3, a simplified security registration form that can be filed by companies that have met prior reporting requirements. A Form F-3 is the equivalent of a Form S-3 for foreign companies; companies are eligible to file an F-3 or an S-3 form when, among other things, they have filed Exchange Act reports for a certain time and have a float over a certain level. Id. ¶¶ 81.[6] Petrobras satisfied the F-3 requirements for the duration of the Class Period, except for when it delayed release of its financials

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[6] "Float" refers to outstanding shares minus closely-held and restricted shares.

because of the allegations that underlie this case. Id. ¶¶ 90, 187. Petrobras filed an F-3 form during the Class Period on August 29, 2012. Id.

Defendants dispute the fifth Cammer factor, which looks to "empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price." Cammer, 711 F. Supp. at 1287. Because this factor is disputed, the Court considers it separately below.

The sixth Cammer factor[7] considers market capitalization. The average aggregate market value of the Petrobras common ADS during the Class Period was $16.9 billion, greater than 90% of publicly traded U.S. companies. Feinstein Report ¶ 93. The average aggregate market value of Petrobras preferred ADS during the Period was $15.9 billion, an amount that, on its own, would mean Petrobras was larger than 90% of publicly traded U.S. companies. Id. ¶ 190.

The seventh Cammer factor considers the bid-ask spread for the securities at issue. The average bid-ask spread for Petrobras common ADS over the Class Period was 0.09%, and the average bid-ask spread for Petrobras preferred ADRs was 0.08%. Id. ¶¶ 99, 196. By comparison, the average bid-ask

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[7] Really the first "Krogman" factor. As noted above, in Krogman v. Sterritt, 202 F.R.D. 467 (N.D. Tex. 2001), the court supplemented and elaborated on the Cammer factors.

spread for all stocks in the Center for Research in Security Prices ("CRSP") database was 0.59%. Id.

The eighth Cammer factor considers the issuer's float. Feinstein reported that none of the Petrobras common ADS were held by insiders or affiliated corporate entities. Id. ¶ 95. Accordingly, the entire $16.9 billion average aggregate value of Petrobras common ADS was floated during the Class Period, again placing Petrobas in the top decile of U.S. companies. The float for the preferred ADS varied during the Class Period, but averaged $15.9 billion, always exceeding the minimum requirement for F-3 eligibility. Id. ¶ 185.

The Court now considers the application of the Cammer factors to the market for Petrobras debt securities. Although the Cammer factors were not designed for debt securities, plaintiffs argue that they are still useful in evaluating the efficiency of a debt securities market, particularly in conjunction with an analysis of the equities market for the same company. See In re Enron Corp. Sec., 529 F. Supp. 2d 644, 747-48 (S.D. Tex. 2006). To analyze the Petrobras debt markets, Feinstein omitted some Cammer factors, modified others, and considered additional debt-specific factors. The Court agrees that the modified Cammer factors provide a useful rubric to evaluate debt markets.

The first modified Cammer factor considers the par value and float of the debt securities. Feinstein reported that the aggregate par value of Petrobras Notes totaled $41.4 billion and was larger than 90% of all market capitalizations on the NYSE,

Amex, and NASDAQ during the Class Period. Feinstein Report ¶ 246. Feinstein reported that no substantial portion of Petrobras Notes was held by insiders, so that the float was equivalent to the aggregate par value. Id. ¶ 248.

The second modified Cammer factor considers analyst and credit rating agency coverage of the debt securities. As noted above, Feinstein reported that over 50 analysts cover Petrobras's securities, inarguably a significant number. Id. ¶¶ 66, 173. There was also extensive news coverage of Petrobras. Id. ¶¶ 71, 176. During the Class Period, Petrobras was covered by the major credit rating agencies, Fitch, Moody's, and Standard & Poor's. Id. ¶¶ 231-35.

The third modified Cammer factor considers the market makers and underwriters for the debt securities. Feinstein reported that there were at least 20 underwriters of the Petrobras Bonds, including large and prominent investment banks. Id. ¶ 241. Feinstein also opined that underwriters generally serve as market makers for securities and that many investment banks that published analyst reports covering the bonds also served as market makers. Id. ¶ 242-43.

The fourth modified Cammer factor considers institutional ownership of the debt securities. Feinstein reported that 214 different mutual funds held one or more Petrobras bonds during the Class Period. Id. ¶¶ 236-38. Feinstein opined that wide institutional ownership indicates market efficiency because institutional investors often conduct their

own research on securities and make investment decisions based on that research. Id.

