No. ________

IN THE

Supreme Court of the United States

APOLLO GROUP, INC., et al.,

Petitioners,

v.

POLICEMEN'S ANNUITY AND BENEFIT FUND OF CHICAGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In any securities fraud case, a plaintiff must prove "loss causation"—that a misrepresentation that artificially inflated the stock price actually caused the plaintiff's loss. Plaintiffs typically prove loss causation by pointing to a drop in stock price after the true facts are revealed—i.e., after a so-called "corrective disclosure" is made. This case presents two questions that have split the circuits:

1. This Court has held that an efficient market automatically incorporates all publicly available information into stock price. Based upon this presumption, plaintiffs who invoke the efficient market theory do not have to prove that they personally knew of and relied on a misrepresentation. Under this theory, a corrective disclosure that reveals the previously undisclosed material facts should immediately produce a decline in price. Where a plaintiff invokes the efficient market theory to avoid having to prove reliance, is the plaintiff barred from trying to prove loss causation based on a decline in price that happened weeks or months after the corrective disclosure?

2. If the stock price does not decline after the facts are publicly revealed, but does decline after an analyst issues a report that merely synthesizes and comments upon the already-public information, is the plaintiff barred from treating that report as a fraud-revealing corrective disclosure that suffices to prove loss causation?

PARTIES TO THE PROCEEDING

The petitioners, who were the defendants-appellees below, are Apollo Group, Inc., Todd S. Nelson, and Kenda B. Gonzales. The respondent, who was the plaintiff-appellant below, is the Policemen's Annuity and Benefit Fund of Chicago.

CORPORATE DISCLOSURE STATEMENT

Petitioner Apollo Group, Inc. has no parent corporation and no person or publicly traded corporation owns more than 10% of its stock.

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JURISDICTION

The court of appeals entered its judgment on June 23, 2010. A timely petition for panel rehearing and rehearing *en banc* was denied on August 17, 2010. App. 20a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory provisions of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(4), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5, are reproduced at App. 21a-24a.

INTRODUCTION

In every securities fraud case, the plaintiff must prove "loss causation," and virtually every securities fraud case that is a class action involves an application of the efficient market theory. But the circuits are hopelessly split about how a plaintiff can prove loss causation in an efficient market—with the Ninth Circuit adopting the most plaintiff-friendly rules.

The efficient market theory may be the most powerful weapon this Court has ever granted to securities fraud plaintiffs. In the classic fraud case, the plaintiff cannot win simply by proving that a statement was false. The plaintiff must also prove that he heard and relied upon the statement in acting to his detriment. Reliance is an element of securities fraud as well. But in *Basic, Inc. v. Levinson*, this Court held that a plaintiff does not have to prove that he personally heard and relied on the statement when the market is "efficient." 485 U.S. 224, 246-49 (1988).

Large, sophisticated public stock markets are typically presumed to be efficient, which means that the market quickly and fully incorporates all information that is in the public arena into the stock price. So when a publicly traded company makes a material misrepresentation, the plaintiff can invoke the assumption that the market relied on the misrepresentation which in turn artificially inflated the stock's price, and the plaintiff is presumed to have relied on the stock's price as reflecting the stock's fair value. Without this "fraud on the market" assumption, securities fraud class actions would be virtually impossible: Very few shareholders could assert that they heard and relied upon the same misstatement and the proof as to each shareholder would be different.

Loss causation is also a critical element of securities fraud. A plaintiff must prove the "causal connection between the material misrepresentation and the loss," *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342 (2005), and may recover only "those economic losses that misrepresentations actually cause," *id.* at 345. In an efficient market, loss causation typically boils down to a simple proposition: If a misrepresentation artificially inflated a stock's price, then the stock price will decline when the market learns the true facts—when the market hears statements that correct the prior misstatement or omission. *Id.* at 344-45. And the amount of the decline in direct response to such a so-called "corrective disclosure" represents a measure of how much the misrepresentation inflated the stock price. Accordingly, plaintiffs are not permitted to recover losses based on stock price drops that are attributable to anything other than corrective disclosures. *Id*. at 345-46.

In the two decades since this Court adopted the efficient market theory, it has never directly addressed two interrelated questions that have a profound impact on loss causation, both of which have split the circuits.

The first stems from a question this Court explicitly left open in *Basic*: "how quickly and completely publicly available information is reflected in market price." 485 U.S. at 249 n.28. The answer to this question dictates the viability of many securities fraud cases. Plaintiffs' lawyers typically file securities fraud cases when stocks decline in price. To prove loss causation, they attempt to demonstrate that the declines occurred some time after alleged corrective disclosures became public. But what is the permissible time lag between the disclosure and the stock decline, and is it permissible to have one standard for purposes of the fraud on the market presumption, and a fundamentally different standard for materiality and loss causation?

The circuits are hopelessly split on this question. On one side of the spectrum is the view (adopted in three circuits) that in an efficient market, the stock must decline immediately after the alleged corrective statement. Under this view, if there is any lag in time, then the decline cannot be attributed to the alleged corrective disclosure, either because the market did not regard the information as material or because the alleged fraud did not cause the plaintiff's loss. On the other side of the spectrum is the view—adopted by three other circuits, including the Ninth Circuit—that for purposes of determining loss causation plaintiffs can point to purported corrective disclosures that do not yield price declines for days, weeks, or even months.

The second (and closely related) question is what sorts of statements can qualify as corrective disclosures. In order to bridge the time lag between the corrective disclosure of facts and a decline in stock price, plaintiffs' lawyers will often point to further statements that were made *after* the public learns the facts. They will assert that the market may have learned the *facts*, but it did not appreciate their full ramifications until some authoritative source translated the facts with additional analysis or predictions of their effect. The question is whether such assertions can be reconciled with this Court's holding that the price of securities traded on well-developed markets reflects "all publicly available information." *Basic*, 485 U.S. at 246.

Five circuits have held that the recharacterization or analysis of previously disclosed facts—or opinions or predictions regarding the impact of such facts—*cannot* be a corrective disclosure. The Ninth Circuit stands alone in holding that an analyst's opinions, predictions, and analyses of previously disclosed facts can be a corrective disclosure.

The Ninth Circuit's approach to both questions grants plaintiffs all the benefits of a presumptively efficient market without any of its consequences: It posits a market that is perfectly efficient, speedy, and omniscient for purposes of granting plaintiffs the enormous benefit of the presumption of reliance on misrepresentations, but horribly inefficient, sluggish, and doltish in response to corrective disclosures.

The lower courts need this Court's guidance to determine whether that asymmetrical approach is the law.

STATEMENT OF THE CASE[1]

Factual Background

Petitioner Apollo is a publicly traded corporation that is the parent company of the University of Phoenix ("UOP"), the largest private university in the United States. Plaintiff brought this securities-fraud class action alleging that Apollo made false and misleading statements concerning a Department

[1] The Excerpts of Record and the Supplemental Excerpts of Record before the court of appeals will be cited as "ER" and "SER," respectively.

of Education ("DOE") program review and a subsequent report (the "DOE report") that was critical of UOP's student-recruiting practices.

UOP participates in the federal financial aid program established under Title IV of the Higher Education Act. To remain eligible to receive Title IV funds, UOP must meet various statutory and regulatory requirements, including a prohibition against providing incentive compensation to its enrollment counselors based solely on the number of students recruited. *See* 20 U.S.C. § 1094(a)(20); 34 C.F.R. § 668.14(b)(22)(ii)(A).

In August 2003, the DOE began a review of UOP's recruiting practices, and by February 5, 2004, the DOE provided its report to Apollo confidentially. The DOE report concluded that UOP violated the restriction on incentive compensation. Apollo strongly disagreed with the DOE's assessment, and believed that it would be able to resolve the issues in a way that would not materially affect the company's finances. Apollo advised the market of the fact that the DOE was reviewing its program, but not of the report itself, in a series of analyst calls between March and August 2004.

