16-0250-cv

United States Court of Appeals
for the Second Circuit

PENSION FUNDS,

Plaintiff,

ARKANSAS TEACHERS RETIREMENT SYSTEM, WEST VIRGINIA INVESTMENT MANAGEMENT BOARD, PLUMBERS AND PIPEFITTERS PENSION GROUP, ILENE RICHMAN, Individually and on behalf of all others similarly situated, PABLO ELIZONDO, HOWARD SORKIN, Individually & on behalf of all others similarly situated, TIKVA BOCHNER, EHSAN AFSHANI, LOUIS GOLD, THOMAS DRAFT, Individually & on behalf of all others similarly situated

Plaintiffs-Appellees,

(Caption Continued on Inside Cover)

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLANTS' APPEAL SEEKING REVERSAL OF CLASS CERTIFICATION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(F)

ON APPEAL FROM AN ORDER GRANTING CLASS CERTIFICATION BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK MASTER FILE NO. 1:10 CIV. 03461 (PAC) THE HONORABLE PAUL A. CROTTY

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May 4, 2016

Counsel for Amicus Curiae

[continuation from cover page]

— v. —

GOLDMAN SACHS GROUP, INC., LLOYD C. BLANKFEIN, DAVID A. VINIAR, GARY D. COHN,

Defendants-Appellants,

SARAH E. SMITH,

Defendant.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Chamber of Commerce of the United States of America hereby certifies that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules and Statutes

Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, the Chamber of Commerce of the United States of America (the "Chamber"), submits this brief pursuant to Federal Rule of Appellate Procedure 29(a). The Chamber has received consent from both Defendants-Appellants and Plaintiffs-Appellees for the filing of this brief.

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million business, trade, and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, such as this one, that raise issues of concern to the nation's business community.

Many of the Chamber's members are companies subject to U.S. securities laws who are potential targets of federal class action lawsuits. The Supreme Court has held that there is a proper place for those lawsuits when the

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1(b) of the United States Court of Appeals for the Second Circuit, counsel for the Chamber states that no counsel for a party authored this brief in whole or in part, and that no person—other than the Chamber, its members, or its counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

defendant has made a material misstatement with scienter and "there is a proper connection between a defendant's misrepresentation and a plaintiff's injury." Amgen Inc. v. Conn. Ret. Plans and Tr. Funds, 133 S. Ct. 1184, 1192 (2013) (citation omitted). The Court also has recognized, however, the extraordinary costs that such lawsuits can place on American business and the American economy when untethered from their roots in the common law of fraud. Dura Pharm. Inc. v. Broudo, 544 U.S. 336, 347 (2005); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 744 (1975). In particular, securities class action litigation can "raise the cost of being a publicly traded company . . . and shift securities offerings away from domestic capital markets." Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 164 (2008); see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 81 (2006) (noting that securities class action lawsuits can be misused to "injure the entire U.S. economy." (internal quotation marks and citation omitted)). For that reason, the Chamber regularly files *amicus curiae* briefs in various class action appeals, including in Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014) ("Halliburton II").

The decision below squarely implicates interests at the heart of the Chamber's mission. By setting up a virtually insurmountable burden for defendants to satisfy in rebutting the presumption of reliance, the decision below relieved the Plaintiffs of their burden to establish price impact once the Defendants

made a prima facie showing of absence of price impact as an empirical matter. For both of these reasons, the district court decision undermines the Supreme Court's decision in Halliburton II and would permit class actions to be certified without any basis for presuming classwide reliance. If not reversed, it will "'effectively convert Rule 10b-5 into a scheme of investor's insurance'" and invite automatic certification whenever there is a significant stock price drop. Dura Pharm., 544 U.S. at 345 (quoting Basic v. Levinson, 485 U.S. 224, 252 (1988) (White, J., concurring in part and dissenting in part)).