The fifth modified Cammer factor again considers the ability of the issuer to file a Form S-3. As discussed above, Petrobras satisfied the F-3 requirements for the duration of the Class Period, except for when it delayed release of its financials because of the allegations that underlie this case. Id. ¶ 90, 187. Petrobras filed an F-3 form during the Class Period on August 29, 2012. Id.

The sixth modified Cammer factor considers trading volume and frequency. Feinstein reported a table of weekly average trading volumes for the Petrobras Notes during the Class Period. See id. at 64 tbl.5. The volumes ranged from 1.13% to 10.95%, with most over 2%. Id. Accordingly, all the bonds were over Cammer's 1% threshold for a substantial presumption of efficiency, even though the Cammer thresholds are designed for common stock, which trades more frequently than bonds. Id. ¶ 253. In addition, the average number of days between successive trades in the Notes ranged from 0.020 and 0.418 over the Class Period. Id. ¶ 257. By comparison, relatively few corporate bonds trade more frequently than 200 days in a year. Id. § 255. Feinstein concluded that the trading volumes and frequencies of the Notes were significantly high.

The final modified Cammer factor is the fifth unmodified Cammer factor: empirical evidence of a cause and effect relationship between events and an immediate response in the price of the debt securities. Because this factor is also disputed with

respect to the Notes, the Court considers it separately below.

Defendants and their expert Gompers do not directly dispute Feinstein's application of the foregoing Cammer factors, unmodified or modified. Instead, Gompers testified that the foregoing factors are "structural factors that are necessary for efficient markets," but not, on their own, sufficient. Gompers Report ¶ 27. According to Gompers, the fifth Cammer factor, "empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price," is the only factor sufficient to show market efficiency.

Although the Second Circuit has recognized that evidence of causality has been considered the most important Cammer factor, it has not held that direct evidence is always necessary. See Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196, 204 n.11, 207-08 (2d Cir. 2008). While some language in Cammer supports Gompers' view that direct evidence is essential, see Cammer, 711 F. Supp. at 1287, this Court, which is not bound by Cammer, does not agree that only direct evidence is sufficient to demonstrate market efficiency in translating material disclosures into effect on market price. As the Supreme Court recently opined, "market efficiency is not a yes-or-no proposition," and particularly strong indications of market efficiency from the indirect Cammer factors can lessen the burden to be carried by the fifth, "direct evidence" Cammer factor. Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2414 (2014).

Causality is notoriously difficult to prove with certainty, even in physics or chemistry, let alone in market analyses, because of the large number of factors involved and the difficulty of measuring them with precision, separating out their interactions, etc. Where, as here, the indirect factors overwhelmingly describe a large and well-functioning market for Petrobras securities, common sense suggests that the market would materially react to material disclosures. Put simply, Petrobras was one of the largest and most-analyzed firms in the world throughout the Class Period, and such size and sophistication raise the likelihood of an efficient market.

In any event, though it is a somewhat involved analysis, the Court ultimately concludes that plaintiffs have satisfied the fifth Cammer factor. To be sure, almost every aspect was disputed. The experts even sparred over whether any direct evidence of the fifth factor existed. Feinstein testified that he found direct evidence of a link between events and prices movements in Petrobras securities. Specifically, Feinstein ran four event studies on the Petrobras equities and two on the debt securities. Feinstein identified three categories of event dates: (1) dates when Petrobras filed 6-K Forms containing the term "corrupt*",[8] excluding dates when the terms was used only in boilerplate language; (2) dates when Petrobras filed any 6-K

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[8] Meaning the letters "corrupt" followed by any letters or no letters.

Form; and (3) dates when Petrobras released earnings statements. He then looked at the price movements of Petrobras securities for a given set (or combined multiple sets) of event dates, using a regression analysis to strip out any price movement that was caused by external forces, such as moves in the wider market. Next, he compared the proportion of event dates with statistically significant price movements to the proportion of non-event dates with statistically significant price movements, concluding that there was a statistically significant difference in proportions for common ADS and preferred ADS and across the Petrobras Notes. See Feinstein Report ¶¶ 148-61, 205-21, 279-86. In other words, there were more likely to be big price movements on days when important Petrobras events occurred, demonstrating the markets in Petrobras securities were responsive to new information.

Gompers challenged both the execution and the sufficiency of Feinstein's tests. First, Gompers objected to Feinstein's selection of event dates. Gompers objected that by selecting dates uses the term "corrupt*," Feinstein ignored dates on which allegation-related information was released to the market that did not include the specific term "corrupt*." Gompers also identified three additional dates with 6-Ks that included the term corruption that he argued should not have been excluded as boilerplate dates. Finally, Gompers claimed that Feinstein failed to produce evidence that the information released on various dates across all three date sets was new. In particular, he contended that, because Petrobras is a Brazilian company,

some information had already been released in Brazil.

