18-3667-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ARK. TEACHER RET. SYS. V. GOLDMAN SACHS GRP., INC.

UNOPPOSED MOTION BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS' PETITION FOR REHEARING AND FOR REHEARING EN BANC

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May 19, 2020

Pursuant to Federal Rule of Appellate Procedure 29(b), the Chamber of Commerce of the United States of America (the "Chamber") respectfully requests leave of the Court to submit the accompanying *amicus curiae* brief in support of Defendants-Appellants' petition for panel rehearing or rehearing *en banc* in the above-captioned case. Defendants-Appellants consent to the filing of this brief; Plaintiffs-Appellees take no position. In support of this motion, the Chamber states as follows:

1. The Chamber has a substantial and obvious interest in the outcome of this petition. The Chamber is the Nation's largest business federation. It directly represents 300,000 members and indirectly represents the interests of approximately 3 million business, trade, and professional organizations of every size, in every sector, and from every region of the United States. Many of the Chamber's members are companies subject to U.S. securities laws who would be adversely affected if the decision below were permitted to stand.
2. The Chamber's submission will aid the Court's consideration of the petition for rehearing, because the Chamber is well-positioned to describe the potential ramifications of the majority's decision on businesses. The Chamber has long been concerned about the costs that securities class actions impose on the American economy. The Chamber regularly files

amicus curiae briefs in various securities class action appeals, including in Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014) ("Halliburton II"), and in this case on both prior occasions when it was before this Court.

3. The Chamber has received Defendants-Appellants' consent for the filing of an *amicus curiae* brief. Plaintiffs-Appellees have advised the Chamber that they take no position on the filing of the accompanying *amicus curiae* brief.

For these reasons, the Chamber respectfully submits that consideration of the attached *amicus* brief will assist the Court in its determination of the petition, and asks that the Court grant the Chamber leave to file its *amicus* submission.

Dated: May 19, 2020

Respectfully Submitted,

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18-3667-cv

IN THE

United States Court of Appeals
FOR THE SECOND CIRCUIT

ARKANSAS TEACHER RETIREMENT SYSTEM, WEST VIRGINIA INVESTMENT MANAGEMENT BOARD, PLUMBERS AND PIPEFITTERS PENSION GROUP,

Plaintiffs-Appellees,

(*Caption continued on inside cover*)

PURSUANT TO DECEMBER 11, 2018 ORDER GRANTING PERMISSION TO APPEAL
FROM AN ORDER GRANTING CERTIFICATION OF CLASS
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

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLANTS' PETITION FOR REHEARING AND FOR REHEARING EN BANC

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May 19, 2020

PENSION FUNDS, ILENE RICHMAN, Individually and
on behalf of all others similarly situated,

Plaintiffs,

HOWARD SORKIN, Individually and on behalf of all others similarly situated,
TIKVA BOCHNER, On behalf of herself and all others similarly situated,
DR. EHSAN AFSHANI, LOUIS GOLD, Individually and on behalf of
all others similarly situated, THOMAS DRAFT, individually and
on behalf of all others similarly situated,

Consolidated-Plaintiffs,

—against—

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

Defendants-Appellants,

SARAH E. SMITH,

Consolidated-Defendant.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae the 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.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the Chamber of Commerce of the United States of America, is the Nation's largest business federation. It directly represents 300,000 members and indirectly represents the interests of approximately 3 million business, trade, and professional organizations of every size, in every sector, and from every region of the United States.

Many of the Chamber's members are companies subject to the U.S. securities laws who would be adversely affected if the majority's decision is not corrected. Further, the Chamber has long been concerned about the costs that securities class actions impose on the American economy. To that end, the Chamber regularly files amicus curiae briefs in various securities class action appeals, including in Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014) ("Halliburton II") and in this case on both prior occasions when it was before this Court.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for the Chamber states that no counsel for a party authored this brief in whole or in part, and 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.

SUMMARY OF ARGUMENT

The panel majority (over the dissent of Judge Sullivan) set an impossibly high bar for defendants to rebut the Basic presumption, and thereby rendered class certification effectively automatic in securities class actions. In doing so, it contradicted the Supreme Court's decision in Halliburton II, which made clear that defendants must be afforded a meaningful opportunity to rebut the inference of price impact before a class is certified. 573 U.S. at 284. If left standing, the majority's virtually unattainable standard for rebuttal evidence will impose a significant burden on businesses, as the majority recognized, by increasing the pressure to settle securities class actions regardless of their merit.

