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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re ALPHABET, INC. SECURITIES LITIGATION This Document Relates To: ALL ACTIONS.	Master File No.: 4:18-CV-06245-JSW CLASS ACTION **DEFENDANTS' OPPOSITION TO PLAINTIFF'S CLASS CERTIFICATION MOTION**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Page(s)

Page(s)

Statutes

TABLE OF ABBREVIATIONS

Abbreviation	Meaning
¶ or Complaint	Consolidated Amended Complaint for Violations of the Federal Securities Laws, dated April 26, 2019 (ECF 62)
Ferrell	Rebuttal Report of Professor Allen Ferrell, dated August 22, 2022 (Liming Decl. Ex. 2)
Ex. __	Exhibits attached to Declaration of Drew Liming in Support of Defendants' Opposition to Plaintiff's Class Certification Motion
Mason	Expert Report of Joseph R. Mason, Ph.D., dated June 21, 2022 (ECF 103-2)
Motion	Notice of Motion and Motion to Certify Class, Appoint Class Representative, and Appoint Class Counsel; Memorandum of Points and Authorities in Support Thereof, dated June 21, 2022 (ECF 102)

INTRODUCTION

"This is a prototypical class action case," writes Plaintiff in its Motion. That must be the understatement of the year. To the contrary, this is a case of first impression. It is the first time—at least after the Supreme Court's decision in *Goldman*, but possibly ever—a plaintiff attempts to bring a securities fraud class action when (i) the purported fraud did not impact the company stock price and (ii) there are no damages. These are insurmountable deficiencies, not routine objections.

No price impact. In *Goldman*, the Supreme Court definitively held that defendants may defeat class certification by showing "that an alleged misrepresentation did not actually affect the market price of the stock." 141 S. Ct. 1951, 1959 (2021). In assessing price impact, courts "should be open to *all* probative evidence on that question—qualitative as well as quantitative—aided by a good dose of common sense." *Id.* The report of Prof. Allen Ferrell shows that Plaintiff's alleged "fraud" had no impact on Alphabet's stock price—either at the time when the allegedly misleading statements were made or when the alleged "corrective disclosures" entered the market. This is not an instance of mixed or equivocal evidence. The statistical evidence is clear and uncontroverted. As Plaintiff admitted, its expert "did not even offer a price-impact opinion." Plaintiff cannot avoid this reality by invoking the inapposite holding in *Affiliated Ute Citizens v. U.S.*—the Ninth Circuit emphatically rejected that theory last year. *See In re Volkswagen*, 2 F.4th 1199 (9th Cir. 2021).

No damages. No price impact also means there are no damages. Plaintiff bears the burden of showing "damages are capable of measurement on a classwide basis" through "a model purporting to serve as evidence of damages in this class action [that] must measure only those damages attributable to that theory." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34-35 (2013). Plaintiff's expert failed to provide any damages model—because there can be none. Plaintiff's expert previously had a damages theory rejected for the same fallacies present in his current report.

This lawsuit should not have been brought and cannot be maintained as pleaded. It would be the first time a securities class action would be certified when there were no damages attributable to the purported fraud, contrary to the Exchange Act. 15 U.S.C. § 78bb(a)(1) ("No person permitted to maintain a suit for damages under the provisions of this chapter shall recover . . . a total amount in excess of the actual damages to that person"). Plaintiff's attempt to pivot to allegations that are not in

the Complaint should be rejected. If Plaintiff wishes to embrace a new legal theory, it must first amend its Complaint. Meanwhile, class certification should be denied.

BACKGROUND

A. This Lawsuit Is Filed after Google Identifies and Fixes Bugs in Google+

In March 2018, Google identified a bug in an application programming interface ("API") for its social media platform, Google+. Ex. 1 at 2. The API allowed users to grant app developers access to their own profile data and the public profile information of their friends. *Id.* The bug made available to apps using the API certain Google+ profile fields (name, email, occupation, gender, and age) that had been voluntarily shared with the consenting user even if not marked as public. *Id.* It did not include data like messages, passwords, or phone numbers. *Id.*

Google's engineers "found **no evidence** that any developer was aware of this bug, or abusing the API, and . . . found **no evidence** that any Profile data was misused." Ex. 1 at 2. They fixed the bug promptly. *Id.* On October 8, 2018, the Wall Street Journal ran an article on the bug. ¶ 57. That same day, Google announced that it had decided to discontinue Google+ for consumers because it "has low usage and engagement" and is "challenging to develop and maintain." Ex. 1 at 1-2.

B. Only Two Alleged Misrepresentations Remain in This Case

On April 26, 2019, Plaintiff filed its Complaint. It alleged that Defendants had made a dozen misleading statements regarding data security practices, despite the bug only affecting Google+. ¶ 2. This Court granted Defendants' motion to dismiss in full. ECF 82 at 6-7. Although the Court granted leave to amend, Plaintiff appealed. ECF 83, 85. The Ninth Circuit affirmed the dismissal of ten of the twelve challenged statements. ECF 87 at 34-37. It reversed as to two statements. Both are from Alphabet's 1Q18 and 2Q18 10-Qs, stating: "[t]here have been no material changes to our risk factors since our Annual Report on Form 10-K for the year ended December 31, 2017." *Id.* at 11.