Feinstein offers some specific ripostes to these points, but the Court does not deem it necessary to discuss them at length here. The dispute over the inclusion of event dates is essentially about the role of subjectivity in such analysis. Gompers objects that Feinstein's choice of event dates injects subjectivity into his analysis. However, Gompers' suggested improvements -- including other dates with allegation-related information, more 6-K corruption dates, analysis of whether information was new enough -- could also be criticized as subjective. There is always some subjectivity in analyses of this nature, and courts would be unable to rely on expert testimony if they could not tolerate a modest level of subjectivity. The Court concludes that Feinstein's selection of event dates displays only that -- a modest level of subjectivity -- and that this is not fatal to his conclusions.

Gompers next objected that Feinstein should have used the BOVESPA index, an index of stocks on the Brazilian stock market, instead of the CRSP Market Index in his regression analysis. Gompers contended that the BOVESPA does a better job than the CRSP Market Index of stripping out exogenous returns. Feinstein responded that the BOVESPA returns are not exogenous to the Petrobras returns because, as a result of Petrobras's size and prominence in Brazil, the BOVESPA's movements were driven in part by Petrobras. Moreover, Feinstein re-ran his tests using the BOVEPSA index and concluded that using the BOVESPA in his

regression analysis would not change his overall conclusions. See Feinstein Rebuttal Report ¶ 83, Exhibit-7a-7w. The Court credits Feinstein's testimony and concludes that his regression analysis is sound.

Gompers further objected that the sample sizes used in Feinstein's tests were too small and could result in "large standard errors, broad confidence intervals, and tests having low power." Gompers Report ¶ 84 (quoting Reference Manual on Scientific Evidence, 3rd ed. (Washington: The National Academies Press, 2011), 255). But Feinstein pointed out that these properties would bias his tests against finding statistical significance -- the danger would be false negatives not false positives. Feinstein Rebuttal Report ¶ 68. Moreover, Feinstein performed an additional bootstrap analysis and the Fisher's Exact Test to demonstrate that his results were robust. See Feinstein Rebuttal Report ¶¶ 69-70, Exhibit 8a-8b. The Court credits Feinstein's testimony and concludes that his sample sizes do not seriously undermine his results.

Gompers still further objected that Feinstein did not conduct tests on the Petrobras Notes using the earnings statement date set alone, although Feinstein did use the earnings statement date set by itself for his analysis of the common and preferred ADS. Gompers Report ¶ 72. Feinstein responded that unless bonds are close to default they are insensitive to earnings announcements and so the earning statements date set by itself was not an appropriate event date set for the Petrobras Notes. Feinstein Rebuttal Report ¶ 89. Moreover, the

results of Feinstein's regression analysis on the Petrobras Notes showed that the fixed-rate Petrobras bonds moved in response to market interest rates, indicating the market for Petrobras Notes was efficient. Feinstein Report ¶ 288-91, Ex. 7c. Accordingly, the Court concludes that the fact that Feinstein did not use the earnings statement date set alone in his analysis of the Petrobras Notes does not damage his conclusions regarding the market for Petrobras debt securities.

Gompers raised some other technical objections to Feinstein's report. For example, he pointed out computational errors that Feinstein made in his initial analysis. See Gompers Report ¶ 76-80. Feinstein corrected these errors in his rebuttal report, and they did not change his conclusions. Feinstein Rebuttal Report ¶¶ 48-49. Upon considering the magnitude of these errors and Gompers' other critiques of Feinstein's execution of his methodology, the Court does not deem them substantial enough to seriously undermine Feinstein's credibility or his conclusions regarding the efficiency of the markets for Petrobras securities.

Concerns about execution aside, Gompers also raised objections to the sufficiency of Feinstein's approach. First, Gompers objected to Feinstein's conclusions because no peer-reviewed academic article has used Feinstein's methodology to evaluate the efficiency of a market. Feinstein's method of comparing the proportions of statistically significant observations in two samples is a "z-test," essentially a version of the more famous Student's "t-test." See Reference Manual on Scientific Evidence, 3rd ed.

