Case No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ERICA P. JOHN FUND, INC.,
FKA ARCHDIOCESE OF MILWAUKEE SUPPORTING FUND, INC.,
On Behalf of Itself and All Others Similarly Situated,

Plaintiff-Respondent,

v.

HALLIBURTON COMPANY AND DAVID LESAR,

Defendants-Petitioners.

ON PETITION FOR PERMISSION TO APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS

DEFENDANTS' PETITION FOR PERMISSION TO APPEAL THE DISTRICT COURT'S JULY 25, 2015 ORDER GRANTING IN PART PLAINTIFF'S MOTION TO CERTIFY CLASS

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v.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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QUESTIONS PRESENTED

(1) Whether a defendant in a federal securities class action may rebut the presumption of reliance at the class-certification stage by showing that the disclosure preceding a stock-price decline did not correct any alleged misrepresentation.

(2) When a defendant rebuts the presumption that the alleged misrepresentation affected the stock price, does the plaintiff or defendant bear the ultimate burden of persuading the court on the issue of price impact?

INTRODUCTION

After twelve years of litigation, the Supreme Court vacated class certification because Halliburton was denied the right to rebut the presumption of reliance with evidence concerning price impact. *Halliburton Co. v. Erica P. John Fund, Inc. ("Halliburton II")*, 134 S. Ct. 2398 (2014). The district court again certified a class. In doing so, it answered incorrectly two key legal questions—one substantive and one procedural—that turn on the proper interpretation of *Halliburton II*. Most importantly, the district court held that even where a price decline following an alleged corrective disclosure is the plaintiff's only possible evidence of price impact, a court is required to assume that the disclosure in fact corrected an alleged misrepresentation. The court thus certified a class based upon an alleged corrective disclosure—that Halliburton had suffered an adverse asbestos verdict—that both this Court and the district court had previously found not corrective as a matter of law. Without a *corrective* disclosure linking the price decline to some earlier misrepresentation, there is no evidence of price impact at

the time of the misrepresentation. *Assuming* that all disclosures are corrective robs defendants of their price-impact rebuttal right. And it opens the floodgates to class certification based on any price decline caused by negative news.

The Eighth Circuit recently granted Rule 23(f) review to consider the same questions presented here. Granting this Rule 23(f) petition will spare district courts years of confusion about the scope of the rebuttal right. It will also profoundly affect this case, avoiding the injustice of forcing Halliburton to defend a massive class action when the Supreme Court's ruling prohibits certification.

STATEMENT OF FACTS

In 2002, lead plaintiff Archdiocese of Milwaukee Supporting Fund ("the Fund") filed a putative class action under SEC Rule 10b-5, purporting to represent all purchasers of Halliburton stock between June 1999 and December 2001. *Erica P. John Fund, Inc. v. Halliburton Co. ("Halliburton I")*, 131 S. Ct. 2179, 2183 (2011). The complaint alleged that Halliburton made misrepresentations about various topics, including potential liability in asbestos litigation. *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co. ("AMSF II")*, 597 F.3d 330, 334 (5th Cir. 2010). The Fund claimed that shareholders lost money when Halliburton's stock price declined upon the release of negative news related to the alleged misstatements. *Id*. Applying circuit precedent, both the district court and this Court denied class certification because the Fund failed to establish loss

causation—in large part because the disclosures preceding the price declines did not correct any alleged misrepresentation. *Id.* at 336, 339-44.

The Supreme Court vacated the original denial of class certification, holding that plaintiffs are not required to establish loss causation to obtain class certification. *Halliburton I*, 131 S. Ct. at 2185-87. The district court then certified a class, rejecting Halliburton's argument that it had rebutted the presumption of reliance with evidence that the alleged misrepresentations did not distort the market price of Halliburton stock. On Rule 23(f) appeal, this Court acknowledged that Halliburton had indeed offered "extensive evidence of no price impact." *Erica P. John Fund, Inc. v. Halliburton Co. ("EPJF I")*, 718 F.3d 423, 435 n.11 (5th Cir. 2013). But this Court nonetheless affirmed the class certification, concluding that price-impact rebuttal was a purely merits issue and therefore off-limits at the class-certification stage under the Supreme Court's decision in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013).

