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U.S. DISTRICT COURT
N.D. OF ALABAMA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

LOCAL 703, I.B. OF T. GROCERY
AND FOOD EMPLOYEES WELFARE
FUND, et al.,

PLAINTIFFS,

vs. CASE NO. CV 10-J-2847-S

REGIONS FINANCIAL CORPORATION,
et al.,

DEFENDANTS.

MEMORANDUM OPINION and ORDER

This action comes before the court after defendants' appeal of this court's Order of June 14, 2012, granting class certification. The Eleventh Circuit has remanded the action to this court, stating

> ... we affirm the District Court's well-reasoned order in nearly all respects. But we vacate and remand for further proceedings in light of *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, __ U.S. __, 134 S.Ct. 2398 (2014), to allow consideration of Region's evidence of price impact and for the District Court to review the duration of the class period.

Local 703, I.B. of T. Grocery and Food Employees Welfare Fund, et al., v. Regions Financial Corp., 762 F.3d 1248, 1252 (11th Cir.2014).[1]

[1]In its ruling on appeal, the Eleventh Circuit instructed this court to shorten the Class Period by one day, and the same was amended to correct the same by Order dated October 1, 2014 (doc. 254).

In its opinion, the Eleventh Circuit found that this court properly applied the presumption from *Basic v. Levinson*, 485 U.S. 224, 225 (1988), namely that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations*." Id.,* at 1253-1254. As noted by the Eleventh Circuit, the *Basic* presumption, as set forth by the Supreme Court in *Erica P. John Fund v. Halliburton Co. (Halliburton I)*, 131 S.Ct. 2179 (2011) allows the court "to presume 'that an investor relies on public misstatements whenever he buys or sells stock at the price set by the market.'" *Local 703*, at 1254, citing *Halliburton I*, 131 S.Ct. at 2185. The Eleventh Circuit concluded that this court properly applied the presumption in its analysis of the efficiency of the market for Regions stock. *Local 703*, 762 F.3d at 1254. Furthermore, the Eleventh Circuit affirmed this court's finding that Regions stock was trading in an efficient market, as required for application of the *Basic* presumption. *Id*., at 1258.

In considering the effect of *Halliburton II* on this court's class certification order, the Eleventh Circuit noted that this court relied on the state of the law at the time it entered that order, without the advantage of *Halliburton II,* which issued from the Supreme Court almost two years later. Thus, the Eleventh Circuit vacated and remanded this court's order solely for this court to "review all facts and conduct the inquiry now required in the wake of *Halliburton II*." *Id*., at 1259. This court thus

confines its current review solely to the application of *Halliburton II* on the evidence previously submitted to this court, and on which this court based its class certification decision, with the benefit of additional briefs submitted by the respective parties. Specifically, *Halliburton II* requires this court to reconsider the defendants' price impact evidence, and whether that evidence rebuts the *Basic* presumption. In other words, if defendants' evidence supports a finding that its corrective disclosures on January 20, 2009, did not have an impact on the stock price, then the *Basic* presumption of fraud-on-the-market is rebutted. *See Halliburton*, 134 S.Ct. at 2415-2416.

Factual Background

The plaintiffs allege that investors in defendant Regions' stock were harmed by defendants' fraudulent statements and reports concerning the performance of Regions' investments, and specifically investments in real estate. As the Eleventh Circuit summarized the underlying facts,

> According to the plaintiffs' amended complaint, Regions made a series of misrepresentations beginning in 2008, about the value of its assets and its financial stability. More specifically, the plaintiffs allege that Regions – which was heavily invested in the real estate market – manipulated the way unhealthy assets were carried on its books to avoid disclosing significant losses that would compromise the company's value.... Plaintiffs say that the failure to accurately represent the company's financial situation resulted in artificially high stock prices for Regions, and allowed it to avoid the precipitous decline of its stock price

> that would have resulted during the recession, absent the misleading disclosures. On January 20, 2009, Regions made a substantial corrective disclosure, reporting $5.6 billion in losses. That same day, Regions stock traded at $4.60 per share, compared to $23 per share on the first day of the proposed class period.

Local 703, 762 F.3d at 1252.