(2011), 300.[9] There is no dispute that z-tests are commonly used and widely accepted statistical tools. See id.; Feinstein Rebuttal Report ¶ 37; Gompers Rebuttal Report ¶ 9; see also, Reference Manual on Scientific Evidence, 3rd ed. (2011), 591-97 (discussing epidemiological cohort study that compares incidence of emphysema in different populations). Both sides refer to Feinstein's methodology as an "FDT" test because use of z-test to evaluate market efficiency was first proposed in a law review article by three well-known securities econometric experts, whose combined initials were "FDT." See Paul A. Ferrillo, Frederick C. Dunbar, and David Tabak, The "Less Than" Efficient Capital Markets Hypothesis: Requiring More Proof from Plaintiffs in Fraud-on-the-Market Cases, 78 St. John's L. Rev. 81, 119-22 (2004). Gompers contends that, because the article was not peer-reviewed, a z-test cannot be used to show market efficiency. Were Feinstein using a novel or questionable statistical technique, the Court would place more weight on the absence of peer review. But it is not necessary for every application of a commonly used statistical technique to be peer-reviewed. Indeed, the elegance of statistical methods is that they can be applied to data sets of varying substantive significance, from rates of emphysema to transactions on modern

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[9] The Reference Manual on Scientific Evidence is jointly prepared by the Federal Judicial Center and by the National Research Council of the National Academy of Sciences. The undersigned was one of the four federal judges who served on the committee that oversaw the preparation of the 3rd Edition.

securities markets.[10] Because the Court is convinced that the z-test is a well-established and sound statistical technique, the lack of peer review does not seriously undermine Feinstein's application of the z-test.

Next, Gompers objected to Feinstein's conclusions on the grounds that Feinstein's z-tests failed to consider the directionality of movements in the Petrobras market. By simply comparing the proportions of dates with statistically significant returns, Feinstein's z-tests did not examine whether a statistically significant return on a given day was positive or negative and, in particular, whether the price of a security moved up or down as expected based on the precipitating market event. Feinstein did not dispute that his z-test methodology alone could not test directionality. Instead, he reported the results of a supplementary analysis examining how

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[10] The Court is also mystified by Gompers' claim that one of the authors of the FDT article subsequently disavowed Feinstein's methods. Gompers states, "[i]n fact, David Tabak (one of the authors of the St. John's Law Review article) specifically noted that the collective evaluation required by the FDT test rendered the methodology 'not . . . able to fully distinguish an efficient market from an inefficient one.'" Gompers Rebuttal Report ¶ 13 (quoting Tabak, David, "Use and Misuse of Event Studies to Examine Market Efficiency," NERA Working Paper, April 30, 2010, 7). But Tabak's sentence is, in fact, "[t]here are several ways that versions of the FDT methodology may not be able to fully distinguish an efficient market from an inefficient one." Tabak, David, "Use and Misuse of Event Studies to Examine Market Efficiency," NERA Working Paper, April 30, 2010, 7. This manner of selective quotation does not redound to Gompers' credit.

the prices of common and preferred Petrobras ADS moved on earning announcement dates. See Feinstein Rebuttal Report ¶¶ 91 53, Appendix-2. To conduct this analysis, Feinstein examined analyst reports on earnings event dates and coded their tenor as "Positive," "Negative," "Mixed/Neutral," or "In Line." On dates with statistically significant returns, he found that the price movements in common and preferred ADS were consistent with his assessments of the tenor of analyst coverage. Id.

Gompers and defendants objected to this analysis as subjective and flawed. Overall, they objected to Feinstein's categorization of the tenor of analyst coverage as dependent on his subjective interpretation. More specifically, they claimed that the tenor of coverage on two of the dates Feinstein labeled "Positive," May 16, 2011, and October 28, 2013, should have been labeled "Mixed/Neutral." The Court agrees that these dates were mischaracterized. See Transcript dated Dec. 21, 2015 at 44-50, ECF No. 413; Gompers Rebuttal Report ¶¶ 52-55. Moreover, Feinstein did not provide the analyst reports he relied on in making his coverage assessments and, other than the excerpts listed in Appendix-2 to his rebuttal report, did not explain how he arrived at specific tenor determinations. Therefore, it is difficult to assess whether the two dates identified by defendants are anomalous or indicative of wider deficiencies in Feinstein's directionality testing. Accordingly, the Court places only limited weight on Feinstein's directionality testing of the Petrobras ADS.

The Court also places only limited weight on the evidence of the directionality of the movements in the Petrobras Notes market. Feinstein reported that his regression analysis of the Notes showed that they moved with his Benchmark Bond return variable, which serves as basic confirmation of the directionality of Notes price movements. Feinstein Report ¶¶ 288-91; Ex. 7c. However, Gompers identified three dates when some Notes had statistically significant price declines while other Notes had statistically significant price increases. Feinstein did not address these movements. Accordingly, the Court concludes that there is only limited evidence of directionality in the Petrobras Notes market.