The Supreme Court vacated again, accepting "Halliburton['s] conten[tion] that defendants should at least be allowed to defeat the presumption at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price." *Halliburton II*, 134 S. Ct. at 2414. The Court emphasized that "any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff . . . will be sufficient to rebut the

presumption of reliance." *Id.* at 2415. "Because the courts below denied Halliburton th[e] opportunity" to make that showing, the Court vacated and remanded for proceedings "consistent with this opinion." *Id.* at 2417.

On remand, the district court found that Halliburton had rebutted the presumption as to five of the six alleged corrective disclosures by demonstrating no price impact. The court granted certification, however, on the Fund's sixth alleged corrective disclosure: Halliburton's contemporaneous announcement of an adverse Baltimore County jury verdict in an asbestos case on December 7, 2001, which was followed by a 40% stock-price decline. The Fund asserted that the announcement "corrected" alleged misstatements about Halliburton's potential exposure to asbestos liability, and thus that the price decline following that correction showed that the alleged misstatements had distorted the market price.

The district court rejected Halliburton's arguments on two crucial issues stemming from *Halliburton II*. First, it refused to consider Halliburton's argument that because the disclosure did not in fact correct any alleged misrepresentation, Halliburton had rebutted the presumption that an alleged misrepresentation affected the stock price. *Erica P. John Fund, Inc. v. Halliburton Co. ("EPJF II")*, No. 3:02-CV-1152-M, 2015 WL 4522863, at *7-9 (N.D. Tex. July 25, 2015). The court instead held that, for purposes of class certification, it must assume the corrective nature of the disclosure and inquire only into whether the stock-price

decline was statistically significant. Second, it concluded that, despite Federal Rule of Evidence 301's contrary mandate, Halliburton has the ultimate burden of persuasion regarding price impact. *Id.* at *4-7.

SUMMARY OF THE ARGUMENT

Leave to appeal is warranted to protect defendants' *Halliburton II* right to make full price-impact rebuttals at the class-certification stage. The district court mistakenly believed that *Halliburton II* and *Amgen* prohibited it from considering whether the disclosures that caused price declines actually corrected any alleged misrepresentations, despite conceding that such a finding may "sever the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff." *EPJF II*, 2015 WL 4522863, at *9 (quoting *Halliburton II*, 134 S. Ct. at 2415-16). This question is central to determining whether there is evidence that the alleged misrepresentations distorted the market price in the first place. And because price impact is an essential precondition to a class action under *Halliburton II*, this question cannot be deemed a purely merits issue and deferred for later consideration. In ruling otherwise, the district court repeated the same analytical misstep that led to the Supreme Court's reversal in *Halliburton II*.

The district court also erred by assigning the burden of persuasion to defendants on price impact. Both of these important questions are likely to recur in

numerous securities class actions, as the Eighth Circuit implicitly recognized in granting Rule 23(f) review on similar issues. This Court should do likewise.

ARGUMENT

I. Immediate review under Rule 23(f) is appropriate.

A. Leave to appeal is appropriate when "a certification decision turns on a novel or unsettled question of law." *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc*., 482 F.3d 372, 379 (5th Cir. 2007). Other than the decision below, no post-*Halliburton II* case has squarely decided whether a district court may, at the certification stage, determine whether a disclosure that precedes a price decline is corrective. Such "[u]nsettled questions of law concerning the entanglement of the merits with the class certification decision," *id.* at 380, are a well-settled ground for Rule 23(f) review. Moreover, as the district court observed, "securities litigation typically focuses on a price change at the time of a corrective disclosure." *EPJF II*, 2015 WL 4522863, at *9. That is because, as here, plaintiffs often cannot prove price impact by directly showing price inflation at the time of the alleged misrepresentation. It is thus essential to know whether defendants may rebut such a price-impact theory by showing that the alleged disclosures did not in fact correct any previous alleged misrepresentation.[1]

[1] Courts that anticipated *Halliburton II*'s endorsement of price-impact rebuttals examined whether allegedly corrective disclosures were in fact corrective. *See infra* at 8-9.