Here, Defendants demonstrated that the alleged misstatements lacked price impact: They presented unrebutted evidence that the alleged misstatements were so generic that they could not have price impact under a wealth of this Court's prior decisions and that those statements in fact had no front-end price impact when made, that there was no back-end price impact when the allegedly misstated information was disclosed in at least 36 subsequent articles, and that later price declines were caused by the filing of a regulatory enforcement action (rather than the substance of the alleged misstatements). Nonetheless, disregarding Halliburton II, the majority endorsed the district court's misapplication of the preponderance standard and further imposed a "heavy burden" on Defendants to rebut the Basic

presumption, which in the words of Judge Sullivan rendered the presumption of reliance "truly irrebuttable and class certification . . . all but a certainty in every case." Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc., 955 F.3d 254, 278 (2d Cir. 2020) (Sullivan J., dissenting) ("Goldman II").

The full Court should correct this critical error, which renders Halliburton II a dead letter in this Circuit where many of the most significant securities cases are defended.

ARGUMENT

I. THE MAJORITY EVISCERATED HALLIBURTON II BY IMPOSING AN IMPOSSIBLY HIGH REBUTTAL BURDEN ON DEFENDANTS

Halliburton II stressed that the Basic presumption is "just that," a presumption—and although plaintiffs under Basic can satisfy their initial burden at the class certification stage with "indirect" evidence that the market was efficient, that is not conclusive evidence of the ultimate fact of price impact. Halliburton II, 573 U.S. at 263. Defendants therefore have a right to present evidence to rebut the inference of price impact by "any showing that severs the link between the alleged misrepresentations" and the price paid by the plaintiff. Id. at 269.

Here, the district court granted class certification based on Plaintiffs' allegations that general statements about conflicts and business principles maintained existing inflation in Goldman's stock price, as supposedly evidenced

by losses Plaintiffs suffered when government enforcement actions about Goldman's CDO conflicts were either reported or rumored in the media. In doing so, however, the district court improperly rejected the powerful rebuttal evidence offered by Defendants. In addition to the generalized nature of the alleged misstatements and the absence of front-end price movement on the dates of those alleged misstatements, Defendants presented expert analysis concluding that (i) there was an absence of price impact on 36 dates prior to the alleged "corrective disclosures" when information about Goldman's conflicts was disseminated; and (ii) the price drops that followed the alleged "corrective disclosures" were attributable to the reports of enforcement activity, not to any new revelation about Goldman's conflicts. Goldman II, 955 F.3d at 262–63.

In uncritically accepting the district court's conclusions and improperly placing a "heavy burden" on Defendants, the majority endorsed an impossibly high standard to overcome the Basic presumption; it is unclear whether a defendant could *ever* meet this burden and defeat class certification under the majority's approach.

A. The Majority Endorsed An Unreasonably High Threshold For Rebutting The Basic Presumption Through Evidence Of Lack Of Price Movement Following Prior Reports Correcting The Alleged Misstatements

The majority wrongly sanctioned the district court's rejection of Defendants' evidence that there was no price movement on the dates that allegedly corrective

information was revealed in 36 prior articles. Id. at 271. As Judge Sullivan correctly recognized in his dissent, the lack of price movement following those 36 articles was powerful, unrefuted evidence that the later drop in stock price was caused by something other than the disclosures of the alleged conflicts of interest. Id. at 277 (Sullivan J., dissenting).

However, the majority declined to consider the lack of price movement on those dates, noting that the district court rejected the 36 reports because there were not exact "equivalencies between the news stories and the 'corrective disclosures.'" Id. at 274 (majority). But complete equivalency is too high a threshold for rebuttal evidence given that different reports will naturally contain at least some unique information.[2] Applying this standard would render any defendant's right to rebut under Halliburton II meaningless.