After listing the elements a plaintiff must prove in a private securities fraud action,[2] the Eleventh Circuit considered this court's analysis of the law concerning the reliance element the plaintiffs must prove. Specifically, under *Basic v. Levinson*, 485 U.S. 224 (1988), the plaintiffs may have a rebuttable presumption of class-wide reliance on defendants' misrepresentations based on a "fraud-on-the-market theory." *Id.*, at 245. The fraud-on-the-market theory postulates that "the market price of shares traded on a well-developed market reflects all publicly available information, and, hence, any material misrepresentations." *Halibuton I*, 131 S.Ct. at 2185 (discussing *Basic*). Applying the theory allows the presumption that "an investor relies on public misstatements when he buys or sells stock at the price set by the market." *Id*. In its class certification opinion, this court found that the plaintiffs properly invoked the *Basic* presumption. *Local 703*, 762 F.3d at 1254.

To recapitulate, to invoke the *Basic* presumption, a plaintiff must prove that:

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[2]Those elements are (1) the existence of a material misrepresentation (or omission), (2) made with scienter (i.e., "a wrongful state of mind"), (3) in connection with the purchase or sale of any security, (4) on which the plaintiff relied, and (5) which was causally connected to (6) the plaintiffs' economic loss. *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 633 (11th Cir. 2010). See also *Halliburton I*, 131 S.Ct. at 2184.

(1) the alleged misrepresentations were publicly known, (2) they were material, (3) the stock traded in an efficient market, and (4) the plaintiff traded the stock between when the misrepresentations were made and when the truth was revealed. *See Basic*, 485 U.S., at 248, n. 27; *Amgen,* 133 S.Ct., at 1198.

> Each of these requirements follows from the fraud-on-the-market theory underlying the presumption ....
>
> The first three prerequisites are directed at price impact—"whether the alleged misrepresentations affected the market price in the first place." *Halliburton I*, 563 U.S., at —, 131 S.Ct., at 2182. In the absence of price impact, *Basic*'s fraud-on-the-market theory and presumption of reliance collapse....

Halliburton II, 134 S.Ct., at 2413-2414.

The Eleventh Circuit considered, and rejected, each of the defendants' arguments as to why this court's conclusion was erroneous, and held that "[t]he trial judge properly applied the established law of our Circuit to analyze the efficiency of the market." *Local 703*, 762 F.3d at 1254.

Rebutting the *Basic* Presumption and *Halliuburton II*

As noted above, the Eleventh Circuit ruled that this court properly applied *Basic* to allow the plaintiffs a presumption of class-wide reliance on defendants' confirmatory misrepresentations which served to keep the stock price artificially inflated. However, the Eleventh Circuit added that *Halliburton II* requires this court

further consider defendants' price impact evidence to rebut the *Basic* presumption. *Local 703*, 762 F. 3d at 1258-1259, citing *Halliburton II,* 134 S.Ct. at 2414-16 (stating defendants may introduce price impact evidence both to undermine the plaintiffs' case for market efficiency and to rebut the *Basic* presumption once it has been established). As to the scope of the remand, the Eleventh Circuit limited it as

> In keeping with the suggestion of both parties that the analysis of Region's case rebutting the *Basic* presumption should be reconsidered in light of *Haliburton II*, we remand to the District Court to undertake that review. But we are mindful, and the District Court is no doubt aware, that its work on remand will be limited in scope. The Supreme Court only said that defendants "*may* seek to defeat the *Basic* presumption" with evidence that the misrepresentations did not impact price. *Id*., at 2417 (emphasis added). *Halliburton II* by no means holds that in every case in which such evidence is presented, the presumption will always be defeated. Indeed, this Court has recognized the distinct role that confirmatory information may have in this analysis. See *FindWhat*, 658 F.3d at 1310 ("A corollary of the efficient market hypothesis is that disclosure of confirmatory information – or information already known by the market – will not cause a change in the stock price. This is so because the market has already digested that information and incorporated it into the price."). But in any event, because the District Court is in the best position to review all the facts and conduct the inquiry now required in the wake of *Halliburton II*, we vacate and remand for that purpose.

Local 703, 762 F.3d at 1259.

In *Halliburton II*, the Supreme Court recognized that "defendants should at least be allowed to defeat the [*Basic*] presumption at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price."

