Appeal No. 14-3178

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IBEW LOCAL 98 PENSION FUND, MARION HAYNES,
AND RENE LEBLANC,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
No. 11–cv-429 (DWF/FLN)
The Honorable Donovan W. Frank

**BRIEF FOR CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA
AS *AMICUS CURIAE* SUPPORTING DEFENDANTS-APPELLANTS
FOR REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 29(c), *Amicus Curiae* states that it is a non-profit membership organization, with no parent company and no publicly-traded stock.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

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). All parties who have appeared in this appeal have consented to the filing of this brief.

The Chamber is the Nation's largest federation of business companies and associations. It directly represents 300,000 members and indirectly represents the interests of over 3 million business, trade, and professional organizations of every size, in every sector, and from every region of the United States. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. Many of the Chamber's members are companies subject to U.S. securities laws. To that end, 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 Chamber has long been concerned about the costs that class action lawsuits – and particularly securities class actions – impose on the American economy. The Supreme Court has recognized that the increase of securities class action litigation puts a significant economic drain on U.S. public companies and their investors, both through the direct costs of litigation and settlements and indirectly through higher insurance costs. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 81 (2006) (discussing the use of securities class action lawsuits "to injure 'the entire U.S. economy'"); Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 189 (1994) (remarking that the "uncertainty and excessive litigation can have ripple effects" and "increased costs . . . of the litigation and settlement costs under 10b-5 may be . . . incurred by the company's investors"); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740-43 (1975) (noting that extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with inadequate claims to extort settlements from innocent companies); Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) (stating that the "[c]ertification of a large class may . . . 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"); see also Fed. R. Civ. P. 23(f) Advisory Committee Notes to 1998 Amendments (stating that "[a]n 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").

According to Stanford Law School's Securities Class Action Clearinghouse, total settlement dollars from securities class actions rose by 46 percent in 2013 and totaled $4.8 billion.[1] These costs impose a burden on capital markets and increase the costs of capital and insurance for businesses of all sizes and for the U.S. economy generally. See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 164 (2008) (stating that class action securities lawsuits can "raise the cost of being a publicly traded company . . . and shift securities offerings away from domestic capital markets"). In addition, the U.S. Senate has noted that many securities class actions have "had an in terrorem effect on Corporate America . . . . These lawsuits have added significantly to the cost of raising capital and represent a 'litigation tax' on business . . . . Many of these companies are high-technology companies which, by their very nature, have unpredictable business prospects and, consequently, volatile stock prices." S. Rep. No. 104–98, at 9 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 687–88 (footnotes omitted).

[1] Stanford Clearinghouse & Cornerstone Research, *Securities Class Action Settlements: 2013 Review and Analysis*, at 3 (2014), *available at* http://securities.stanford.edu/research-reports/1996-2013/Settlements-Through-12-2013.pdf.

The District Court's decision undermines those principles by relieving plaintiffs of their burden to show price impact once a defendant has made a showing of absence of price impact. In essence, under the District Court's reasoning, a class action lawsuit can survive on a mere showing of market efficiency even if the only evidence rebuts price impact. This is diametrically opposed to the Supreme Court's decision in Halliburton II.

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE RULE 29(c)(5)

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), 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.

SUMMARY OF ARGUMENT

In Halliburton II, the Supreme Court held that, while a securities fraud plaintiff could satisfy the reliance element of a Rule 10b-5 action by invoking a presumption of reliance, that presumption was rebuttable and that the defendant could rebut the presumption through evidence that the misrepresentation did not in fact affect the stock price. In so holding, the Court made clear that the gravamen for a securities class action lawsuit was not market efficiency but market impact: "[t]he fundamental premise underlying the presumption is that an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction. If it was not, then there is no grounding for any contention that [the] investor[] indirectly relied on th[at] misrepresentation[] through [his] reliance on the integrity of the market price." Halliburton II, 134 S. Ct. at 2414 (internal citations omitted).