During the summer of 2004, Apollo negotiated with the DOE, and ultimately settled with the Department for $9.8 million. There is no dispute that this amount was not material to Apollo's financial results. In a press release and subsequent analyst conference call on September 7, 2004, Apollo disclosed the existence of the DOE report and its settlement with the DOE. These disclosures had no statistically significant effect on the price of Apollo's stock.

A week later, on September 14 and 15, the contents of the DOE report were widely disseminated through various major newspapers, including the *Wall Street Journal*, the *Chicago Tribune*, the *Dallas Morning News*, and *The Arizona Republic*. These newspapers published highly critical stories about Apollo's recruiting practices that quoted excerpts from the DOE report's inflammatory allegations, and noted problems Apollo and the for-profit education industry would face in light of the report.

For example, on September 14, *The Arizona Republic* ran a front-page story that characterized the DOE report as a "harsh[]" and "critical" evaluation of Apollo's recruiting practices. ER 580, 582. The newspaper reported it had obtained the "45-page report," which described a "corporate culture overly focused on boosting enrollment" and "compensation and sales practices the department says range from illegal to unethical to aggressive." ER 580. The article quoted the report's assertion that UOP "[s]ystematically and intentionally operates in a duplicitous manner so as to violate the department's prohibition against incentive compensation," and emphasized various regulatory risks. ER 580-81. The article warned that the regulatory scrutiny of Apollo imperiled the "60 percent of the school's tuition revenue [that] comes from financial aid." ER 581.

The next day the *Wall Street Journal* published another highly critical article entitled, "Will Apollo's Bad Report Card Get Its Shares Grounded?" ER 671. The *Journal* reported that it had reviewed a "newly disclosed [DOE] report" that "blasts Apollo Group Inc.'s flagship University of Phoenix for a 'culture of duplicity' in which supervisors improperly lavished money on sales employees for signing up scores of new students, including those unable to cut it." *Id*. According to the article, the report "raise[d] the question of whether a too-aggressive approach contributed to Apollo's dazzling growth—and if it now will be forced to tone down its approach and grow more slowly." *Id*.

Similar articles appeared in *The Dallas Morning News* and the *Chicago Tribune*. Each emphasized the regulatory risk that the DOE report foreshadowed for Apollo and its industry. Under the banner, "School Fine May Foretell Crackdown," the *Chicago Tribune* reported that "leading industry executives said Tuesday that investigations may lead to stricter regulatory control of their sector and spark the interest of Congress." ER 598. It quoted a statement from Apollo's CEO that "Congress will get more involved," and an acknowledgment from the CEO of another for-profit university that, "[i]f there turns out to be inappropriate activity, it will stimulate regulators to take a more aggressive role." *Id.*

Despite this extensive negative national news coverage there still was no statistically significant movement in Apollo's stock price.

On September 20, nearly a week after the press coverage (and two weeks after Apollo's first announcement of these events), a securities analyst, Kelly Flynn of UBS, released two reports about Apollo and the for-profit education industry in which she downgraded her outlook for Apollo's stock and lowered UBS's rating on Apollo from "Neutral" to "Reduce." ER 502. Her reports offered opinions, analyses, and predictions about the potential impacts of the DOE report, as well as other negative developments completely unrelated to the DOE report. Flynn's reports did not disclose any of the contents of the DOE report, and the opinions and analyses referred only to facts that had already been publicly announced.

On September 21, the day after Flynn disseminated her analyses, and downgraded Apollo's stock rating, there was a statistically significant drop in Apollo's stock price.

Proceedings in the District Court and Court of Appeals

Plaintiff filed this class action suit in the United States District Court for the District of Arizona alleging violations of Section 10(b). Plaintiff asserted that Apollo committed securities fraud by failing to tell the market about the DOE report itself (as opposed to just the fact that the DOE was conducting a review) during Apollo's analyst calls between March and August 2004, and downplaying the significance of the DOE report when it announced its settlement with the DOE on September 7, 2004.

The case was tried to a jury. Because the lag between the disclosure of the DOE report and the decline in stock price was so long, plaintiff attributed the decline to Flynn's analyst reports. It insisted that the analyst reports were "corrective disclosures," even though they contained no new facts. Because Apollo's disclosure of the DOE settlement on September 7, and the detailed press coverage on September 14 and 15 of the DOE report's allegations and their potential regulatory repercussions, had produced no statistically significant drop in the price of Apollo's stock, plaintiff's case depended entirely upon proving that the Flynn reports—which revealed nothing other than Flynn's analyses and opinions about these events, and the stock rating downgrade—finally revealed the fraud. The district court correctly instructed the jury that the "alleged misrepresentations and omissions in this case could have caused the plaintiff to suffer damages only if you determine that the analyst reports issued by Kelly Flynn on September 20, 2004 were corrective disclosures." SER 118.

The jury returned a verdict in favor of plaintiff. The jury calculated an amount of inflation per share, which would total hundreds of millions of dollars for all shares purchased during the class period. Defendants then moved for judgment as a matter of law, arguing that the Flynn reports were not corrective disclosures as a matter of law because they did not disclose any new facts that corrected any prior statement made by defendants or reveal Apollo's alleged fraud.

The district court agreed and entered judgment as a matter of law in defendants' favor. The court concluded that no reasonable juror could infer loss causation from the stock price decline following the Flynn reports because the reports did not provide any new, fraud-revealing facts or analysis. The court held that "[a] corrective disclosure that does not reveal anything new to the market is, by definition, not corrective." App. 8a. The court determined that the evidence at trial was insufficient to show that the Flynn reports said anything appreciably different from what had been previously reported by Apollo itself and by major American newspapers.

Although predictions (as distinguished from the disclosure of facts) do not constitute corrective disclosures, the district court noted that plaintiff's "claim[] that the Flynn reports were the first to predict future regulatory problems as a result of the previously disclosed contents of the DOE report . . . was demonstrably false." App. 10a. In light of the *Chicago Tribune* article "report[ing] that 'leading industry executives said . . . that investigations may lead to stricter regulatory control of their sector,'" and Apollo CEO Todd Nelson's own predictions of greater regulatory scrutiny, the court determined that the jury "could not properly conclude that the [Flynn] reports were corrective [disclosures]." App. 11a.

The district court also rejected plaintiff's contention that the Flynn reports were corrective disclosures because they supposedly "revealed for the first time that the UOP was experiencing increasing turnover among its enrollment counselors as a result of the new compensation plan." *Id.* The court stated that "the uncontradicted evidence at trial was that enrollment counselor turnover actually decreased," and "[a]s a matter of logic, false information cannot possibly be corrective information." *Id.* In addition, because Apollo did not make any representations at all concerning turnover, the district court held that plaintiff "did not present any evidence linking this claim to *Apollo's misrepresentations*." *Id.* (emphasis in original).

Finally, the district court rejected plaintiff's claim that the "Flynn reports were corrective because it was 'obvious from the report[s] that Flynn had 'read the [DOE] report.'" App. 12a. "[W]hat Flynn did or not read before issuing her reports is irrelevant. All that matters is what she actually disclosed to the market in her reports, and [plaintiff] conceded, as it must, that Flynn did not disclose any of the DOE report's contents in her reports, much less any new contents." *Id.*

The Ninth Circuit reversed, holding that "[t]he jury could have reasonably found that the [Flynn] reports following various newspaper articles were 'corrective disclosures' providing *additional or more authoritative* fraud-related information that deflated the stock price." App. 2a (emphasis added).

In so doing, the Ninth Circuit relied on *In re Gilead Sciences Securities Litigation*, 536 F.3d 1049, 1058 (9th Cir. 2008), for the proposition that a later disclosure can be "corrective" for purposes of proving loss causation when the "public"—not the market—

initially "fail[s] to appreciate [the] significance" of earlier fraud-revealing disclosures. App. 2a. The court also relied on *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 503 (9th Cir. 1992), for the proposition that what the market understands depends on the "intensity and credibility" of the fraud-revealing information. App. 2a.

