16-1912

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

v.

BARCLAYS PLC, ROBERT DIAMOND, ANTONY JENKINS,
BARCLAYS CAPITAL INC., WILLIAM WHITE,
Defendants-Appellants,

CHRIS LUCAS, TUSHAR MORZARIA, BOB DIAMOND,
Defendants.

On Appeal from 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* PAUL S. ATKINS, ELIZABETH COSENZA, DANIEL M. GALLAGHER, JOSEPH A. GRUNDFEST, PAUL G. MAHONEY, RICHARD W. PAINTER AND ANDREW N. VOLLMER IN SUPPORT OF DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page(s)

DOCKETED CASES

RULES

OTHER AUTHORITIES

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). The district court here held that a defendant must rebut the *Basic* presumption "by a preponderance of the evidence," SA42, and thereby "foreclose" the possibility of price impact, SA40. 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*.

Amici curiae are a group of former Commissioners and officials of the United States Securities and Exchange Commission as well as law professors 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 the district court erred in interpreting *Halliburton II*'s standard for rebutting the fraud-on-the-market presumption, making the

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[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. All parties have consented to the filing of this brief.

presumption irrebuttable in practice in some of the weakest cases, where plaintiffs are unable to identify a price impact and instead allege "price maintenance."

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 David and Mary Harrison Distinguished Professor 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
- Andrew N. Vollmer, who is Professor of Law, General Faculty, and Director of the John W. Glynn, Jr. Law & Business Program, at the University of Virginia School of Law, and served as Deputy General Counsel of the SEC from 2006 to early 2009.

SUMMARY OF ARGUMENT

The district court's order granting class certification should be reversed because it threatens to render the Supreme Court's decision in *Halliburton II* a nullity. In *Halliburton II*, faced with defendants' arguments that the fraud-on-the-market presumption of reliance recognized in *Basic* should be abandoned as inconsistent with modern understandings of market efficiency, the Court found a middle ground. It held that the element of reliance in a securities fraud class action may still be proven through the fraud-on-the-market doctrine, but stressed that defendants must be given a meaningful opportunity "to defeat the presumption at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2414 (2014).

The district court's decision cannot be reconciled with *Halliburton II*.

First, the court erred by requiring Defendants to satisfy a "preponderance of the evidence" standard to rebut the *Basic* presumption of reliance. SA42. Federal Rule of Evidence 301, which is cited in *Basic* itself, makes clear that the burden of a party challenging the application of a presumption is to "*produc[e]* evidence to rebut the presumption … [b]ut this role does not shift the burden of *persuasion*, which remains on the party who had it originally." Fed. R. Evid. 301 (emphasis added). Here, Defendants presented evidence—including the testimony of

Plaintiffs' own expert—that rebutted the *Basic* presumption, which under Rule 301 should have shifted the burden of persuasion back to Plaintiffs. The district court, however, held Defendants to a more demanding requirement: to "prove" an absence of price impact by a "preponderance of the evidence." SA42. In so doing, the district court misapplied Rule 301, and as a result improperly determined that Plaintiffs satisfied Rule 23's predominance requirement for class certification.

Second, the district court erred by disregarding evidence rebutting Plaintiffs' so-called "price maintenance" theory, making it effectively impossible for Defendants to rebut the presumption of reliance. SA42-44. The event study prepared by Plaintiffs' own expert did not find a price impact on Barclays' ADS on any of the dates of Defendants' alleged misstatements in this case. SA39. Yet the district court dismissed that evidence because under Plaintiffs' speculative "price maintenance theory," a "misstatement can impact a stock's value … by improperly maintaining the existing stock price." *Id.* (internal quotation marks omitted). Under *Halliburton II*, however, such a speculative *assumption* of price impact through "price maintenance" cannot negate *direct evidence* of no price impact at the time alleged misstatements were made.

ARGUMENT

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

A. The Path to *Halliburton II*

Halliburton II reflected a compromise between maintaining what many considered the inordinate power of the fraud-on-the market doctrine and overturning *Basic* altogether. The decision came at a time that *Basic* was under attack from the defendants' bar. Courts were rightly concerned about "[t]he power of the fraud-on-the-market doctrine" and the "*in terrorem* power of [class] certification," *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 266, 267 (5th Cir. 2007), through which defendants have paid tens of billions of dollars in securities litigation settlements.[2]

In the years before *Halliburton II*, courts struggled over the prerequisites for successfully invoking the *Basic* presumption at the class certification stage. In 2011, the Supreme Court unanimously held in *Halliburton I* that plaintiffs did not