Halliburton II, 134 S.Ct., at 2414. Specifically, the Supreme Court considered the types of evidence the defendants could use in such a quest, ruling

> Our choice in this case, then, is not between allowing price impact evidence at the class certification stage or relegating it to the merits. Evidence of price impact will be before the court at the certification stage in any event. The choice, rather, is between limiting the price impact inquiry before class certification to indirect evidence, or allowing consideration of direct evidence as well. As explained, we see no reason to artificially limit the inquiry at the certification stage to indirect evidence of price impact. Defendants may seek to defeat the *Basic* presumption at that stage through direct as well as indirect price impact evidence.

Halliburton II, 134 S.Ct., at 2417.

Thus finding that the issue before this court now is a quite narrow one – specifically, whether the evidence defendants previously placed before this court rebutted the presumption under *Basic*, in light of *Halliburton II* – the court once again carefully reviews that evidence.[3] The defendants recognize that this court has been

[3]Though defendants attempt to force a *Daubert* hearing, challenging the plaintiffs' evidence, the court sees no need for the same at this juncture. The only issue before the court currently is whether the ***defendants'*** evidence rebuts the *Basic* presumption. Unless the defendants are challenging their own experts under *Daubert*, the court finds no justification for delaying a ruling through *Daubert* motions. Similarly, the court declines to consider plaintiffs' evidence in light of *Comcast Corp. v Behrend*, 133 S.C.t. 1426 (2013), and *Bussey v. Macon Cnty. Greyhound Park, Inc*., 562 F.App'x 782 (11th Cir. 2014), as defendants suggest this court must do. Both of those cases predate the Eleventh Circuit's opinion here, but post-date this court's class certification Order. Clearly, a trial court has no duty to constantly review its prior holdings every time a new case is issued by a higher court. Moreover, both of those cases address the "predominance" prong for purposes of proving class wide damages in class certificationsin anti-trust litigation, not securities fraud litigation. The defendants suggest that, although neither of those cases had been decided when this court certified the class here, the plaintiffs failed to meet the requirements set forth in *Comcast* and *Bussey,* meaning that the class cannot be certified. Further, pointing to the very narrow purpose of remand by the Eleventh Circuit, the defendants argue plaintiffs cannot reopen discovery to establish a class-wide damages model. Somewhat rephrased, defendants argue plaintiffs failed to prove something they did not have to prove at the time this court ruled, and now are barred from proving it because they did not prove it earlier. Fortunately for legal scholars everywhere, the law has never been so harsh. The undersigned will stick to solely the narrow issue before it, as set forth by the Eleventh Circuit.

instructed only to consider the evidence defendants presented "that its stock price did not change in the wake of any of the alleged misrepresentations." Defendants' Status Report (doc. 251), at 3, citing *Local 703*, 2014 WL 3844070, at *7. Should the court find a lack of price impact from the alleged misrepresentations, the plaintiffs' reliance on the fraud on the marked is defeated, and the class certification can not stand. Furthermore, defendants recognize that, accepting plaintiffs' theory that the price of Regions' stock remained artificially high due to misrepresentative "confirmatory information," then a price impact should be evident on the date of defendants' "corrective disclosure." Defendants' Status Report (doc. 251), at 4, citing *Halliburton II,* 134 S.Ct. at 2414. *See also* defendants' memorandum (doc. 256), at 1-2. Evidence of lack of any such impact "severs the link between the alleged misrepresentation" and "the price ... paid[] by the plaintiff," and thus would defeat class certification. *Halliburton II*, 134 S.Ct. at 2414; citing *Basic*, 483 U.S. at 248.

This court considered this very issue before granting class certification. Defendants previously asserted that even if the plaintiffs successfully invoked the fraud-on-the-market presumption for class wide proof of reliance, Regions successfully rebutted it. Defendants' opposition (doc. 103), at 7. The court delved into just such considerations, finding the same required by cases such as *In re Merck & Co., Inc. Securities Litig.*, 432 F.3d 261, 269 (3rd Cir. 2005); *Semerenko v.*

Cendant Corp., 223 F.3d 165, 179 (3rd Cir. 2000); *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1420, 1425 (3rd Cir. 1997) (given an efficient market, information that does not impact a security's price is immaterial). *Halliburton II* did not change this inquiry.

