16-450

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BARCLAYS BANK PLC, BARCLAYS CAPITAL INC.,
ROBERT DIAMOND, ANTONY JENKINS, WILLIAM WHITE,
Petitioners,

v.

JOSEPH WAGGONER, MOHIT SAHNI, BARBARA STROUGO,
individually and on behalf of all others similarly situated,
Respondents.

On Petition for Permission to Appeal from an Order Granting Class Certification Entered on February 2, 2016 by the United States District Court for the Southern District of New York, No. 14 Civ. 5797 Before the Honorable Shira A. Scheindlin

BRIEF FOR *AMICI CURIAE* FORMER SEC OFFICIALS AND LAW PROFESSORS IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

In *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) ("*Halliburton II*"), the Supreme Court held that defendants opposing a motion for class certification must be given an opportunity to rebut the fraud-on-the-market presumption of reliance recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). This case raises important questions concerning whether that presumption will truly be rebuttable in practice.

The district court here held that a defendant must rebut the *Basic* presumption "by a preponderance of the evidence," A-42, and thereby "foreclose" the possibility of price impact, A-40. In practice, this standard makes it effectively impossible for defendants to rebut the *Basic* presumption at the class certification stage, contrary to the Supreme Court's decision in *Halliburton II*. This Court recently granted a Rule 23(f) petition in *In re Goldman Sachs Group, Inc. Securities Litigation*, No. 15-3179 (Jan. 26. 2016), in which many of the *amici* here also filed an *amicus* brief urging appellate review, *see id.*, ECF No. 19, and which raises issues that substantially overlap with those in this case.

Amici curiae are a group of former Commissioners and officials of the United States Securities and Exchange Commission as well as law professors

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, contributed money to fund its preparation or submission.

whose scholarship and teaching focuses on the federal securities laws. *Amici* have a strong interest in the issues addressed in this brief. While not every individual *amicus* may endorse every statement made in this brief, the brief nonetheless reflects *amici*'s consensus that Defendants' petition raises important questions about the standards for rebutting the fraud-on-the-market presumption following *Halliburton II* that, as in *Goldman Sachs*, justify this Court's immediate review.

In alphabetical order, *amici curiae* are: the Honorable Paul S. Atkins, who served as a Commissioner of the SEC from 2002 to 2008; Elizabeth Cosenza, who is Associate Professor and Area Chair, Law and Ethics, at Fordham University; the Honorable Daniel M. Gallagher, who served as a Commissioner of the SEC from 2011 to 2015; the Honorable Joseph A. Grundfest, who is the William A. Franke Professor of Law and Business at Stanford Law School, and served as a Commissioner of the SEC from 1985 to 1990; Paul G. Mahoney, who is the Dean, David and Mary Harrison Distinguished Professor, and Arnold H. Leon Professor of Law, at the University of Virginia School of Law; Richard W. Painter, who is the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School; and Kenneth E. Scott, who is the Ralph M. Parsons Professor of Law, Emeritus, at Stanford Law School.

ARGUMENT

I. *HALLIBURTON II* HELD THAT DEFENDANTS CAN REBUT THE *BASIC* PRESUMPTION AT THE CLASS CERTIFICATION STAGE

In *Halliburton II*, the Supreme Court declined to overrule *Basic*'s holding that the element of reliance in a securities fraud class action may be proven through the fraud-on-the-market doctrine. At the same time, the Supreme Court held that defendants must be "allowed to defeat the presumption at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price." 134 S. Ct. at 2414. As *Halliburton II* emphasized, "*Basic* itself 'made clear that the presumption was just that'"—a presumption—"'and could be rebutted by appropriate evidence.'" *Id.* (quoting *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011) ("*Halliburton I*")). Specifically, *Basic* held that "*[a]ny showing* that severs the link between the alleged misrepresentation and … the price received (or paid) by the plaintiff … will be sufficient to rebut the presumption of reliance." 485 U.S. at 248 (emphasis added).

Halliburton II went a step further than *Basic*, holding that a showing of "price impact"—*i.e.*, that the alleged misrepresentation actually affected the stock's price—is "an essential precondition for any Rule 10b-5 class action." 134 S. Ct. at 2416. As the Supreme Court explained, "[w]hile *Basic* allows plaintiffs to establish that precondition indirectly" through a presumption, "it does not require courts to ignore a defendant's direct, more salient evidence showing that the

alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply." *Id.*

Halliburton II further recognized that proof of price impact has "everything to do with the issue of predominance at the class certification stage." 134 S. Ct. at 2416. Absent a showing of price impact, a class may not invoke *Basic*'s presumption of reliance. *Id.* at 2415-2416. "And without the presumption of reliance, a Rule 10b-5 suit cannot proceed as a class action." *Id.* at 2416. Accordingly, "to maintain the consistency of the presumption with the class certification requirements of Federal Rule of Civil Procedure 23," *Halliburton II* held that "defendants *must* be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock." *Id.* at 2417 (emphasis added).