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[2] Between 1996 and 2015, defendants paid almost $84 billion in 2015 dollars to settle securities class actions. Although this figure also includes class actions brought under other liability provisions of the federal securities laws, it is fair to assume that the bulk of the actions involved claims under Section 10(b). *See* Cornerstone Research, *Securities Class Action Settlements: 2015 Review and Analysis* 3 (2016) ($52.6 billion in 2015 dollars from 2006 to 2015), *available at* http://bit.ly/1XSaBt2; Cornerstone Research, *Securities Class Action Settlements: 2006 Review and Analysis* 1 (2007) ($26.5 billion in 2006 dollars from 1996 to 2005), *available at* http://bit.ly/1NtqVQs; U.S. Bureau of Labor Statistics, CPI Inflation Calculator, http://1.usa.gov/1SF8pDY ($1 in 2006 worth $1.18 in 2015).

have to affirmatively show loss causation to invoke the *Basic* presumption, because loss causation "has nothing to do with whether an investor relied on the misrepresentation in the first place." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 813 (2011) ("*Halliburton I*").

Two years later, the Court held that plaintiffs need not "prove materiality [as] a prerequisite to class certification." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013). The *Amgen* Court reasoned that materiality was an "indispensable element[] of a Rule 10b-5 claim"; as a result, "the failure of proof on the element of materiality would end the case for one and for all," meaning that "individual questions of reliance or anything else" could "never … overwhelm questions common to the class." *Id.* at 1196, 1199.

These decisions left open important questions concerning under what circumstances the *Basic* presumption could be rebutted at the class certification stage, including whether a defendant could rebut the presumption through a showing that a defendant's allegedly false statements did not produce an impact on the stock's price. And perhaps more significantly, four Justices in *Amgen* raised the possibility that the Court might overturn its prior decision in *Basic*. Justice Thomas dissented, joined by Justices Kennedy and Scalia, writing that "[t]he *Basic* decision itself is questionable" and that "[o]nly four justices joined the portion of the [*Basic*] opinion adopting the fraud-on-the-market theory," and noting that, in

Amgen, "the Court ha[d] not been asked to revisit" *Basic*. 133 S. Ct. at 1208 n.4 (Thomas, J., dissenting). Justice Alito concurred, noting that he had joined the majority "with the understanding that the petitioners did not ask us to revisit *Basic*'s fraud-on-the-market presumption." *Id.* at 1204 (Alito, J., concurring).

B. *Halliburton II*'s "Midway Position" And The Role of Event Studies

The petitioners in *Halliburton II* responded to these invitations and launched a full-scale attack on *Basic*. In the end, the Court honored *stare decisis* and declined to overrule *Basic*. *See* 134 S. Ct. at 2408-2413. Instead, the *Halliburton II* Court took what, according to Justice Kennedy, was "the midway position" between overruling *Basic* and maintaining the status quo.[3] The Court preserved the *Basic* presumption but stressed that defendants must be granted an opportunity to rebut the presumption with direct evidence showing the absence of a price impact. *Id.* at 2416.

As *Halliburton II* noted, "*Basic* itself 'made clear that the presumption was just that'"—a presumption—"'and could be rebutted by appropriate evidence.'" 134 S. Ct. at 2414 (quoting *Halliburton I*, 563 U.S. at 811). Indeed, *Basic* itself made clear that the evidentiary burden for rebutting the presumption was modest,

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[3] Tr. of Oral Arg. at 17, *Halliburton II*, No. 13-317 (U.S. Mar. 5, 2014), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/13-317_e18f.pdf.

stating 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." *Basic v. Levison*, 485 U.S.224, 248 (1988) (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).

Moreover, *Halliburton II* noted that there was no "dispute that defendant may introduce price impact evidence at the class certification stage, … for the purpose of countering a plaintiff's showing of market efficiency." 134 S. Ct. at 2414-2415. This evidence typically comes in the form of "event studies," "regression analyses that seek to show that the market price of the defendant's stock tends to respond [or not] to pertinent publicly reported events." *Id.* at 2415. The Court recognized that it made "no sense" and could "lead to bizarre results" if that same evidence could not also be introduced to "rebut[] the presumption altogether" by showing that the alleged misstatements had no price impact. *Id.* at 2415. The Court illustrated the absurdity of such a result with an example:

> Suppose a defendant at the certification stage submits an event study looking at the impact on the price of its stock from six discrete events, in an effort to refute the plaintiffs' claim of general market efficiency. All agree the defendant may do this. Suppose one of the six events is the specific misrepresentation asserted by the plaintiffs. All agree that this too is perfectly acceptable. Now suppose the district court determines that, despite the defendant's study, the plaintiff has carried its burden to prove market efficiency, but that the evidence shows no price impact with respect to the specific misrepresentation challenged in the suit. *The evidence at the certification stage thus shows an efficient market, on which the alleged misrepresentation had no price impact. And yet under EPJ Fund's view, the plaintiffs' action should be certified and proceed as a class action (with all that entails), even though the fraud-on-the-market theory does not apply and common reliance thus cannot be presumed.*

Such a result is inconsistent with Basic's own logic.

Id. (emphasis added).

Thus, the Court in *Halliburton II* made clear that event studies provide one method for establishing that "the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply." 134 S. Ct. at 2416. An event study that addresses "the specific misrepresentation asserted by the plaintiffs" that "shows no price impact with respect to the specific representation challenged in the suit" is evidence that "the fraud-on-the-market theory does not apply," "common reliance … cannot be presumed," and the lawsuit should not "be certified and proceed as a class action," "with all that entails." *Id.* at 2415. Put another way, under *Halliburton II*, "evidence of no 'front-end' price impact rebut[s] the *Basic* presumption," because it constitutes "direct evidence … that sever[s] any link between the alleged … misrepresentations and the stock price at which plaintiffs purchased." *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 782-783 (8th Cir. 2016).

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

In this case, Defendants did precisely what the Supreme Court held would establish a lack of price impact: Defendants pointed out that *Plaintiffs'* expert's event study showed that none of Barclays' alleged misstatements affected its stock price on the days those statements were made. SA39. That is, Plaintiffs' event

study "show[ed] no price impact with respect to the specific misrepresentation[s] challenged in the suit." *Halliburton II*, 134 S. Ct. at 2415. The district court nonetheless granted Plaintiffs' motion for class certification, employing reasoning that, if accepted, would effectively nullify the Supreme Court's decision in *Halliburton II*.

The district court erred in two fundamental ways. First, the court imposed a far more demanding standard for rebutting the *Basic* presumption than appropriate. Second, although Plaintiffs were unable to show that any of the alleged misstatements moved the price of Barclays' stock, the district court allowed Plaintiffs to simply *plead* a so-called "price maintenance" theory of price impact and disregarded Defendants' compelling evidence rebutting it. 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*.

A. The District Court 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." SA40, 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). 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 reasonable jury finding of the nonexistence of the presumed fact." *Id.* at 149 (internal quotation marks omitted). "[T]he ultimate risk of nonpersuasion must remain squarely on [the party invoking the presumption] in accordance with established principles governing civil trials." *Ruggiero v. Krzeminski*, 928 F.2d 558, 563 (2d Cir. 1991).

In endorsing the fraud-on-the-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*, 134 S. Ct. at 2415 (quoting *Basic*, 485 U.S. at 248) (emphasis added). Thus, contrary to the district court's holding here, Defendants were not required under *Basic* and Rule 301 to rebut the fraud-on-the-market presumption "by a preponderance of the evidence." SA42. In effect, the district court improperly shifted the ultimate burden of persuasion to Defendants.

The district court's approach also runs contrary to the requirements of Rule 23. The Supreme Court has made clear that plaintiffs "must actually *prove*—not simply plead—that their proposed class satisfies each requirement of [the rule]." *Halliburton II*, 134 S. Ct. at 2412 (citing *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2551-2552 (2011)). And this Court has ruled that "[t]he party seeking class certification must establish the Fed. R. Civ. P. 23 requirements by a preponderance of the evidence." *Pennsylvania Pub. Sch. Emps.' Ret. Sys. v. Morgan Stanley & Co., Inc.*, 772 F.3d 111, 119 (2d Cir. 2014); *see also Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008) ("[T]he preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements[.]").

There is every reason to believe that the district court's error affected the ultimate outcome of Plaintiffs' class certification motion. Under a proper application of Rule 301 and Rule 23, the burden of persuasion here should have shifted back to Plaintiffs. As the Eighth Circuit's recent opinion in *Best Buy*

explained, "when plaintiffs present[] a prima facie case that the *Basic* presumption applies to their claims, defendants ha[ve] the burden to come forward with evidence showing a lack of price impact." 818 F.3d at 782 (citing Fed. R. Evid. 301). The Defendants certainly did that here, and once they did so, Rule 301 and Rule 23 required that Plaintiffs establish Rule 23's predominance requirement—including the requirement of price impact—by a preponderance of the evidence. Plaintiffs did not satisfy that standard, as even the district court acknowledged that their evidence of "price impact" was neither "strong" nor "compelling." SA44.