C. Plaintiff Discovers an Inconvenient Truth: Damages Are Zero

During the course of the lawsuit, Plaintiff discovered that the damages alleged in the Complaint are *zero*. None of the alleged "corrective disclosures" on October 8, 9, and 10, 2018, resulted in statistically significant stock drops relative to the market and industry. Ferrell ¶ 22. As a result, Plaintiff (and the putative class) suffered no recoverable loss due to the alleged misstatements.

Perhaps aware of the fatal defects in its damages theory, Plaintiff sought to delay adjudication of its class certification motion until after it had completed discovery. ECF 94 at 8. The Court rejected Plaintiff's proposed delay. ECF at 95. On June 21, 2022, Plaintiff filed its motion for class certification. ECF 102. Plaintiff's proposed class consists of purchasers of Alphabet stock from April 23, 2018 through October 7, 2018. *Id.* at 2. In a departure from the damages theory alleged in the Complaint (and a tacit concession that the October 2018 disclosures result in zero damages), the Motion—for the first time—mentions a *new* stock drop on April 30, 2019. *Id.* at 3. Plaintiff now claims damages for a date *not* alleged in its Complaint—in fact, a date four days *after* Plaintiff filed the Complaint—and almost seven months *after* the end of the proposed class period. Plaintiff's failure to amend means that Defendants have been prevented from opposing this new theory.

D. Plaintiff Relies on a Deficient Expert Report and Then Refuses to Allow Defendants to Depose Its Expert

In support of the Motion, Plaintiff offered the report of Dr. Joseph Mason. ECF 103-2. Dr. Mason's Report does not include any model calculating damages on a classwide basis. Mason ¶¶ 29-49. Instead, he discusses, without actually performing any analysis, two potential methodologies that he *might* use at some unspecified future time. The first methodology would be an event study, the traditional approach for securities class actions. *Id.* ¶¶ 30-36. But because damages for the October 2018 stock drops are *zero* under such a model, Dr. Mason also proposes a "fundamental valuation" model to calculate purported stock inflation. *Id.* ¶¶ 37-44. The fundamental valuation theory is used to calculate projected values of companies or specific corporate assets, not directly measure inflation in publicly-traded shares (as shown by Dr. Mason's repeated citations to a book titled "*Valuing a Business: The Analysis and Appraisal of Closely Held Companies*"). *Id.*

Defendants repeatedly asked Plaintiff to make Dr. Mason available for a deposition. ECF 122. Plaintiff refused to provide dates. *Id.* As a result, Defendants have been deprived of the opportunity to ask Dr. Mason to back up the novel damages theory he proposes in his report.

ARGUMENT

"Before certifying a class, the [Court] must conduct a 'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of Rule 23." *Mazza v. Am. Honda Motor Co.*,

666 F.3d 581, 588 (9th Cir. 2012). As the Supreme Court has instructed, Plaintiff "must actually *prove*—not simply plead—that [its] proposed class satisfies each requirement of Rule 23[.]" *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014).

Plaintiff fails to carry its burden of proving facts necessary to satisfy Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." Rule 23(b)(3) requires a searching inquiry: As the Supreme Court explained, "[i]f anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)." *Comcast*, 569 U.S. at 34. Plaintiff fails to prove predominance for two independent reasons. First, Plaintiff fails to establish that reliance is common across class members, as explained by the Supreme Court in *Goldman*. Second, Plaintiff did not put forth a model "establishing that damages are capable of measurement on a classwide basis." *Comcast*, 569 U.S. at 34.

I. PLAINTIFF'S PROPOSED CLASS FAILS THE *GOLDMAN* STANDARD BECAUSE ALLEGED MISSTATEMENTS HAD NO IMPACT ON ALPHABET'S STOCK PRICE

A. The Supreme Court's Recent Decision in *Goldman* Requires a Factual Inquiry into Price Impact at the Class Certification Stage

"To recover damages for violations of section 10(b) and Rule 10b-5, a plaintiff must prove . . . 'reliance upon the [alleged] misrepresentation or omission,'" among other things. *Halliburton*, 573 U.S. at 267. When the plaintiff alleges, as it does here, a fraud on the market theory, it can "invoke a rebuttable presumption" that the alleged falsehood "was reflected in the market price[.]" *Goldman*, 141 S. Ct. at 1958-59 (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 241-48 (1988)).

