No. 14-3178

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IBEW LOCAL 98 PENSION FUND, MARION HAYNES, RENE LEBLANC, Individually and on Behalf of All Others Similarly Situated

Plaintiffs-Appellees,

v.

BEST BUY CO., INC., BRIAN J. DUNN, JIM MUEHLBAUER, MIKE VITELLI

Defendants-Appellants.

On Appeal from the United States District
Court for the District of Minnesota
Civil No. 11-cv-429 (DWF/FLN)
The Honorable Donovan W. Frank

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel for Securities Industry and Financial Markets Association hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: December 11, 2014

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

BACKGROUND AND SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. *BASIC* AND *HALLIBURTON II* EXPRESSLY ESTABLISHED A DEFENDANT'S RIGHT TO REBUT THE PRESUMPTION OF RELIANCE AT THE CLASS CERTIFICATION STAGE OF A LAWSUIT 4

II. THE DISTRICT COURT ERRONEOUSLY REJECTED DEFENDANTS' REBUTTAL OF THE APPLICABILITY OF THE FRAUD ON THE MARKET THEORY 6

A. The District Court Erroneously Held That the Statements May Have Had Price Impact by Virtue of Later Price Movements 7

B. The Market's Reaction to the December 14 Disclosures Does Not Show Price Maintenance 12

III. DEPRIVING DEFENDANTS OF THE ABILITY TO REBUT PRICE IMPACT AT THE CLASS CERTIFICATION STAGE IN PRICE MAINTENANCE CASES WILL INCREASE THE BURDENS THAT SECURITIES CLASS ACTIONS IMPOSE ON THE ECONOMY 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Affiliated Ute Citizens of the State of Utah v. *United States*,
406 U.S. 128 (1972)....................11

Amgen Inc. v. *Conn. Ret. Plans & Trust Funds*,
133 S. Ct. 1184 (2013)....................1

AT&T Mobility LLC v. *Concepcion*,
131 S. Ct. 1740 (2011)....................16

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

Blue Chip Stamps v. *Manor Drug Stores*,
421 U.S. 723 (1975)....................18

Bricklayers & Trowel Trades Int'l Pension Fund v. *Credit Suisse Sec. (USA) LLC*,
752 F.3d 82 (1st Cir. 2014)....................9

Cammer v. *Bloom*,
711 F. Supp. 1264 (D.N.J. 1989)....................9

Castillo v. *Envoy Corp.*,
206 F.R.D. 464 (M.D. Tenn. 2002)....................13

Coopers & Lybrand v. *Livesay*,
437 U.S. 463 (1978)....................16

Dura Pharm., Inc. v. *Broudo*,
544 U.S. 336 (2005)....................14

Erica P. John Fund, Inc. v. *Halliburton Co.*,
131 S. Ct. 2179 (2011)....................1, 14

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967 F.2d 742 (2d Cir. 1992) 11

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259 F.3d 154 (3d Cir. 2001) 16

In re PolyMedica Corp. Sec. Litig.,
432 F.3d 1 (1st Cir. 2005)..10

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765 F. Supp. 2d 512 (S.D.N.Y. 2011) 12

SEC v. *Tambone*,
597 F.3d 436 (1st Cir. 2010)..17

Stoneridge Inv. Partners, LLC v. *Scientific-Atlanta, Inc*.,
552 U.S. 148 (2008)..19

Swack v. *Credit Suisse First Boston*,
383 F. Supp. 2d 223 (D. Mass. 2004)..12

Teamsters Local 445 Freight Div. Pension Fund v. *Bombardier Inc*.,
546 F.3d 196 (2d Cir. 2008) 9

Tussey v. *ABB, Inc*.,
746 F.3d 327 (8th Cir. 2014) 1

STATUTES

Securities Exchange Act of 1934 ....4, 14

Section 10, 15 U.S.C. § 78j..4

Section 21D, 15 U.S.C. § 78u-4 14

RULES AND REGULATIONS

17 C.F.R § 240.10b-5...4

Fed. R. App. P. 29 1

Fed. R. Civ. P. 23 ..... 3, 4

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INTEREST OF AMICUS CURIAE

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers.[1] SIFMA's mission is to support a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the United States regional member of the Global Financial Markets Association.

