No. 17-303

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-MHW-KAJ

ANSWER IN OPPOSITION TO DEFENDANTS' PETITION FOR PERMISSION TO APPEAL (FED. R. CIV. P. 23(f))

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 17-303 Case Name: In re Big Lots, Inc., et al.

Name of counsel: Susan K. Alexander

Pursuant to 6th Cir. R. 26.1, City of Pontiac General Employees' Retirement System, and
Name of Party
makes the following disclosure: Teamsters Local 237 Additional Security Benefit Fund

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

N/A

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

N/A

CERTIFICATE OF SERVICE

I certify that on April 10, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Susan K. Alexander

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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I. INTRODUCTION

Defendants have not identified any "novel or unsettled" question that requires this Court's review. *See In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002). Instead, defendants challenge the careful and rigorous analysis of the district court's class certification decision by revisiting issues the Supreme Court and this Court have already resolved and making assertions that circuits around the country have repeatedly addressed and, nearly without exception, rejected.

Defendants' overheated rhetoric aside, this was a routine class certification order by an experienced district court judge, applying settled principles of law to the record facts. *See id.* at 959-60. The Petition should be denied.

II. RULE 23(f) STANDARDS

This Court "has broad discretion to grant or deny a Rule 23(f) petition, and any pertinent factor may be weighed in the exercise of that discretion." *Id.* at 959. Still, Rule 23(f) appeals are "never to be routine." *Delta*, 310 F.3d at 959. Class certification decisions "which 'turn[] on case-specific matters of fact and district court discretion,' …—as most certification decisions indisputably do—generally will not be appropriate for interlocutory review.'" *Id.* (quoting *Prado-Steiman v. Bush*, 221 F.3d 1266, 1275-76 (11th Cir. 2000) (quoting Advisory Committee Note, Fed. R. Civ. P. 23)).

Rule 23(f) appeals "will be the exception, not the norm." *Id.* at 960. The merits of the district court order are "always relevant" and "in examining a petitioner's likelihood of succeeding on the merits of an appeal, it should be remembered that the standard of review is whether the district court committed an abuse of discretion." *Id.* "'An abuse of discretion occurs when we are left with the definite and firm conviction that the [district] court … committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors or where it improperly applies the law or uses an erroneous legal standard.'" *Rikos v. The Procter & Gamble Co.*, 799 F.3d 497, 504 (6th Cir. 2015) *cert. denied*, *The Procter & Gamble Co. v. Rikos*, __ U.S. __, 136 S. Ct. 1493 (2016) (quoting *United States v. Haywood*, 280 F.3d 715, 720 (6th Cir. 2002) (alterations in original).

III. ARGUMENT: DEFENDANTS HAVE FAILED TO IDENTIFY ANY PROPER BASIS FOR INTERLOCUTORY REVIEW

The district court carefully analyzed each element of Rule 23 in a 44-page order, explaining its reasoning in detail and following relevant authority from this Court and the Supreme Court. Specifically, the district court strictly adhered to the instruction of *Halliburton Co. v. Erica P. John Fund, Inc.* ("*Halliburton II*"), __ U.S. __, 134 S. Ct. 2398, 2417 (2014) in providing defendants "an opportunity before class certification to defeat the [fraud-on-the-market] presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock."

After a thorough review of defendants' proffered evidence, the court simply found that defendants failed to provide evidence showing that their false statements "did not actually affect the market price of the stock." *Id.* While defendants are dissatisfied with that evidentiary ruling, they have provided absolutely no basis for this Court's interlocutory review at this juncture.

A. Two of Defendants' Asserted Issues Have Been Addressed—and Rejected—by the Supreme Court

The assertions defendants raise regarding (1) whether analysis of price impact includes the time when a false statement is corrected, and (2) whether a value investor still relies on the market price, have each been resolved by the Supreme Court. *Halliburton II*, 134 S. Ct. at 2411, 2414. Both assertions fall squarely within the holding of *Halliburton II*.