The *Basic* presumption is critical to securities class certification. *Id.* "[W]ithout the *Basic* presumption, individualized issues of reliance ordinarily would defeat predominance and 'preclude certification' of a securities-fraud class action." *Id.* The presumption is rebuttable. "[D]efendants may rebut the *Basic* presumption at class certification by showing 'that an alleged misrepresentation did not actually affect the market price of the stock.' If a misrepresentation had no price impact, then *Basic*'s fundamental premise 'completely collapses, rendering class certification inappropriate.'" *Id.*

In *Goldman*, the Supreme Court definitively held that:

> In assessing price impact at class certification, courts "'should be open to *all* probative evidence on that question—qualitative as well as quantitative—aided by a good dose

> of common sense.'" That is so regardless whether the evidence is also relevant to a merits question like materiality. As we have repeatedly explained, a court has an obligation before certifying a class to "determin[e] that Rule 23 is satisfied, even when that requires inquiry into the merits."

141 S. Ct. at 1960-61. The Court explained that, "[i]n most securities-fraud class actions, as in this one, the plaintiffs and defendants submit competing expert evidence on price impact. The district court's task is simply to assess all the evidence of price impact—direct and indirect—and determine whether it is more likely than not that the alleged misrepresentations had a price impact." *Id.* at 1963. The Court's task is easier here, where Dr. Mason proffers no opinion on price impact. *Infra* at 7.

The present case fits neatly within the *Goldman* framework. Because Plaintiff was not required to show price impact earlier, its Complaint survived the pleading stage and the issue evaded the Ninth Circuit's scrutiny. But now, Plaintiff has still provided no evidence of price impact. And that is not surprising: as discussed below, the alleged fraud *had no price impact* on Alphabet's stock. This is a rare case where there was no price inflation on the dates on which the allegedly misleading statements were published *or* a price decline on the dates on which the alleged fraud was revealed.

B. The Evidence Shows that the "Corrective Disclosures" Alleged in the Complaint Had No Impact on Alphabet's Stock Price

Defendants submit the report of Dr. Allen Ferrell, Greenfield Professor of Securities Law at Harvard Law School. Prof. Ferrell will be available at the hearing to answer the Court's questions.

As is typical for securities class actions, Prof. Ferrell conducted a statistical event study to determine whether Alphabet's price movements could be attributable to company-specific news. Ferrell ¶¶ 41-67. To isolate the movements of Alphabet stock from general market and industry movements, Prof. Ferrell examined statistical models that included indices for NASDAQ (the market in which Alphabet trades), and for the technology industry. *Id.* ¶ 40. *See Halliburton*, 573 U.S. at 280 ("plaintiffs themselves can and do introduce evidence of the *existence* of price impact in connection with 'event studies'—regression analyses that seek to show that the market price of the defendant's stock tends to respond to pertinent publicly reported events. . . . Defendants—like plaintiffs—may accordingly submit price impact evidence prior to class certification").

As previously noted, the only remaining claims in this action concern allegedly misleading risk factors incorporated in Alphabet's Forms 10-Q of April 23 and July 23, 2018. *See* Ferrell ¶ 8; *In re*

Alphabet Sec. Litig., 1 F.4th 687, 702 (9th Cir. 2021). Prof. Ferrell's model shows that there is no statistically significant increase in Alphabet's stock price on April 23, 2018, relative to the broader market and industry. Ferrell ¶ 43.[1] On the contrary, Alphabet's stock declined on that date, relative to the market and industry. *Id.* On July 23, 2018, Alphabet's stock price did increase, but, as Prof. Ferrell notes, the allegedly misleading risk factor published that day was identical to the one published in the April 2018 10-Q. *Id.* ¶ 44. As such, that information had already been priced into the stock. *Id.* Market commentators attributed Alphabet's stock increase on July 23, 2018, to other factors. *Id.* There is no economic evidence that the alleged misleading statements and omissions caused inflation in Alphabet's stock price when they were published. *Id.* ¶¶ 43, 45.

In addition to examining the price impact at the time the statement/omission was made ("upfront price impact"), courts also examine the price reaction on the day of the corrective disclosure ("backend price impact"). As one court explained:

> So the movement of a stock price immediately after a false statement often tells us very little about how much inflation the false statement caused. The best way to determine the impact of a false statement is to observe what happens when the truth is finally disclosed and use that to work backward, on the assumption that the lie's positive effect on the share price is equal to the additive inverse of the truth's negative effect. (Put more simply: what goes up, must come down.)

Glickenhaus v. Household Int'l, Inc., 787 F.3d 408, 415 (7th Cir. 2015) (plaintiff retained an expert to perform such a financial analysis); *Goldman*, 141 S. Ct. at 1961 ("Plaintiffs typically try to prove the amount of inflation indirectly: They point to a negative disclosure . . . and an associated drop in its stock price; allege that the disclosure corrected an earlier misrepresentation; and then claim that the price drop is equal to the amount of inflation maintained by the earlier misrepresentation.").