Similarly, although the district court cited three lower court cases to support its holding that defendants bear the burden of persuasion with respect to price impact, none squarely confronts Halliburton's Rule 301 argument. *See id.* at *5 (collecting cases). This question necessarily governs every case in which the defendant attempts a price-impact rebuttal under *Halliburton II*.[2] The Eighth Circuit recently granted Rule 23(f) review in recognition of the novel and unsettled nature of both of these important questions.[3]

B. This case exemplifies that "class certification may be the backbreaking decision that places 'insurmountable pressure' on a defendant to settle, even where the defendant has a good chance of succeeding on the merits." *Regents*, 482 F.3d at 379. The alleged corrective disclosure for which the class was certified preceded a 40% decline in stock price, reflecting enormous alleged damages. *EPJF II*, 2015 WL 4522863, at *24. Litigation has now dragged on twelve years, "frustrat[ing] or delay[ing] normal business activity of the defendant which is totally unrelated to the lawsuit." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975). The same factors that warranted Rule 23(f) review twice before in this case are equally compelling now.

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[2] Pre-*Halliburton II* courts that allowed price-impact rebuttal disagreed with the district court's view of the burden of persuasion. *See infra* at 19 n.10.

[3] *IBEW Local 98 Pension Fund v. Best Buy Co.*, Civ. No. 11-429, 2014 WL 4746195 (D. Minn. Aug. 6, 2014), *Fed. R. Civ. P. 23(f) appeal docketed*, No. 14-3178 (8th Cir. Sept. 24, 2014) (Appendix G). The appellants' opening brief reflects the issues presented. *See* Appendix H.

II. The district court erred by refusing to consider whether the alleged corrective disclosure was actually corrective.

A. Price impact simply refers to "whether the alleged misrepresentations affected the market price in the first place." *Halliburton I*, 131 S. Ct. at 2182, 2187. "Price impact" is the "fundamental premise" of the presumption of reliance that enables securities class actions because it allows courts to presume that plaintiffs relied in common on a misrepresentation that distorted the price of the stock. *Halliburton II*, 134 S. Ct. at 2416. Because "[p]rice impact is [] an essential precondition for any Rule 10b-5 class action," *id.*, "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. The district court violated *Halliburton II* by refusing to consider evidence that directly rebuts plaintiff's only theory of price impact.

According to this Court, "[p]rice impact can be shown" in two ways: "(1) by an increase in price following a fraudulent public statement or (2) a decrease in price following a revelation of the fraud." *EPJF I*, 718 F.3d at 434 (numbering added). The Fund has never relied on the first method. *See, e.g.*, *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co. ("AMSF I")*, No. 3:02-CV-1152-M, 2008 WL 4791492, at *2 n.11 (N.D. Tex. Nov. 4, 2008) ("[Plaintiffs] do not point to *any* stock price increases resulting from positive misrepresentations."). It relies on the second path: "a decrease in price following a revelation of the

fraud," *i.e.*, a corrective disclosure. *EPJF I*, 718 F.3d at 434. Thus, if there is no disclosure that reveals the fraud, there can be no price impact.

B. Whether a disclosure is "corrective"—*i.e.*, whether it reveals the fraud—is central to whether there is evidence of price impact at the time of the misrepresentation. Price declines occur for countless reasons following an endless variety of disclosures. Nearly all of these declines say nothing about whether the price was inflated by an earlier misrepresentation. Only a disclosure that corrects a previous misrepresentation—and precipitates a price decline—suggests that the misrepresentation distorted the market price—*i.e.*, that there was price impact.

But, as this Court has explained, if the price decline was caused by anything other than "revelation of the truth," the price decline does not "raise an inference that the price was actually affected by . . . alleged misrepresentations." *AMSF II*, 597 F.3d at 336; *id*. (without a "correction to a prior misleading statement . . . there would be no inference raised that the original, allegedly false statement caused an inflation in the price to begin with"). It is therefore no surprise that in the most recent appeal, this Court referred to Halliburton's showing that its disclosures were not corrective as "extensive evidence of no price impact." *EPJF I*, 718 F.3d at 435 n.11 (citing Halliburton 5th Cir. Br. 35-61).

Indeed, courts that anticipated *Halliburton II* allowance of price-impact rebuttals accurately perceived that a "class cannot be certified" where there is no

evidence that an "alleged misrepresentation caused a statistically significant increase in the price" or a "corrective disclosure caused a statistically significant decline in the price." *In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480, 493 (S.D.N.Y. 2011) (citing *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 484 (2nd Cir. 2008)). If there was no price movement at the time of the misrepresentation, and the court "determine[s] that there was no corrective disclosure," the disclosure "cannot serve as a basis for certifying the class." *Id*.