SIFMA regularly files amicus curiae briefs in cases that raise legal issues of vital concern to the participants in the securities industry. SIFMA appeared before this Court as amicus curiae in *Tussey* v. *ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014), and regularly appears as amicus curiae in many cases involving issues arising under the federal securities laws, including *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) ("*Halliburton II*"), *Amgen Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013), and *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179 (2011) ("*Halliburton I*").

This case involves important issues regarding the standard for class certification in private actions under the federal securities laws for

[1] All parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(c)(5), the undersigned counsel certify that no party's counsel authored this brief in whole or in part; no party or party's counsel, or any other person, other than amici or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

misrepresentations in connection with public-market transactions. These issues are directly relevant to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry. Resolution of these issues will have a profound effect on SIFMA's members.

BACKGROUND AND SUMMARY OF ARGUMENT

On August 6, 2014, just a few weeks after the Supreme Court's important decision in *Halliburton II*, the District Court certified a plaintiff class in this federal securities fraud litigation. During the class certification proceedings, Plaintiffs relied on a rebuttable presumption of classwide reliance under *Basic, Inc.* v. *Levinson*, 485 U.S. 224 (1988), to show that issues common to all class members would predominate over individual issues at trial, as required by Rule 23 of the Federal Rules of Civil Procedure.

Relying on *Basic* and *Halliburton II*, Defendants offered direct evidence to rebut the *Basic* presumption of classwide reliance. They showed that the two misstatements alleged by Plaintiffs did not have any impact on the price of Best Buy shares. Although the evidence showed beyond dispute that the alleged misstatements caused no share price increase, the District Court nonetheless certified the class based on its finding that Defendants had failed to exclude the speculative possibility that the alleged misstatements might have caused the price to stay the same when, but for the misstatements, the price would have dropped. This is known as the "price maintenance" theory of price impact. The District Court thus turned the rebuttable presumption of classwide reliance under *Basic* into an irrebuttable presumption, in direct conflict with both *Basic* and *Halliburton II.*

ARGUMENT

I. *BASIC* AND *HALLIBURTON II* EXPRESSLY ESTABLISHED A DEFENDANT'S RIGHT TO REBUT THE PRESUMPTION OF RELIANCE AT THE CLASS CERTIFICATION STAGE OF A LAWSUIT

In *Basic*, the Supreme Court confirmed that a plaintiff's reliance on an alleged misrepresentation is an indispensable element of a securities fraud claim under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R § 240.10b-5. The Court also held that if each member of a proposed class asserting such claims must prove individual reliance on each alleged misrepresentation, then the individual issues in the litigation would predominate over common issues, in conflict with Rule 23(b)(3) of the Federal Rules of Civil Procedure, and, as a result, the class could not be certified. *Basic*, 485 U.S. at 242.

The Court, however, endorsed a method of indirect proof of classwide reliance. This method of proof, based on an economic theory that was in vogue at the time of *Basic*, required a proposed class representative to prove (i) that the stock in question traded in an efficient market—*i.e.*, a market in which new material information is quickly reflected in the market share price—at all times relevant to the alleged fraud; (ii) that the alleged misrepresentation was sufficiently public; and (iii) that the alleged misrepresentation was material. The Court held that a plaintiff who offered such proof was entitled to a rebuttable presumption of

reliance because, according to the economic theory underlying the Court's analysis, under such circumstances the alleged misstatement would have been transmitted to all investors through the market price of the stock. The Court emphasized, however, that a defendant could rebut the presumption—and thus defeat class certification, with its coercive effect on settlement negotiations—by coming forward with direct evidence that "the misrepresentation in fact did not lead to a distortion of price." *Basic*, 485 U.S. at 248.