Consistent with this approach, Prof. Ferrell also examined stock movements on the alleged corrective disclosure dates in October 2018. Ferrell ¶ 46. He concludes that on October 8, 9, and 10, 2018, Alphabet's stock price moves were not statistically different than those of the market and industry. *Id.* ¶¶ 48, 55, 59. As Prof. Ferrell notes, "the lack of price impact is consistent with the fact

[1] For price impact, Plaintiff must show statistically significant moves in the stock price. Ferrell ¶ 32; *In re Intuitive Surgical Sec. Litig.*, 2016 U.S. Dist. LEXIS 178148, at *45-47 (N.D. Cal. Dec. 22, 2016) (no price impact where "neither [expert] found a statistically significant price impact at the 95% confidence level"); *In re Novatel Wireless Sec. Litig.*, 830 F. Supp. 2d 996, 1019 (S.D. Cal. 2011) ("decline in stock price caused by the revelation of that truth must be statistically significant").

that market participants did not consider the alleged October 8, 2018 Corrective Disclosure value-relevant." *Id.* ¶ 48. Few analysts commented on the alleged corrective disclosures, and they noted the disclosures were of little importance to Alphabet. *Id.* ¶¶ 50-51. Analyst predictions of Alphabet's price remained virtually unchanged. *Id.* ¶ 49. The results do not change if, instead of examining each day, the analysis is conducted cumulatively for all three days. *Id.* ¶ 63.

Aware that there is no price impact for the October 2018 disclosures, Plaintiff now tries to add another corrective disclosure, on April 30, 2019. Motion at 3. But this stock drop is not alleged *anywhere* in the Complaint. Plaintiff has not pleaded any particularized facts, as required by the Ninth Circuit, that the April 2019 stock drop was caused by the alleged misstatements or why an efficient market would take six months to react to them. *See Irving Firemen's Relief & Ret. Fund v. Uber Techs., Inc.*, 998 F.3d 397, 404 (9th Cir. 2021) (requiring loss causation be pleaded with particularity). Nor can Plaintiff add a stock drop that comes almost seven months *after* the end of its proposed class. *See In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480, 493 (S.D.N.Y. 2011) (stock drops that "fall outside of the class period . . . cannot serve as a basis of proving a link between the misrepresentation and the price for the class as Plaintiff[] seek[s] to define it").

In sum, Prof. Ferrell's analysis demonstrates that "there is no period within the proposed class period where the alleged misrepresentation caused a statistically significant increase in the price or where a corrective disclosure caused a statistically significant decline in the price." *Moody's*, 274 F.R.D. at 493. By contrast, Plaintiff's expert does not proffer *any* analysis on price impact.[2] In Plaintiff's own words, "Professor Mason did not even offer a price-impact opinion[.]" ECF No. 125 at 5. Given this failure, "the reliance presumption for the class as [Plaintiff] [has] defined it is successfully rebutted and the class cannot be certified." *Moody's*, 274 F.R.D. at 493.

C. Plaintiff Cannot Circumvent *Goldman* by Purporting to Plead "Pure Omissions"

Plaintiff is aware its case cannot proceed (as a class or individually) if the alleged fraud had no

[2] Plaintiff might try to draw attention away from its inability to provide any evidence of price impact by arguing that Defendants have the burden of showing the absence of price impact. *Goldman*, 141 S. Ct. at 1963. But the Supreme Court explained that "the allocation of the burden is unlikely to make much difference on the ground. . . . The defendant's burden of persuasion will have bite only when the court finds the evidence in equipoise—a situation that should rarely arise." *Id.* This is not a close case where the Court must weigh competing evidence; Plaintiff admits it provided none.

impact on Alphabet's stock. Having given up on showing price impact, Plaintiff's only argument is that it can simply avoid *Goldman* analysis. ECF 102 at 11. Plaintiff now claims that its lawsuit is based exclusively on omissions, not affirmative statements, and that somehow that means reliance can be assumed. ECF 125 at 5; ECF 102 at 11; ¶ 42 (invoking *Affiliated Ute*). Plaintiff's argument is wrong for many reasons: it ignores Ninth Circuit precedent, mixes up securities law, and would lead to absurdity where public companies could be sued for fraud even when there is no harm to investors.

1. *Affiliated Ute* Does Not Apply to Cases Challenging Affirmative Statements

Recent Ninth Circuit authority holds that *Affiliated Ute* does not apply to the present case. The *Affiliated Ute* "presumption should not be applied to cases that allege both misstatements and omissions[.]" *VW*, 2 F.4th at 1204-05. "We instructed that this requires courts to 'analytically characterize [the] action as either primarily a nondisclosure case (which would make the presumption applicable), or a positive misrepresentation case' (where the presumption would be unavailable)." *Id.* The Court explained that "there is no question that Plaintiff alleges an omission regarding Volkswagen's use of defeat devices, but that omission is simply the inverse of the affirmative misrepresentations" challenged in the Complaint. *Id.* at 1208. As a result, "the presumption does not apply to 'misstatements whose only omission is the truth that the statement misrepresents.'" *Id.*[3]

The Ninth Circuit expressly warned against attempts by plaintiffs to circumvent the showing required for pleading securities fraud by simply styling a misrepresentation as an omission:

> As we noted before, '[a]ll misrepresentations are also nondisclosures, at least to the extent that there is a failure to disclose which facts in the representation are not true.' But while fraud necessarily involves concealing the truth, we cannot allow such concealment to transform affirmative misstatements into implied omissions. To do so would stray from *Affiliated Ute*'s purpose of excusing the difficult or impossible evidentiary burden of proving a 'speculative possibility in an area where motivations are complex and difficult to determine.'