Moreover, the majority's decision was inconsistent with extensive prior case law applying a less demanding standard when plaintiffs rely on stock movements after corrective disclosures as part of their affirmative case. Those cases uniformly hold that corrective disclosures may originate from any number of sources so long

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[2] See, e.g., Grae v. Corr. Corp. of Am., 330 F.R.D. 481, 500 (M.D. Tenn. 2019) ("[F]or [a prior disclosure] to sufficiently undercut [a corrective disclosure's] capacity to demonstrate price impact, the [prior disclosure] must have revealed at least enough to bridge the gap between [defendant's] representations and the truth.").

as they reveal to the market the falsity of the prior misstatements.[3] Under this authority, it is not legally significant that one of the subsequent alleged "corrective disclosures" included supposed "hard evidence" "disclosed by a federal government agency," given that the disclosure merely repeated the substance of the 36 prior articles. Id. at 271. Plaintiffs routinely prosecute claims based on press reports similar to those the district court criticized here as somehow lacking. Finally, because a disclosure does not need to contain the entire truth to be corrective,[4] it is irrelevant whether the alleged "corrective disclosures" contained some additional information that the 36 reports did not. Id.

Critically, had the majority properly considered the 36 reports, it would have realized that Goldman's shareholders were "indifferent" to the very facts the

[3] "Dura did not set forth any requirements about the quality, form, [] precision," or source of a "corrective disclosure." Sapssov v. Health Mgmt. Assocs., Inc., 608 F. App'x 855, 866 (11th Cir. 2015); see also In re eSpeed, Inc. Sec. Litig., 457 F. Supp. 2d 266, 297 (S.D.N.Y. 2006). "A corrective disclosure can come from any source, and can take any form from which the market can absorb [the information] and react . . . so long as it 'reveal[s] to the market the falsity' of the prior misstatements." Pub. Emps. Ret. Sys. of Miss. v. Amedisys, Inc., 769 F.3d 313, 322 (5th Cir. 2014) (alteration in original) (citation omitted); In re Enron Corp. Sec., Derivative & ERISA Litig., No. MDL-1446, 2005 WL 3504860, at *16 (S.D. Tex. Dec. 22, 2005) ("[T]he market may learn of possible fraud from a number of sources," including "newspapers and journals.").

[4] See Dura Pharm. Inc. v. Broudo, 544 U.S. 336, 342 (2005) (recognizing that loss causation can be established when "the relevant truth begins to leak out"); In re Bristol Myers Squibb Co. Sec. Litig., 586 F. Supp. 2d 148, 165 (S.D.N.Y. 2008) ("[A] corrective disclosure need not take the form of a single announcement, but rather, can occur through a series of disclosing events.").

majority "assume[d]" would have devalued Goldman's share price and that were reported in the 36 articles: Goldman's alleged "failure to prevent employees from illegally advising clients to buy into CDOs that were built to fail by a hedge fund secretly shorting the investors' positions." Id.; see also JA5358–60 (A November 2, 2009 front page *Wall Street Journal* article, reporting that "[Mr. Paulson] met with bankers at . . . Goldman Sachs[] and other firms to ask if they would create . . . CDOs . . . that Paulson & Co. could wager against . . . . Goldman Sachs[] didn't see anything wrong with Mr. Paulson's request and agreed to work with his team.").

The majority's holding thus imposes an unreasonably high and asymmetric standard for rebuttal evidence and leads to the unfair result that a disclosure that fails to overcome the presumption is nonetheless sufficient to state a claim and support class certification. Moreover, the majority's decision is particularly problematic when compounded with its holding that highly general statements that do not cause front-end price movement can give rise to a securities fraud class action under the price maintenance theory. Goldman II, 955 F.3d at 267–69. Under these twin rulings, defendants will be unable to rebut the Basic presumption by showing either a lack of front-end price movement or a lack of back-end price movement at the time that substantively similar (if not identical) information was revealed before the corrective disclosure. That renders class certification

automatic wherever general statements are paired with a subsequent price drop, which happens in essentially every securities class action.

B. The Majority Endorsed An Impossibly High Threshold For Rebutting The Basic Presumption Through Evidence That A Stock Drop Resulted From Something Other Than The Revelation Of An Alleged Misstatement

The majority also wrongly affirmed the district court's decision to the extent that it ignored and discredited Defendants' unrebutted evidence that the alleged misstatements were not the cause of the stock price movement on the alleged "corrective disclosure" dates. Id. at 271.