Recently, in *Halliburton II*, the Court revisited and made important clarifications concerning a defendant's opportunity to rebut the *Basic* presumption of reliance. The Court held that a defendant must be allowed—before trial, during class certification proceedings—to rebut the presumption with direct evidence that the alleged misrepresentation had no impact on the market price of the stock when that statement was made.

As the Court explained in *Halliburton II*:

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

134 S. Ct. at 2414. The Court held that a defendant may rebut the first of these constituent presumptions—and thus rebut the entire *Basic* presumption of reliance—with "'[a]ny showing that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff'" because that evidence disposes of "the basis for finding that the fraud had been transmitted through market price." 134 S. Ct. at 2415-16 (quoting *Basic*, 485 U.S. at 248) (alteration in *Halliburton II*).

II. THE DISTRICT COURT ERRONEOUSLY REJECTED DEFENDANTS' REBUTTAL OF THE APPLICABILITY OF THE FRAUD ON THE MARKET THEORY

The District Court erroneously rejected Best Buy's showing that two statements during a call with investors on September 14, 2010 (the "Investor Call") indicating that Best Buy was on track to meet its earnings per share projections for the year had no price impact. It did so based on two lines of speculation: that the statements may have had a delayed impact even though the unrebutted evidence showed they had no impact at the time; and that a price decline after a substantially different disclosure three months later—a December 14, 2010 announcement that Best Buy was reducing its earnings per share guidance for the year due to poor performance during the third quarter—might indicate that the September statements had caused price impact by "maintaining" the price of Best Buy stock. The District Court's approach effectively denied Best Buy the opportunity to rebut

the *Basic* presumption, thus making that presumption irrebuttable, contrary to the holdings of *Basic* and *Halliburton II*.

A. The District Court Erroneously Held That the Statements May Have Had Price Impact by Virtue of Later Price Movements

The District Court erroneously rejected Best Buy's showing that the statements during the Investor Call did not affect the market price of Best Buy stock. Best Buy's expert witness Kenneth Lehn demonstrated that no statement made during the Investor Call caused any change in the market price of Best Buy's shares—and Plaintiffs' own expert witness, Bjorn Steinholt, agreed with Mr. Lehn. This was dispositive evidence of an absence of price impact.

On September 14, 2010, two hours before the Investor Call, Best Buy issued a press release (the "Press Release") that, as conceded by Plaintiffs' own expert witness, was informationally identical to the Investor Call. By analyzing intra-day changes in the price of Best Buy stock on September 14, Mr. Lehn demonstrated that the Press Release, which, the District Court had ruled, contained no actionable statements, caused all of the share price increase that occurred on that day. He thus proved that *none* of the increase could be attributed to the Investor Call, on which Plaintiffs base their claims. (A266-67 ¶¶ 17-18.)

Plaintiffs' expert reached the same conclusion. As a result of his own event study, Mr. Steinholt concluded that "the information contained in [the inactionable statements in] the 2Q11 earnings release clearly caused the

statistically significant price increase in Best Buy's stock price . . . ." (A339 ¶ 9.) He further concluded that no statements made during the Investor Call caused any subsequent change in the price of Best Buy shares: "[B]y the time the 2Q11 conference call started, the economic substance of the alleged misrepresentations was largely reflected in Best Buy's stock price." (A340 ¶ 11.)

Thus, the record before the District Court was clear and undisputed: the challenged statements in the Investor Call caused no price impact. This was sufficient to rebut the presumption of reliance under the fraud on the market theory.

The District Court, however, indulged in speculation having no basis in—and much of it contradicted by—the record before it.