VW, 2 F.4th at 1208-09. Here, as in *VW*, the Complaint is based on affirmative statements:

[3] The Ninth Circuit's ruling in *VW* is also consistent with the views of other Courts of Appeals. *Waggoner v. Barclays PLC*, 875 F.3d 79, 95-96 (2d Cir. 2017) (in "many instances, an omission to state a material fact relates back to an earlier statement, and if it is reasonable to think that that prior statement still stands, then the omission may also be termed a misrepresentation"). The Second Circuit held that if the complaint cites to affirmative misstatements in public filings and the alleged "omissions" only "exacerbated the misleading nature of the affirmative statements," then the claim is not based primarily on omissions for purposes of *Affiliated Ute*. *Id.* at 96 (concluding that the alleged "omissions" were "simply the inverse of the plaintiffs' misrepresentation allegation").

- "This case arises out of defendants' misleading statements relating to data security and management integrity[,]" ¶ 2;
- "defendants chose to continue making statements . . . but these coordinated statements maintained the same assurances and warnings[,]" ¶ 42;
- "defendants omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading," ¶ 86;
- "defendants disseminated or approved the statements as specified above in ¶¶43-53," ¶ 94.

Similarly, the Ninth Circuit's order in this case abounds with references to affirmative statements: "The complaint identifies a dozen allegedly misleading statements, but we begin by considering two *statements* made by Alphabet in its quarterly reports filed with the SEC on Form 10-Q in April 2018 and July 2018. We conclude that the complaint adequately alleges that these two *statements* omitted material facts necessary to make the *statements* not misleading." *Alphabet*, 1 F.4th at 702 (emphases added). "Risk *disclosures* that 'speak[] entirely of as-yet-unrealized risks and contingencies' and do not 'alert[] the reader that some of these risks may already have come to fruition' can mislead reasonable investors." *Id.* at 703. "Alphabet is at least one alleged maker of the 10-Q *statements* here[.]" *Id.* at 705. "[T]he complaint does not plausibly allege that these remaining *statements* are misleading material misrepresentations or omissions[.]" *Id.* at 708-09.

Both the Complaint itself and the Ninth Circuit's ruling make it clear that Plaintiff's case is based on challenges to affirmative statements, purportedly rendered misleading by the alleged omissions. *Affiliated Ute* does not apply. Plaintiff cannot now recast its allegations as pure omissions in order to avoid the inconvenient discovery that its lawsuit fails the *Goldman* analysis.[4]

2. Plaintiff's Argument Is Based on a Mixup of Omissions Theories

It is black-letter law that the U.S. federal securities regime does not make omissions actionable,

[4] District courts examining similar cases where omissions and affirmative statements were mixed have consistently held that plaintiffs cannot evade the reliance element of securities fraud by invoking *Affiliated Ute*. *In re Vale S.A. Sec. Litig.*, 2022 U.S. Dist. LEXIS 6433, at *61 (E.D.N.Y. Jan. 11, 2022) (rejecting *Affiliated Ute* presumption where "the vast majority of the statements at issue in this case involve affirmative misstatements" regarding risks); *Crago v. Charles Schwab & Co.*, 2021 U.S. Dist. LEXIS 207499, at *10 (N.D. Cal. Oct. 27, 2021) (denying class certification; *Affiliated Ute* presumption did not apply where alleged omission was the reverse of affirmative public statements); *Loritz v. Exide Techs.*, 2015 U.S. Dist. LEXIS 100471, at *66 (C.D. Cal. July 21, 2015) (plaintiff did not rely on the company's silence, but on risk factors disclosed in its Form 10-K).

absent a duty of disclosure. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011) ("[Section] 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information."). The Ninth Circuit recently emphasized this fundamental premise:

> Plaintiffs suggest that Twitter—when faced with a setback in dealing with software bugs plaguing its MAP program—had a legal duty to disclose it to the investing public. Not so. While society may have become accustomed to being instantly in the loop about the latest news . . . our securities laws do not impose a similar requirement. . . . [C]ompanies do not have an obligation to offer an instantaneous update of every internal development, especially when it involves the oft-tortuous path of product development. . . . A company must disclose a negative internal development only if its omission would make other statements materially misleading.

Weston Family P'ship v. Twitter, Inc., 29 F.4th 611, 620 (9th Cir. 2022); *In re Rigel Pharms., Inc. Sec. Litig.*, 697 F.3d 869, 880 n.8 (9th Cir. 2012) ("as long as the omissions do not make the actual statements misleading, a company is not required to disclose every safety-related result . . . even if investors would consider the omitted information significant"). This type of mixed misstatement-plus-omission case is exactly what Plaintiff pleaded and what the Ninth Circuit allowed to proceed. Plaintiff abandons its original case, and recasts it as a "pure omission" case under *Affiliated Ute*.