In its prior class certification opinion, this court ruled

> The law is clear that reliance by investors on alleged material omissions may be presumed. *In re Dynex Capital, Inc. Securities Litigation*, 2011 WL 781215, 7 (S.D.N.Y.2011), citing *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153 (1972); *In re Merrill Lynch Auction Rate Sec. Litig.*, 704 F.Supp.2d 378, 397 (S.D.N.Y. 2010). Less clear is the law on how that presumption may be rebutted. Trying to coalesce *Halliburton* and *Basic* has lead to varied results across the Circuits. *Compare Connecticut Retirement Plans and Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1177 (9th Cir. 2011) ("a plaintiff need not prove materiality at the class certification stage to invoke the presumption; materiality is a merits issue to be reached at trial or by summary judgment motion if the facts are uncontested. The only elements a plaintiff must prove at the class certification stage are whether the market for the stock was efficient and whether the alleged misrepresentations were public") with *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474, 483 (2nd Cir. 2008) ("[t]he burden of showing that there was a price impact is properly placed on the defendants at the rebuttal stage ... *Basic* made clear that defendants could 'rebut proof of the elements giving rise to the presumption, or show that the misrepresentation in fact did not lead to a distortion of price....' 485 U.S. at 248, 108 S.Ct. 978 ."); *Pennsylvania Ave. Funds v. Inyx Inc.*, 2011 WL 2732544, 8 (S.D.N.Y.2011) ("One way to 'sever the link' is to demonstrate that the alleged misrepresentations were immaterial because they did not lead to a distortion in price. *Basic*, 485 U.S. at 248–49.").
>
> Defendants' expert, Christopher M. James, Ph.D., asserts that the

alleged misrepresentations "did not change the total mix of public information that was known to the market. Because the alleged misrepresentations did not change the total mix of information available on the market, investors could not have relied on them when making their purchase (or sale) decisions." *See* defendants' ex. A to doc. 102, ¶ 20. Thus, Dr. James concludes that plaintiffs' claim that the stock price reacted to the "news events" is inconsistent with the claim that the stock traded in an efficient market. *Id.* He uses quotes from analysts to demonstrate that "book value is inflated due to goodwill associated with the acquisition of AmSouth" was common knowledge during the class period. *Id*., ¶ 28.

The Court of Appeals for the Second Circuit interpreted *Basic* to mean "that a successful rebuttal defeats certification by defeating the Rule 23(b)(3) predominance requirement. Hence, the court must permit defendants to present their rebuttal arguments before certifying a class...." *Salomon*, 544 F.3d at 485 (quotation and citation omitted). Applying *Salomon,* the Third Circuit adopted the Second Circuit's holding that defendants have the burden "to show that the allegedly false or misleading material statements did not measurably impact the market price of the security," *In re DVI, Inc. Securities Litigation* 639 F.3d 623, 637-638 (3rd Cir. 2011), citing *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474, 486 n. 9 (2nd Cir. 2008). The *Salomon* court further ruled that "Any showing that severs the link between the alleged misrepresentation and ... the price ... will be sufficient to rebut the presumption of reliance." *Id*., at 484. The Third Circuit ultimately disagreed with the Second Circuit's insistence that loss causation was thus a necessary step to prevent rebuttal of the presumption. *See In re DVI, Inc. Securities Litigation* 639 F.3d 623, 636-637 (3rd Cir. 2011).

Defendants make the same erroneous arguments here. In their opposition, the defendants repeatedly assert that none of the misrepresentations were material because the marked price never reflected the misrepresentations. Defendants mix price impact and loss causation. Proof of the cause of plaintiffs' losses as a result of the defendants' misrepresentations is not before the court at this time. Such a discussion is in the realm of "loss causation" and reserved for a trial

> on the merits....
>
> The defendants argue that the plaintiffs have not shown that the price decrease on January 20, 2009, was due to the particular announcement the plaintiffs claim because Regions released other information unrelated to the plaintiffs' allegations at the same time. *See* James report, ¶ 60. However, the entire purpose of the presumption is to avoid turning a class certification motion into a trial on the merits in the issue of reliance. *See e.g, Schleicher v. Wendt,* 618 F.3d 679, 685 (7th Cir. 2010) ("Defendants say that, before certifying a class, a court must determine whether false statements materially affected the price. But whether statements were false, or whether the effects were large enough to be called material, are questions on the merits.")

Memorandum Opinion of June 14, 2012 (doc. 151), at 37-41.

Halliburton II clarified that the failure of a corrective disclosure to affect the market price may serve as a rebuttal to the presumption of reliance. The defendants' pleadings on the issue of class certification allege that their misrepresentations and subsequent corrective statements had no affect on the market.[4] *See e.*g., defendants' memorandum (doc. 256) at 4-5.

