No. 17-303

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE BIG LOTS, INC., STEVEN S. FISHMAN, JOE R. COOPER, CHARLES W. HAUBIEL II AND TIMOTHY A. JOHNSON,
Petitioners.

ON PETITION PURSUANT TO FED. R. CIV. P. 23(f) FOR PERMISSION TO APPEAL THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, ENTERED ON MARCH 17, 2017 (DKT. NO. 88), GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION IN *ALAN WILLIS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED V. BIG LOTS, INC., ET AL.*, NO. 2:12-CV-00604

BRIEF OF *AMICI CURIAE* LAW PROFESSORS AND FORMER SEC OFFICIALS IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL PURSUANT TO FED. R. CIV. P. 23(f)

GIDEON A. SCHOR
WILSON SONSINI GOODRICH & ROSATI
PROFESSIONAL CORPORATION
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
Telephone: 212-999-5800
Facsimile: 212-999-5899
gschor@wsgr.com

ALBERT LIN (OH Bar No. 0076888)
ICE MILLER LLP
250 West Street
Columbus, Ohio 43215
Telephone: 614-462-2233
Facsimile: 614-222-3693
albert.lin@icemiller.com

Attorneys for Amici Curiae
Law Professors and Former SEC Officials

April 7, 2017

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

MISCELLANEOUS

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 be rebuttable as contemplated by *Halliburton II*.

In its Opinion and Order entered on March 17, 2017 ("Opinion" or "Op."), The District Court here failed to articulate the correct burden-allocation rules. That failure alone warrants vacatur and remand under this Court's recent case law. Moreover, statements in the District Court's Opinion indicate that the District Court allocated the wrong burdens to the wrong parties. Specifically, the District Court likely gave defendants the ultimate burden of persuasion on the issue of whether there was price impact, even though that burden should have been at all times on plaintiffs. The District Court also likely gave plaintiffs no burden of production, even though defendants' production of evidence of no price impact caused the burden to shift to plaintiffs to produce evidence of price impact.

[1] A motion for leave to file this brief is being filed herewith. None of the parties to this case or their counsel authored this brief in whole or in part. None of the parties to this case or their counsel contributed money that was intended to fund preparing or submitting the brief. No one other than *amici curiae* and their undersigned counsel contributed money that was intended to fund preparing or submitting this brief.

Finally, any suggestion by the District Court that defendants' burden of production included a burden to produce evidence of no back-end price impact is erroneous.[2]

The Second, Fifth, and Eighth Circuits have recently granted Rule 23(f) petitions that raise issues substantially similar to those in this case.[3] The Second Circuit appeals are pending, and the Eighth Circuit's merits holding supports Defendants' position, notwithstanding the District Court's rejection thereof.[4] Denial of Defendants' 23(f) petition will put this Court at odds with every other Circuit that has confronted the question.

Amici curiae include former Commissioners of the United States Securities and Exchange Commission ("SEC") and law professors whose scholarship and teaching focus 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

---

[2] When an alleged misrepresentation causes a stock's price to increase, the increase is referred to as "front-end price impact." Op. at 34. When a disclosure that allegedly corrects the alleged misrepresentation causes the stock's price to drop, that drop is referred to as "back-end price impact." Op. at 34-35.

[3] *Barclays Bank PLC v. Waggoner*, No. 16-450 (2d Cir. June 15, 2016); *In re Goldman Sachs Group, Inc.*, No. 15-3179 (2d Cir. Jan. 26, 2016); *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 15-90038, 2015 WL 10714013 (5th Cir. Nov. 4, 2015); *IBEW Local 98 Pension Fund v. Best Buy Co.* ("*Best Buy*"), 818 F.3d 775, 782 (8th Cir. 2016).

[4] The Fifth Circuit appeal has been stayed pending district court approval of a proposed settlement. *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 15-11096 (5th Cir. Dec. 28, 2016).

that Defendants' petition raises important questions about the standards for rebutting the fraud-on-the-market presumption following *Halliburton II* that 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 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 a David and Mary Harrison Distinguished Professor at the University of Virginia School of Law; and Richard W. Painter, who is the S. Walter Richey Professor of Corporate Law at the University of Minnesota 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)). 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." *Id.* Absent a showing of price impact, a class may not invoke *Basic*'s presumption of reliance. *Id.* at 2415-16. "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 Nullify *Halliburton II*

Because the District Court did not articulate the proper standards for allocating evidentiary burdens, and arguably placed the wrong burdens on the wrong parties, immediate review is warranted.