Thus, those questions provide no basis for interlocutory review. They are not "novel or unsettled." *Delta*, 310 F.3d 960. The district court did not abuse its discretion in applying Supreme Court law to record facts. *Id.*

1. Price Impact Includes "Corrections"

The Supreme Court holds that price impact may be observable when a false statement is made—or at the time of its "correction." *Halliburton II*, 134 S. Ct. at 2414. "*Basic* itself 'made clear that the [fraud-on-the-market] presumption was just that, and could be rebutted by appropriate evidence,' including evidence that the

asserted misrepresentation (*or its correction*) did not affect the market price of the defendant's stock." *Id.* (citation omitted; emphasis added).

Despite this clear instruction, defendants press this Court to revisit the issue—as a basis for granting interlocutory review. But, *Halliburton II* settles this issue. Defendants' misleading references to certain phrases taken out of context do not change that result. (Petition 9) *Halliburton II* makes clear that price impact may be observable at the time defendants' false statement is corrected and the truth comes out. 134 S. Ct. at 2414.

Straining to create a legal issue, defendants attempt to make the difficult assertion that, while the Supreme Court makes clear that price impact may be observable at the time of a false statement or at the time of its correction, defendants may show "the misrepresentation did not in fact affect the stock price" (*id.* at 2414) by considering only one of those two possible times. (Petition 14-15) Their assertion defies logic and—as the district court held (Ex. A 36-39)—is contrary to the substantial majority of courts that have recognized that, often "the best way to determine the impact of a false statement is to observe what happens when the truth is finally disclosed and use that to work backward." *Glickenhaus & Co. v. Household Int'l., Inc.*, 787 F.3d 408, 415 (7th Cir. 2015); *accord Schleicher v. Wendt*, 618 F.3d 679, 683-84 (7th Cir. 2010); *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282,

1314 (11th Cir. 2011); *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 258 (2d Cir. 2016).[1]

To the extent defendants are suggesting that the substance of a corrective disclosure is appropriately considered at the class certification stage, that argument has also been fully addressed and resolved by the Supreme Court. Whether the substance of the alleged corrective disclosure caused plaintiffs' loss is not appropriately addressed at class certification. *Erica P. John Fund, Inc. v. Halliburton Co.* ("*Halliburton I*"), 563 U.S. 804, 813 (2011). And, whether the substance of the alleged disclosure actually corrected the alleged false statements—*i.e.*, was material to the market—is also not appropriately addressed at class certification. *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, __ U.S. __, 133 S. Ct. 1184, 1199 (2013). Both loss causation and materiality are common issues that the Supreme Court holds must be reserved for a merits stage and are not properly decided at class certification.

[1] Defendants' reference to *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775 (8th Cir. 2016) does not advance their position. In *Best Buy*, the Eighth Circuit chose not to apply the price-maintenance theory to the unusual facts before it, determining that defendants had produced "overwhelming evidence of no price impact" based on plaintiffs' expert's testimony that price inflation was established by false statements that were held inactionable on other grounds and the operative actionable statements (made only two hours later) were substantively "virtually the same." *Id.* at 783. No such unique facts are present here.

When the price impact analysis is appropriately focused on the alleged corrective disclosures—which were already upheld as plausible when the district court denied defendants' motion to dismiss (District Court Docket No. ("Dkt.") 49)—both parties agree that Big Lots' stock price suffered statistically significant price declines on April 24, 2012 and August 23, 2012. (Dkt. 60-3, Ex. 2¶¶41, 44; Dkt. 75-9, Ex. P¶68) There is no issue of any kind for this Court to resolve.

2. "Value Investors" Are Still Typical

The Supreme Court holds that "value investors" rely on the market price just as other investors do. *Halliburton II*, 134 S. Ct. at 2411. According to the Court, a value investor "implicitly relies on the fact that a stock's market price will eventually reflect material information—how else could the market correction on which his profit depends occur?" *Id.*

As the Court explained, the fact that such investors do indeed rely on the market price—even if trying to outwit it—is sufficient for the fraud-on-the-market presumption of *Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988). "[T]o indirectly rely on a misstatement in the sense relevant for the *Basic* presumption, he need only trade stock based on the belief that the market price will incorporate public information within a reasonable period." *Halliburton II*, 134 S. Ct. at 2411. "The value investor also presumably tries to estimate *how* undervalued or overvalued a particular stock is,

and such estimates can be skewed by a market price tainted by fraud." *Id.* (emphasis in original).