However, evidence of directionality or the degree of fit between expected and observed moves in a market need not be substantial to allow a finding of market efficiency. Such evidence goes to the accuracy of the price of a security, and the Supreme Court has explained that it is not the accuracy of a price as a reflection of underlying value but instead the sensitivity of the price to false statements that underlies the Basic presumption. See Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2410 (2014) (""That the ... price [of a stock] may be inaccurate does not detract from the fact that false statements affect it, and cause loss,'" which is all that Basic requires.'") (quoting Schleicher v. Wendt, 618 F.3d 679, 685 (7th Cir. 2010) (alteration in original)). Defendants' own arguments that Feinstein's tenor assessments were subjective demonstrate the wisdom of the Supreme Court's position. Any assessment of the tenor of

analyst coverage and the expected impact of an event on the market will be subjective. Indeed, the analyst reports released on May 15, 2011, and May 16, 2011, varied in their assessments of the same earnings event. See Feinstein Rebuttal Report, Appendix-2; Transcript dated Dec. 21, 2015 at 44-50, ECF No. 413. Whether the market, upon receiving new information, moved in the precise way analysts or experts would expect it to move is not the key to unlocking Basic's presumption of reliance. What is essential is evidence that, when the market received new information, it "generally affect[ed]" the price. Halliburton, 134 S. Ct. at 2410. In this case, the z-tests provide such evidence. Accordingly, the Court concludes that the limited evidence of directionality is not fatal to plaintiffs' showing of market efficiency.

Finally, Gompers objected to the sufficiency of Feinstein's results on the grounds that "in an efficient market, the price of a security should always move in response to the release of new value-relevant information that is materially different from expectations." Gompers Rebuttal Report ¶ 31. Gompers allowed that, because of potential shortcomings in a regression analysis, "there may be instances where [an] event study does not always show directionally consistent price movements to new information." Id. But, he "would expect the vast majority of days with new value-relevant information that is materially different from expectations to have statistically significant price movements that are directionally consistent with the information." Id. Gompers pointed out that Feinstein's event studies failed to show that the

Petrobras markets moved in response to events the vast majority of the time.

Feinstein responded that not every event will move a market and that the impact of an event depends on various factors, including, among other things, the nature of the event, whether the information involved is truly new,[11] whether a confounding event occurs simultaneously, the magnitude of background volatility, and how the event unfolded. Feinstein Rebuttal Report ¶ 33. In light of these complex forces, one should not expect to see a price movement on every news day.

The Court sides with Feinstein. The Supreme Court has rejected Gompers' absolutist view of market efficiency by making clear that "market efficiency is a matter of degree" and that 'Basic's presumption of reliance . . . does not rest on a "binary' view of market efficiency." Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2410

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[11] This factor is why the Court gives little weight to Gompers' application of Feinstein's methodology to the eighty-five alleged corrective disclosure dates in Plaintiffs' Complaint. Gompers Report ¶¶ 88-89, 92, Ex. 3. Gompers found that the proportion of alleged corrective disclosure dates with statistically significant price moves was not statistically significantly larger than other dates during the period. Id. In contrast to Feinstein's selection of event dates, which involved a tolerable level of subjectivity, see supra, the alleged corrective disclosure dates were compiled by plaintiffs as dates when news of the alleged bribery and kickback scheme trickled out. By design, they did not all involve new information being presented to the market and are therefore not an appropriate sample for a z-test. Feinstein Rebuttal Report ¶ 64.

(2014). In assessing market efficiency, courts should not let the perfect become the enemy of the good. In this case, where the indirect Cammer factors lay a strong foundation for a finding of efficiency, a statistically significant showing that statistically significant price returns are more likely to occur on event dates is sufficient as direct evidence of market efficiency and thereby to invoke Basic's presumption of reliance at the class certification stage. Accordingly, plaintiffs have adequately demonstrated that common issues of law and fact will predominate over individual issues with respect to the reliance element of their Exchange Act claims.

Defendants also argue that plaintiffs have failed to satisfy Rule 23(b)(3) because they have not presented an adequate model of classwide damages. It is "'well-established' in [the Second Circuit] that 'the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification' under Rule 23(b)(3)." Roach v. T.L. Cannon Corp., 778 F.3d 401, 405 (2d Cir. 2015). However, the Supreme Court has held that if a court does rely on a classwide model of damages when certifying a class, the "model . . . must actually measure damages that result from the class's asserted theory of injury." Id. at 407; see Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013).