A. *Basic*, *Halliburton II*, and Rule 301 Establish the Proper Allocations of the Burdens of Production and Persuasion

In all 10b-5 cases, plaintiff bears the burden of establishing reliance. Establishing reliance on the alleged misrepresentation itself, however, might be too difficult for a plaintiff who traded on an impersonal stock market. *See Basic*, 485 U.S. at 245. *Basic* therefore held that, if four prerequisites are established (publicity, materiality, market efficiency, and market timing), a presumption of reliance arises, relieving plaintiff (at least initially) of any burden to submit evidence of reliance, whether through proof of reliance on the alleged misrepresentation itself or though proof of the alleged misrepresentation's impact on stock price. *See id.* at 245-47; *Halliburton II*, 134 S. Ct. at 2412.

In endorsing the presumption of reliance, *Basic* relied explicitly on Federal Rule of Evidence 301. *See* 485 U.S. at 245. Rule 301 provides that defendant's

burden is to "*produc[e]* evidence to rebut the presumption. But this rule does not shift the burden of *persuasion*, which remains on the party who had it originally." Fed. R. Evid. 301 (emphasis added).[5] In *Halliburton II*, the Supreme Court held that defendant has an opportunity to rebut the reliance presumption at the class certification stage and may do so by offering evidence that the misrepresentation at issue had no impact on the company's stock price. 134 S. Ct. at 2414, 2417. *Halliburton II* described 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 plaintiff is "'sufficient to rebut the presumption of reliance.'" 134 S. Ct. at 2415 (quoting *Basic*, 485 U.S. at 248 (emphasis added)).

Basic, *Halliburton II*, and Rule 301 have accordingly established several propositions. First, for purposes of rebutting the reliance presumption, defendant's burden is one of production, not persuasion. Second, once defendant submits evidence showing no price impact, the rebuttal of the presumption is complete

[5] 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[.]" 21B Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5124 (2d ed. 2005). However, a presumption is rebutted "'upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact.'" *In re Yoder* Co., 758 F.2d 1114, 1118 (6th Cir. 1985) (citation omitted).

unless plaintiff submits evidence showing price impact.[6] Finally, plaintiff always has the burden to persuade the court that there was reliance and thus—absent evidence of reliance on the misrepresentation itself—that there was price impact. Where plaintiff has submitted evidence of price impact in response to defendant's evidence of no price impact, plaintiff's burden of persuasion includes the burden to persuade the court that plaintiff's evidence in fact establishes price impact[7] and should be credited over defendant's evidence of no price impact. If plaintiff does not meet the burden of persuasion on price impact, "then the presumption of reliance [does] not apply," and plaintiff must prove "that he directly relied" on the alleged misrepresentation, *Halliburton II*, 134 S. Ct. at 2408—a requirement that would cause individual issues of reliance to predominate over common ones. *Basic*, 485 U.S. at 242; *Halliburton II*, 134 S. Ct. at 2416.

B. The District Court Improperly Allocated the Burdens of Production and Persuasion

Two parts of the District Court's Opinion are relevant here. First, the District Court held that the Eighth Circuit's burden-allocation analysis in *Best Buy* was incorrect: "That analysis flips the burden onto plaintiffs to prove price impact under their advanced theory when the burden should rest on a defendant to prove

[6] *Best Buy*, 818 F.3d at 783 (noting that "plaintiffs presented no contrary evidence [to the evidence submitted by defendants] of price impact").

[7] *Best Buy*, 818 F.3d at 782 (holding that plaintiffs' expert evidence itself established no price impact).

lack of price impact in order to rebut *Basic*'s presumption at this stage . . . ." Op. at 38. Second, the District Court held that the reliance presumption in this case was not rebutted: "Defendants failed to show that there was no statistically significant price impact following the corrective disclosures in this case. Accordingly, Defendants have failed to rebut the presumption of reliance . . . ." Op. at 40. These holdings include several errors.

(1) The District Court failed to articulate and allocate the burden of persuasion: The District Court failed to place *on Plaintiffs* the burden of persuasion concerning the issue of price impact. The law is clear that the burden of persuasion on the issue of price impact rests at all times on Plaintiffs. *Supra* at 6-7.

In fact, the District Court failed even to acknowledge that there is any burden on Plaintiffs. This failure to set forth the proper legal standard—here, that plaintiff bears the burden of persuasion on the issue of price impact—is sufficient by itself to require vacatur and remand. *See In re BancorpSouth, Inc.*, No. 16-0505, 2016 U.S. App. LEXIS 16936, at *3-4 (6th Cir. Sept. 6, 2016) (vacating and remanding class certification order because district court failed to set forth applicable legal standard: "[O]n this record, we are unable to determine if the district court abused its discretion in certifying a class.").