The District Court order here misapplied those principles and accordingly eviscerated the protection afforded by Halliburton II. It also ran afoul of Federal Rule of Civil Procedure 23. Once defendants offered evidence of lack of price impact, the burden fell on Plaintiffs to offer evidence of price impact. Furthermore, the District Court's erroneous reliance on an assumption that the alleged misrepresentations *could* have affected the stock price – rather than evidence that they *did* – would have other far-reaching consequences if left undisturbed on appeal. Such reasoning would undermine the safe-harbor Congress granted under the Private Securities Litigation Reform Act (the "PSLRA") for forward-looking guidance. It would allow securities fraud plaintiffs to obtain certification on a theory that guidance inflated a stock's price, merely by identifying some future statement that does not correct the prior guidance and alleging that by not correcting the prior guidance, the company was maintaining inflation in the stock – even in the absence of any evidence of price impact.

ARGUMENT

I. A CARDINAL PRINCIPLE OF CLASS ACTION LAW AND FEDERAL RULE OF CIVIL PROCEDURE 23 IS THAT PLAINTIFF BEARS THE BURDEN WITH RESPECT TO EVERY ELEMENT OF THE RULE 23 ANALYSIS, INCLUDING PREDOMINANCE

As the Supreme Court has cautioned, the class action remains "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). Notably, "[t]o come within the exception, a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with [Federal Rule of Civil Procedure] 23." Id.; Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (noting the same). And "the trial court [must be] satisfied after a *rigorous* analysis" that a plaintiff has met the prerequisites of Rule 23. See id. (emphasis added).

Under Federal Rule ("Rule") of Civil Procedure 23, a party seeking to certify a class action bears the burden of proof with respect to every Rule 23 requirement. Luiken v. Domino's Pizza, LLC, 705 F.3d 370, 372 (8th Cir. 2013) ("In order to obtain class certification, a plaintiff has the burden of showing that the class should be certified and that the requirements of Rule 23 are met.") (quoting Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994)). Moreover, Rule 23 "does not set forth a mere pleading standard." Comcast, 133 S. Ct. at 1432; ("[A] party must not only be prepared to prove [the requirements of Rule 23(a)]. The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b).") (internal citation and quotations omitted). Thus, proof of the Rule 23 requirements is critical to the class certification inquiry. See Elizabeth M. v. Montenez, 458 F.3d 779, 786 (8th Cir. 2006) (noting "the 'rigorous analysis' under Rule 23 must involve consideration of what the parties must prove.").

This burden is no different for the "predominance" requirement under Rule 23(b)(3). See Fed. R. Civ. P. 23(b)(3) (requiring the court to find "that the questions of law or fact common to class members predominate over any questions affecting only individual members"); Comcast, 133 S. Ct. at 1432 ("If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a).").

II. THE DISTRICT COURT VIOLATED THESE CARDINAL PRINCIPLES OF CLASS ACTION LAW AND EVISCERATED THE RIGHT OF DEFENDANTS UNDER HALLIBURTON II TO REBUT PRICE IMPACT AT CLASS CERTIFICATION

A. Under Halliburton II, The Ultimate Question Is Price Impact

In concluding Plaintiffs had satisfied the predominance element, the District Court misapplied these bedrock principles and rendered illusory Halliburton II's promise that defendants have the right to rebut the fraud-on-the-market presumption of reliance at class certification. In Halliburton II, the Supreme Court – faced with the decision of whether to overrule the fraud-on-the-market presumption of reliance from Basic Inc. v. Levinson, 485 U.S. 224 (1988) – chose to keep the presumption, but provided defendants a right at the class certification stage to rebut the presumption with evidence of a lack of price impact. See Halliburton II, 134 S. Ct. at 2407, 2414. The Court recognized that a successful Section 10(b) claim requires proof of reliance, and that in the absence of common issues of reliance, individualized issues would predominate and defeat class certification. See id. at 2412 (noting that "[i]n securities class action cases, the crucial requirement for class certification will usually be the predominance requirement of Rule 23(b)(3)" and "[t]he Basic presumption does not relieve plaintiffs of the burden of proving—before class certification—that [the predominance] requirement is met"); id. at 2416 ("[W]ithout the presumption of reliance, a Rule 10b-5 suit cannot proceed as a class action: Each plaintiff would have to prove reliance individually, so common issues would not 'predominate' over individual ones.").