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

The district court also disregarded Defendants' extensive evidence of a lack of price impact in light of Plaintiffs' so-called "price maintenance" theory, under which Plaintiffs speculated that Defendants' alleged misstatements somehow "maintained" an "inflated" stock price. The district court's deference to that speculative *theory* led it to improperly disregard Defendants' *evidence* of a lack of price impact, making it effectively impossible for Defendants to rebut the presumption of reliance at the class certification stage.

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." SA39. 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." SA39. Under this convenient theory, which this Court has never endorsed, 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." SA39.

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 Northern 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"). Under *Halliburton II*, such a speculative *assumption* of price impact through "price maintenance" cannot negate direct *evidence* of no price impact at the time alleged misstatements were made.

Second, the district court also disregarded evidence Defendants presented to rebut Plaintiffs' "price maintenance" theory. For example, the district court's motion-to-dismiss decision held that the alleged misrepresentations regarding LX were not *quantitatively* material because the business unit LX provided only approximately "0.1 percent of Barclays PLC's total revenue," far below the threshold of five percent used to measure materiality on a quantitative basis. JA171-172 & n.119. Nonetheless, the court held that the alleged misstatements may have been *qualitatively* material to a reasonable investor due to Barclays' statements about "restoring its integrity" following its LIBOR settlement, which occurred in June 2012. JA172.

As Defendants pointed out, the district court's materiality ruling cannot be squared with Plaintiffs' "price maintenance" theory. The court's materiality ruling indicates that Barclays' ADS price can only have become "inflated" *after* the June 2012 LIBOR settlement, whereas Plaintiffs' theory, as presented by their expert, is that the price of Barclays' ADS was inflated *before* June 2012. *See* JA663, 668-669, 815. Plaintiffs' price-maintenance theory was thus refuted, because

"immaterial information, by definition, does not affect market price." *Amgen*, 133 S. Ct. at 1195.

The district court similarly disregarded Defendants' expert testimony demonstrating that the June 26, 2014 price decline was likely due to investor concerns regarding regulatory scrutiny and litigation risk. *See* SA42-44. 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." *Northern Telecom*, 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. JA660-661. Indeed, Plaintiffs' expert cited a drop in Barclays' ADS price on October 31, 2012 as an indication of an efficient market *because* Barclays disclosed two government investigations on that date. JA441. Plaintiffs' expert also relied on analyst reports and news stories to infer that the market reacted to information regarding Barclays's alleged misconduct related to LX, and all of these publications attribute the decline in Barclays' stock price to factors other than the alleged misstatements or concerns about Barclays' "integrity." *See* JA460, 750-754.

Ultimately, even the district court acknowledged that the price drop in this case may have been in reaction not "to the particular fraud alleged but to the fact

that Barclays was being sued by a regulator," JA173 n.121, and recognized that Plaintiffs' evidence "does not support a strong inference or provide compelling evidence of price impact." SA44. The court nonetheless concluded that the *Basic* presumption was unrebutted because Plaintiffs allegedly "asserted a tenable theory of price maintenance." SA41-42. By relying on Plaintiffs' unsupported speculation and dismissing Defendants' evidence for not "proving lack of price impact," SA44, the court failed to require Plaintiffs to "*prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23." *Halliburton II*, 134 S. Ct. at 2412.

The practical effect of these errors is to render the fraud-on-the-market presumption effectively irrebuttable at the class certification stage. That result is not only contrary to the mandate of *Halliburton II*, but also promises to be extremely costly for defendants facing weak securities fraud suits. Every year, dozens of putative securities are filed in this Circuit in which many billions of dollars are potentially at stake.[4] These cases are generally won and lost at the class

[4] 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), *available at* (https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2014-Year-in-Review. 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*.

certification stage due to the "*in terrorem* power of certification." *Oscar*, 487 F.3d at 267. It would be ironic indeed if the *least* meritorious plaintiffs, who cannot present actual evidence of price impact, can automatically prevail at the class certification stage by simply speculating that an alleged misstatement "maintained" an "inflated" price.

CONCLUSION

The order of the district court should be reversed.

Respectfully submitted.

/s/ David S. Lesser

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 4,292 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ David S. Lesser
DAVID S. LESSER

August 1, 2016