II. THE DISTRICT COURT'S DECISION THREATENS TO EFFECTIVELY NULLIFY *HALLIBURTON II*

Like *Goldman Sachs*, No. 15-3179, this case raises crucial questions concerning whether *Basic*'s presumption will truly be rebuttable at the class certification stage—as *Halliburton II* held it must be. First, this case presents the question of the proper standard of proof for rebutting the *Basic* presumption. Here, the district court imposed a far more demanding standard for rebutting the *Basic* presumption than appropriate. Second, this appeal raises significant questions about how a defendant may rebut the presumption where plaintiffs rely on a so-

called "price maintenance" theory of price impact. Defendants here countered that theory with compelling evidence, which the district court simply disregarded. Taken together, the district court's rulings made it impossible in practice for Defendants to rebut the *Basic* presumption at the class certification stage, contrary to *Halliburton II*. Immediate review is thus warranted.

A. The Decision Applied the Wrong Burden of Proof Under *Basic*

The district court held that Defendants "must prove by a preponderance of the evidence" that the price of Barclays ADS was not affected by the alleged misrepresentations concerning LX, and that Defendants failed to do so because they did not "*foreclose* plaintiffs' reliance on the price maintenance theory." A-40, A-42 (emphasis added). Thus the district court required Defendants to prove conclusively that fraud was not the cause of the price drop.

The Federal Rules of Evidence, however, make clear that defendants' burden is to "*produc[e]* evidence to rebut the presumption … [b]ut this rule does not shift the burden of *persuasion*, which remains on the party who had it originally." Fed. R. Evid. 301 (emphasis added).[2] In endorsing the fraud-on-the-

[2] Under Rule 301, a "presumption" is "an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts." *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 148 (2d Cir. 2007) (internal quotation marks omitted). However, such an "assumption ceases to operate … upon the proffer of contrary evidence." *Id.* In particular, a presumption is rebutted when the party opposing it introduces evidence that, "when viewed in the light most favorable to" the party against whom the presumption runs, "could support a

market presumption, *Basic* specifically cites Rule 301, *see* 485 U.S. at 245, and both *Basic* and *Halliburton II* describe the burden of rebutting the presumption in terms consistent with Rule 301, recognizing that "'*[a]ny showing* that severs the link'" between the alleged misrepresentation and the price paid by the plaintiff is "'sufficient to rebut the presumption of reliance.'" *Halliburton II*, 189 S. Ct. at 2415 (quoting *Basic*, 485 U.S. at 248) (emphasis added). The district court's "preponderance of the evidence" standard thus improperly shifted the ultimate burden of persuasion to Defendants. There is every reason to believe that this error affected the ultimate outcome of Plaintiffs' class certification motion, as the district court itself acknowledged that Plaintiffs' evidence of "price impact" was neither "strong" nor "compelling." A-44.

The district court decision in *Goldman Sachs* similarly imposed an excessively demanding burden of proof for rebutting the *Basic* presumption. *See In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10-cv-3461, 2015 WL 5613150, at *7 (S.D.N.Y. Sept. 24, 2015) (requiring defendants to "demonstrate a complete absence of price impact" with "conclusive evidence"). Judge Scheindlin relied on that decision here, to similar effect. *See* A-44 n.129. As it did in *Goldman Sachs*, this Court should grant review in this case to address the proper burdens of

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reasonable jury finding of the nonexistence of the presumed fact." *Id.* at 149 (internal quotation marks omitted).

production and persuasion for rebutting the *Basic* presumption at the class certification stage under *Halliburton II*.

B. The Decision Disregarded Evidence Challenging Plaintiffs' Speculative "Price Maintenance" Theory

Review is especially warranted because the district court also disregarded Defendants' extensive evidence of a lack of price impact in light of Plaintiffs' so-called "price maintenance" theory. Here too the district court followed the *Goldman Sachs* decision, which similarly rejected evidence seeking to rebut a "price maintenance" theory. *See In re Goldman Sachs Grp., Inc. Sec. Litig.*, 2015 WL 5613150, at *6 (accepting "Plaintiffs' argument … that the misstatements simply served to maintain an already inflated stock price"). And as in *Goldman Sachs*, the district court's approach here made it effectively impossible for Defendants to rebut the presumption of reliance.