The Court held that a common issue of reliance could be shown by evidence of "price impact" – i.e., "whether the alleged misrepresentations affected the market price in the first place." See id. at 2414. The Court also held that the plaintiff in a securities class action lawsuit could satisfy its initial burden of the presumption of reliance by showing "(1) that the alleged misrepresentations were publicly known, (2) that they were material, (3) that the stock traded in an efficient market, and (4) that the plaintiff traded the stock between the time the misrepresentations were made and when the truth was revealed." Id. at 2408.

But the Court recognized that "market efficiency" alone was not enough to satisfy Rule 23 or to permit a case to proceed as a class action. Rather, the ultimate question remained price impact and, to that end, the Supreme Court permitted defendants to rebut the presumption of reliance "through evidence that an alleged misrepresentation did not actually affect the market price of the stock." Id. at 2417. In other words, defendants can "rebut the presumption of reliance with evidence of a *lack* of price impact, not only at the merits stage – which all agree defendants may already do – but also before class certification." Id. at 2413. The Court thus recognized, "[p]rice impact is . . . an essential precondition for any Rule 10b-5 class action." Id. at 2416. "In the absence of price impact, Basic's fraud-on-the-market theory and the presumption of reliance collapse." Id. at 2414.

B. The District Court's Holding Eviscerates Halliburton II

The District Court's holding misinterprets Halliburton II and renders it a hollow shell. The Defendants here presented evidence at class certification – unrebutted by Plaintiffs – that the alleged misrepresentations at the heart of Plaintiffs' lawsuit did not have any impact on the market price of Best Buy stock. (See A259.) Specifically, the evidence showed that there was no positive stock price movement at the time of the alleged misstatements. (A259.) On the contrary, the evidence showed that the price of the stock decreased by a few cents following the alleged misrepresentations. (See A329.) Plaintiffs offered no evidence in response that the alleged misrepresentations did have a price impact on the price of Best Buy stock.

Under Halliburton II, that should have been the end of the story. "In the absence of price impact, Basic's fraud-on-the-market theory and presumption of reliance collapse." Halliburton II, 134 S. Ct. at 2414. If there is no evidence that the misrepresentation was reflected in the market price at the time of the plaintiff's transaction, "then there is no grounding for any contention that [the] investor[] indirectly relied on th[at] misrepresentation[] through [his] reliance on the integrity of the market price." Id. (internal citations omitted).

The District Court nonetheless held that Plaintiffs had established a common issue with respect to reliance and that the predominance requirement was satisfied based purely on Plaintiffs' allegations. That was error. Despite the absence of any actual evidence of price impact and "[e]ven though the stock price may have been inflated prior to the earnings phone conference," the District Court ruled that Plaintiffs had established their burden because: "the alleged misrepresentations *could* have further inflated the price, prolonged the inflation of the price, or slowed the rate of the fall" and that "[d]efendants . . . have not offered evidence to show that Best Buy's stock price did not decrease when the truth was revealed." IBEW Local 98 Pension Fund v. Best Buy Co., No. 11-429 (DWF/FLN), 2014 WL 4746195, at *6 (D. Minn. Aug. 6, 2014).

The District Court's holding has it backwards. After Plaintiffs invoked the presumption of reliance, Defendants rebutted that presumption by presenting evidence that there was in fact no positive price impact on

September 14 – at the time the alleged misrepresentations were made. (A259.) Once Defendants rebutted the presumption, the burden then fell to Plaintiffs to present evidence that there was a price impact. Plaintiffs made no such showing.