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[4]The main distinction between this court's prior analysis and what the Eleventh Circuit believes needed by *Halliburton II* is materiality. Material facts include those "which affect the probable future of the company and those which may affect the desire of investors to buy, sell, or hold the company's securities." They include any fact "which in reasonable and objective contemplation might affect the value of the corporation's stock or securities." *SEC v. Mayhew*, 121 F.3d 44, 52 (2nd Cir. 1997) (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2nd Cir.1968) (en banc)).

Clearly, under *Haliburton II*, the materiality of the defendants' alleged misrepresentations is reserved for trial on the merits. *Haliburton II*, 134 S.Ct., at 2416 ("Given that the other *Basic* prerequisites must still be proved at the class certification stage, the common issue of materiality can be left to the merits stage without risking the certification of classes in which individual issues will end up overwhelming common ones."). Thus, the court now considers only the evidence offered to rebut the finding of class wide reliance on the misrepresentations, and not materiality of the same.

As the Eleventh Circuit eloquently explained prior to *Halliburton II*:

> In a fraud-on-the-market case, the Supreme Court allows the reliance element of a Rule 10b-5 claim to be rebuttably presumed, so long as the defendant's fraudulent misstatement was material and the market was informationally efficient. *See id.* at 247, 108 S.Ct. 978 ("Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations ... may be presumed for purposes of a Rule 10b–5 action."). This presumption follows directly from the efficient market hypothesis. Because an informationally efficient market rapidly and efficiently translates public information into the security's price, the market price will reflect the defendant's fraudulent statement, and everyone who relies on the market price as a reflection of the stock's value in effect relies on the defendant's misrepresentation. *Id*. at 241, 108 S.Ct. 978; see also *Peil*, 806 F.2d at 1161. "Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements." *Basic,* 485 U.S. at 241-42, 108 S.Ct. 978 (quoting *Peil*, 806 F.2d at 1160).

FindWhat Investor Group v. FindWhat.com, 658 F.3d at 1310-1311 (emphasis is original).

Defendants previously alleged that the misrepresentations in question had no affect on the price per share of Regions' stock, that the market "knew" Regions would increase its loan loss reserves and write down its goodwill, and the market viewed goodwill as "immaterial." Defendants' opposition (doc. 103) at 12. *See also* exhibits 2, 6, 7, 9, 12-15, 17-19 thereto. The defendants' identical argument in their current memorandum (doc. 256) thus have already been considered by this court. However, the court again delves into defendants' contention that "*Even if the Alleged*

Misrepresentations were Confirmatory, Regions' Evidence of No "Price Impact" on both the Alleged Misrepresentation Dates and the Corrective Disclosure Dates Successfully Rebuts the Fraud-on-the-Market Presumption and Defeats Class Certification." Defendants' memorandum (doc. 256), at 5.

In support of this argument, defendants allege that the event study conducted by Dr. Christopher James, previously provided to the court, demonstrates that the alleged misrepresentations did not cause a statistically significant price increase on any of the thirteen alleged misrepresentation days. Defendants' memorandum (doc. 256), at 5. Nodding to plaintiffs' theory of confirmatory information as an explanation for the lack of price impact, the defendants assert that even allowing for the same still requires evidence that a corrective disclosure after release of the confirmatory information impacted the price. Defendants' memorandum (doc. 256), at 6.

The defendants make no attempt to dispute that, following Regions' January 20, 2009, announcement of a net loss of $5.6 billion for the fourth quarter of 2008 (driven by the net loss of $6 billion charge for the impairment of good will), Regions stock fell to $4.60, a drop of $1.47. Defendants' expert asserts that the January 20, 2009, price tumble was based on external market factors, citing to evidence that on the same date, January 20, 2009, Wells Fargo stock fell 23.89 percent, BB&T stock

fell 11.09 percent, and Huntington Bancshares fell 16.45 percent. Dr. James' declaration, ¶ 63, and exhibit 9 thereto. *See also* Dr. James' declaration at ¶¶ 64-66. Thus, defendants argued plaintiffs failed to show that the corrective disclosure – that defendant Regions was writing off $6 billion in goodwill – had any "statistically significant impact" on the price of Regions' stock. Defendants' memorandum (doc. 256), at 7. *See also* Report of Christopher James, Ph.D., submitted as exhibit A of defendants' evidentiary submissions (doc. 102) at 3. Yet those same evidentiary submissions noted such reports from industry analysts as that, on January 21, 2009, "Regions took a goodwill impairment in 4Q08, driving a high GAAP loss per share of $9.01. The goodwill impairment accounted for $8.66 of the loss." *See* doc.102-3, exhibit 28. This, of course, is evidence of price impact.