Affiliated Ute created a narrow presumption of reliance that applies only in "pure omissions" cases—where the duty to disclose arises not from a misleading affirmative statement, but from some regulatory requirement or relationship. In *Affiliated Ute*, defendants bought shares from Native Americans without disclosing the existence of a more lucrative resale market. 406 U.S. 128, 152-53 (1972). The securities did not trade in an efficient market, so there could be no reliance on market price. Given defendants' role in creating a market, the Court held that they had a duty to disclose the existence of another market, and that plaintiffs could be presumed to have relied on this omission. *Id.*

In the narrow context of private market transactions, a presumption of reliance was defensible even without market-wide price impact. Without an efficient market, it was difficult to assess the impact of the omissions (or a corrective disclosure). *See Wilson v. Comtech Telecomms.*, 648 F.2d 88, 93 (2d Cir. 1981) ("the rationale for a presumption of causation in fact in cases like *Affiliated Ute*, in which no positive statements exist: reliance as a practical matter is impossible to prove"). That rationale is absent—price impact, if any, is readily measurable—where a plaintiff alleges specific statements (or specific corrective disclosures) by a publicly traded company in an efficient market.

Since *Affiliated Ute*, courts have emphasized its narrow application to those instances where a duty of disclosure arises independent of any affirmative statements made. *Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 940 (9th Cir. 2009) ("Insider trading cases are a notorious example: the insider who knows nonpublic information and trades on the basis of it has committed an actionable omission.").

Plaintiff's Complaint does not fit within the terms, or rationale, of *Affiliated Ute*.[5] Plaintiff challenges affirmative statements by Alphabet, which the alleged omissions purportedly rendered misleading. *Supra* at 8-9. The alleged omissions are simply the reverse of the challenged statements, as explained in *VW*. *Supra* at 8. In addition, unlike in *Affiliated Ute*, Plaintiff expressly pleads reliance on the market price: "As a result of the dissemination of the misleading information and failure to disclose material facts . . . the market price of Alphabet securities was artificially inflated during the Class Period. . . . [M]embers of the Class purchased . . . Alphabet securities during the Class Period at artificially high prices and were damaged thereby." ¶ 98. Plaintiff also alleges that the market for Alphabet securities was efficient, meaning that "unexpected material news about Alphabet was rapidly reflected in and incorporated into its stock price." ¶ 84(g). The rationale for *Affiliated Ute*'s presumption of reliance is absent: by purchasing shares in an efficient market, Plaintiff is well positioned to demonstrate any price impact of the alleged misleading statements.

"Because a 'pure omission' theory is relatively uncommon in securities litigation, and also not strictly within the letter of Rule 10b-5, courts often, to some confusion, use the term 'omission' when referring to statements that fall under the second prong of Rule 10b-5." *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 240 n.9 (2d Cir. 2016). Plaintiff seeks to exploit this confusion and apply the *Affiliated*

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[5] Plaintiff's allegations of "manipulative conduct," actionable under Rule 10b-5(a) or (c), do not change this analysis. As the Ninth Circuit explained: "In declining to apply the *Affiliated Ute* presumption, we recognized that '[a]ny fraudulent scheme requires some degree of concealment, both of the truth and of the scheme itself. But we explained the mere fact of concealment cannot transform affirmative conduct into omissions. To do otherwise would permit the *Affiliated Ute* presumption to swallow the reliance requirement almost completely[.] Therefore, we held the *Affiliated Ute* presumption of reliance did not apply and 'carefully maintained the well-established distinction, for purposes of the *Affiliated Ute* presumption, between omission claims, on the one hand, and misrepresentation and manipulation claims, on the other.'" *VW*, 2 F.4th at 1205-06; *accord Desai*, 573 F.3d 931; *Meitav Dash Provident Funds & Pension Ltd. v. Spirit Aerosystems Holdings, Inc.*, 2022 U.S. Dist. LEXIS 24481, at *89-90 (N.D. Okla. Jan. 7, 2022) (dismissing manipulative conduct claims where plaintiff failed to allege reliance).

Ute presumption to omissions based on a challenge to affirmative statements. That stretches *Affiliated Ute*'s narrow holding beyond its limits and runs contrary to the Ninth Circuit's *VW* analysis.

Regardless of whether Plaintiff styles its case as based on omissions or misstatements, Plaintiff cannot escape its greatest challenge: the stock price did not move when the alleged "truth" was revealed. *Supra* at 7. Assume, for the sake of argument, that there is no price impact upfront (when the omission occurs), because the omission preserved the existing price without increasing it (*i.e.*, "inflation maintenance"). There must still be a backend price impact, on the corrective disclosure dates, when the inflation dissipates. *Goldman* applies with equal force to "inflation maintenance:"

> Under this theory, a misrepresentation causes a stock price "to *remain* inflated by preventing preexisting inflation from dissipating from the stock price." Plaintiffs allege here that between 2006 and 2010, Goldman maintained an inflated stock price by making repeated misrepresentations about its conflict-of-interest policies and business practices. The alleged misrepresentations are generic statements from Goldman's SEC filings and annual reports[.] . . . According to Plaintiffs, these statements were false or misleading—and caused Goldman's stock to trade at artificially inflated levels—because Goldman had in fact engaged in several allegedly conflicted transactions without disclosing the conflicts. Plaintiffs further allege that once the market learned the truth about Goldman's conflicts from a Government enforcement action and subsequent news reports, the inflation in Goldman's stock price dissipated, causing the price to drop and shareholders to suffer losses.