The District Court's conclusory statements that the alleged misrepresentations "could" have had price impact and that Plaintiffs allege "that Best Buy's stock price rose after the alleged misstatements and later declined after Best Buy revealed information on December 14, 2010," IBEW Local 98 Pension Fund, 2014 WL 4746195 at *6, cannot substitute for evidence consistent with Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) and Halliburton II. Under Wal-Mart, and its progeny, the burden is on the Plaintiff at class certification to prove each of the Rule 23(a) and 23(b)(3) factors by a preponderance of the evidence. See 131 S. Ct. at 2551; Halliburton II, 134 S. Ct. at 2412 (noting Supreme Court precedent "ha[s] made clear that plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3)"); see Comcast, 133 S. Ct. at 1432 ("The party [seeking certification] must . . . satisfy through evidentiary proof at least one of the provisions of Rule 23(b) . . .

[including] that the questions of law or fact common to class members predominate over any questions affecting only individual members.") (internal quotation marks omitted); Levitt v. J.P. Morgan Sec., Inc., 710 F.3d 454, 465 (2d Cir. 2013) ("The Rule 23 requirements must be established by at least a preponderance of the evidence."); Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 591 (3d Cir. 2012) (noting "[t]he party seeking certification bears the burden of establishing each element of Rule 23 by a preponderance of the evidence"); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012) ("It is sufficient if each disputed [Rule 23] requirement has been proven by a preponderance of evidence."). That necessarily includes proof with respect to the predominance element. And, under Halliburton II, proof with respect to the predominance element in a securities fraud class action as it pertains to reliance comes from evidence of price impact. See 134 S. Ct. at 2416 ("The fact that a misrepresentation was reflected in the market price at the time of [the] transaction—that it had price impact—is Basic's fundamental premise. It thus has everything to do with the issue of predominance at the class certification stage.") (internal quotation marks and citations omitted); id. at 2408 (under Basic "if a defendant could show that the alleged misrepresentation did not, for whatever reason, actually affect the market price . . . then the presumption of reliance would not apply").

Thus, Plaintiffs' burden cannot be reduced to a showing based on mere allegations without relieving the Plaintiff entirely of his burden of proof and permitting a securities class action in virtually every case that involves a widely-traded security and a stock price drop. That is decidedly not the message of Halliburton II.

III. AFTER DEFENDANTS REBUTTED THE PRESUMPTION OF RELIANCE, THE BURDEN FELL TO PLAINTIFFS TO SHOW PRICE IMPACT IN ORDER TO CARRY THEIR BURDEN ON THE PREDOMINANCE ELEMENT

The Basic presumption is just that – a presumption. The Supreme Court described it as a "useful device[] for allocating the burdens of proof between parties." See Basic, 485 U.S. at 245. But "market efficiency" – the metric for invoking the presumption – is not the ultimate fact attempted to be proven by the presumption. "Price impact" is, and the Supreme Court emphasized in Halliburton II that "the . . . prerequisites for invoking the presumption constitute an indirect way of showing price impact" and that Basic "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." 134 S. Ct. at 2415-16.

Thus, it follows that once a defendant rebuts the presumption of reliance with evidence of a lack of price impact, the burden falls to plaintiffs to show price impact in order to satisfy their burden on the predominance element. Federal Rule of Evidence ("Rule") 301, the very rule invoked by Basic to describe the type of presumption the Court was recognizing, provides that "unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption." The Rule, however, also goes on to provide that it "does not shift the burden of persuasion, which remains on the party who had it originally." Fed. R. Evid. 301; Kelly v. Armstrong, 141 F.3d 799, 802 (8th Cir. 1998) ("Federal Rule of Evidence 301 states that a presumption imposes upon a party against whom it is directed the burden of production, or going forward with the evidence, but does not shift the burden of proof, or persuasion."). Under the prevailing "bursting bubble" view of Rule 301, the presentation of rebuttal evidence "destroys that presumption, leaving only that evidence and its inferences to be judged against the competing evidence and its inferences to determine the ultimate question at issue."[2] Lupyan v. Corinthian Colls., Inc., 761 F.3d