The Ninth Circuit gave no indication how the market could have "failed to appreciate the significance" of the DOE report in light of the comprehensive media coverage of its contents and potential consequences. Nor did the court attempt to explain how or why the newspapers could not have been sufficiently "credible" sources, or how a supposedly efficient market could have been blind to the published facts for one to two weeks, until a securities analyst issued reports that said nothing new.

REASONS FOR GRANTING THE PETITION

There is direct conflict among the circuits regarding how efficiently information is incorporated into price. Under one approach—most clearly espoused by the Ninth Circuit, but also supported in the Fifth and Sixth Circuits—the defendant can be held liable in a presumptively efficient market even where the gap between the alleged corrective disclosure and the subsequent price reaction is days, weeks, or months. Under the other approach—espoused by the Second, Third, and Eleventh Circuits—there can be no liability unless the price declines immediately after a corrective disclosure.

There is also a conflict among the circuits regarding what type of information can constitute a corrective disclosure in an efficient market. In the Ninth Circuit alone, a purported corrective disclosure does not even have to say anything new. An analysis or synthesis of already disclosed facts or an analyst's decision to lower its rating on a company's stock can suffice to establish loss causation. The Second, Third, Fourth, Fifth, and Eleventh Circuits have all rejected this approach.

The issues involved here are of substantial national importance in light of the billions of dollars a year in securities class action settlements and judgments, as well as the high proportion of class actions filed in the Ninth Circuit.

The lack of clear guidance from this Court on these two very important issues has led to inconsistent decisions that offend standards of justice and fairness because the result in any particular case depends so much on where the case was filed. This case presents an excellent vehicle to address these issues because it follows a full trial on the merits and allows the Court to address the substantive standards for proving, and not just pleading, loss causation.

I. THE CIRCUITS ARE SPLIT ON TWO FUNDAMENTAL ISSUES OF LOSS CAUSATION.

A. The Circuits Are Split On Whether A Delayed Reaction Can Provide A Basis For Loss Causation In An Efficient Market.

The circuits are hopelessly split over the time frame in which a corrective disclosure must be incorporated into a stock's price. The approaches break into two diametrically opposed camps.

Immediate price reaction required. In one camp are several circuits that hold that a defendant cannot be held liable based upon a purported corrective disclosure unless the price declined immediately after the announcement of the allegedly undisclosed facts. Some courts in this camp hold that the defendant cannot be held liable in that circumstance because the plaintiff cannot prove loss causation. Others hold that liability cannot be established because the market's failure to react immediately proves that the market did not view the disclosure (and thus the allegedly misrepresented fact) as material.

The Third Circuit is emphatically entrenched in this camp. As then-Judge Alito explained:

> [W]hen a stock is traded in an efficient market, the materiality of disclosed information may be measured post hoc by looking to the movement, in the period *immediately*

> following disclosure, of the price of the firm's stock. Because in an efficient market "the concept of materiality translates into information that alters the price of the firm's stock," if a company's disclosure of information has no effect on stock prices, "it follows that the information disclosed . . . was immaterial as a matter of law."

Oran v. Stafford, 226 F.3d 275, 282 (3d Cir. 2000) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997)) (emphasis added).

The Eleventh Circuit is squarely aligned with the Third Circuit's position, holding that a plaintiff's theory of loss causation was "frivolous" where the stock price did not react following an initial alleged corrective disclosure, but declined 22 days later following a second alleged corrective disclosure. *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 689 (11th Cir. 2010). The court explained that any theory of loss causation must fail when it depends on "measur[ing] loss causation over twenty days after the market had learned of the alleged fraud." *Id.*

The Second Circuit is in accord. It affirmed summary judgment for a defendant whose controversial accounting treatment for certain transactions had been publicly revealed in SEC filings and in news media reports, but whose stock did not decline until a year later when it again became the focus of critical articles in the *Wall Street Journal* and the *Financial Times*. *See In re*

Omnicom Grp., Inc. Sec. Litig., 597 F.3d 501, 503-08 (2d Cir. 2010). With such a long time lag, the Second Circuit did not have occasion to opine about just how quickly the market must react. Even so, the court reasoned that "[h]aving sought to establish investor reliance by the fraud-on-the-market theory, [the plaintiff] faces a difficult task," for it "must concede that the numerous public reports on the . . . transaction were '*promptly digested*' by the market and 'reflected in Omnicom's stock price' in 2001 while seeking to recover for a stock price decline a year later in 2002." 597 F.3d at 511 (emphasis added). Under this reasoning, a time lag of days or weeks would almost certainly be impermissible.

The Second Circuit also adopted the immediacy rule in *Teamsters Local 445 Freight Division Pension Fund v. Bombardier, Inc.*, 546 F.3d 196 (2d Cir. 2008), where it affirmed a district court's denial of class certification. The court held that "[e]vidence that unexpected corporate events or financial releases cause an immediate response in the price of a security has been considered the most important . . . factor" in determining market efficiency and "the essence of an efficient market and the foundation for the fraud on the market theory." *Id.* at 207 (internal quotation marks and brackets omitted). The absence of a prompt price reaction following adverse disclosures was one of the key factors the court identified as supporting a finding that the market was inefficient. *Id.* at 210 ("the empirical data actually supported a finding of market inefficiency because there were no material price drops . . . after [the securities] were downgraded . . . and because transaction prices . . . reacted weakly to unexpected downgrades") (internal quotation marks and brackets omitted).

Immediate price reaction not required. In stark contrast is the approach that the Fifth, Sixth, and Ninth Circuits take. In these circuits, it is permissible for a plaintiff to point to a corrective disclosure as a basis for liability even though the stock did not decline for weeks or even months after the purported corrective disclosure (and despite the fact information is assumed to be incorporated promptly for purposes of the fraud on the market presumption). The Ninth Circuit has taken the lead on this issue, holding that it is possible for a plaintiff to prove both materiality and loss causation in an efficient market even though the time between the purported corrective disclosure and the price reaction lags by days, weeks, or even months.

In this case, the Ninth Circuit held that Flynn's analyst reports—which provided no new factual information—could constitute corrective disclosures and suffice to prove loss causation. But by the time the Flynn analyst reports were published, two weeks had passed since Apollo's announcement of the existence of the DOE report and its settlement, and a week had passed since the contents of the DOE report and its potential consequences were discussed in highly negative national newspaper coverage. In ruling that the analyst reports could be considered corrective disclosures, the Ninth Circuit relied upon its earlier decision in *Gilead*, 536 F.3d at 1058, which held that plaintiffs adequately pled loss causation where there was an *82-day gap* between the alleged corrective disclosure and the price decline. *Gilead* in turn relied on the Ninth Circuit's prior decision in *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920 (9th Cir. 2003), which held that a *51-day* delay between a corrective disclosure and a price decline did not render the information immaterial as a matter of law. *Id.* at 934.

The Fifth Circuit has followed the Ninth Circuit's lead in *Lormand v. US Unwired, Inc.*, 565 F.3d 228 (5th Cir. 2009). *Lormand* involved a series of alleged corrective disclosures regarding the negative effects of a company's program catering to sub-prime credit customers. While there was an immediate price reaction following the final alleged corrective disclosure, the Fifth Circuit held that one of the earlier disclosures could also be a corrective disclosure, even though it "was followed immediately by a stock price increase rather than a decrease." *Id.* at 266 n.33. Citing the Ninth Circuit's decision in *Gilead*, the Fifth Circuit held that "a delayed reaction can still satisfy the pleading requirements for 'loss causation.'" *Id.*[2]

Similarly, the Sixth Circuit has held that an efficient market may take an extended period of time to incorporate information into its price following a

[2] While the Fifth Circuit went on to say that "*proof* of causation would be more difficult when significant time elapses before the market allegedly reacts," 565 F.3d at 266 n.33 (emphasis in original), the fact that it allowed the case to survive a motion to dismiss indicated that it thought loss causation could be proven even where there was a "delayed reaction" to a corrective disclosure.

corrective disclosure. In assessing the materiality of a tire manufacturer's statements about the safety of its tires, the Sixth Circuit cited favorably the Third Circuit's doctrine that "'information important to reasonable investors (in effect, the market) is *immediately* incorporated into stock prices,'" *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651 (6th Cir. 2004) (quoting *Burlington*, 114 F.3d at 1425) (emphasis added), but then measured the stock price reaction over a six-week period.