SUMMARY OF ARGUMENT

In Halliburton II, the Supreme Court established an important rule of securities class action law: Although the plaintiff in a securities class action can rely on the existence of an efficient market as "indirect" evidence to satisfy its initial burden to show that a misrepresentation had "price impact" and, thus, that the predominance standard is satisfied, the defendant has a right to rebut that presumption at the class certification stage with "direct, more salient evidence showing that an alleged misrepresentation did not actually affect the stock's market price" and that in such instance the burden would then shift back to the plaintiff to show price impact under the "rigorous" standards required to satisfy Federal Rule of Civil Procedure ("FRCP") 23. 134 S. Ct. at 2416; see Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011). That ruling was well grounded in securities law

and federal class action law. The federal securities laws make private actions available to protect investors "against those economic losses that misrepresentations actually cause," Dura Pharm., 544 U.S. at 345, and, accordingly, may proceed only if there is reliance—i.e., "a proper connection between a defendant's misrepresentation and a plaintiff's injury." Amgen, 133 S. Ct. at 1192 (citation omitted). In addition, class actions remain "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (citation omitted). Accordingly, the Court has repeatedly reminded that the movant under Rule 23 must prove all of the elements necessary to demonstrate satisfaction of that rule. Wal-Mart, 564 U.S. at 351-52. Adherence to those standards is particularly important under the securities laws where the Supreme Court has also warned of the "in terrorem" impact of securities fraud class actions. See, e.g., Dura Pharm., 544 U.S. at 347; Blue Chip Stamps, 421 U.S. at 741.

The decision below flouted the rule set forth in Halliburton II. The district court first declined to follow this Court's repeated holdings that similar statements about a firm's business principles and conflicts controls are "too general" for reasonable investors to rely on them. See, e.g., City of Pontiac Policemen's and Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 183-86 (2d Cir. 2014). Under these decisions the challenged statements by definition could not

cause a price impact as a matter of law. Dkt. 46 (Defendant-Appellants' Brief) at 34-38. The court also affirmatively acknowledged that the "misstatements had no impact on the stock price when made" (SPA at 11[2]), that "there was no movement in Goldman's stock price" on 34 prior dates when corrective information was disclosed (id.), and that even on Plaintiffs' alleged corrective disclosure dates, there was evidence of "a price decline for an alternate reason." Id. at 13.

The court nonetheless held that Defendants had not rebutted the presumption of reliance because they did not offer "*conclusive evidence* that no link exists between the price decline and the misrepresentation" and "Defendants cannot demonstrate a *complete absence* of price impact." Id. (emphasis added). In effect, the court ruled that *Plaintiffs* had met the "rigorous" standard established by Wal-Mart and demonstrated "price impact" because *Defendants* had not ruled out every conceivable basis for price impact that Plaintiffs might demonstrate but had not demonstrated from evidence. That ruling sets up a virtually insurmountable bar for defendants seeking to rebut the presumption of reliance and, contrary to Halliburton II, effectively makes the showing of market efficiency an irrebutable presumption. It also conflicts with the plain language of Federal Rule 301, which

[2] Citations to the district court's opinion, In re Goldman Sachs Grp., Inc. Sec. Litig., Master File No. 10 Civ. 3461(PAC), 2015 WL 5613150 (S.D.N.Y. Sept. 24, 2015), refer to page numbers in the Special Appendix ("SPA") attached to Defendants-Appellants' brief in support of their appeal, Dkt. 46.

requires the party opponent of a presumption only to offer evidence sufficient to raise a factual issue and makes clear that the existence of a presumption does not shift the burden of proof on an issue (here, price impact), which remains on the party which originally had it.

If upheld by this Court, the district court's decision threatens to cause substantial harm to public companies and their shareholders and, ultimately, to the American economy. It would allow meritless putative securities class actions to be certified even when there is no evidence of price impact from an alleged misrepresentation. Because class certification vastly increases the costs and risks to defendants of litigating securities actions, such improper class certification will have significant adverse impact on American businesses, shareholders, and capital markets. The district court's decision should be reversed.