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[2] The familiar McDonnell Douglas framework for analyzing Title VII discrimination claims is illustrative. See Lake v. Yellow Transp., Inc., 596 F.3d 871, 873-74 (8th Cir. 2010) (noting in this context "[a] prima facie case creates a rebuttable presumption of discrimination"). Under this framework, a "plaintiff must first present a prima facie case of intentional discrimination. The burden then shifts to defendant to articulate a legitimate, nondiscriminatory reason for its action. If defendant meets that

314, 320 (3d Cir. 2014) (internal quotations omitted) (citing McCann v. Newman Irrevocable Trust, 458 F.3d 281, 288 (3d Cir. 2006)). Accordingly, because Plaintiffs ultimately bore the burden on the Rule 23 requirements, once Defendants presented evidence of lack of price impact, the burden reverted to Plaintiffs to counter Defendants' evidence by demonstrating there was price impact – either by showing a statistically significant stock price impact at the time of the statement or by showing a statistically significant stock price movement caused by the disclosure to the market of the information alleged to have been misrepresented.

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minimal burden, plaintiff must show that the proffered nondiscriminatory reason is merely a pretext for unlawful . . . discrimination." Fiero v. CSG Sys., Inc., 759 F.3d 874, 878 (8th Cir. 2014). Critically, plaintiff's establishment of a prima facie case does not relieve plaintiff of its obligation to meet its ultimate burden of proof on its discrimination claims, should the defendant rebut the prima facie case. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993) ("[A]lthough the McDonnell Douglas presumption shifts the burden of *production* to the defendant, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'"); Pye v. Nu Aire, Inc., 641 F.3d 1011, 1019 (8th Cir. 2011) (noting that if the "defendant provides such a [nondiscriminatory] reason, the presumption disappears, and the burden shifts back to the plaintiff to show that the proffered reason was pretext for discrimination"). The district court's obligation to treat a rebuttable presumption as just that can be no less at the certification threshold, in which a rigorous inquiry is essential and "actual, not presumed, conformance with Rule 23[] [is] indispensable." See Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982). Presumption or no presumption, plaintiff must still "be prepared to prove that . . . in fact . . . [the relevant Rule 23 elements exist]." See Comcast, 133 S. Ct. at 1432.

This test notably does not impose any exceptional burden on Plaintiffs. To the contrary, at summary judgment and at trial, the burden is on the plaintiff to demonstrate a causal connection between the drop in stock price and the alleged misrepresentations. See In re Control Data Corp. Sec. Litig., 933 F.2d 616, 621 (8th Cir. 1991) (reversing grant of directed verdict for defendants on grounds that "[t]he class presented evidence of a sufficient 'causal nexus' between [the corporation's] improper accounting and the drop in . . . stock price"); see also In re Omnicom Grp., Inc. Sec. Litig., 597 F.3d 501, 510 n.3 (2d Cir. 2010) (noting "summary judgment [for defendants would be] appropriate if [plaintiffs] cannot show that at least some of the price drop was due to the fraud"); Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse First Boston, 853 F. Supp. 2d 181, 193 (D. Mass. 2012), aff'd sub nom. Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse Sec. (USA) LLC, 752 F.3d 82 (1st Cir. 2014) ("[T]o survive summary judgment, plaintiffs must isolate the extent to which the decrease in stock price was caused by the disclosure and not, as the Supreme Court has warned, 'the tangle of [other] factors affecting [stock] price,' such as changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price"). Simply put, once defendants have burst the presumption of reliance with evidence of price impact at class certification, it cannot be extraordinary to ask the party required to prove the Rule 23 requirements – here, Plaintiffs – to show what they would have to establish anyway at summary judgment or at trial in order to meet that burden.