B. The Circuits Are Split On Whether The Analysis Of Previously Disclosed Facts Can Constitute A "Corrective Disclosure" In An Efficient Market.

The circuits are also in conflict over whether a recharacterization or analysis of previously disclosed information can be a corrective disclosure, with the Ninth Circuit standing alone in holding that it can.

Five circuits—the Second, Third, Fourth, Fifth, and Eleventh—hold that the opinions and re-characterizations such as those contained in the Flynn reports are not corrective disclosures sufficient to establish loss causation. *See Omnicom*, 597 F.3d at 512; *In re Merck & Co. Sec. Litig.*, 432 F.3d 261, 269-70 (3d Cir. 2005); *Teachers' Ret. Sys. v. Hunter*, 477 F.3d 162, 187-88 (4th Cir. 2007); *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330, 340 (5th Cir. 2010); *Thompson*, 610 F.3d at 689-91. The rule in these circuits is that disclosures constituting merely "confirmatory information" already in the market do not qualify as corrective disclosures. *Halliburton*, 597 F.3d at 340.

In each of these circuits, it is not enough to show that a stock declined after a second disclosure "amplified" the first, *Thompson*, 610 F.3d at 690-91, or provided "a negative characterization of already-public information," *Omnicom*, 597 F.3d at 512. Nor would it be enough to show that the stock declined after an especially "authoritative" source offered an interpretation of the previously disclosed facts. *Merck*, 432 F.3d at 269-70 (*Wall Street Journal* interpretation of previously disclosed facts was not a corrective disclosure); *Omnicom*, 597 F.3d at 506-07 (accounting professor's publicly expressed opinion that transaction raised a "red flag" did not disclose new facts).

None of the other circuits would accept the Ninth Circuit's concept that the Flynn reports could have been corrective disclosures because they were "more authoritative." App. 2a. Nor would they permit an analyst's downgrade to be considered a corrective disclosure. Consistent with the efficient market premise adopted in *Basic*, these circuits hold that once the facts have been publicly disclosed, a second report of the same information from another source cannot be considered a corrective disclosure, regardless of how authoritative that second source is.

These circuits would reject any notion that an efficient market selectively chooses the information it absorbs based on the source; instead, consistent with *Basic*, they hold that "[t]he efficient market theory . . . posits that *all* publicly available information about a security is reflected in the market price of the security." *Thompson*, 610 F.3d at 691 (emphasis added); *accord Halliburton*, 597 F.3d at 334 ("Under the fraud-on-the-market theory, it is assumed that in an efficient, well-developed market *all* public information about a company is known to the market and is reflected in the stock price.") (emphasis added); *see also In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 14 (1st Cir. 2005) ("an efficient market is one in which the market price of the stock *fully reflects all* publicly available information") (emphasis in original).

The Ninth Circuit's ruling that a jury could have concluded that the Flynn reports included "additional . . . fraud-related information" also ignores the critical fact that the Flynn reports did not disclose any "additional" *facts*, which is what *Dura* and the other circuits consider relevant. *See, e.g., Dura*, 544 U.S. at 344 ("[A] person who 'misrepresents the financial condition of a corporation in order to sell its stock' becomes liable to a relying purchaser 'for the loss' the purchaser sustains 'when the *facts* . . . become generally known' and '*as a result*' share value 'depreciate[s].'") (quoting Restatement of Torts § 548A (1976), Comment *b*, at 107) (emphasis added); *Teachers' Ret. Sys.*, 477 F.3d at 187 (only the disclosure of "*new facts* . . . that revealed [a defendant's] previous representations to have been fraudulent" can constitute a corrective disclosure) (emphasis added).

The only information plaintiff suggested was factually new in this case consisted of a securities analyst's *post hoc* assessments of the "risks" of regulatory action against Apollo, and the "risks" of increased counselor turnover in connection with Apollo's new compensation plan. App. 10a. In other circuits, these assessments and opinions regarding "risks," and the downgrade of Apollo's stock rating, would have been treated as "amplifications" or "negative characterizations," not as new corrective disclosures that could serve as a basis for loss causation. *See, e.g., Merck*, 432 F.3d at 270 (*Wall Street Journal* reporter's analysis of the magnitude of an allegedly improper revenue recognition practice did not constitute a corrective disclosure where the company had previously disclosed its practice).

* * *

The conflicts in loss causation standards among the circuits have become entrenched in the two decades since *Basic* was decided. *See Greenhouse v. MCG Capital Corp.*, 392 F.3d 650 (4th Cir. 2004) (noting the split between the Ninth and Third Circuits on the immediacy issue in the materiality context and declining to "tak[e] a position on this thorny issue"). The uncertainty and conflict will persist until this Court steps in to clarify the standards for establishing loss causation in efficient markets.

II. THE NINTH CIRCUIT'S APPROACH TO LOSS CAUSATION IS INCONSISTENT WITH THE EFFICIENT MARKET THEORY AND WITH THIS COURT'S HOLDINGS IN *BASIC* AND *DURA*.

The Ninth Circuit's view on both issues presented contravenes this Court's holdings and rationales in *Basic* and *Dura*.

Regarding the first issue, *Basic* held "that the market price of shares traded on well-developed markets reflects *all publicly available* information, and, hence, any material misrepresentations." 485 U.S. at 246 (emphasis added). In so ruling, this Court adopted a principle that is embraced by the overwhelming majority of economists. As Nobel laureate William F. Sharpe explained in his seminal textbook, "In an efficient market, investors will incorporate any new information *immediately and fully* in security prices." William F. Sharpe, Gordon J. Alexander & Jeffery V. Bailey, *Investments* 95 (6th ed. 1999) (emphasis added).

Under this view, efficient stock markets generally respond to new information within one day. Eugene F. Fama, *Efficient Capital Markets: II*, 46 J. Fin. 1575, 1601-02 (1991). As a leading law review article (which this Court cited in *Basic*) reports, "[i]mplicit in [the fraud on the market theory] is an acceptance of the efficient market thesis, which states that publicly available information affecting a corporation's prospects is *rapidly absorbed* by the market, that *the information has an immediate impact on the stock price*, and that the marketplace reacts to both true and false data." Barbara Black, *Fraud on the Market: A Criticism of Dispensing With Reliance Requirements in Certain Open Market Transactions*, 62 N.C. L. Rev. 435, 454 (1984) (cited in *Basic*, 485 U.S. at 247 n.26) (emphasis added).

The Ninth Circuit has effectively rejected *Basic's* ruling that efficient markets incorporate "all" publicly available information into stock prices. Instead, the Ninth Circuit's view is that the same market for the same stock can be both highly efficient and highly inefficient, depending on what stage one asks the question and who benefits from the answer. Thus, the Ninth Circuit has applied a completely different standard of market efficiency in assessing the presumption of reliance on the one hand, and materiality and loss causation on the other.

In the context of establishing the fraud on the market presumption, the Ninth Circuit has stated that market efficiency is characterized by an "'*immediate* response in the stock price.'" *Binder v. Gillespie*, 184 F.3d 1059, 1064-65 (9th Cir. 1999) (quoting *Cammer v. Bloom*, 711 F. Supp. 1264, 1287 (D.N.J. 1989) (emphasis added)). But the Ninth Circuit has expressly adopted a different position with respect to loss causation.

In *America West*, it stated that efficient markets may be "subject to distortions that prevent the ideal of 'a free and open public market' from occurring." 320 F.3d at 934. Accordingly, in the Ninth Circuit, a "plaintiff establishes fraud on the market by demonstrating that a security is actively traded in an 'efficient market,' in which prices immediately reflect all publicly available information," but "an *immediate* response is *not* required for loss causation." *Miller v. Thane Int'l, Inc.*, 615 F.3d 1095, 1103 (9th Cir. 2010) (first emphasis in original).