C. The court below conceded that the corrective nature of disclosures is probative regarding price impact: "it may be true that a finding that a particular disclosure was not corrective as a matter of law would 'sever the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff.'" *EPJF II*, 2015 WL 4522863, at *9 (quoting *Halliburton II*, 134 S. Ct. at 2415-16). The court nonetheless refused to consider whether the disclosures were corrective, reasoning "that class certification is not the proper procedural stage for the Court to determine . . . whether the relevant disclosures were corrective," *id.* at *7, because "[t]o hold otherwise would require the Court to pass judgment on the merits of the allegations," *id.* at *9.

This rationale is directly contrary to *Halliburton II*. Although price impact is a merits issue, it must be fully considered at the class-certification stage when raised by defendants because it is "*Basic*'s fundamental premise," which "has

everything to do with the issue of predominance at the class certification stage." *Halliburton II*, 134 S. Ct. at 2416. Thus, "to maintain the consistency of the presumption with the class certification requirements of Federal Rule of Civil Procedure 23, 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. In short, courts may not "ignore . . . evidence showing that the alleged misrepresentation did not actually affect the stock's market price." *Id.* at 2416. Under *Halliburton II*, then, "any showing" that rebuts the presumption of price impact, *id.* at 2415—including whether disclosures were corrective—must be considered at the Rule 23 stage. By refusing to consider evidence that directly refutes the Fund's only theory of price impact, the district court violated that mandate.

D. Several errors led the district court astray. First, the court reasoned that because it must assume that "the asserted misrepresentations were, in fact, misrepresentations," it must also "assum[e] that the asserted corrective disclosures were corrective of the alleged misrepresentations." *EPJF II*, 2015 WL 4522863, at *9. That does not follow. Whether a statement is a misrepresentation (*i.e.,* false) has no bearing on whether it affected the market price, and is therefore irrelevant to price impact. The corrective nature of a disclosure, however, is *dispositive* of whether the resulting price decline is evidence that the earlier misrepresentation

had a price impact. Thus, while courts may not at the certification stage consider the falsity of the alleged misrepresentations, they *must* consider the "correctiveness" of the subsequent disclosures.

Second, the court mistakenly labeled "Halliburton's argumen[t] regarding whether disclosures were corrective" as "a veiled attempt to assert the 'truth on the market' defense, which pertains to materiality." *Id.* at *7; *see id.* at *9 ("[T]he Court is unable to unravel such a [correctiveness] finding from the materiality inquiry."). Whether a disclosure is corrective, however, does not turn on whether the truth previously entered the market. Rather, a disclosure's correctiveness turns solely on its relationship to the prior misrepresentation; if the disclosure does not reveal a truth obscured by the misrepresentation, it cannot be corrective.

The December 7, 2001 announcement illustrates this point. Halliburton did not argue that the disclosure was non-corrective because the market had earlier become aware of the Baltimore verdict or of Halliburton's allegedly inadequate asbestos reserves. It argued instead that the verdict announcement did not reveal any truth obscured by Halliburton's previous statements about its asbestos reserves and therefore that the resulting price decline proved nothing about whether those statements had affected the market price. *See AMSF II*, 597 F.3d at 340-41.[4]

[4] By contrast, in the case cited by the district court on this point, the defendant claimed that the truth had entered the market before the misrepresentation, not that the later disclosure was non-corrective. *See Aranaz v. Catalyst Pharm. Partners Inc.*, 302 F.R.D. 657, 670-71 (S.D. Fla.

The court leapt from this error to declaring that correctiveness—like materiality—is a merits inquiry irrelevant to Rule 23 predominance because the absence of corrective disclosures ends the case for all class members. Materiality, however, "is a discrete issue that can be resolved in isolation from the other prerequisites" of the presumption and thus "can be wholly confined to the merits stage." *Halliburton II*, 134 S. Ct. at 2416. By contrast, the non-corrective nature of these disclosures goes to the very heart of price impact—which courts must examine at class certification—by refuting that the subsequent stock-price declines are evidence of prior price distortion. There is consequently "no reason to artificially limit the [price-impact] inquiry at the certification stage." *Id.* at 2417. Halliburton "may seek to defeat the *Basic* presumption at that stage through direct as well as indirect price impact evidence," *id.*, which is precisely the purpose of the evidence of lack of correctiveness that the district court refused to consider.[5]

2014). Indeed, the *Aranaz* court specifically noted the strong evidence of price impact that is utterly lacking here: "a clear and drastic spike following the alleged misrepresentation and an equally dramatic decline following the revelation of the truth." *Id.* at 673.