Defendants presented a study of 880 analyst reports demonstrating that analysts and investors attributed the stock price declines to the news of a government enforcement action against Goldman—not to a revelation that Defendants had allegedly misrepresented their approach to conflicts of interest. Defendants' expert, Dr. Choi, also testified that the stock price decline on those corrective disclosure dates was entirely due to the news that the SEC and DOJ had commenced enforcement actions. The district court failed to acknowledge the 880 analyst reports in its certification decision, and improperly rejected Dr. Choi's expert opinion.

The majority uncritically adopted the district court's errors, including its failure to acknowledge the analyst reports and its rejection of Dr. Choi's opinion. Dr. Choi identified three "factors" describing the enforcement action against

Goldman: It was not accompanied by a settlement, included scienter-based charges, and charged an individual defendant in addition to the company. These factors understandably limited the number of comparable events. It was therefore error for the district court to reject Dr. Choi's conclusion simply because it was based on too few events.

The upshot of the majority's endorsement is to preclude defendants in many circumstances from offering *any* rebuttal evidence under Halliburton II because disclosure events often do not generate large numbers of comparable events. In short, if the majority's decision is left uncorrected, event studies will be rendered useless to defendants and few, if any, will be able to rebut the Basic presumption before a district court or obtain reversal of class certification on appeal.

II. THE MAJORITY'S DECISION CONTRADICTS HALLIBURTON II AND RENDERS CLASS CERTIFICATION AUTOMATIC AT A SIGNIFICANT COST TO BUSINESS

The high bar set by the majority renders the Basic presumption "truly irrebuttable," Goldman II, 955 F.3d at 278 (Sullivan, J., dissenting), in many cases, and is contrary to Halliburton II. The majority endorsed the district court's rejection of *all* of Defendants' powerful evidence without requiring any contrary evidence from Plaintiffs that the stock price drops were caused, even in part, by the

subsequent repetition of the allegedly corrective information.[5] Under this standard, Halliburton II's explicit instruction that "defendants must be afforded an opportunity before class certification" to rebut price impact, 573 U.S. at 284, is a dead letter.

The majority's decision has the severe consequence of rendering class certification "all but a certainty in every case." Goldman II, 955 F.3d at 278. If left standing, it will only exacerbate the explosion of securities class actions and impose significant costs on businesses, which will face acute pressure to settle—a grim reality the majority acknowledged. Id. at 269 (majority) ("We are not blind to the widespread understanding that class certification can pressure defendants into settling large claims, meritorious or not, because of the financial risk of going to trial."); see also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 149 (2008); Hevesi v. Citigroup Inc., 366 F.3d 70, 80 (2d Cir. 2004); U.S. Chamber Inst. for Legal Reform, Containing the Contagion: Proposals to Reform the Broken Securities Class Action System 2 (Feb. 2019). And in establishing a virtually unattainable standard, the majority makes it inevitable that the reviewing

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[5] As Judge Sullivan explained, the Plaintiffs' expert conflated "the price impact of the conflict disclosures and the price impact of the enforcement actions," by "arguing that the two were inextricably intertwined," and "offered no clear explanation for why the market only moved after the 37th recital of fraud allegations." Id. at 277.

court will nearly always affirm that a defendant's "proffer simply came up short." Goldman II, 955 F.3d at 274. This eliminates any meaningful opportunity for reversal on appeal and deprives defendants of the essential protection against erroneous class certification provided by interlocutory appeal under Rule 23(f).[6]

The business community is already vulnerable to massive, unpredictable liability from securities class actions. The Court should not permit the majority's erroneous application of Halliburton II to increase that exposure.

CONCLUSION

The Court should grant Defendants' petition for rehearing or rehearing *en banc*.

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[6] See John Beisner et al., Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings, Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates (Apr. 29, 2014), https://www.jdsupra.com/legalnews/study-reveals-us-courts-of-appeal-are-l-52418/ (noting courts of appeal more frequently rule against certification, particularly where the district court granted certification).

Dated: May 19, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 29 and FED. R. APP. P. 5(c) because the brief contains 2481 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f). 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 the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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