First, the District Court observed that Best Buy's stock price rose on later days during the class period and fell at the end of that period. (A362.) But actively traded stocks regularly rise and fall in price as a result of a myriad of unrelated developments, and the holding of *Halliburton II* regarding rebuttal would be a dead letter if this fact alone were enough to prevent rebuttal of price impact. Where, as here, the expert testimony adduced by both parties showed that "the economic substance of the alleged misrepresentations was largely reflected in Best Buy's stock price" even before the Investor Call (A340 ¶ 11), it was clear error for

the District Court to attribute subsequent price movements to the actionable statements in the Investor Call.[2]

Second, the District Court speculated that "[e]ven though the stock price may have been inflated prior to the earnings phone conference, the alleged misrepresentations *could have* further inflated the price, prolonged the inflation of the price, or slowed the rate of fall." (A362 (emphasis added).) This sort of speculation, too, is always available and, if sufficient, would negate the Supreme Court's holding that defendants may rebut the fraud on the market presumption.

Moreover, the District Court's speculation reflects a misunderstanding of both the law and economics, as well as the evidence that was before the Court. *Basic* conditions the presumption of reliance on a plaintiff's proving that the stock at issue traded in an efficient market. *Halliburton II*, 134 S. Ct. at 2408; *Basic*, 485

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[2] The federal courts have consistently recognized that the mere temporal sequence of events does not prove a causal relationship. *See Cammer* v. *Bloom*, 711 F. Supp. 1264, 1287 (D.N.J. 1989) (noting that "empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price" are "the foundation for the fraud on the market theory"). That is why the statistical analysis known as an "event study"—a methodology on which both parties in this case relied—has become the most widely accepted method of proving whether an alleged misstatement caused a change in the share price of a stock. *See Bricklayers & Trowel Trades Int'l Pension Fund* v. *Credit Suisse Sec. (USA) LLC*, 752 F.3d 82, 86 (1st Cir. 2014) ("The usual—it is fair to say 'preferred'—method of proving loss causation in a securities fraud case is through an event study, in which an expert determines the extent to which the changes in the price of a security result from events such as disclosure of negative information about a company, and the extent to which those changes result from other factors."); *Teamsters Local 445 Freight Div. Pension Fund* v. *Bombardier Inc.*, 546 F.3d 196, 207-08 (2d Cir. 2008) (discussing event studies in the context of market efficiency and noting that "[a]n event study that correlates the disclosures of unanticipated, material information about a security with corresponding fluctuations in price has been considered *prima facie* evidence of the existence of . . . a causal relationship").

U.S. at 248 n.27. As Plaintiffs' expert, Mr. Steinholt, admitted in the District Court, one factor in the test for determining whether Best Buy traded in an efficient market requires a plaintiff to show that the market incorporated new material information into the stock price "quickly." (A335 ¶¶ 1-2, 340 ¶ 12 n.19.)[3] In support of his conclusion that Best Buy stock traded in an efficient market, Mr. Steinholt opined that material information concerning Best Buy would have been incorporated into Best Buy's share price "within one day." (A244 ¶ 8 n.1.) As already noted, Mr. Steinholt agreed that the alleged misstatements during the Investor Call, which started at 10:00 a.m. on September 14, did not move Best Buy's share price that day. Thus, the record was clear and undisputed that any price movement would have occurred during the day of September 14, and the only price increase on that day occurred prior to the Investor Call. The record provides no support, and instead clearly contradicts, the District Court's speculation that the statements in the Investor Call first affected Best Buy's stock price later in the class period.

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[3] *See In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 19 (1st Cir. 2005) (holding that, for a market to be efficient "[f]or purposes of establishing the fraud-on-the-market presumption of reliance," the market price must "respond[] so quickly to new information that ordinary investors cannot make trading profits on the basis of such information"); *In re PolyMedica Corp. Sec. Litig.*, 453 F. Supp. 2d 260, 278 & n.22 (D. Mass. 2006) (holding that, to be sufficiently quick, a price reaction must be "fully completed on the same trading day as its release ['[o]r the next trading day, if the news is released after the market has closed']—and perhaps even within hours or minutes").