[5] The district court also hinted, though never elaborated, that *Halliburton I*'s loss-causation holding somehow prohibited consideration of whether the disclosures here were corrective. To be sure, evidence relevant to rebutting price impact might also be relevant to loss causation—especially where (as here) a plaintiff relies exclusively on later price declines to reverse-engineer a misrepresentation's alleged price impact. *Halliburton II* removes any doubt by holding that all evidence rebutting price impact must be considered at the class-certification stage, despite the Fund's urging the Supreme Court to conclude that the overlap with loss causation made Halliburton's evidence inadmissible. *See* Brief for Respondent at 50-52, *Halliburton II*, 134 S. Ct. 2398 (No. 13-317); *EPJF I*, 718 F.3d at 434 (declining to consider Halliburton's price-impact evidence because it would also defeat the loss-causation element).

Finally, the district court thought that addressing the correctiveness of disclosures at class certification would give defendants "a third bite at the apple" on that issue "after the dismissal stage and before summary judgment." *EPJF II*, 2015 WL 4522863, at *9. Not so. A plaintiff need not plead corrective disclosures in his complaint, and if he does those allegations are not subject to the PSLRA's heightened pleading requirements, so there is often no testing of this question at the 12(b)(6) stage. *See Pub. Emps. Ret. Sys. of Miss. v. Amedisys, Inc.*, 769 F.3d 313, 320-21 (5th Cir. 2014). Moreover, even if corrective disclosures are alleged in the complaint, the district court's approach allows class certification based on disclosures that were not alleged in the complaint and thus could not be challenged at the dismissal stage. Here, the Fund identified new alleged corrective disclosures—based on its expert's identification of dates with significant price declines—that were not alleged in its complaint. Tr. of Hr'g at 70:10-13, 84:17-22 (Dec. 1, 2014) (Appendix I). And once a class is certified, most cases settle before reaching a decision on summary judgment.[6] The district court's approach therefore will often preclude even one bite at the apple on this essential price-impact question, which cannot stand after *Halliburton II*.

[6] *See Securities Class Action Settlements – 2014 Review and Analysis*, CORNERSTONE RESEARCH 20 (2015), http://securities.stanford.edu/research-reports/1996-2014/Settlements-Through-12-2014.pdf (between 1996 and 2014, 1286 out of 1393 securities class action settlements occurred before a ruling on summary judgment, and 912 of those occurred after the first ruling on a motion to dismiss but before any ruling on summary judgment).

E. The court's refusal to consider the non-corrective nature of the December 7, 2001 disclosure was outcome-determinative on class certification. This Court and the district court previously held that the contemporaneous disclosure of the Baltimore asbestos verdict was not corrective as a matter of law. *See, e.g.*, *AMSF I*, 2008 WL 4791492, at *11; *AMSF II*, 597 F.3d at 336, 340-41. The announcement of that verdict did not correct Halliburton's previous alleged misstatements concerning its asbestos reserves and the prospects of asbestos litigation. *See AMSF II*, 597 F.3d at 340-41. Halliburton made fulsome public disclosures that "ke[pt] the market abreast of asbestos developments as they occurred," which "undermines any conclusion that the [announcement of any jury verdicts or judgments] corrected prior misrepresentations." *Id.* at 341. Before December 2001, the company disclosed an asbestos reserve, net of expected insurance recoveries, of $124 million, *id.* at 339, corresponding to the more than 200,000 open asbestos claims disclosed in its public filings. Halliburton had never made any pre-verdict statement predicting a positive outcome in, or otherwise discussing, any of those individual cases, including the Baltimore case. Indeed, Halliburton had repeatedly "warn[ed] about the uncertainties of litigation and the possibility that a series of adverse court rulings could materially impact the expected resolution of asbestos claims." *Id*. at 340. This Court thus concluded that the December 7, 2001 disclosure did not "demonstrate[] that Halliburton's

previous estimates of asbestos liability obscured the relevant truth about the asbestos estimates." *Id*. Consequently, the price decline following that disclosure does not indicate that any previous alleged misstatement distorted the price of Halliburton's stock. By presuming that the disclosure was "corrective"—and refusing to consider contrary evidence—the district court gutted Halliburton's right to rebut the Fund's sole theory of price impact.