ARGUMENT

I. THE DISTRICT COURT'S DECISION IS CONTRARY TO HALLIBURTON II

In Halliburton II, the Supreme Court held that, in order to sustain a securities class action lawsuit, the plaintiff must show that an alleged misrepresentation or omission had an impact on stock price. 134 S. Ct. at 2416. The Court also held that—in the absence of contrary proof by defendant—the plaintiff can satisfy its initial burden of showing market impact by demonstrating

that the defendant's stock traded in an efficient market. Id. at 2408, 2413. In so holding, however, the Court also made clear that a showing of market efficiency, i.e., that the stock traded in an efficient market, was not equivalent to, and did not establish an irrebutable presumption with respect to, the ultimate fact of price impact. The Court held that, at the class certification stage, the defendant can rebut the plaintiff's "indirect way of showing price impact" by providing "direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price." Id. at 2415-16. It further reiterated that such rebuttal can be made by "'[a]ny showing that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff.'" Id. at 2415 (quoting Basic, 485 U.S. at 248) (alteration in original). The presumption is "'just that, and c[an] be rebutted by appropriate evidence,' including evidence that the asserted misrepresentation (or its correction) did not affect the market price of the defendant's stock." Id. at 2414. In that circumstance, the presumption would disappear, and Plaintiffs would retain their initial burden to show not just market efficiency, but price impact. Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 301.02 ("After [sufficient] rebuttal evidence is presented, the presumption disappears from the case.").

As the Court stated, "[p]rice impact is … an essential precondition for any Rule 10b-5 class action." Halliburton II, 134 S. Ct. at 2416. When a plaintiff

shows market efficiency, "but . . . the evidence shows no price impact with respect to the specific misrepresentation challenged in the suit . . . the basis for finding that the fraud had been transmitted through market price would be gone. And without the presumption of reliance, a Rule 10b-5 suit cannot proceed as a class action . . ." because a plaintiff cannot satisfy all of the requirements of Rule 23 of the Federal Rules of Civil Procedure. Id. at 2415-16 (internal quotation marks and citation omitted).

That ruling was well grounded in securities law and federal class action law. The Supreme Court has held that reliance is a *sine qua non* of a federal securities claim. The Plaintiff must show "a proper connection between a defendant's misrepresentation and a plaintiff's injury." Amgen, 133 S. Ct. at 1192 (citation omitted). Without evidence of reliance, there is no Section 10(b) claim. Stoneridge, 552 U.S. at 159 (noting that "[r]eliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action" and confirming no liability where petitioner failed to show reliance). Moreover, class actions remain "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Comcast Corp., 133 S. Ct. at 1432 (citation omitted). Accordingly, "[t]o come within the exception, a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with [FRCP] 23." Id. (citation omitted); Halliburton

II, 134 S. Ct. at 2412 (stating that "plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of [FRCP] 23, including (if applicable) the predominance requirement of [FRCP] 23(b)(3)") (emphasis in original). Thus, when defendants rebut the initial showing made by plaintiffs, plaintiffs cannot rely on mere presumptions or assumptions. Plaintiffs must offer proof. And a tie goes to the defendants. That proof must be sufficient to satisfy the fact finder by a preponderance of the evidence. Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 202 (2d Cir. 2008) ("the preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements."); see also Myers v. Hertz Corp., 624 F.3d 537, 547 (2d Cir. 2010) (same).

The decision below, however, eviscerates Halliburton II and, in the vast majority of cases, would effectively eliminate the reliance requirement that provides the justification for federal securities claims.

Defendants showed that the alleged misrepresentations could not form the basis for Section 10(b) reliance as a matter of law. Goldman Sachs made nothing more than "general statements about reputation, integrity, and compliance with ethical norms"—statements that this Court repeatedly has held are too general to support a securities fraud claim. See, e.g., UBS, 752 F.3d at 183 (noting that

such statements are "inactionable puffery" and thus too general to be relied upon). Indeed, this Court has warned that accepting such general statements as the basis for § 10(b) reliance would "bring within the sweep of federal securities laws many routine representations made by investment institutions" that "no investor would take. . . seriously in assessing a potential investment." ECA, Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co., 553 F.3d 187, 206 (2d Cir. 2009).