IV. THE RULING OF THE DISTRICT COURT ALSO UNDERMINES THE SAFE-HARBOR GRANTED FOR FORWARD-LOOKING STATEMENTS

Congress intended to facilitate the provision of forward-looking guidance from companies such as that provided by Best Buy in September by protecting them against lawsuits based on such stock drops. To that end, the PSLRA includes a safe-harbor for forward-looking statements under certain circumstances. See 15 U.S.C. §§ 77z–2(a) & (c)(1) (1995) , 78u–5(a) & (c)(1) (1995); see, e.g., Parnes v. Gateway 2000, Inc., 122 F.3d 539, 548 (8th Cir. 1997) (noting that "when an offering document's forecasts, opinions or projections are accompanied by meaningful cautionary statements, the forward-looking statements will not form the basis for a securities fraud claim if those statements did not affect the 'total mix' of information the document provided investors. In other words, cautionary language, if sufficient, renders the alleged omissions or misrepresentations immaterial as a matter of law."). The safe-harbor under the PSLRA reflects Congress's judgment that market efficiency and educated judgments about investing are facilitated and not deterred if companies are encouraged to make statements about their expectations for future financial performance. See H.R. Conf. Rep. 104–369, at 43 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 741 (Congress "has adopted a statutory 'safe harbor' to enhance market efficiency by encouraging companies to disclose forward-looking information."); see id. at 42-43 (citing Testimony of Hon. Richard C. Breeden, former Chairman, Securities and Exchange Commission ("SEC"), before the Securities Subcommittee of the Senate Committee on Banking, Housing, and Urban Affairs, Apr. 6, 1995) ("Shareholders are also damaged due to the chilling effect of the current system on the robustness and candor of disclosure . . . . Understanding a company's own assessment of its future potential would be among the most valuable information shareholders and potential investors could have about a firm").

The District Court's class certification decision, however, not only undermines Halliburton II but also undermines the safe-harbor Congress created for forward-looking statements. For example, the District Court's decision subverts Congress's policy objectives to encourage companies to provide forward-looking information by removing liability if a company's predictions in its forward-looking guidance turn out to be wrong. It should be stressed here that Best Buy's September statements that the District Court correctly found not to be actionable and the September statements that the court found to be actionable concerned the same general subject – Best Buy's expected year-end earnings-per-share performance. (A58, A62.) The non-actionable statements were pure forward-looking forecasts or projections for how Best Buy would finish the year whereas the District Court ruled that the actionable statements also included a statement of present historical fact – that Best Buy's current performance was "in line" and consistent with those year-end projections. (A228-232; A234-236.) It is also notable that the December 14 disclosure that the Plaintiffs alleged to be corrective did not specifically disclose any information Plaintiffs alleged to have been withheld from the market on September 14 or disaggregate the impact of any such information. It simply announced that Best Buy did not achieve its expected earnings per share and explained those results not by anything that was known but not disclosed in September but by performance after September. (See No. 14-3178, Dkt. Entry Dec. 4, 2014, Defs.'-Appellants' Br. at 34.)

Under these circumstances, Plaintiffs' burden was relatively clear: even assuming the continued validity of the maintenance theory, (see Defs.'-Appellants' Br. at 30), it should have offered proof either of a positive price impact from the misleading statements in September or a negative impact at the end of the class period attributable to the disclosure of any allegedly concealed information. The District Court held that it was required to do neither at class certification. It stated that it was sufficient that Plaintiffs alleged that the December stock price drop reflected the removal of inflation placed into the stock by the allegedly misleading statements in September. That ipse dixit, if upheld by this Court, would not only undermine Halliburton II but threaten the entire edifice that encourages companies to make forward-looking statements by relieving them of liability if those statements turn out to be wrong. In virtually every case in which a company discloses that it has failed to achieve a result it projected to achieve, there will be a stock price drop. That is the impact of bad news in an efficient market.[3]