The evidence previously submitted reflects that, despite Regions' repeated assurances to the marketplace, Regions reported a $5.6 billion net loss for the fourth quarter of 2008 due mainly to "a $6 billion non-cash charge for impairment of goodwill." Based on this announcement, Regions shares fell significantly.[5] Clearly,

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[5]Regions asserted that any misrepresentations regarding its goodwill, predating its announcement of the $6 billion impairment to its goodwill, were not "material." *See* defendants' opposition (doc. 103), at 8-10. As quoted by the plaintiffs, one article, titled "Regions Financial Must Think We're All Stoned,"(October 23, 2008)(submitted by defendants as exhibit 21 to doc. 102) states

> It all comes down to that pneumatic, intangible asset known as goodwill, which is about as valuable as the air in a paper sack. As of Sept. 30 [2008], according to Regions, the bank's goodwill was worth $11.5 billion, slightly more than the quarter

representing Regions had assets that did not actually exist could keep the value of its stock trading at an artificially high level.[6]

Defendants previously asserted that none of the misrepresentations identified by the plaintiffs were, in fact, material, because the market was already aware that the statements were false. Defendants' opposition (doc. 103), at 21. Additionally, defendants claimed that misrepresentations from April 2008 through January 2009 were immaterial, because the market was aware the loan loss reserves were going to increase. Defendants' response (doc. 103), at 21-27.

The plaintiffs previously responded that they did not allege that investors were unaware that Regions planned to increase its loan loss provision or even write down its good will. Plaintiffs' response (doc. 107), at 34. Rather, plaintiffs alleged that the loan loss reserves were false and misleading, and that goodwill was overstated, false

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> before. That's about 59 percent of Regions' book value, and $4.1 billion more than what the stock market says the entire company is worth....
>
> There's a bigger problem here, though. By sticking to that goodwill valuation, Regions executives might as well be telling us we can't trust a single number of their financial statements....
>
> Irrational goodwill isn't the only thing weird about Regions' accounting either...
>
> Common sense tells you a bank's loan-loss allowance, in an economic decline, should be rising as a percentage of nonperforming assets....

[6]Such a statement is different from defendants' expert's statistics which support a lack of evidence that Regions' stock price increased from the misrepresentations. *See* Exhibit 10 to Exhibit A to Declaration of James (doc. 102). Using misrepresentations to maintain a stock price is no less of a fraud than use of the same to artificially increase the price.

and misleading, and that the defendants intentionally misrepresented these to suggest a financial situation that was not true. Plaintiffs' response (doc. 107), at 34, *see also* defendants' opposition (doc. 103) at 28 (stating on July 1, 2008, Regions publicly disclosed that the SEC questioned Regions' assertion its goodwill was not impaired).[7]

As the court previously ruled, if the market was already aware that Regions' statements of financial condition were false, then there could be no injury from these statements, or the later official corrective statements. While the court finds, and common sense dictates, that market knowledge that numbers will change is not the same as market knowledge that the numbers provided are false, or intentionally misleading, the misleading statements must have some effect on the price of the stock to survive the *Hallibuton II* inquiry.[8] *See e.g., Amgen Inc. v. Conn. Ret. Plans &*

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[7]Regions was accused of "insult[ing] the public's intelligence by publishing asset values that defy logic. Saying Regions' goodwill is worth $11.5 million would be like a hen bragging that her unlaid egg weighs more than she does." Defendants' opposition (doc. 103), at 28.

[8]Specifically, the Supreme Court explained this as:

> Defendants—like plaintiffs—may accordingly submit price impact evidence prior to class certification. What defendants may not do, EPJ Fund insists and the Court of Appeals held, is rely on that same evidence prior to class certification for the particular purpose of rebutting the presumption altogether.
>
> This restriction makes no sense, and can readily lead to bizarre results. Suppose a defendant at the certification stage submits an event study looking at the impact on the price of its stock from six discrete events, in an effort to refute the plaintiffs' claim of general market efficiency. All agree the defendant may do this. Suppose one of the six events is the specific misrepresentation asserted by the plaintiffs. All agree that this too is perfectly acceptable. Now suppose the district court determines that, despite the defendant's study, the plaintiff has carried its burden to prove market efficiency, but that the evidence shows no price impact with respect to the specific misrepresentation challenged in the suit. The evidence at the certification stage thus shows an efficient market, on which the alleged misrepresentation had no price impact. And yet under EPJ Fund's view, the plaintiffs' action should be certified and proceed as a class action

Halliburton II, 134 S.Ct. at 2415.