Feinstein proposed a three-step damages methodology: (1) an event study could determine the amount of price inflation in a given security, as well as how much of this dissipated upon disclosures; (2) an "inflation ribbon" could be constructed, measuring the difference between the inflated price

of the security and what it would have traded at without the alleged misrepresentations; and (3) per shares damages could be calculated as the difference between the inflation on the date shares were purchased and the inflation on the date those same shares were sold. Feinstein Report ¶ 296.

In response, Gompers divided the alleged corrective disclosures into "numeric" and "non-numeric" disclosures. Gompers Report ¶ 107-08. Numeric disclosures involved quantitative information, such as the amount of a write-down, while non-numeric disclosures involved qualitative information, such as acknowledgment of ethical breaches. Id. Gompers claimed that numeric disclosures would categorically have no impact on the price of Petrobras securities because prices were based on the economic value of Petrobras's assets, specifically their future cash flows. Id. ¶¶ 109-17. Gompers further claimed that the impact of non-numeric disclosures on the prices of Petrobras securities would be too difficult to measure because, among other reasons, different investors would have had different appetites for risk when investing in Petrobras and price declines following non-numeric disclosures could have been caused by collateral factors.

It is not necessary, however, to resolve the detailed disputes over plaintiffs' damages model at the class certification stage. Indeed, plaintiffs do not even have a burden to produce a classwide damages model at this time. "'[T]he fact that damages may have to be ascertained on an individual basis' [is] simply one 'factor that [courts must] consider in

deciding whether issues susceptible to generalized proof 'outweigh' individual issues' when certifying the case as a whole." Roach v. T.L. Cannon Corp., 778 F.3d 401, 405 (2d Cir. 2015). Nonetheless, the Court concludes that plaintiffs' proposed damages model weighs modestly, although not dispositively, in favor of granting class certification. Plaintiffs' proposed damages model is not unusual for a securities fraud class action. The Court credits Gompers' point that there may be serious difficulties in determining the impact of non-numeric disclosures. But it is not clear that these difficulties will be fatal, and they do not mean that plaintiffs' proposed model does not match their theory of liability. The Court does not credit Gompers' claim that numeric disclosures have no effect on the prices of Petrobras securities. The Court understands Gompers' point about economic value as a theoretical matter, but, in practical terms, it is difficult for the Court to accept that, in a reasonably efficient market, a company's stock price would not decline upon reports that it faces billions of dollars in losses. Gompers Report ¶ 108, 117. Accordingly, the Court concludes that plaintiffs' model of classwide damages provides a modest indication that common issues of law and fact will predominate over individual issues under Rule 23(b)(3).

Based on the foregoing analysis, the Court concludes that plaintiffs have satisfied the requirements of Rule 23(b)(3). Because plaintiffs have satisfied the requirements of Rule 23, the Court hereby certifies two classes. The Exchange Act Class is defined as follows:

> As to claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, all purchasers who, between January 22, 2010 and July 28, 2015, inclusive (the "Class Period") purchased or otherwise acquired the securities of Petroleo Brasileiro S.A. ("Petrobras"), including debt securities issued by Petrobras International Finance Company S.A. ("PifCo") and/or Petrobras Global Finance B.V. ("PGF") on the New York Stock Exchange (the "NYSE") domestic transactions, and Excluded from the Class are former officers and directors Of Petrobras, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which Defendants have or had a controlling interest.

The Securities Act Class is defined as follows:

> As to claims under Sections 11 and 15 of the Securities Act of 1933, all purchasers who purchased or otherwise acquired debt securities issued by Petroleo Brasileiro S.A. ("Petrobras"), Petrobras International Finance Company S.A. ("PifCo"), and/or Petrobras Global Finance B.V. ("PGF"), in domestic transactions, directly in, pursuant and/or traceable to a May 15, 2013 public offering registered in the United States and/or

a March 11, 2014 public offering registered in the United States before Petrobras made generally available to its security holders an earnings statement covering a period of at least twelve months beginning after the effective date of the offerings, and were damaged thereby. As to claims under Sections 12(a)(2) of the Securities Act of 1933, all purchasers who purchased or otherwise acquired debt securities issued by Petroleo Brasileiro S.A. ("Petrobras"), Petrobras International Finance Company S.A. ("PifCo"), and/or Petrobras Global Finance B.V. ("PGF"), in domestic transactions, directly in a May 15, 2013 public offering registered in the United States and/or a March 11, 2014 public offering registered in the United States before Petrobras made generally available to its security holders an earnings statement covering a period of at least twelve months beginning after the effective date of the offerings, and were damaged thereby. Excluded from the Class are Defendants, current or former officers and directors of Petrobras, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which Defendants have or had a controlling interest.