The district court's approach portends absurd results. It allows any plaintiff to obtain class certification by pointing to any day in the class period on which there was a disclosure of company-specific information followed by a statistically significant stock-price drop. Under the decision below, courts may not examine whether the disclosure corrects, or indeed bears any linkage to, a prior alleged misrepresentation. Even armed with evidence that the disclosure was not corrective, the defendant is left powerless to rebut price impact. This makes a mockery of *Halliburton II*, requiring certification where there is no evidence of price impact whatsoever—neither price inflation caused by a misrepresentation, nor a price decline caused by a corrective disclosure.

III. The district court erred by placing the burden of persuasion with respect to price impact on defendants.

The district court stated that its allocation of the burden of persuasion would not have affected its disposition. *EPJF II*, 2015 WL 4522863, at *4. If, however, this Court were to hold that the district court should have determined whether the

December 7, 2001 disclosure was corrective, and finds it necessary to remand that question, the burden of persuasion could yet be relevant. Apart from its application here, the burden of persuasion for price-impact rebuttal is an important, recurring issue that warrants immediate guidance from this Court.

A. Federal Rule of Evidence 301 governs all "presumptions in civil cases," "unless a federal statute or these rules provide otherwise." Rule 301, cited in *Basic* itself, states that the defendant has the burden of "producing evidence to rebut the presumption," but the "burden of persuasion . . . remains on the party who had it originally."[7] Although no "statute" or "rule[] provide[s] otherwise," the district court departed from Rule 301, relying heavily on a law review article that finds Rule 301 an imperfect fit for the presumption of reliance.

Nothing in the *Halliburton II* majority opinion suggests defendants bear the ultimate burden of persuasion on price impact. After the parties joined issue in the briefing on whether Rule 301 governs, the Supreme Court "agree[d]" with "Halliburton['s] conten[tion] that defendants should at least be allowed to defeat the presumption at the class certification stage *through evidence* that the misrepresentation did not in fact affect the stock price." *Halliburton II*, 134 S. Ct.

[7] *See City of Arlington v. F.C.C.*, 668 F.3d 229, 256 (5th Cir. 2012) ("[T]he *only* effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact. . . . [O]nce a party introduces rebuttal evidence sufficient to support a finding contrary to the presumed fact, the presumption evaporates, and the evidence rebutting the presumption, and its inferences, must be judged against the competing evidence and its inferences to determine the ultimate question at issue.") (footnotes omitted), *aff'd*, 133 S. Ct. 1863 (2013).

at 2414 (emphasis added). The Court repeatedly stated that defendants may rebut the presumption with "evidence" that there was no price impact. Consistent with Rule 301, defendants' rebuttal burden is thus one of evidentiary production, not ultimate persuasion. The Court never stated that defendants must "prove" or "establish" the lack of price impact by a preponderance of the evidence.[8]

That makes sense because plaintiffs have the burden of persuasion on all Rule 23 issues, of which price impact is fundamental: "The *Basic* presumption does not relieve plaintiffs of the burden of proving—before class certification—that this [Rule 23(b)(3) predominance] requirement is met." *Halliburton II*, 134 S. Ct. at 2412. And "price impact . . . . has everything to do with the issue of predominance," *id.* at 2416, for "[i]n the absence of price impact, *Basic*'s fraud-on-the-market theory and presumption of reliance collapse." *Id.* at 2414. As the Supreme Court concisely put it, "[p]rice impact is thus an essential precondition for any Rule 10b-5 class action." *Id*. at 2416.