This asymmetrical approach to market efficiency cannot be reconciled with *Basic* or *Dura*. It is also profoundly unfair. Under the Ninth Circuit's view, the same efficient market that incorporates information immediately when the fraud allegedly takes place, thereby allowing plaintiffs to dispense with establishing the element of individual reliance, somehow then fails to incorporate information for days, weeks, and even months for purposes of assessing materiality and loss causation.

The Ninth Circuit's reference to market "distortions" in its analysis of loss causation contravenes the efficient market principle adopted in *Basic*. The *only* reason for allowing a fraud on the market action to proceed is the presumption that the market price at each moment reflects all publicly available information. If "distortions" delay information from being incorporated into the market price for days, weeks, or even months, then the market simply does not meet the definition of efficiency. Alternatively, it could be that the market is efficient and is "right" and the information was not regarded by the market as material, or even if objectively material, did not cause a plaintiff's loss.

But it cannot be both: the market cannot be efficient for purposes of assimilating a defendants' fraud immediately into price, and then lazy and unresponsive when that fraud is revealed. As the Third Circuit said, "[a]n efficient market for good news is an efficient market for bad news." *Merck*, 432 F.3d at 271. Moreover, the Ninth Circuit does not even require that the supposed "distortions" be pled, much less proved. They can be simply assumed. *America West*, 320 F.3d at 949 n.1 (Tallman, J., dissenting) ("I am at a loss to understand what evidence the majority employs to discount the non-reaction of the market because the 'market is subject to distortions.' What distortions? The plaintiffs have not alleged any, and in fact have alleged the opposite in order to invoke the fraud-on-the-market theory.").

Regarding the second issue presented, the Ninth Circuit's holding fails to differentiate between facts and opinions. Both can move markets, but under *Dura* it is only fraud revealing facts that can be a basis for proving loss causation.

Under settled law, companies are not required to—and typically do not—make predictions about their stock performance, or offer analyses, opinions, or predictions regarding the *facts* they disclose to the market, or issue ratings on their stock. *See, e.g., In re Sofamor Danek Grp., Inc.*, 123 F.3d 394, 402 (6th Cir. 1997) (en banc) ("predictions not 'substantially certain to hold,' like most matters of opinion, simply do not come within the duty of disclosure"); *Kushner v. Beverly Enters., Inc.*, 317 F.3d 820, 831 (8th Cir. 2003) ("[T]here is no duty to disclose 'soft information,' such as a matter of opinion, predictions, or a belief as to the legality of the company's own actions.

Soft information must be disclosed only if virtually as certain as hard facts.") (citation omitted).

But analysts do make predictions and offer analysis of publicly known facts, and their predictions and stock ratings can and do move markets. The SEC has recognized the critical distinction between material facts disclosed by issuers—which can be the subject of misstatements and subsequent corrective disclosures—and the analyses of those facts provided by securities analysts.[3] The Ninth Circuit's ruling that Flynn's analyst reports constituted a corrective disclosure ignores that distinction and runs directly contrary to the loss causation paradigm established in *Dura*.

Under *Dura*, loss causation requires a corrective disclosure of facts that were misstated or concealed by the defendant in violation of law. 544 U.S. at 344. Analyses, opinions, and predictions cannot be "corrective" within the meaning of *Dura*. *See Omnicom*, 597 F.3d at 512 (article did not constitute a corrective disclosure because it did not contain any new "hard fact[s]": "A negative journalistic characterization of previously disclosed facts does not constitute a corrective disclosure of anything but the journalists' opinions."); *Halliburton*, 597 F.3d at 342

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[3] *See* Selective Disclosure and Insider Trading, Release Nos. 33-7881, 34-43154, IC-24599, 65 Fed. Reg. 51,716 (Aug. 24, 2000) at 51,717 (securities analysts "provide value for investors by using their education, judgment and expertise to *analyze* information") (emphasis in original); *id.* at 51,722 (analysts construct a "'mosaic' of information" through a "combination of persistence, knowledge, and insight").

("We have characterized [news commentary and analysts] as merely 'well-informed speculation.'").

Dura requires plaintiffs to establish that their losses were caused by "defendant's fraud," 544 U.S. at 338, not by the "tangle of factors affecting price," *id.* at 343. Analyses and predictions such as those embodied in the Flynn reports are part of this "tangle of factors affecting price"—they are not facts that can constitute a corrective disclosure. Under *Dura*, losses attributable to the fraudulent misrepresentation or concealment of facts are measured by the stock price decline "'when the *facts* . . . become generally known' and 'as a result' share value 'depreciate[s].'" *Id.* at 344 (quoting Restatement of Torts § 548A, Comment *b*, at 107) (emphasis added).

Dura also emphasized that Section 10(b) was not intended "to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations *actually cause*." *Id.* at 345 (emphasis added). By divorcing the revelation of the factual basis for a supposed fraud from any statistically significant price effect, the Ninth Circuit breaks that causal connection.

The connection between a corrective disclosure and a stock price decline is made more attenuated by the passage of time, as more information enters into the market. Under *Basic*, efficient markets incorporate information into stock prices efficiently—not over the nearly three-month period that the Ninth Circuit characterized as "[a] limited temporal gap" in *Gilead*. 536 F.3d at 1058.

The Ninth Circuit's "non-immediacy" standard effectively eviscerates *Dura*. This Court rejected standardless assessments of loss causation in *Dura*, when it overturned the Ninth Circuit's prior rule that plaintiffs could establish causation by showing that the fraudulent statement or omission "touches upon" the reasons that the stock price declined. *See* 544 U.S. at 343 ("To 'touch upon' a loss is not to *cause* a loss, and it is the latter that the law requires.") (emphasis in original). The current Ninth Circuit approach to loss causation is philosophically a return to the "touches upon" standard, and practically invites courts to make inconsistent and inherently subjective rulings.

III. THE QUESTIONS PRESENTED ARE RECURRING ISSUES OF NATIONAL IMPORTANCE, AND THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THEM.

This Court has recognized the importance of well functioning capital markets to the health and vitality of the United States, and the utility of rules governing these markets that are susceptible of consistent application. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006) ("The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated."); *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010) (criticizing the circuits' "collection of tests. . . , complex in formulation and unpredictable in application" for extraterritorial application of Section 10(b)).

While loss causation is an element of a plaintiff's case in Rule 10b-5 cases, it is usually raised by a defendant attempting to disprove an essential element of the plaintiff's case. In the abstract one would not think this should be so hard. If the market really is efficient and does not react when the allegedly misrepresented facts are disclosed, that should be the end of the story—a plaintiff's losses were caused by the "tangle of factors" affecting price, not by a securities fraud.

But the Ninth Circuit, which regularly ranks first or second among the circuits in terms of the number of securities cases filed,[4] has introduced two unnecessary and counterproductive elements of uncertainty into the equation: (1) virtually any time delay—no matter how long—between the factual revelation and the stock price drop will not be sufficient for a defendant to establish a lack of materiality or the absence of loss causation; and (2) the corrective disclosure does not even have to consist of newly revealed facts—the post-prandial ponderings of wise men and women can also suffice if they are sufficiently "authoritative."

These glosses on the holdings in *Basic* and *Dura* substantially diminish the effectiveness of the loss causation defense in a circuit where a quarter of the cases are filed, making it difficult to obtain the dismissal of meritless cases at an early stage, and

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[4] *See* Alexander Aganin, Cornerstone Research, *Securities Class Action Filings 2009: A Year in Review* 25 (2010) (between 1997 and 2008 the Second and Ninth Circuits have ranked either first or second in the number of cases filed and have each accounted for 24% of the securities class actions filed).

clogging the courts with cases whose undeserved settlement value arises from the lack of clear and easy to apply rules. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975) ("[I]in the field of federal securities laws . . . even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment."); *Dura*, 544 U.S. at 347 (expressing concern with "permit[ting] a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value") (quotation omitted); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (securities fraud actions "can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law").