While failure to set forth the proper legal standard is sufficient to require remand, the District Court's error went beyond that failure. The District Court likely placed the burden of persuasion *on Defendants*. When describing Defendants' burden, the District Court referred to Defendants' burden to "*prove* lack of price impact." Op. at 38 (emphasis added). The District Court used the general term "prove" rather than the specific terms "produce" and "persuade." Op. at 38. But usage of the term "prove" still indicates that the District Court had in mind the burden of *persuasion*. *See Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 274-75 (1994) (holding that, by twentieth century, "burden of proof" meant "burden of persuasion").

(2) The District Court failed to articulate and allocate the burden of production: By failing to acknowledge *any* burden on Plaintiffs, the District Court also erroneously ignored the requirement that, once defendant has produced evidence of no price impact, plaintiff thereafter has the burden to produce evidence of price impact. *Supra* at 6-7. Again, vacatur is warranted simply by the District Court's failure to acknowledge that Plaintiffs have this burden of production. *In re BancorpSouth, Inc.*, 2016 U.S. App. LEXIS 16936, at *3-4. And, again, insofar as the District Court was ruling that Plaintiffs actually have no such burden of production, that ruling was erroneous.

(3) Any placement on Defendants of a burden to produce evidence of no back-end price impact was improper: Let us assume *arguendo* that, despite the District Court's failure to use the specific terms "produce" and "persuade" (*supra* at 9), the District Court was really holding that, where Plaintiffs rely on a price maintenance theory, Defendants' burden of production includes the burden of producing evidence of no back-end price impact.[8] For two reasons, such a holding would lack a legal basis.

First, Defendants' burden of production is lighter than that set forth in such a holding. Defendants' burden of production is to make "any showing" that severs the link between the misrepresentation and the stock price. *Basic*, 485 U.S. at 248. Defendants' evidence—namely, the event study in Plaintiffs' expert report showing that there was no front-end price impact (Op. at 35)—more than met this burden of production.

Second, nothing in Plaintiffs' submission below justified giving Defendants a burden to produce evidence of no back-end price impact. Plaintiffs' expert report—while adverting to the *theory* of price maintenance—never actually

[8] This brief uses the term "back-end price impact" because the District Court's Opinion uses the same term. But the term is misleading because "price impact," as the phrase is used in *Basic* and *Halliburton II*, refers to the impact that the alleged misstatement had on the stock price at the time of plaintiff's stock purchase. *Halliburton II*, 134 S. Ct. at 2415-16.

includes *evidence* that price maintenance occurred *in this case*.[9] Because there was no such evidence, there was nothing for Defendants to rebut. Thus, Defendants never had any burden to produce evidence—whether by producing evidence of no back-end price impact or otherwise—to rebut Plaintiffs' price maintenance theory.

[9] That lapse was fatal to Plaintiffs' ability to rely on price maintenance for purposes of class certification. *Halliburton II*, 134 S. Ct. at 2412 (plaintiffs "must actually *prove*—not simply plead–that" proposed class satisfies Rule 23 (emphasis in original)).

CONCLUSION

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

DATED: April 7, 2017

Respectfully submitted,

s/ *Gideon A. Schor*
Gideon A. Schor
WILSON SONSINI GOODRICH & ROSATI
PROFESSIONAL CORPORATION
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
Telephone: 212-999-5800
Facsimile: 212-999-5899
gschor@wsgr.com

s/ *Albert Lin*
Albert Lin (OH Bar No. 0076888)
ICE MILLER LLP
250 West Street
Columbus, Ohio 43215
Telephone: 614-462-2233
Facsimile: 614-222-3693
albert.lin@icemiller.com

Attorneys for Amici Curiae
Law Professors and Former SEC Officials

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 2,576 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 typestyle requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

DATED: April 7, 2017

Respectfully submitted,

s/ *Gideon A. Schor*
Gideon A. Schor
WILSON SONSINI GOODRICH & ROSATI
PROFESSIONAL CORPORATION
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
Telephone: 212-999-5800
Facsimile: 212-999-5899
gschor@wsgr.com

s/ *Albert Lin*
Albert Lin (OH Bar No. 0076888)
ICE MILLER LLP
250 West Street
Columbus, Ohio 43215
Telephone: 614-462-2233
Facsimile: 614-222-3693
albert.lin@icemiller.com

Attorneys for Amici Curiae
Law Professors and Former SEC Officials

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2017, I caused to be electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. To the best of my knowledge, all parties to this appeal are represented by counsel who are registered CM/ECF users and will be served electronically by the appellate CM/ECF system.

DATED: April 7, 2017

Respectfully submitted,

s/ *Albert Lin*

Albert Lin (OH Bar No. 0076888)
ICE MILLER LLP
250 West Street
Columbus, Ohio 43215
Telephone: 614-462-2233
Facsimile: 614-222-3693
albert.lin@icemiller.com

Attorneys for Amici Curiae
Law Professors and Former SEC Officials