Thus, defendants' argument that lead plaintiff and class representative, the City of Pontiac General Employees' Retirement System, and additional class representative, Teamsters Local 237 Additional Security Benefit Fund, are not typical because they were value investors deadends in *Halliburton II*. As defendants concede, the Retirement System and the Benefit Fund did rely on the "market's translation of publicly available information into stock prices" (Petition 6-7), but hoped to add value to that understanding through investment advisors. Accordingly, following *Halliburton II*, both the Retirement System and the Benefit Fund relied on defendants' false statements "in the sense relevant for the *Basic* presumption" because they traded "on the belief that the market price [would] incorporate public information within a reasonable period." *Halliburton II*, 134 S. Ct. at 2411.

Again, there is no "unsettled" issue for this Court to resolve. As the district court noted, "[c]ourts have routinely rejected the argument defendant[s] now advance[]." (Ex. A 13 (alterations in original)) The district court plainly did not abuse its discretion in applying Supreme Court law to record facts.

B. Defendants Are Unlikely to Succeed on the Other Two Issues They Raise—One of Which Has Been Rejected by the Majority of Courts to Address It and the Other of Which Is a Fact-Based Challenge

The two other issues on which defendants rely for their claim that this case merits the exceptional intervention of interlocutory review are also well settled. Circuits around the country have rejected the burden of proof issue defendants raise and their damages assertion is entirely fact-based. Neither assertion merits interlocutory review. Defendants are extremely unlikely to succeed in showing that the district court abused its discretion in rejecting either of these routinely-raised, routinely-rejected, and fact-based assertions.

1. The Supreme Court and Circuit Courts Around the Country Agree that Defendants Have the Burden to "Sever the Link" in Order to Rebut the Fraud-on-the-Market Presumption

There is no need to grant interlocutory appeal to clarify the burden of proof here. Both parties agree that "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption." (Petition 12)

For the fraud-on-the-market presumption, the Supreme Court clarifies that rebutting the presumption means producing evidence that "'severs the link between the alleged misrepresentation and … the price received (or paid) by the plaintiff.'" *Halliburton II*, 134 S. Ct. 2415 (citation omitted). As defendants concede (Petition

12), this Court holds that 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); *accord St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993) (a party rebuts a presumption with "'the introduction of admissible evidence' … which, if believed by the trier of fact, would support a finding" that the presumed fact is not accurate) (citation and emphasis omitted).

The problem with defendants' assertion—and the reason defendants are extremely unlikely to succeed in any argument that the district court abused its discretion on this basis—is that defendants never rebutted the presumption here. As discussed above, the Supreme Court holds that price impact may be observable when a false statement is made—or at the time of its "correction." *Halliburton II*, 134 S. Ct. at 2414. Defendants limited their assertion that their fraud had no impact on Big Lots' stock price to an argument that "there was no statistically significant residual price increase on the alleged misstatement dates." (Petition 13) But, as the district court correctly explained, carefully following *Halliburton II*, "to successfully rebut the *Basic* presumption, a defendant cannot simply show that a price did not rise after a misrepresentation." (Ex. A 37) As noted, the Supreme Court and circuits around the

country agree. *Halliburton II*, 134 S. Ct. at 2414; *Glickenhaus*, 787 F.3d at 415; *FindWhat*, 658 F.3d at 1314; *Vivendi*, 838 F.3d at 258.

Thus, defendants' assertion about what procedure and burdens should have applied "once defendants produced evidence rebutting the presumption" (Petition 13) is simply moot here. The problem is that defendants never rebutted the presumption—under any applicable burden of proof. Indeed, defendants' expert conceded that he was neither asked to conduct, nor did conduct, a price impact analysis. (Dkt. 78-2, 216:21-24; 218:2-8) Defendants simply declined to address price impact at the time of the "correction." *See Halliburton II*, 134 S. Ct. at 2414. There is no burden of proof issue that this Court need resolve on interlocutory appeal.

2. The Supreme Court's *Comcast* Decision Provides No Support for Defendants' Fact-Bound Disagreement with the Damages Model Provided by Plaintiffs Which Is Based on an Event Study, Supported by Expert Analysis, and Consistent with Plaintiffs' Theory of the Case

Defendants are also extremely unlikely to succeed in the *Comcast* assertion they raise regarding damages wherein they ask this Court to undergo interlocutory review of a careful and vigorous evidentiary ruling by the district court.