Moreover, on an issue that plays such a significant role in the U.S. economy,[5] it offends traditional notions of justice and fairness for results to be so different depending on where a case is filed.

Recently, the Court has recognized the importance of clear rules in securities cases. *See, e.g., Morrison*, 130 S. Ct. at 2886 (adopting a bright-line "transactional test" that "the purchase or sale is

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[5] Each year since 2000, securities class action settlements have exceeded $2 billion, and the aggregate total since that time exceeds $50 billion. Ellen M. Ryan & Laura E. Simmons, Cornerstone Research, *Securities Class Action Settlements: 2009 Review and Analysis* 1 (2010).

made in the United States, or involves a security listed on a domestic exchange"); *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784, 1793-99 (2010) (clarifying inquiry notice standards for Section 10(b) statute of limitations defenses). The situation among the lower courts when it comes to assessing loss causation is similarly affected by different standards, and loss causation affects a far broader array of cases.

This case presents an excellent vehicle for this Court to review and clarify the standards for proving loss causation. This is one of the rare securities fraud cases that has gone through a full trial on the merits, and thus presents an opportunity for the Court to clarify the standards for not just pleading, but proving loss causation. Decisions rendered at the motion to dismiss stage do not permit the Court to review these important issues on a fully developed factual record. The Court should take this opportunity to adopt clear and uniform standards regarding loss causation in cases governed by the fraud on the market theory adopted in *Basic*.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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November 15, 2010

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: APOLLO GROUP, INC. SECURITIES LITIGATION, **POLICEMEN'S ANNUITY AND BENEFIT FUND OF CHICAGO,** Plaintiff-Appellant, **v.** **APOLLO GROUP, INC. et al.,** Defendants-Appellees.	No. 08-16971 D.C. No. 2:04-cv-02147-JAT **MEMORANDUM*** (Filed Jun. 23, 2010)

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Argued and Submitted March 3, 2010
Pasadena, California

Before: **KOZINSKI**, Chief Judge, **W. FLETCHER**, Circuit Judge and **GETTLEMAN**,** District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Robert W. Gettleman, United States District Judge for the Northern District of Illinois, sitting by designation.

The district court erred in granting Apollo judgment as a matter of law. The jury could have reasonably found that the UBS reports following various newspaper articles were "corrective disclosures" providing additional or more authoritative fraud-related information that deflated the stock price. *Cf. In re Gilead Scis. Sec. Litig.,* 536 F.3d 1049, 1058 (9th Cir. 2008) (later disclosure corrective when public initially "failed to appreciate [the] significance" of negative information); *Hanon* v. *Dataproducts Corp.,* 976 F.2d 497, 503 (9th Cir. 1992) (what market understands depends on "intensity and credibility" of information).

Apollo is not entitled to a new trial. The district court did not abuse its discretion by excluding Flynn's potentially confusing deposition testimony, which Apollo had already chosen not to use on cross-examination. *See* Fed. R. Evid. 403; *Sprint/United Mgmt. Co.* v. *Mendelsohn,* 552 U.S. 379, 384 (2008). The district court also properly instructed the jury. It made clear that damages could be awarded only for fraud-related losses, and it was not required to instruct the jury on a theory of liability the plaintiffs hadn't presented.

Finally, there is no basis for remittitur. The jury could have reasonably credited the expert who testified that the fraud revealed by multiple corrective disclosures accounted for $5.55 of the drop in stock price. Damages are limited by the extent of Apollo's fraud, not by the subset of fraud the UBS reports alone revealed. *See In re Dauo Sys., Inc.*, 411 F.3d

1006, 1027 (9th Cir. 2005) ("[Plaintiffs'] economic loss was the decline in their stock value that was the direct result of Dauo's misrepresentations.").

We reverse and remand with instructions that the district court enter judgment in accordance with the jury's verdict.

REVERSED AND REMANDED WITH INSTRUCTIONS.

2008 WL 3072731 (D.Ariz.)

United States District Court,
D. Arizona.
In re **APOLLO** GROUP, INC.
SECURITIES LITIGATION.
This Document Relates To: All Actions.
Master File No. CV 04-2147-PHX-JAT.
Nos. CV 04-2204-PHX-JAT,
CV 04-2334-PHX-JAT.

Aug. 4, 2008.

ORDER

JAMES A. TEILBORG, District Judge.

This securities-fraud class action centers around a Department of Education ("DOE") program review at the University of Phoenix ("UOP"), a wholly-owned subsidiary of Apollo Group, Inc., that began in August 2003 and ended by settlement agreement on September 7, 2004. The Policemen's Annuity and Benefit Fund of Chicago ("PABF"), representing a class of persons who purchased Apollo stock between February 27, 2004 and September 14, 2004, claimed that Apollo and two of its individual officers made false or misleading statements concerning the status of this program review, and that these misrepresentations caused certain investors to suffer economic loss after the truth was fully disclosed to the market by way of two analyst reports (the "Flynn reports") on September 20, 2004. At trial, the Court instructed the jury that loss causation, an essential element of PABF's securities-fraud claim, could be found only if the

Flynn reports were "corrective disclosures." The jury found for PABF.

Apollo and its individual officers now move for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) and, alternatively, for a new trial under Rule 59. The dispositive question presented in the Rule 50(b) motion is whether the evidence at trial was sufficient to support the jury's finding that the Flynn reports were corrective disclosures. The Court finds that it was not, and will therefore grant the Rule 50(b) motion.

I. Background

The Court recites the facts relevant to this motion consistent with the jury verdict.

On February 5, 2004, as part of its ongoing program review at the UOP, the DOE sent Apollo a program review report that preliminarily found that the UOP had violated DOE regulations. Apollo was not required to immediately disclose the report, and it chose not to do so. But on six different occasions thereafter, between February 27, 2004 and September 7, 2004, Apollo misrepresented the actual state of affairs surrounding the program review by making public statements at odds with the existence and contents of the DOE report. On September 14 and 15, 2004, the contents of the DOE report were widely disseminated for the first time through various newspapers articles, including articles in *The Wall Street Journal, The Arizona Republic, and the Chicago*

Tribune. The market did not react to the disclosure of this news in any significant way. Five days later, the Flynn reports were issued. These reports downgraded Apollo's stock for various reasons, some of which PABF argued at trial were necessary to reveal the truth of Apollo's prior misrepresentations. Apollo's stock price fell significantly thereafter.

II. Discussion

A. Motion for Judgment as a Matter of Law

The Ninth Circuit has articulated the applicable "standard of review for post-verdict motions for judgment as a matter of law ('JMOL')" as follows:

> The trial court can overturn the jury and grant such a motion only if, under the governing law, there can be but one reasonable conclusion as to the verdict. In other words, the motion should be granted only if there is no legally sufficient basis for a reasonable jury to find for that party on that issue. In ruling on a motion for JMOL, the court is not to make credibility determinations or weigh the evidence and should view all inferences in the light most favorable to the nonmoving party. The court must accept the jury's credibility findings consistent with the verdict. It must disregard all evidence favorable to the moving party that the jury is not required to believe. The court may not substitute its view of the evidence for that of the jury.

Winarto v. Toshiba Am. Elecs. Components, Inc., 274 F.3d 1276, 1283 (9th Cir.2001) (internal citations and quotations omitted).