Defendants also went further and proffered voluminous expert evidence showing that "the alleged misrepresentations had no impact on Goldman's stock price when made"; that "the corrective disclosures had no negative impact on the stock price"; and that stock price movement identified by Plaintiffs was attributable to, among other things, disclosure of "regulatory activities," "heightened risks and exposure to penalties," and costs of compliance with current and potential enforcement actions. SPA at 7-9. Defendants also identified 34 other dates on which corrective information was disclosed without impacting Goldman's stock price—evidence that disclosure of the allegedly omitted information could not have caused price impact. The district court wrongly chose not to consider that evidence. Id. at 11. By any measure, such proof was sufficient to raise a factual question regarding price impact.

The court held, however, that Defendants had not rebutted the fraud-

on-the-market presumption and no burden with respect to price impact shifted to Plaintiffs because that proof was not "conclusive." Defendants did not offer "conclusive evidence that no link exists between the price decline and the misrepresentation" and "Defendants cannot demonstrate a complete absence of price impact." Id. at 13.

The court's "no conclusive evidence" holding requires Defendants not only to present their own affirmative evidence showing no price impact but also to present evidence foreclosing all evidence that Plaintiffs could—but did not—present showing the existence of price impact. Defendants showed that the alleged misrepresentations had no impact on the stock price when made (a showing the court accepted but deemed "insignificant," id. at 11). They showed that on 34 occasions, corrective disclosures were made without an effect on the stock price (a showing the court refused to consider, id.). And they showed that the price movement identified by Plaintiffs was attributable to causes other than the alleged misrepresentations (a showing the court rejected because it "fail[ed] to demonstrate that no part of the decline was caused by the corrective disclosures," id. at 12 (emphasis added)). No matter the showing (and despite a total absence of rebuttal evidence from Plaintiffs), the court would settle for nothing short of iron-clad certainty. In effect, under the district court's analysis, the plaintiff need ever only prove an efficient market. Unless the defendant completely rules out all

possibilities of price impact, the burden of persuasion would not be shifted back to Plaintiffs and the class certification standard would be satisfied.

That test sets up an all but insuperable bar for defendants seeking to rebut the presumption of reliance and effectively creates an irrebutable presumption contrary to Halliburton II. As this very case demonstrates, if, as the district court held, the defendant is required not only to rebut the evidence that has been offered by plaintiff but also—before any burden is shifted back to plaintiffs—to offer conclusive evidence and refute proof that could be offered but was not, there would be little left of the framework established by Halliburton II. In virtually every case, it could be said that there is a possibility—albeit remote—that disclosure of omitted information could cause a price impact. That is the reason why courts establish burdens of proof and the reason why—in the instance of reliance under the federal securities laws—upon defendants making a threshold showing of the absence of price impact, the court places the burden to prove price impact on the plaintiffs. But, under the ruling of the district court, the only circumstance in which the burden would be shifted back to plaintiffs would be where defendants—not plaintiffs—have affirmatively and definitively demonstrated the absence of price impact and plaintiffs cannot offer any evidence to refute that conclusive showing. In effect, because there is always contingency, all plaintiffs will have to show is market efficiency.

II. THE DISTRICT COURT FAILED TO PROPERLY APPLY FEDERAL RULE OF EVIDENCE 301 IN ALLOCATING THE BURDEN OF PROOF

In Basic, the Supreme Court firmly grounded the fraud-on-the-market presumption on Rule 301. See Basic, 485 U.S. at 245 (citing Fed. R. Evid. 301). By its own terms, Rule 301 applies "[i]n a civil case, unless a federal statute or these rules [of evidence] provide otherwise." Fed. R. Evid. 301. Consequently, that rule describes the effects and operation of the Basic presumption. But it does not—as the court below effectively ruled—establish an irrebuttable presumption. By its terms, it establishes a rebuttable presumption: "this rule does not shift the burden of persuasion, which remains on the party who had it originally." Fed. R. Evid. 301. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) (as in the case of all presumptions, the ultimate burden of persuasion remained at all times with plaintiff.).