The District Court also erred by applying to the alleged misrepresentations in this case a standard that would apply only in an omissions case, if ever. Where, as here, the plaintiff alleges affirmative misrepresentations,[4] the proper question is not how the market would have reacted had it been told the truth, but rather how it would have reacted had the misleading statement not been made. *See Basic*, 485 U.S. at 245 (noting that the fraud-on-the-market presumption of reliance in purchasing stands in for proof of how the plaintiff "would have acted . . . if the misrepresentation had not been made" and incorporated into the stock's price by an efficient market).[5] The answer to that question is clear on the record here: because the non-actionable Press Release had revealed the very same information as the Investor Call, there is no basis for

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[4] Plaintiffs argued this case purely as a misrepresentation case, and not as an omissions case. Plaintiffs sought class certification only under *Basic*, which applies to cases involving affirmative misrepresentations, and not under *Affiliated Ute Citizens of the State of Utah* v. *United States*, 406 U.S. 128 (1972), the relevant authority for cases concerning omissions. The District Court, nonetheless, held that Best Buy did not sufficiently show an absence of price impact because Best Buy did not offer evidence to disprove that Best Buy's stock price declined "when the alleged truth *concealed* by the alleged misrepresentations came to light" on December 14, 2010. (A362-63 (emphasis added).)

[5] *See also Litton Indus., Inc*. v. *Lehman Bros. Kuhn Loeb Inc*., 967 F.2d 742, 748 (2d Cir. 1992) (noting that the fraud-on-the-market presumption stands in for the "generally indeterminable fact of what would have happened but for . . . the misrepresentations that skewed the market value of stock" (internal quotation marks omitted)); Jonathan R. Macey et al., *Lessons from Financial Economics: Materiality, Reliance, and Extending the Reach of* Basic *v.* Levinson, 77 Va. L. Rev. 1017, 1029 (1991) (noting that in testing "how much a stock price has reacted to news" the comparison is between the "actual return" on a stock at the time the market receives news and the "predicted return" on the stock—that is, "what the return would have been without the news").

concluding that the market would have reacted any differently had the Investor Call not taken place or the challenged statements not been made.

In sum, Best Buy's proof that the actionable alleged misstatements caused no price change on September 14 leaves no basis for finding that the alleged misstatement was ever "transmitted through market price." Proving that the alleged misstatement failed to cause a price increase on the day it was made completely rebuts the *Basic* presumption in this case.

B. The Market's Reaction to the December 14 Disclosures Does Not Show Price Maintenance

The District Court mistakenly relied on a theory known as "price maintenance" as a basis to uphold Plaintiffs' claim of reliance. It speculated that the alleged misrepresentations "could have" prolonged inflation of Best Buy's stock price or slowed its fall, and found dispositive the fact that the stock price fell when Best Buy's third-quarter earnings were announced in December 2010. (A362.) The record shows that this theory is inapplicable to the facts of this case, if it is ever valid at all.

Under the price maintenance theory, as adopted by certain district courts, a misstatement "can cause inflation by causing the stock price to be artificially maintained at a level that does not reflect its true value." *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 562 (S.D.N.Y. 2011); *see also Swack* v. *Credit Suisse First Boston*, 383 F. Supp. 2d 223, 240 (D. Mass. 2004)

(noting that a stock price could be artificially inflated when "[d]efendants' conduct could have tempered a drop in price that would otherwise have occurred, or resulted in a greater increase than the stock would otherwise have enjoyed"); *Castillo* v. *Envoy Corp.*, 206 F.R.D. 464, 472 (M.D. Tenn. 2002) (noting that misstatements may have caused a stock's price to be "artificially *maintained* at a level that did not reflect its true value" (internal quotation marks omitted)). Based on this theory, the District Court treated the price decline on December 14—when Best Buy released its actual third quarter results and its year-end projection—as evidence of price impact that might have been caused by the statements in the September 14 Investor Call, three months earlier.

The District Court's analysis was clearly erroneous and should be rejected. The market's reaction to Best Buy's disclosures on December 14 provides no evidence that the September 14 statements had price impact by preventing a similar price decline at that time.