To recover for securities fraud under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, a plaintiff must establish " 'loss causation,' *i.e.,* a causal connection between the material misrepresentation and the loss." *Dura Pharms., Inc. v. Broudo,* 544 U.S. 336, 342 (2005). One way in which the plaintiff can prove this element is by showing that a corrective disclosure caused the stock price to decline.[1] *Metzler Inv. GMBH v. Corinthian Colls., Inc.,* ___ F.3d ___, No. 06-55826, at 9267 (9th Cir. July 25, 2008) (stating that the market must "learn[ ] of and react[ ] to [the] fraud"); *In re Daou Sys., Inc.,* 411 F.3d 1006, 1026 (9th Cir.2005); *Lentell v. Merrill Lynch & Co., Inc.,* 396 F.3d 161, 175 (2d Cir.2005); *Omnicom Group, Inc. Sec. Litig.,* 541 F.Supp.2d 546, 551 (S.D.N.Y.2008). A "corrective disclosure" is a disclosure that reveals the fraud, or at

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[1] Isolating the effect of a corrective disclosure on a stock price requires expert testimony. The tool most often used by experts to isolate the effect of a corrective disclosure on a stock price is the "event study." *In re Apollo Group, Inc. Sec. Litig.,* 509 F.Supp.2d 837, 844 (D.Ariz.2007) (citing *In re Imperial Credit Indus., Inc*., 252 F.Supp.2d 1005, 1014 (C.D.Cal.2003)). In grossly oversimplified terms, the event study enables an expert to pinpoint any decline in the stock price attributable to market factors unrelated to the corrective disclosure. Once this is accomplished, if a statistically significant price decline remains, then the expert can be reasonably certain that the corrective disclosure, and thus the fraud, caused that remaining decline.

least some aspect of the fraud, to the market. *See Lentell,* 396 F.3d at 175 n.4 (holding that, to be corrective, a disclosure must "reveal to the market the falsity of the prior [representations]); *Omnicom,* 541 F.Supp.2d at 551 (stating that "a disclosure need not reflect every detail of the alleged fraud" but "must reveal some aspect of it"). A disclosure that does not reveal anything new to the market is, by definition, not corrective. *Omnicom,* 541 F.Supp.2d at 551.

At trial, as at summary judgment, PABF's loss-causation theory, as articulated by its expert witness, Dr. Steven P. Feinstein, depended entirely on the jury finding the Flynn reports to be corrective disclosures. Apollo argues that the evidence was insufficient to support such a finding for two independent reasons.

First, Apollo contends that a market analyst's opinion – which is all the Flynn reports were – is not, and never can be, a "corrective disclosure." Apollo maintains that, to be corrective, a disclosure must reveal *facts* that are necessary to correct the falsity of prior misstatements or omissions, as opposed to simply *analyzing* previously disclosed facts. The Court considered and rejected this argument at summary judgment, stating:

> In order to grant summary judgment to Defendants on this issue, the Court would have to conclude as a matter of law that a market professional's analysis of facts that had been previously disclosed to the investing public can *never* be a corrective disclosure. Defendants have not

> cited, and this Court has not found, any case that supports this proposition.

In re Apollo Group, Inc. Sec. Litig., 509 F.Supp.2d at 846 (emphasis added). Although it appears that at least one district court has since concluded otherwise, see *Omnicom,* 541 F.Supp.2d at 552, the Court will not retreat from its prior holding. To do so, and hold otherwise, would give companies the perverse incentive to indulge in opaque, piecemeal disclosures, specially designed to avoid any market reaction to the news. *See In re Merck & Co., Inc. Sec. Litig.,* 432 F.3d 261, 271 (3d Cir.2005) (declining to hold that analysis of previously disclosed facts can never be a corrective disclosure because the court did not "wish to reward opaqueness"). This Court has no desire to encourage corporate gamesmanship of this kind.

With that said, the Court's rejection of Apollo's rigid, facts-only approach to corrective disclosures is not to deny that the typical securities fraud will be fully revealed through the disclosure of facts, without the need for any subsequent analysis. As the *Merck* court stated, "An efficient market for good news is an efficient market for bad news." 432 F.3d at 271. The situations in which the pertinent facts are obfuscated in such a way, or are of such complexity, as to require someone to connect the dots for a bewildered market represent a very rare type of securities-fraud case, and would not be the rule. The Court's position simply recognizes that an efficient market is not necessarily an omniscient one.

Second, Apollo contends that, even accepting the premise that analysis of existing facts may sometimes be necessary to reveal a fraud to the market, the Flynn reports were not necessary to reveal the fraud in this case because they did not provide any new, fraud-revealing analysis. The Court agrees. At trial, there were only three aspects of the Flynn reports that PABF contended were corrective,[2] and the evidence was insufficient to show that any one of these aspects was in fact corrective.

First, PABF claimed that the Flynn reports were the first to predict future regulatory problems as a result of the previously disclosed contents of the DOE report. This claim, however, was demonstrably false, as evidenced in particular by a *Chicago Tribune* article entitled "School Fine May Foretell Crackdown," published five days before the Flynn reports were issued. [Tr. Ex. 14083-R (Doc. # 559).] That article – in the context of discussing the DOE's investigation of the UOP, the findings of wrongdoing contained in the DOE report, and the subsequent

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[2] Actually, PABF only explicitly argued for two corrective aspects to the Flynn reports. [Tr. 4062:20-23 ("[T]he only new information is that she has the report and she's talked to enrollment counselors. That's the only new information. There's no other information.").] But while discussing these two allegedly corrective aspects, PABF also argued that the reports were corrective because they were the first to tie future regulatory problems to the DOE report [Tr. 4059:19-4062:5], an argument also made at summary judgment, *In re Apollo Group,* 509 F.Supp.2d at 845.

"record fine" that resulted – reported that "leading industry executives said . . . that investigations may lead to stricter regulatory control of their sector and spark the interest of Congress." [*Id.*] The article also reported that Todd Nelson himself, Apollo's chief executive officer at the time and one of the individual defendants in this lawsuit, "told an investors conference in New York that [he was] concerned about investigations into for-profit education companies" like the UOP. [*Id.*] Thus, contrary to PABF's contention at trial, Flynn was not the first to tie future regulatory problems to the DOE report, and the jury therefore could not properly conclude that her reports were corrective for this reason.

Second, PABF claimed that the Flynn reports revealed for the first time that the UOP was experiencing increasing turnover among its enrollment counselors as a result of a new compensation plan. This claim, however, was factually wrong. The uncontradicted evidence at trial was that enrollment-counselor turnover actually decreased after the implementation of the new compensation plan. [Tr. 2408:1-2411:5.] As a matter of logic, false information cannot possibly be corrective information. Moreover, although PABF presented evidence arguably linking the claim of increasing enrollment-counselor turnover to *the DOE report,* PABF did not present any evidence linking this claim to Apollo's misrepresentations. Thus, the jury could not properly conclude that the Flynn reports were corrective on this basis.

Third, PABF claimed that the Flynn reports were corrective because it was "obvious from the report[s]" that Flynn had "read the [DOE] report." [Tr. 4059:1-2.] But this, of course, is nonsense. What Flynn did or did not read before issuing her reports is irrelevant. All that matters is what she actually disclosed to the market in her reports, and PABF has conceded, as it must, that Flynn did not disclose *any* of the DOE report's contents in her reports, much less any new contents.[3] [Tr. 4059:2.]

Securities-fraud actions are "available, not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." *Dura,* 544 U.S. at 345; *see also Basic, Inc. v. Levinson,* 485 U.S. 224, 252 (1988) (White, J., concurring in part and dissenting in part) (rejecting an argument that "would effectively convert Rule 1 Ob-5 into a scheme of investor's insurance"). The evidence at trial undercut all bases on which PABF claimed the Flynn reports were corrective. Thus, although PABF demonstrated that Apollo misled the market in various ways

[3] In its opposition to Apollo's motion for judgment as a matter of law, PABF argues that two other bits of information disclosed in the Flynn reports were also corrective: (1) Flynn's statement that enrollment counselors had reported that enrollment targets were getting harder to hit; and (2) the fact that the UOP had adopted a new compensation plan. But neither bit of information was linked in any way to Apollo's prior misrepresentations. [Tr. 2170:19-2171:25.] Thus, the jury could not have found the Flynn reports to be corrective on either of these bases.

concerning the DOE program review, PABF failed to prove that Apollo's actions caused investors to suffer any harm. Therefore, Apollo is entitled to judgment as a matter of law.

B. Motion for New Trial

Apollo also moved in the alternative for a new trial under Federal Rule of Civil Procedure 59. The Court is required to conditionally rule on this motion in the event the appellate court reverses the grant of judgment as a matter of law. See Fed.R.Civ.P. 50(c)(1).