Goldman, 141 S. Ct. at 1959-60. Plaintiff cannot evade the *Goldman* analysis.

II. PLAINTIFF'S EXPERT HAS FAILED TO IDENTIFY AN ACTUAL DAMAGES MODEL, AS THE SUPREME COURT REQUIRED IN *COMCAST*

Plaintiff also fails to carry its burden of proving predominance under Rule 23(b) because it does not demonstrate that "damages are susceptible of measurement across the entire class," and that "a model purporting to serve as evidence of damages in [a] class action" "measure only those damages attributable to [the plaintiff's] theory." *Comcast*, 569 U.S. at 35.

Plaintiff comes nowhere close to satisfying *Comcast*. Plaintiff's expert fails to specify a concrete model calculating share price inflation and class member losses. Dr. Mason's report gives a boilerplate description of two methods that *he claims* are "often" used to estimate damages: (1) share price reaction; and (2) fundamental valuation. Mason ¶¶ 29–46. Neither satisfies *Comcast*.

A. *Comcast* Requires Plaintiff to Identify an Actual Model of Damages Attributable to Its Theory of Securities Fraud

Following *Comcast*, courts have rejected proposed classes in securities cases where the plaintiff

"failed to set forth any model of damages[.]" *Loritz*, 2015 U.S. Dist. LEXIS 100471, at *70-71. For example, the expert in *Loritz* eventually "describe[d] generally some techniques that he asserts can be used to address each issue (most of which he claims arise commonly in cases such as this)." *Id.* at *71. That approach did not pass muster under *Comcast*, because the plaintiffs' expert failed to "tie these theories to the facts of this case or to each other." *Id.* at *71; *see also Sicav v. Jun Wang*, 2015 U.S. Dist. LEXIS 6815, at *11, 17 (S.D.N.Y. Jan. 21, 2015) (denying class certification because plaintiffs failed to make "a concrete presentation" of how they "propose to reliably establish damages"); *In re BP P.L.C. Sec. Litig.*, 2013 U.S. Dist. LEXIS 173303, at *74 (S.D. Tex. Dec. 6, 2013) (rejecting merely "invoking the event study methodology").

That is exactly what Dr. Mason did here. Dr. Mason's report consists of generic language that lacks any application to the present case. Mason ¶¶ 29–46. Although damage models "need not be exact" at the class-certification stage, Dr. Mason has provided no calculations or specifics whatsoever. *Comcast*, 569 U.S. at 35. The Ninth Circuit has expressly rejected such boilerplate: "Instead of providing an imperfect model," Dr. Mason "provided only a promise of a model to come." *Ward v. Apple Inc.*, 784 F. App'x 539, 541 (9th Cir. 2019).

This is not the first time that Dr. Mason has put forth a generic "model" that has fallen short of *Comcast*'s requirements. *Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116 (S.D.N.Y. 2014). In *J.P. Morgan*, Dr. Mason took a similar approach as here and proposed several general methodologies to calculate damages. *Id.* at 141. He "conclude[d] by stating that it is his opinion 'that class-wide damages can be calculated in a formulaic manner.'" *Id.* In his deposition, however, Dr. Mason admitted that he had "not created such a model to date." *Id.* The court rejected Dr. Mason's generalities. It held that "without assurance beyond Mason's say-so, [it] cannot conclude that there is a damages model that will permit the calculation of damages on a classwide basis." *Id.* at 142. In addition, "a more precise specification of the damages calculation" was needed to confirm that Dr. Mason's model was actually tied to the theory of liability. *Id.* at 141.

The reason why Dr. Mason has failed to perform any calculations is self-evident. If he had actually performed an event study, as Prof. Ferrell did, he would be forced to acknowledge that the October 2018 stock drops result in zero damages. This is of particular significance: ***By asking the***

Court to certify a class when there are no damages, Plaintiff would create a new category of shareholder lawsuits, in which public companies could be sued for securities fraud even with no actual investor losses. That is against the letter of Exchange Act and controlling law. *See* 15 U.S.C. § 78bb(a)(1); *In re Nektar Therapeutics Sec. Litig.*, 34 F.4th 828, 835 (9th Cir. 2022) ("To plead a claim under § 10(b) and Rule 10b-5, a plaintiff must allege . . . 'economic loss'"; "[e]ach of these elements must be independently satisfied"); *VW*, 2 F.4th at 1203 ("elements of a Rule 10b-5 claim are: . . . 'economic loss'"; "[i]f one of these elements is missing, the claim fails").[6]