Trust Funds, 133 S.Ct. 1184, 1197 (2013) (while the presumption of price impact may be rebutted at the class certification stage by directly showing an absence of price impact, it may not be indirectly rebutted by showing that the misrepresentation was immaterial).

Defendants rely on the event study prepared by Christopher James to support their argument that the January 20, 2009, corrective disclosure had no significant impact on the price per share. Furthermore, defendants now assert that because plaintiffs' expert conducted no event study of his own, plaintiffs necessarily cannot survive the analysis after *Halliburton II.* Defendant's memorandum (doc. 256), at 7-8. The defendants read too much into *Halliburton II.* While that case recognized that an event study can show the reaction of market price to corrective disclosures (134 S.Ct., at 2415), nothing in *Halliburton II* requires the plaintiffs to produce an event study in opposition to defendants' event study on a class certification motion.

Turning to defendants' expert's event study, the same concludes that the 24% decline in Regions stock on January 20, 2009, was not due to the recognition of Regions' corrective disclosures, but due to across the board investor panic. *See e.g.*, defendant ex. 102-1, ¶ 62. According to defendants, this "conclusively finds no price impact on January 20, 2009." Defendants memorandum (doc. 256), at 8. Yet the same event study also noted that the New York Stock exchange index declined only

6.11 percent that same day. *Id*.

Regardless of other events occurring the day in question, defendants concede its stock tumbled 24% on January 24, 2009. Whether this tumble was due to defendants' corrective disclosures, namely that good will was significantly more impaired than previously asserted and that the loan loss reserves where drastically understated, or due to the overall market conditions on that day, is an ultimate question in this action, and properly reserved for a jury to decide. Similarly, whether this tumble was the continuation of the steady decline in stock price from February 2008 through the end of the class period, due to external market factors, or whether it was directly attributable to the January 20, 2009, corrective disclosure is a question of fact, so tied to the merits of this case that it is reserved for the trier of fact. As the Southern District of Florida recently recounted,

> Defendants attempt to rebut the presumption of reliance by showing that the alleged misrepresentation had no impact on the price of Catalyst common stock. In support of this contention, Defendants rely largely on the argument that the truth—that 3,4–DAP was an effective and available treatment for LEMS—was already known to the public and that the alleged misrepresentation therefore could not have impacted the price of Catalyst common stock. This argument, known as the "truth-on-the-market" defense, is a corollary of the fraud-on-the-market theory of liability and similarly relies on the efficient capital markets hypothesis. *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 167 (2d Cir.2000) ("[A] defendant may rebut the presumption that its misrepresentations have affected the market price of its stock by showing that the truth of the matter was already known."); *cf. Basic Inc.*,

485 U.S. at 248 (noting that the presumption of reliance in a fraud-on-the-market case may be rebutted by showing that "the 'market makers' were privy to the truth").

However, a truth-on-the-market defense may not be used at the class certification stage to prove an absence of price impact so as to show a lack of predominance because it goes to materiality; as previously stated, the truth's presence on the market renders an alleged misrepresentation immaterial. *See, e.g., Ganino*, 228 F.3d at 167 ("[A] misrepresentation is immaterial if the information is already known to the market because the misrepresentation cannot then defraud the market.") (Katzmann, J.); *Provenz v. Miller*, 102 F.3d 1478, 1492 (9th Cir.1996) ("In a 'fraud on the market' case an omission is materially misleading only if the information has not already entered the market.") (internal quotations omitted); see also *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097 (1991) (holding that true statements may discredit a false statement such that the risk of deception decreases to the point that the misstatement is immaterial). That the "truth-on-the-market" defense goes to materiality is readily apparent when the argument is deconstructed. In arguing that the truth's presence on the market precludes price impact, Defendants rely on the validity of the efficient capital markets hypothesis and assume that Catalyst common stock traded in an informationally efficient market such that the price of Catalyst stock was impacted by all public and material information. And because the market's knowledge of the truth has no bearing on whether the alleged misrepresentation was publicly known, the "truth-on-the-market" defense, stripped down, is merely an argument that the alleged misrepresentation was immaterial in light of other information on the market.