Hence, this Court has applied the "bursting bubble" view and held that, in the absence of statutory mandate or rule otherwise, "the ultimate risk of nonpersuasion must remain squarely on [the party employing the presumption] in accordance with established principles governing civil trials." Ruggiero v. Krzeminski, 928 F.2d 558, 563 (2d Cir. 1991). Moreover, the burden on the party opponent is not high. In the face of a presumption, an opposing party "need only come forward with sufficient evidence to avoid a directed verdict. After this much

rebuttal evidence is presented, the presumption disappears from the case." Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 301.02. This Court has confirmed this principle, holding that when a party against whom a presumption is invoked produces evidence which, "when viewed in the light most favorable to [defendants], would permit a reasonable jury to infer" that the presumed fact was incorrect, the presumption is rebutted. ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 149 (2d Cir. 2007). Other courts in this Circuit have held likewise. See, e.g., Sinatra v. Heckler, 566 F. Supp. 1354, 1359-60 (E.D.N.Y. 1983) ("[i]n order to rebut the presumption . . . the claimant must adduce evidence that would be sufficient to overcome a directed verdict."). The district court's requirement that Defendants' evidence must be "conclusive" in order to rebut the presumption (SPA at 13) is an impermissibly high bar, since "proffered evidence is sufficient to rebut a presumption as long as the evidence could support a reasonable jury finding of the nonexistence of the presumed fact." Punchgini, 482 F.3d at 149 (internal quotation marks and citation omitted) (emphasis added). Indeed, the district court's standard exceeds even proof beyond a reasonable doubt required in criminal settings.

The proper application of Rule 301 can also be seen in the Title VII disparate treatment context. Title VII plaintiffs must make a prima facie showing of discrimination, which entitles Title VII plaintiffs to a presumption of racial

discrimination. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981). Defendants then have an opportunity to rebut this presumption if they "clearly set forth, through the introduction of admissible evidence, the reasons for" the allegedly discriminatory conduct. Id. at 255. A successful rebuttal need not be conclusive, however. "It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Id. at 254 (relying on Fed. R. Evid. 301). "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted." Id. at 255. At all times "[t]he plaintiff retains the burden of persuasion," and once the presumption has been rebutted, the plaintiff must meet the "ultimate burden" of convincing the court of the alleged discrimination. Id. at 256.

The same evidentiary burdens of Rule 301 apply to price impact determinations made at the class certification stage. IBEW Local 98 Pension Fund v. Best Buy Co., No. 14-3178, 2016 WL 1425807 at *6 (8th Cir. Apr. 12, 2016). However, the court below did not properly apply Rule 301 in certifying the class. It did not identify a rule or statute that altered the burdens under Rule 301. Indeed, no such rule or statute exists. And, contrary to Punchgini, it did not view the evidence presented by Defendants "in the light most favorable" to them and ask whether that evidence would "permit" the jury to find the presumed fact was incorrect. 482 F.3d 135. Instead, the district court asked whether the evidence—

viewed in the light most favorable to Plaintiffs—*required* the jury to find against Plaintiffs.

That was error. Assuming that this Court's precedents did not establish the absence of price impact as a matter of law, once Defendants produced evidence from which a jury could have found an absence of price impact, under Rule 301 the burden should have shifted back to the Plaintiffs to produce evidence sufficient to satisfy their ultimate burden of persuasion that the alleged misrepresentations had a price impact. This they did not do. In fact, Plaintiffs offered no evidence of price impact, much less evidence that satisfied the burden of persuasion.