The Court appoints USS class representative for the Exchange Act Class and North Carolina and Hawaii class representatives for the Securities Act Class. The Court appoints Pomerantz LLP as class counsel for both Classes.

The Clerk of Court is directed to close documents numbered 255 on the docket of this case.

SO ORDERED.

Dated: New York, NY
February 1, 2016

s/ Jed. S. Rakoff
JED S. RAKOFF,
U.S.D.J.

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of August, two thousand seventeen.

ORDER
Docket No. 16-1914

Universities Superannuation Scheme Limited, Employees Retirement System of the State of Hawaii, North Carolina Department of State Treasurer,

Plaintiffs - Appellees,

Peter Kaltman, individually and on behalf of all others similarly situated, Dimensional Emerging Markets Value Fund, DFA Investment Dimensions Group Inc., on behalf of its series Emerging Markets Core Equity Portfolio, Emerging Markets Social Core Equity Portfolio and T.A. World ex U.S. Core Equity Portfolio, DFA Investment Trust Company, on behalf of its series The Emerging Markets Series, DFA Austria Limited, solely in its capacity as responsible entity for the Dimensional Emerging Markets Trust, DFA International Core Equity Fund, and DFA International Vector Equity Fund by Dimensional Fund Advisors Canada ULC solely in

its capacity as Trustee, Dimensional Funds plc, on behalf of its subfund Emerging Markets Value Fund, Dimensional Funds ICVC, on behalf of its sub-fund Emerging Markets Core Equity Fund, SKAGEN AS, Danske Invest Management A/S, Danske Invest Management Company, New York City Employees' Retirement System, New York City Police Pension Fund, Board of Education Retirement System of the City of New York, Teachers' Retirement System of the City of New York, New York City Fire Department Pension Fund, New York City Deferred Compensation Plan, Forsta AP-fonden, Transamerica Income Shares, Inc., Transamerica Funds, Transamerica Series Trust, Transamerica Partners Portfolios, John Hancock Variable Insurance Trust, John Hancock Funds II, John Hancock Sovereign Bond Fund, John Hancock Bond Trust, John Hancock Strategic Series, John Hancock Investment Trust, JHF Income Securities Trust, JHF Investors Trust, JHF Hedged Equity & Income Fund, Aberdeen Emerging Markets Fund, Aberdeen Global Equity Fund, Aberdeen Global Natural Resources Fund, Aberdeen International Equity Fund, each a series of Aberdeen Funds, Aberdeen Canada Emerging Markets Fund, Aberdeen Canada Socially Responsible Global Fund, Aberdeen Canada Socially Responsible International Fund, Aberdeen Canada Funds EAFE Plus Equity Fund and Aberdeen Canada Funds Global Equity Fund, each a series of Aberdeen Canada Funds, Aberdeen EAFE Plus Ethical Fund, Aberdeen EAFE Plus Fund, Aberdeen EAFE Plus SRI Fund, Aberdeen Emerging Markets Equity Fund, Aberdeen Fully Hedged International Equities Fund, Aberdeen International Equity Fund, Aberdeen Global

Emerging Markets Equity Fund, Aberdeen Global Ethical World Equity Fund, Aberdeen Global Responsible World Equity Fund, Aberdeen Global World Equity Dividend Fund, Aberdeen Global World Equity Fund, Aberdeen Global World Resources Equity Fund, Aberdeen Emerging Markets Equity Fund, Aberdeen Ethical World Equity Fund, Aberdeen Multi-Asset Fund, Aberdeen World Equity Fund, Aberdeen Latin America Equity Fund, Inc., AAAID Equity Portfolio, Alberta Teachers Retirement Fund, Aon Hewitt Investment Consulting, Inc., Aurion International Daily Equity Fund, Bell Aliant Regional Communications Inc., BMO Global Equity Class, City of Albany Pension Plan, Desjardins Dividend Income Fund, Desjardins Emerging Markets Fund, Desjardins Global All Capital Equity Fund, Desjardins Overseas Equity Value Fund, Devon County Council Global Emerging Market Fund, Devon County Council Global Equity Fund, DGIA Emerging Markets Equity Fund L.P., Erie Insurance Exchange, First Trust / Aberdeen Emerging Opportunity Fund, GE UK Pension Common Investment Fund, Hapshire County Council Global Equity Portfolio, London Borough of Hounslow Supperannuation Fund, MacKenzie Universal Sustainable Opportunities Class, Marshfield Clinic, Mother Theresa Care and Mission Trust, Mother Theresa Care and Mission Trust, MTR Corporation Limited Retirement Scheme, Myria Asset Managment Emergence, National Pension Service, NPS Trust Active 14, Ohio Public Employees Retirement System, Washington State Investment Board, Aberdeen Latin American Income Fund Limited, Aberdeen Global ex Japan Pension Fund ppit, FS