Accordingly, while "plaintiffs need not directly prove price impact to *invoke* the *Basic* presumption," *id*. at 2414 (emphasis added), once defendants rebut the

[8] The district court cites Justice Ginsburg's *concurring* opinion, but even that non-controlling opinion simply posits that defendants must "show" the absence of price impact—a statement consistent with Rule 301. And Justice Thomas's opinion concurring in the judgment (for three Justices) correctly observes that "today's decision makes clear that a defendant may rebut the presumption by *producing evidence* that the misstatement at issue failed to affect the market price of the security," 134 S. Ct. at 2425 n.8 (emphasis added), an understanding consistent with both Rule 301 and the plain text of the majority opinion.

presumption with sufficient price-impact evidence, plaintiffs necessarily bear the ultimate burden of persuasion on that essential Rule 23 issue.[9] Leading courts that allowed price-impact rebuttal before *Halliburton II* employed this approach.[10]

B. The district court believed that the presumption of reliance does not "neatly fit into the Rule 301 framework." *EPJF II*, 2015 WL 4522863, at *6 (citing Merritt B. Fox, Halliburton II*: It All Depends on What Defendants Need to Show to Establish No Impact on Price*, 70 Bus. Law. 437 (Spring 2015)). The court's analysis, however, conflated the presumption of price impact with the presumption of reliance that arises if price impact is established. *See Halliburton II*, 134 S. Ct. at 2414 (describing the two presumptions). It is the first presumption at issue here: "[I]f a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is

[9] Thus, contrary to the district court's reasoning, applying Rule 301 to place the ultimate burden of persuasion on plaintiffs would not contravene *Halliburton II* by "requiring the Fund to prove price impact directly." *EPJF II*, 2015 WL 4522863, at *5. *Halliburton II* holds only that plaintiffs "need not directly prove price impact to *invoke* the *Basic* presumption." 134 S. Ct. at 2414 (emphasis added). Rule 301 governs what happens *after* a presumption is "invoke[d]." If defendants cannot rebut the presumption with competent price-impact evidence, plaintiffs would not need to prove price impact directly, and the presumption would allow certification. If defendants carry their burden of production, however, plaintiffs bear the ultimate burden of persuasion on price impact.

[10] *See Salomon*, 544 F.3d at 486 ("If defendants attempt to make a [price impact] rebuttal, . . . the district judge must receive enough evidence . . . . to be satisfied that each Rule 23 requirement has been met."); *Moody's*, 274 F.R.D. at 490 & n.6 ("Defendants bear the burden of rebutting the presumption and Plaintiffs have the opportunity to rebut the rebuttal."). As noted, the post-*Halliburton II* cases cited by the district court do not analyze the Rule 23 and Rule 301 arguments presented here. One case mistakenly invoked *Salomon* to shift the burden of persuasion to defendants, but the quoted sentence states only that defendants bear the burden of showing that there was no price impact "at the rebuttal stage." *McIntire v. China MediaExpress Holdings, Inc.*, 38 F. Supp. 3d 415, 434 (S.D.N.Y. 2014) (quoting *Salomon*, 544 F.3d at 483).

entitled to a presumption that the misrepresentation affected the stock price." *Id*. Rule 301 maps perfectly onto this price-impact presumption as described above.

Thus, contrary to the opinion below, the Rule 301 framework *does* "affor[d] [the Fund] an opportunity to salvage the class by producing its own reputable expert to challenge Halliburton's."[11] *EPJF II*, 2015 WL 4522863, at *7. Indeed, that is exactly what happened here: Halliburton filed its expert report on price impact, and the Fund filed its own expert report six weeks later.

Under a proper understanding of Rule 301's application to the price-impact presumption, if the plaintiff carries its burden of persuasion, price impact is established and a class may be certified under the presumption of reliance. If, however, the plaintiff cannot overcome defendant's price-impact evidence, the presumption of reliance does not arise and individualized issues of reliance prevent class certification. By allowing plaintiffs to escape their burden of proving price impact (when challenged), the district court violated both Rule 23 and Rule 301.

CONCLUSION

Halliburton asks that this Court grant the Petition for Permission to Appeal the July 25, 2015 Order Granting in Part Plaintiffs' Motion to Certify Class.

[11] While the district court traced its view to Professor Fox, even he agrees that "[o]ne way" to "soften[]" "the results from a literal application of Rule 301" "would be to find that the defendant's expert testimony" on price impact "meets the burden of going forward, but to permit the plaintiffs to challenge the defendant's evidence with the burden of persuasion being on the plaintiffs." 70 Bus. Law. at 459.

Respectfully submitted,

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August 10, 2015

CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the above document was served on this the 10th day of August, 2015, via Federal Express on all Counsel of Record, as follows.

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