Here, because Defendants argue that the truth was on the market before the class period began, Defendants' succeeding with their truth-on-the-market defense would defeat materiality as to every putative class member and would thus end this controversy in its entirety. Plaintiffs concede this point, and Defendants offer no dispute. Accordingly, for purposes of determining at this early stage in litigation whether the alleged misrepresentation had any impact on the price of

> Catalyst stock, the Court must disregard evidence that the truth was known to the public. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S.Ct. 1184, 1203 (2013) (holding that the district court did not err by disregarding the defendant's truth-on-the-market defense at the class certification stage, which was proffered to rebut the presumption of price impact so as to show that class certification was improper for lack of predominance). That issue, instead, is a matter for trial or for summary judgment. *Id*. at 1204.

Aranaz v. Catalyst Pharmaceutical Partners Inc., 2014 WL 4814352, *10-11 (S.D.Fla.2014).

In *Amgen*, the Supreme Court recognized the potential overlap with the merits in class action securities litigation. *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S.Ct. 1184, 1194 (2013) (quoting *Dukes*, 131 S.Ct. at 2551 (internal quotation marks omitted)). "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen*, 133 S.Ct. at 1194–95. "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether Rule 23 prerequisites for class certification are satisfied." *Id.* Surely the Supreme Court in *Halliburton II* did not intend to turn the class certification stage of securities litigation into a trial on the merits of the plaintiffs' claims.[9] Yet this is precisely what defendants' interpretation of

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[9]Perhaps in recognition of this conundrum, the Eleventh Circuit stated,

> *Halliburton II* by no means holds that in every case in which such evidence is presented, the presumption will always be defeated. Indeed, this Court has recognized the distinct role that confirmatory information may have in this analysis. *See FindWhat*, 658 F.3d at 1310 ("A corollary of the efficient market hypothesis is that disclosure of confirmatory information—or information already known by the

Halliburton II would have this court do, performing as judge and jury.[10]

Conclusion

In light of the foregoing, the court is of the opinion that the plaintiffs' claims survive the scrutiny now required by *Halliburton II*. The court therefore again **GRANTS** the plaintiffs' motion for class certification. It is therefore **ORDERED** by the court that plaintiffs' motion for class certification (doc. 94) be and hereby is **GRANTED**. The court **ORDERS** the following class be certified, with the plaintiffs to bear the burden and costs of preparing the notices and notifying class members:

> All persons or entities who, between February 27, 2008, and January 19, 2009 (the "Class Period"), purchased or otherwise acquired the securities of Regions Financial Corporation ("Regions"), and were damaged thereby. Excluded from the Class are current and former defendants, members of the immediate family of any current or former defendants, the directors, officers, subsidiaries and affiliates of Regions, any person, firm, trust, corporation, officer, director, or other individual or entity in which any current or former defendant has a controlling

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market—will not cause a change in the stock price. This is so because the market has already digested that information and incorporated it into the price.").

Local 703, 762 F.3d at 1259.

[10]Similarly, the same logic persuades the court that now is not the time in the litigation to have experts subjected to the rigorous consideration required under *Daubert v. Merrell Dow*. Rather, once class notification has been completed, the court will gladly consider *Daubert* motions and the issue of whether expert opinions are lacking in reliability, or merely weight. Although defendants cite the court to cases which hold that the court must conduct *Daubert* analyses before class certification when a party's experts are critical to class certification (defendants' renewed motion to exclude expert opinions (doc. 257, at 3), the court finds the same is not the case here. Accepting for the time that a price decrease in Regions stock in fact occurred on January 20, 2009, does not require the undersigned to delve into why that decrease occurred on that date. The former is a matter of public knowledge and requires no expert testimony. The latter is a question for the jury.

interest, and the legal representatives, affiliates, heirs, successors-in-interest or assigns of any such excluded party.

Counsel are directed to confer and to prepare and submit to the court a proposed notice to class members for the above described class within fifteen (15) days of today's date.

DONE and **ORDERED** this the 19th day of November, 2014.

INGE PRYTZ JOHNSON
SENIOR U.S. DISTRICT JUDGE