First, the District Court improperly treated the December 14 disclosures as "corrective disclosures" with respect to the two alleged misstatements on September 14. The statements on September 14 were based on performance less than one month into the third quarter. The December 14 disclosures, on the other hand, provided actual quarter-end data, along with projections based on critical holiday season activity that had not even begun on

September 14. The December 14 disclosures said nothing whatever about performance as of September 14, and were thus meaningfully different in substance. They provide no evidence that different disclosures on September 14 would have had a price impact, and thus do nothing to contradict Defendants' evidence that the September statements had no price impact. The Supreme Court in *Halliburton I* warned against just the sort of assumption the District Court made here: that the existence of a subsequent price drop proves that an earlier alleged misstatement had price impact. As the Court said: "[T]he drop could instead be the result of other intervening causes, such as 'changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events.'" 131 S.Ct. at 2186 (quoting *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 342-43 (2005)).

Second, the District Court in effect required Defendants to disprove loss causation—an entirely distinct element of a Section 10(b) claim—in order to rebut Plaintiffs' presumption of reliance, in violation of the Supreme Court's holding in *Halliburton I*. A showing that a company's "price fell significantly after the truth became known" is the hallmark of proving loss causation. *Dura*, 544 U.S. at 347; *see also Halliburton I*, 131 S. Ct. at 2185 (describing the loss causation requirement as involving proof that a price decline resulted from the correction of a prior misstatement); 15 U.S.C. § 78u-4(b)(4) (describing plaintiff's

burden of proving that an act or omission caused loss). The Supreme Court in *Halliburton I* expressly rejected the notion that proof of loss causation is an appropriate consideration in determining reliance under the fraud on the market theory: "[L]oss causation is a familiar and distinct concept in securities law; it is not price impact." 131 S. Ct. at 2187. In ruling that proof of loss causation is not properly before a court in determining whether a plaintiff has properly invoked the fraud on the market theory, the Supreme Court certainly did not suggest that the lower courts should instead make the absence of loss causation an element of a defendants' rebuttal of that theory. Just as a plaintiff need not prove loss causation to invoke the fraud on the market theory, a defendant need not disprove loss causation to rebut that theory. But that is precisely what the District Court required when it rejected Defendants' rebuttal for failure to "offer[] evidence to show that Best Buy's stock price did not decrease when the truth was revealed." (A362-63.)

III. DEPRIVING DEFENDANTS OF THE ABILITY TO REBUT PRICE IMPACT AT THE CLASS CERTIFICATION STAGE IN PRICE MAINTENANCE CASES WILL INCREASE THE BURDENS THAT SECURITIES CLASS ACTIONS IMPOSE ON THE ECONOMY

As a practical matter, the District Court's approach in this case denied Defendants the right of rebuttal that the Supreme Court granted in *Halliburton II*. The sort of speculation that the Court allowed to negate a showing of no price impact, if allowed to stand, would render the *Basic* presumption irrebuttable. The Supreme Court described the theory of *Basic* as a "fairly modest premise" that

"does not alter the elements of the Rule 10b-5 cause of action and thus maintains the action's original legal scope." *Halliburton II*, 134 S. Ct. at 2410, 2412. Eliminating the principal remaining limitation on the scope of the *Basic* presumption would realize Justice White's fear that Rule 10b-5 would be converted into a "scheme of investor's insurance." *Basic*, 485 U.S. at 252 (White, J., dissenting) (internal quotation marks omitted).

In practice, efforts to rebut the *Basic* presumption by showing no price impact will often be the last line of defense prior to the certification of the class, a development that places enormous settlement pressure on defendants, even those with meritorious defenses.[6] This problem is especially acute in the context of private securities litigation. Between 2000 and 2013, 77% of decided certification motions in securities litigation resulted in the certification of a class. Renzo Comolli & Svetlana Starykh, NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2013 Full-Year Review* 19 (2013). And research shows that if putative class securities lawsuits survive dismissal and a

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[6] *See, e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001) ("[C]ertifying the class may place unwarranted or hydraulic pressure to settle on defendants.").

large class is certified, even weak cases will result in "blackmail settlements" induced by a small probability of an immense judgment.[7] *Cf.* Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) (noting that class actions risk "recoveries that would ruin innocent shareholders or, what is more likely, . . . blackmail settlements"). The consequences of proceeding to summary judgment or trial include a risk of massive, if not ruinous, monetary liability even if the likelihood of loss is small, as well as heavy costs to conduct document and deposition discovery and to engage experts.