International Equity Mother Fund, NN Investment Partners B.V., acting in the capacity of management company of the mutual fund NN Global Equity Fund, and in the capacity of management company of the mutual fund NN Institutioneel Dividend Aandelen Fonds, NN Investment Partners Luxembourg S.A., acting in the capacity of management company SICAV and its Sub-Funds, and NN (L) SICAV, for and on behalf of NN (L) Emerging Markets High Dividend, NN (L) First, Aura Capital Ltd., WGI Emerging Markets Fund, LLC, Bill and Melinda Gates Foundation Trust, Board of Regents of the University of Texas System, Trustees of the Estate of Bernice Pauahi Bishop, Louis Kennedy, individually and on behalf of all others similarly situated, Ken Ngo, individually and on behalf of all others similarly situated, Jonathan Messing, individually and on behalf of all others similarly situated, City of Providence, individually and on behalf of all others similarly situated, Union Asset Management Holding AG,

Plaintiffs,

v.

Petroleo Brasileiro S.A. Petrobras, BB Securities Ltd., Merril Lynch, Pierce, Fenner & Smith Incorporated, Bank of China (Hong Kong) Limited, Banca IMI, S.p.A., Scotia Capital (USA) Inc., Theodore Marshall Helms, Petrobras Global Finance B.V., Petrobras America Inc., Citigroup Global Markets Inc., Itau BBA USA Securities, Inc., J.P. Morgan Securities LLC, Morgan Stanley & Co. LLC, Mitsubishi UFJ Securities (USA), Inc., HSBC

Securities (USA) Inc., Standard Chartered Bank, Banco Bradesco BBI S.A.,

Defendants - Appellants,

Jose Sergio Gabrielli, Silvio Sinedino Pinheiro, Paulo Roberto Costa, Jose Carlos Cosenza, Renato de Souza Duque, Guillherme de Oliveira Estrella, Jose Miranda Formigl Filho, Maria Das Gracas Silva Foster, Almir Guilherme Barbassa, Mariangela Mointeiro Tizatto, Josue Christiano Gome Da Silva, Daniel Lima De Oliveira, Jose Raimundo Branda Pereira, Sérvio Túlio Da Rosa Tinoco, Paulo Jose Alves, Gustavo Tardin Barbosa, Alexandre Quintão Fernandes, Marcos Antônio Zacarias, Cornelis Franciscus Joze Looman, JP Morgan Securities LLC, PricewaterhouseCoopers Auditores Independentes,

Defendants.

Appellants, Petroleo Brasileiro S.A. Petrobras, Petrobras Global Finance B.V., Petrobras America Inc. and Theodore Marshall Helms, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. Appellants Banca IMI, S.p.A., Banco Bradesco BBI S.A., Bank of China (Hong Kong) Limited, BB Securities Ltd., CitiGroup Global Market, Inc., HSBC Securities (USA) Inc., Itau BBA USA Securities, Inc., J.P.Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Mitsubishi UFJ Securities (USA), Inc., Morgan Stanley & Co. LLC, Scotia Capital (USA) Inc. and Standard Chartered Bank, joined in

the petition. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES
SECOND CIRCUIT
COURT OF APPEALS
s/ Catherine O'Hagan Wolfe

15 U.S.C. § 77k

§ 77k. Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue--

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a

statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof--

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or

had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a

copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material

fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) Effective date of registration statement with regard to underwriters

If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was

offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided,* That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of

the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) Joint and several liability; liability of outside director

(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2)

(A) The liability of an outside director under subsection (e) shall be determined in accordance with section 78u-4(f) of this title.

(B) For purposes of this paragraph, the term "outside director" shall have the meaning given such term by rule or regulation of the Commission.

(g) Offering price to public as maximum amount recoverable

In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

15 U.S.C. § 78j provides in relevant part:

§ 78j. Manipulative and deceptive devices

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(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

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17 C.F.R. § 240.10b–5

§ 240.10b–5 Employment of manipulative and deceptive devices.

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

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Fed. R. Civ. P. 23 provides in relevant part:

Rule 23. Class Actions

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

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

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

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(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification order; notice to class members; judgment; issues classes; subclasses.

(1) *Certification Order.*

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

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

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(2) *Notice.*

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

(i) the nature of the action;

(ii) the definition of the class certified;

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

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

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

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

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

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

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

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