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[3] This occurrence is well-documented in the literature on earnings guidance. See, e.g., Financial Executives Research Foundation, *A Qualitative Study of Earnings Guidance*, at 20 (July 2014), *available at* http://www.financialexecutives.org/ferf/download/2014%20Final/2014-019.pdf ("[A] small earnings surprise could be interpreted as meaningful information about changes in a company's long-term earnings growth rate and warrant a sizable stock price adjustment"); PwC Center for Board

Moreover, here, the non-actionable statement and the near-contemporaneous statements that the Court found to be actionable could be found in the instance of nearly every company that makes a forward-looking statement. Best Buy announced its year-end projections and then said at almost the same time that its performance to date was "in line" with those projections. What company which announces forward-looking guidance will not typically simultaneously state – explicitly or implicitly – that its reported results to-date were consistent with those projections? That will be true of nearly every forecast. And the philosophy of the securities laws is to promote full disclosure. Basic, 485 U.S. at 230 ("This Court repeatedly has described the fundamental purpose of the Act as implementing a philosophy of full disclosure") (internal quotation marks omitted).

If, as the District Court held, the plaintiff in such a case is relieved of any burden to show either front-end price impact or back-end

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Governance, *PwC Audit Committee Excellence Series; Achieving Excellence: Assessing the Company's Forward-Looking Guidance Practices and the Potential Risk of Consensus Estimates*, at 6 (Mar. 2014), *available at* http://www.pwc.com/en_US/us/corporate-governance/publications/assets/pwc-aces-earnings-guidance.pdf ("Investors and analysts react to a company's reported earnings relative to the analysts' consensus estimate for each quarter . . . . Generally the company's stock price will immediately react to the quarterly earnings release (upward or downward) depending on the results of that comparison").

price-impact by demonstrating a causal relationship between the later stock drop and the revelation of some information to the market that is alleged to have been illegally withheld, then plaintiffs would be able to bring a federal securities fraud class action in the case of virtually every earnings miss. Under the District Court's decision, all the plaintiff would have to say is that the defendant company announced guidance and that its implicit or explicit statement that results were consistent with guidance must have been false because the company later missed the guidance. The burden would then fall to defendants to show that the stock price drop was not the result of any curative disclosure. That is not the message of Halliburton II. And, if it becomes the law of this Circuit, few if any companies will issue forward-looking guidance from knowledge that the failure to meet that guidance will ipso facto give grounds to a securities fraud class action lawsuit – the prerequisites for which the class certification plaintiffs will not have to prove but – that the companies will have to disprove.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be reversed.

Dated: December 11, 2014

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 5,320 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: December 11, 2014

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Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2014, I have caused the foregoing Brief of *Amicus Curiae*, the Chamber of Commerce of the United States of America, in support of the Defendants-Appellants to be served on the following parties via email and USPS, First-Class mail, postage prepaid:

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Dated: December 11, 2014

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CIRCUIT RULE 28A(h)(2) CERTIFICATION

I hereby certify that I have submitted for filing to the Court an electronic version of the Brief of Amicus Curiae, the Chamber of Commerce of the United States of America in support of Defendants-Appellants that has been scanned for viruses and is virus free.

Dated: December 11, 2014.

/s/ Lewis J. Liman
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United States Court of Appeals
For The Eighth Circuit
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December 12, 2014

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RE: 14-3178 IBEW Local 98 Pension Fund, et al v. Best Buy Co., Inc., et al

Dear Counsel:

The amicus curiae brief of the Chamber of Commerce of the United States was received on December 11, 2013 and filed on December 12, 2014. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Michael E. Gans
Clerk of Court

AMT

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District Court/Agency Case Number(s): 0:11-cv-00429-DWF