The costs of overbroad class action litigation burden not only defendants, but the economy as a whole. "No one sophisticated about markets believes that multiplying liability is free of cost." *SEC* v. *Tambone*, 597 F.3d 436, 452 (1st Cir. 2010) (Boudin, J., concurring). Instead, it is well recognized that the costs of abusive class actions inevitably "get[] passed along to the public." *Id.* These costs also affect markets: the average securities class action reduces a

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[7] *See* Geoffrey Rapp, *Rewiring the DNA of Securities Fraud Litigation: Amgen's Missed Opportunity*, 44 Loy. U. Chi. L.J. 1475, 1478 (2013) ("[B]ecause securities litigation is so high risk for defendants, these cases—should they survive motions to dismiss and obtain class certification—will almost always settle . . . ."); Tom Baker & Sean J. Griffith, *How the Merits Matter: Directors' and Officers' Insurance and Securities Settlements*, 157 U. Pa. L. Rev. 755, 757-58 (2009) (observing that the merits of securities fraud claims may matter little when it comes to the settlement of securities class actions); Denise N. Martin et al., *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions*, 5 Stan. J.L. Bus. & Fin. 121, 156 (1999) ("Generally, we find that the merits do not have much, if any, explanatory power on settlement size."); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 523 (1991) (study of securities class action settlements concluding that "the merits did not affect the settlement amounts").

defendant company's equity value by 3.5 percent. *See* Anjan V. Thakor, U.S. Chamber Inst. for Legal Reform, *The Unintended Consequences of Securities Litigation* 14 (2005). As the Supreme Court has observed, the costs associated with class actions often are "payable in the last analysis . . . for the benefit of speculators and their lawyers." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975) (quoting *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring)). Particularly in securities class actions, the result often is a transfer of wealth from current to former shareholders, with the plaintiffs' lawyers collecting a sizable tax on the transfer. *See, e.g.*, Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 Stan. L. Rev. 1487, 1503 (1996).

It is imperative that our markets remain attractive to outside investment and to companies considering where to list their securities, and that companies attract qualified individuals to serve on boards and in management positions. Yet it is widely perceived that the United States legal system imposes greater costs on businesses than the legal systems of other major capital markets. *See, e.g.*, Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* ii (2007). As a result, "foreign companies [are] staying away from US capital markets for fear that the potential costs of litigation will more than outweigh any incremental benefits of cheaper

capital." *Id.* at 101. The perception of higher litigation costs frequently is cited as one reason for the decline in the competitiveness of American capital markets. *See, e.g.*, Fin. Servs. Forum, *2007 Global Capital Markets Survey* 8 (2007) (noting that nine of ten foreign companies that delisted from the United States between 2003 and 2007 cited litigation risk as a factor); Comm. on Capital Mkts. Regulation, *Interim Report of the Committee on Capital Markets Regulation* 5 (2006) (noting the importance of the litigation burden in choosing a market); *cf. Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) ("Overseas firms with no other exposure to our securities laws could be deterred from doing business here. This, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets." (citation omitted)).

The Supreme Court in *Halliburton II* placed careful limits on the availability of the fraud on the market theory. It specified that defendants must have the opportunity to rebut that theory by showing an absence of price impact. The District Court's ruling would eviscerate that opportunity. This Court therefore should reverse the District Court.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's class certification order.

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 4,875 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I hereby certify that on this 11th day of December, 2014, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Pursuant to Eighth Circuit Local Appellate Rule 27B(h)(2), I certify that the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection, and, according to the program, is free of viruses.

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