Rule 59(a) states that "after a jury trial," a new trial may be granted "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Reasons for granting a new trial historically include prejudicial evidentiary rulings, *Dorn v. Burlington N. Santa Fe R.R.,* 397 F.3d 1183, 1189 (9th Cir.2005), erroneous or inadequate jury instructions, *Murphy v. City of Long Beach,* 914 F.2d 183, 187 (9th Cir.1990), attorney misconduct, *Anheuser-Busch, Inc. v. Natural Beverage Distribs.,* 69 F.3d 337, 346 (9th Cir.1995), and a verdict that, in the judge's view, is against the clear weight of the evidence (or constitutes a miscarriage of justice), *Molski v. M.J. Cable, Inc.,* 481 F.3d 724, 729 (9th Cir.2007). Apollo maintains that all of these reasons warrant a new trial in this case.

1. Challenged Evidentiary Rulings

Apollo asserts three errors in the Court's evidentiary rulings.

First, Apollo argues that the Court's exclusion of Kelly Flynn's testimony as to the meaning of her reports was prejudicial, especially in light of the fact that the Court permitted PABF's expert witness, Dr. Feinstein, to testify on the same subject. The Court disagrees. The Flynn reports were admitted as evidence of what the market was told on September 20, 2004. What these reports meant *to the market* could only be gleaned from the words contained in them. Permitting Flynn to testify as to the meaning of these words would have invited the jury to determine the meaning of the Flynn reports based on the author's unspoken thoughts and intentions rather than on the words themselves. The danger of confusion and unfair prejudice far outweighed whatever probative value such testimony may have had. See Fed.R.Evid. 403. Any testimony of the parties' loss-causation experts on the same subject simply did not present the same danger.

Apollo next argues that the Court's refusal to permit Apollo's legal advisors to testify about the "rationale" behind their legal advice was prejudicial error. Again, the Court finds no error in this evidentiary ruling. Apollo's legal advisors were permitted to testify as to the advice they actually communicated to Defendant Nelson, as evidence of Nelson's state of mind. They were also permitted to testify as to their qualifications and the professional capacity in which they rendered the advice – i.e., as lawyers with the fiduciary duty and ethical obligation to give their client the best legal advice they can – to establish why Nelson might have properly relied on their advice. But to allow Apollo's advisors to explain why they gave particular advice would have permitted these lawyers to offer what would have amounted to undesignated expert opinion on the governing law of the case, thereby invading the province of the Court and inviting jury confusion. Moreover, to the extent PABF attacked the credibility of these legal advisors by attempting to paint them as mere "highly-paid advocates," Apollo had an adequate opportunity to rehabilitate them by showing that the lawyers acted in their professional capacity, with all the ethical duties that accompany it.

Finally, Apollo argues that it was prejudicial error to allow Dr. Feinstein to testify about the *risks* of the DOE report as a proxy for the *materiality* of the report, one of the ultimate issues in the case. The Court, however, sees a meaningful distinction between, "A reasonable investor would have considered the DOE report to be material," and, "A reasonable investor would have considered the DOE report to expose certain risks." Furthermore, the fact that the Court could have permitted Dr. Feinstein to testify explicitly concerning the materiality of the report, see Fed.R.Evid. 704(a) (stating that opinion testimony is generally "not objectionable" merely "because it embraces an ultimate issue to be decided by the trier of fact"), clearly demonstrates that the Court did not err in admitting this testimony.

2. Jury Instructions

Apollo asserts a number of errors and inadequacies in the jury instructions. But after reviewing the parties' arguments and the jury instructions as a whole, the Court is convinced that the instructions "fairly and adequately cover[ed] the issues presented, correctly state[d] the law, and [were] not misleading." *Chuman v. Wright,* 76 F.3d 292, 294 (9th Cir.1996). The Court's reasons, as stated on the record, will speak for themselves in this regard.

3. Attorney Misconduct

Apollo argues that PABF's allegedly repeated references to irrelevant topics and its alleged use of a "golden rule" argument – asking the jurors to place themselves in the shoes of the class members – prejudiced its right to a fair trial. "A new trial is warranted on the ground of attorney misconduct during the trial where 'the flavor of misconduct . . . sufficiently permeate[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.'" *Anheuser-Busch, Inc.,* 69 F.3d at 346 (quoting *Kehr v. Smith Barney, Harris Upham & Co.,* 736 F.2d 1283, 1286 (9th Cir.1984)). Although there can be no doubt that PABF succeeded in delving into some irrelevant matters early in the trial, and to the extent PABF's argument during closing can even properly be characterized as an improper "golden rule" argument,[4] the Court is not persuaded that PABF's actions tainted the entire proceeding.

4. *Miscarriage of Justice*

Finally, Apollo contends that "[t]he jury in this case returned a verdict that is a miscarriage of justice." But to the extent the appellate court reverses this Court and rules that sufficient evidence supported the jury's finding that the Flynn reports were corrective disclosures, the Court is satisfied that justice was achieved, for Apollo and the class members.

In sum, none of the reasons cited by Apollo warrant a new trial in this case. Therefore, pursuant to Federal Rule of Civil Procedure 50(c)(1), the Court will conditionally deny Apollo's motion for new trial.

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[4] To determine whether *a reasonable investor* would have viewed the DOE report as material, PABF's counsel invited the jury members to ask themselves whether *they personally* would have viewed the report as material *if they were going to invest in Apollo.* [Tr. 4044:8-12 ("Read the [DOE report] and sit down and say to yourself, honestly, if I was going to invest in this company would this give me a reason to pause? Would I find that this altered, significantly altered the total mix of information in the marketplace? Would I find this to be important?").] Any error in this argument was harmless at worst.

III. Conclusion

The evidence at trial was insufficient to support the jury's finding that the Flynn reports were corrective disclosures. Therefore, PABF failed to prove loss causation, and Apollo is entitled to judgment as a matter of law.

For the foregoing reasons,

IT IS ORDERED that Apollo's Motion for Judgment as a Matter of Law (Doc. # 524) is **GRANTED;**

IT IS FURTHER ORDERED that Apollo's Motion for New Trial (Doc. # 523) is **DENIED;**

IT IS FURTHER ORDERED that, for the reasons stated on the record at the motion hearing held on August 4, 2008:

(1) PABF's Motion to Amend the Judgment (Doc. # 521) is **DENIED;**

(2) Apollo's Motion to Correct the Trial Record (Doc. # 550) is **GRANTED IN PART AND DENIED IN PART;** and

(3) Apollo's Motion for Remittitur (Doc. # 525) is **DENIED;**

IT IS FURTHER ORDERED that the Clerk of the Court shall vacate the judgment at Doc. # 508 and the award of costs at Doc. # 553, and shall enter judgment in favor of Defendants and against Plaintiffs.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: APOLLO GROUP, INC. SECURITIES LITIGATION,	No. 08-16971
POLICEMEN'S ANNUITY AND BENEFIT FUND OF CHICAGO, Plaintiff-Appellant,	D.C. No. 2:04-cv-02147-JAT
v.	**ORDER**
APOLLO GROUP, INC. et al., Defendants-Appellees.	(Filed Aug. 17, 2010)

Before: **KOZINSKI**, Chief Judge, **W. FLETCHER**, Circuit Judge and **GETTLEMAN**, District Judge.*

The petition for rehearing and rehearing en banc is denied. *See* Fed. R. App. P. 35, 40.

* The Honorable Robert W. Gettleman, United States District Judge for the Northern District of Illinois, sitting by designation.

15 U.S.C. § 78j. 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)(1)** To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, 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.
>
> **(2)** Paragraph (1) of this subsection shall not apply to security futures products.
>
> **(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 (as defined in section 206B of the Gramm-Leach-Bliley Act), 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.

Rules promulgated under subsection (b) of this section that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) of this section and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78o, 78p, 78t, and 78u-1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities.

15 U.S.C. § 78u-4(b)(4)

(4) Loss causation

In any private action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages.

17 C.F.R. § 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.