First, the district court treated as irrelevant the fact that Plaintiffs' own expert's event study did not find "a statistically significant increase in the price of Barclays ADS on any of the alleged misstatement dates." A-39. The court's dismissal of that evidence is contrary to Supreme Court precedent, which holds that the presumption of reliance is rebutted precisely when it is shown that "the misrepresentation in fact did not lead to a distortion of price," *Basic*, 485 U.S. at 248, and that an event study can constitute "direct [and] salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price"

and thus demonstrate "that the *Basic* presumption does not apply," *Halliburton II*, 134 S. Ct. at 2416.

The district court dismissed this evidence because Plaintiffs invoked a "price maintenance theory." A-39. Under this convenient theory, which this Court has never addressed, a "misstatement can impact a stock's value … by improperly maintaining the existing stock price." *Id.* (internal quotation marks omitted). Then, if a stock's price drops at the end of a class period, a court must *assume* a price impact. The result is a Catch-22 for defendants: It means that whenever a plaintiff speculates that a misstatement "maintained" an "inflated" stock price, a court must ignore the most *direct* evidence of no price impact—that there was no increase in a stock price "on any of the alleged misstatement dates." A-39.

Courts in this circuit have properly recognized that "price maintenance" theories like the one advanced here are particularly prone to being "speculative and hypothetical." *In re N. Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d 446, 461 (S.D.N.Y. 2000); *see also In re Credit Suisse First Boston Corp. (Lantronix, Inc.) Analyst Sec. Litig.*, 250 F.R.D. 137, 145 (S.D.N.Y. 2008) (rejecting "price maintenance theory" that was "based not on facts but on speculation"). Following *Halliburton II*, it is especially important for this Court to decide whether such a speculative *assumption* of price impact through "price maintenance" negates direct *evidence* of no price impact at the time alleged misstatements were made.

Second, the district court also disregarded evidence presented to rebut Plaintiffs' "price maintenance" theory. For example, the district court's motion to dismiss decision held that the alleged misrepresentations about LX could only have been material to a reasonable investor due to Barclays' statements about "restoring its integrity" following its LIBOR settlement, which occurred in June 2012. A-117. However, Plaintiffs' expert testified that Barclays' ADS were inflated *before* June 2012. *See* A-608, 613-614, 760. Plaintiffs' inflation theory was thus refuted because "[i]mmaterial information, by definition, does not affect market price." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013).

The district court similarly disregarded Defendants' expert testimony demonstrating that the June 26, 2014 price decline was due to investor concerns regarding regulatory scrutiny and litigation risk. *See* A-42-44. Courts have recognized that in supposed "price maintenance" cases it is essential to "rule out causes for that maintenance other than the defendants' purported failure to disclose certain information." *In re N. Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d at 461. Here, however, Plaintiffs failed to do so, and their expert admitted that news of a regulatory investigation can, on its own, cause a stock's price to decline. A-605-606. Nonetheless, the district court dismissed Defendants' evidence out of hand for not "proving lack of price impact" "by a preponderance of the evidence." A-44.

C. This Case Warrants Immediate Review

Like *Goldman Sachs*, this case raises important questions concerning the standards for rebutting the fraud-on-the-market presumption in the wake of *Halliburton II*. This Court's guidance on these questions is urgently needed. Every year, dozens of putative securities class actions are filed in this Circuit in which many millions or even billions of dollars are potentially at stake.[3] The outcomes of such cases regularly turn on whether or not class certification is proper under Rule 23, *Basic*, and *Halliburton II*. And if appellate review is ever to occur, it must take place at the class certification stage because "few securities class actions are litigated to conclusion." *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004) (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the Court should grant the Rule 23(f) petition.

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[3] Between 2012 and 2014, this Circuit's district courts saw 153 securities class actions filed. Cornerstone Research, *Securities Class Action Filings: 2014 Year in Review* 25 (2014). Cornerstone Research calculated that the total "maximum dollar loss" for these actions was $389 billion. *Id.* at 30. Although these statistics also include class actions brought under other liability provisions of the federal securities laws, it is fair to assume that the bulk of them involve Section 10(b)—and are thus governed by *Basic* and *Halliburton II*.

Respectfully submitted.

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