III. THE DISTRICT COURT'S DECISION THREATENS TO INCREASE ABUSIVE SECURITIES CLASS ACTION LITIGATION AND HARM U.S. BUSINESS

The Supreme Court has recognized that there is an appropriate place for federal securities class action lawsuits where the defendant has made a material misstatement with scienter and there is a "connection between a defendant's misrepresentation and a plaintiff's injury." Amgen, 133 S. Ct. at 1192 (citation omitted). At the same time, however, those laws provide a private remedy only with respect to "those economic lossess that misrepresentations actually cause." Dura Pharm., 544 U.S. at 345. They do not "provide investors with broad

insurance against market losses," available whenever an investigation is announced and there is a significant stock price drop. Id.

When not scrupously applied, federal class action law can impose significant costs on American business and on the American economy. The Supreme Court has recognized that the more the class action mechanism is expanded, "the greater the likelihood of abuse." Ortiz v. Fibreboard Corp., 527 U.S. 815, 842 (1999). "As a practical matter, the certification decision is typically a game-changer, often the whole ballgame, for plaintiffs and plaintiffs' counsel." Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 591 n.2 (3d Cir. 2012) (citation omitted). "[C]lass certification places inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability." Hevesi v. Citigroup Inc., 366 F.3d 70, 80 (2d Cir. 2004) (internal citation and quotation marks omitted). "[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." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011). The certification of a nationwide securities class will ensure that "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." Blue Chip Stamps, 421 U.S. at 740. Because "[c]ertification of a large class may so increase the defendant's potential damages

liability and litigation costs," even a defendant with the most surefire defense "may find it economically prudent to settle and to abandon a meritorious defense." Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978); see also Fed. R. Civ. P. 23(f) Advisory Committee Notes on Rules to the 1998 Amendment ("An order granting certification. . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."); see also Dura Pharm., 544 U.S. at 347-48 (the securities laws do not create "a partial downside insurance policy").

The Court's decision in Halliburton II struck a balance that recognized those practical realities and the costs of unfounded class action litigation. It took note of the fact that defendants can introduce evidence of the absence of price impact "at the merits stage to rebut the *Basic* presumption," 134 S. Ct. at 2414. Plaintiffs there also admitted that "defendants may introduce price impact evidence at the class certification stage, so long as it is for the purpose of countering a plaintiff's showing of market efficiency, rather than directly rebutting the presumption." Id. at 2414-15. The Court rejected plaintiff's argument however, that the "action should be certified and proceed as a class action (with all that entails), even though the fraud-on-the-market theory does not apply and common reliance thus cannot be presumed." Id. at 2415. If, at the merits stage, the defendants can rebut plaintiff's "indirect proxy" for reliance and force plaintiff to

show price impact, then it would make "no sense" for defendants not to have the same opportunity and to be able to put plaintiffs to the same burden at the certification stage. Id. at 2415-16. Delaying consideration to the merits only prolongs a fatally-flawed case, and subjects class action defendants to intense and undue economic pressures to settle.

This case presents a textbook example of the circumstances in which the Court intended plaintiffs not to be able to rely at the certification stage on the "indirect proxy" and to require them to show that the alleged misrepresentation affected stock price. Beyond the import of this Court's precedents as to the inactionable nature of the statements at issue, defendants pointed to 34 separate dates on which corrective information was disclosed to the market without any effect on Goldman's stock price (in contrast to the three instances identified by Plaintiffs in which the stock price responded to announcements of enforcement activity), which, when coupled with the voluminous expert evidence produced in this case, clearly establishes a lack of price impact. Plaintiff did not offer any contrary evidence. The district court, nonetheless, chose to ignore this "direct, more salient evidence showing that the alleged misrepresentation[s] did not actually affect the stock's market price" (Halliburton II, 134 S. Ct. at 2416), essentially deferring to trial proof of an issue that should have been dispositive in showing that this lawsuit had no merit at the certification stage.

The district court's decision accordingly threatens to unleash a flood of meritless class-action litigation against U.S. businesses, leaving shareholders and the U.S. economy and capital markets to bear the costs.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision.

Dated: May 4, 2016

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(b) because it contains 4,601 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: May 4, 2016

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