B. Dr. Mason's "Fundamental Valuation" Theory Is Completely Irrelevant

For decades, courts have rejected plaintiffs' attempts to use damages models other than event studies. Where a plaintiff "fail[ed] to employ" an event study, the results reached by plaintiff's expert "cannot be evaluated by standard measures of statistical significance." *In re Oracle Sec. Litig.*, 829 F. Supp. 1176, 1181 (N.D. Cal. 1993); *In re Northern Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d 446, 460 (S.D.N.Y. 2000) ("[Plaintiff's expert's] testimony is fatally deficient in that he did not perform an event study or similar analysis to remove the effects on stock price of market and industry information and he did not challenge the event study performed by defendants' expert.").[7]

Because he knows that his event study would result in zero damages, Dr. Mason proposes a novel approach: using "fundamental valuation" to measure stock inflation directly. Mason ¶ 37. Left unsaid is that this methodology is for *an entirely different situation*. Fundamental valuation, like discounted cash flows, is used to project company values; they cannot directly measure the purported

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[6] Because classwide damages are zero (Ferrell ¶¶ 24(a), 69), Plaintiff's proposed class also lacks Article III standing. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) ("Article III standing requires a concrete injury"). The Court should not certify a class lacking Article III standing. *See, e.g.*, *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019) (rejecting proposed class due to "majority, who do not have Article III standing"); *Otto v. Abbott Labs., Inc.*, 2015 U.S. Dist. LEXIS 56121, at *5-6 (C.D. Cal. Jan. 28, 2015) ("courts agree that a proposed class that would 'include a substantial number of people who have no claim under the theory advanced by the named plaintiff' is overbroad, and, therefore, should not be certified") (collecting cases).

[7] *In re Imperial Credit Indus. Sec. Litig.*, 252 F. Supp. 2d 1005, 1016 (C.D. Cal. 2003) (excluding the report of plaintiff's expert's because, "absent an event study or similar analysis, [p]laintiffs cannot eliminate that portion of the price decline of [defendants'] stock which is unrelated to the alleged wrong"); *In re Executive Telecard Sec. Litig.*, 979 F. Supp. 1021, 1024-26 (S.D.N.Y. 1997) (excluding the damages report of plaintiff's expert because he failed to conduct an event study or regression analysis to detect whether stock price declines were the result of forces other than the alleged fraud).

amount of inflation in shares of publicly-traded companies. Ferrell ¶ 70. Dr. Mason admits that fundamental valuation is used to calculate "a firm's value at any time," rather than per share damages. Mason ¶ 38. Dr. Mason's own sources betray him: He cites repeatedly to a book titled *Valuing a Business: The Analysis and Appraisal of Closely Held Companies*, which, on its face, has nothing to do with calculating the value of the shares of publicly-traded corporations. *Id.* at 10-12. Plaintiff's cases on fundamental valuation also have nothing to do with calculating purported share price inflation. Motion at 13 n.4 (*Blue Book Servs., Inc. v. Amerihua Produce, Inc.*, 337 F. Supp. 3d 802, 816 (N.D. Ill. 2018) (using discounted cash flow "to calculate the damage allegedly done to [company's] value based on the unauthorized download and disclosure of its confidential database"); *Questrom v. Federated Dep't Stores, Inc.*, 84 F. Supp. 2d 483, 488-89 (S.D.N.Y. 2000) ("DCF analysis seeks to value a company or revenue producing asset"). Tellingly, they are not securities class actions. There is no reason to apply a fundamental valuation model in this case. Ferrell ¶ 70.

Even if somehow calculated by Dr. Mason's "fundamental valuation," any decrease in Alphabet's company value can only be recoverable in a *shareholder derivative lawsuit*, not in a direct class action. *See Brookfield Asset Mgmt. v. Rosson*, 261 A.3d 1251, 1262-63 (Del. 2021). If the Company was harmed, rather than individual shareholders, then the lawsuit is a derivative one. *Id.*

This "Court is obligated to do more than rubberstamp a proposed damages class merely because a plaintiff's expert purports to have used a peer reviewed methodology[.]" *Werdebaugh v. Blue Diamond Growers*, 2014 U.S. Dist. LEXIS 173789, at *47 (N.D. Cal. Dec. 15, 2014). The Court should reject Dr. Mason's proposed methodology as completely unrelated to this case.

Plaintiff's Complaint alleges that any inflation in the Company's stock price was fully "revealed" in October 2018. Dr. Mason's promise of an analysis based on a disclosure that is not even pleaded in the Complaint in April 2019, means that he offers "'no damages model at all' that is linked to [Plaintiff's] theory of liability[.]" *Fernandez v. UBS AG*,, 2018 U.S. Dist. LEXIS 158225, at *59 (S.D.N.Y. Sep. 17, 2018). Plaintiff has failed to put forth a sufficient damages model.

CONCLUSION

For each of the foregoing reasons, the Court should deny class certification.

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