Uncontroversially, defendants state that in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013), the Supreme Court required that "a plaintiff must articulate a methodology for calculating classwide damages in a manner that is consistent with the

plaintiff's theory of liability." (Petition 15-16) They acknowledge that the district court addressed their *Comcast* challenge to the methodology of plaintiffs' expert, Steinholt, conceding that the court concluded "the proffered methodology is consistent with Plaintiffs' theory of liability and survives a *Daubert* attack." (Petition 16 (quoting Ex. A 26)) Indeed, while defendants purport to assert that the district court did not conduct a "rigorous" analysis of the expert's methodology (Petition 16), they are compelled to concede that the court actually conducted a full *Daubert* analysis and entered a separate 17-page order articulating its conclusions in that regard (Ex. B 1-17), summarizing those conclusions in the class certification order.

Thus, as the district court trenchantly recognized, "[f]airly construed, Defendants' argument is not really that Steinholt's damages opinion is irrelevant or that it is not tied to Plaintiffs' theory of liability but rather that his opinion 'fails to account for the facts of this case' in the sense that he has not already performed the damage calculation specific to this case." (Ex. B 17) That continues to be defendants' assertion in this Petition for interlocutory review. (Petition 15-19)

But, as the district court correctly held, actually calculating plaintiffs' damages "is not required at this stage of the litigation." (Ex. B 17) The only class certification issue pursuant to *Comcast* is whether the "methodology … is … consistent with the Plaintiffs' theory of liability." *Id.*; *Comcast*, 133 S. Ct. at 1433.

This Court has already considered—and rejected—the very argument defendants raise here: "that named plaintiffs must produce actual proof at the class-certification stage of classwide injury." *Rikos*, 799 F.3d at 521. As this Court has already decided, under *Comcast* "named plaintiffs must show that *they will be able* to prove injury through common evidence, not that they have in fact proved that common injury." *Id.* (emphasis in original).[2] That is precisely what the district court found plaintiffs have done here.

Rigorously analyzing arguments and evidence, the district court held that "it is clear from the statements above and Steinholt's deposition testimony that his opinion took into consideration whether an event study could be applied to the facts of this case." (Ex. B 16) "In his deposition, Steinholt explained in detail how the model would be applied to the facts of this case assuming that April 23, 2012, and August 23, 2012, were the only corrective disclosure dates, but he stated that the model could be tweaked to account for information that becomes available throughout litigation of the case, including confounding factors. (*Id.* (citing record evidence)) In particular, the court was persuaded by a report in which "Steinholt explained that his 'proposed methodology only includes damages from the remaining actionable statements, so

[2] In *Rikos*, this Court considered this question in the context of both *Comcast* and *Halliburton II*. 799 F.3d at 520-23. Thus, defendants' claim that the issue is one of "first impression" (Petition 1) is incorrect.

there is no reason to reduce any damages for non-actionable statements." (*Id.* (citing record evidence))

Having reviewed and rigorously analyzed the record evidence, the district court concluded that "[t]he Court discerns nothing about Steinholt's proposed methodology for calculating damages that would be inconsistent with Plaintiffs' theory of liability in this case." (*Id.*) Review of those factual findings—applying a legal standard as to which there is no disagreement—is not the stuff of interlocutory appeal. Defendants are extremely unlikely to succeed in establishing that the court's careful ruling, supported by a fully separate *Daubert* opinion, was an abuse of discretion.

IV. CONCLUSION

For the reasons set forth above, the Petition should be denied.

DATED: April 10, 2017

Respectfully submitted,

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RULE 32(g) CERTIFICATE

The undersigned counsel certified that the Answer in Opposition to Defendants' Petition for Permission to Appeal (Fed. R. Civ. P. 23(f)) uses a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief comprises 2,893 words according to the word count provided by Microsoft Word 2010 word processing software.

s/Susan K. Alexander
SUSAN K. ALEXANDER

DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is Post Montgomery Center, One Montgomery Street, Suite 1800, San Francisco, California 94104.

2. I hereby certify that on April 10, 2017, I electronically filed the foregoing document: **ANSWER IN OPPOSITION TO DEFENDANTS' PETITION FOR PERMISSION TO APPEAL (FED. R. CIV. P. 23(f))** with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

3. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

4. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 10, 2017, at San Francisco, California.

s/Tamara J. Love
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