Case No. 15-11096

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-Appellee*,*

v.

HALLIBURTON COMPANY AND DAVID LESAR,

Defendants-Appellants*,*

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
NO. 3:02-CV-1152-M (Lynn, J.)

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

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CERTIFICATE OF INTERESTED PERSONS

Case No. 15-11096
Erica P. John Fund, Inc. v. *Halliburton Co. et al*.

The undersigned counsel of record certifies that, in addition to the persons and entities identified in the Appellants' Certificate, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 of the Rules of this Court have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

Amicus Curiae

1. The Chamber of Commerce of the United States of America has no parent corporations, and no publicly held company has any ownership interest therein.

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February 16, 2016

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Amicus Curiae, the Chamber of Commerce of the United States of America (the "Chamber"), respectfully submits this brief pursuant to Federal Rule of Appellate Procedure 29(a). Counsel for Defendants-Appellants and Plaintiff-Appellee have consented to this filing.[1]

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States is the largest business federation in the world, representing 300,000 members and indirectly representing the interests of more than 3 million U.S. businesses and professional organizations. The Chamber advocates for the interests of its members in matters before the courts, Congress and the Executive Branch, and regularly files amicus curiae briefs in cases that raise issues of concern to the Nation's business community, including in cases involving important issues of securities class action practice and procedure such as *Halliburton Co*. v. *Erica P. John Fund*, *Inc*., 134 S. Ct. 2398 (2014).

The Chamber and its members are particularly concerned about the costs that securities class action lawsuits impose on the American economy. The Supreme Court has recognized that securities class action litigation can under

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amicus affirms that no counsel for a party authored this brief in whole or in part and no one other than amicus, its members, or its counsel contributed any money intended to fund its preparation or submission.

many circumstances cause serious economic harm to U.S. public companies and their investors. S*ee Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc*., 552 U.S. 148, 164 (2008) (stating that securities class action lawsuits can "raise the cost of being a publicly traded company . . . and shift securities offerings away from domestic capital markets."); *Merrill Lynch, Pierce, Fenner & Smith, Inc*. v. *Dabit*, 547 U.S. 71, 81 (2006) (noting that securities class action lawsuits can be misused to "injure 'the entire U.S. economy.'" (citation omitted)); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *see also* Fed. R. Civ. P. 23(f) Advisory Committee Notes to 1998 Amendments ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."). Because businesses, including the Chamber's members, routinely are targeted in securities class-action lawsuits, amicus and its members are interested in ensuring that courts rigorously analyze whether a plaintiff has satisfied the requirements for class certification before certifying a class and that plaintiffs are held to the standards of proof and persuasion imposed on them under well-established law.

SUMMARY OF ARGUMENT

The Supreme Court's decision in *Halliburton Co*. v. *Erica P. John Fund, Inc*. ("*Halliburton II*"), 134 S. Ct. 2398 (2014), established an important rule of law for securities class actions: Although the plaintiff in a securities class action case may, under *Basic* v. *Levinson*, 485 U.S. 224 (1988), rely on the existence of an efficient market as indirect evidence that an alleged misrepresentation had "price impact" for purposes of meeting the reliance requirement under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, the defendant has a right to rebut that presumption *at the class certification stage* by presenting "direct, more salient evidence showing that an alleged misrepresentation did not actually affect the stock's market price." *Halliburton II*, 134 S. Ct. at 2416.

The rule of *Halliburton II* has not even survived remand. The district court's decision below eviscerated the rule in at least two respects. *First*, the district court held that a court must ignore evidence at the class certification stage that a supposed "corrective" disclosure did not in fact correct any prior alleged misrepresentation and therefore could not have had a relevant price impact. The holding directly flouts the Supreme Court's mandate 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.

Second, the district court held that Federal Rule of Evidence 301 does not apply to the *Basic* rebuttable presumption of reliance under section 10(b) and Rule 10b-5. That holding is contrary to the plain language of Rule 301 which expressly governs "presumptions in civil cases" except where "a federal statute or these rules provide otherwise," Fed. R. Evid. 301. As the Supreme Court held in *Halliburton II*, "if a defendant could show that the alleged misrepresentation did not, for whatever reason, actually affect the market price . . . then the presumption of reliance would not apply." *Halliburton II*, 134 S. Ct. at 2408 (citing *Basic*, 485 U.S. at 248-49). Once a defendant has presented evidence to rebut the *Basic* presumption of price impact, Rule 301 requires that the burden of persuasion shift back to the plaintiff to show price impact under the usual "rigorous" standards required to satisfy Federal Rule of Civil Procedure 23. *See Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011). The district court's contrary holding — that a defendant bears the burden of persuasion on price impact even after presenting evidence to rebut the *Basic* presumption — is plainly erroneous and should be reversed.

If accepted by this Court, the district court's decision threatens to cause substantial harm to public companies and their shareholders by allowing non-meritorious putative securities class actions to be certified even when there is no evidence of price impact from an alleged misrepresentation. Because class

certification vastly increases the costs and risks to defendants of litigating securities actions, such improper class certification will have a significant adverse impact on the Nation's businesses, shareholders, and capital markets. The district court's decision must be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT IT MAY NOT CONSIDER EVIDENCE AT CLASS CERTIFICATION CONCERNING A CORRECTIVE DISCLOSURE THAT REBUTS THE PRESUMPTION THAT AN ALLEGED MISREPRESENTATION HAD A PRICE IMPACT

In *Halliburton II*, the Supreme Court held that a defendant *must* be allowed to present evidence at the class certification stage to rebut the *Basic* presumption that an alleged misrepresentation had a price impact:

> [T]o 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.

Halliburton II, 134 S. Ct. at 2417. The Court also emphasized repeatedly that the types of evidence that a defendant must be allowed to offer at the class certification stage to rebut the *Basic* presumption of a price impact from an alleged misrepresentation should *not* be circumscribed "even though such proof is also highly relevant at the merits stage." *Id.* As the Court explained, "we see no reason to artificially limit the inquiry at the certification stage to indirect evidence of price

impact. Defendants may seek to defeat the *Basic* presumption at that stage through direct as well as indirect price impact evidence." *Id*. at 2417; *see also id*. at 2408 ("'*[A]ny showing* that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance.'" (quoting *Basic*, 485 U.S. at 248) (emphasis added)); *id*. ("[I]f a defendant could show that the alleged misrepresentation did not, *for whatever reason*, actually affect the market price . . . then the presumption of reliance would not apply." (citing *Basic*, 485 U.S. at 248-49) (emphasis added)).

The Supreme Court's mandate in *Halliburton II* is unambiguous: A defendant must not be limited at the class certification stage from presenting evidence or making "[a]ny showing that severs the link between the alleged misrepresentation" and an alleged price impact. *Id*. at 2408 (quoting *Basic*, 485 U.S. at 248) (quotation mark omitted). And "[w]hile *Basic* allows plaintiffs to establish that precondition indirectly, 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." *Halliburton II*, 134 S. Ct. at 2416.

The district court's refusal to consider Halliburton Company's ("Halliburton") evidence that the supposed corrective disclosure on December 7, 2001 was not related to any alleged misrepresentation and, accordingly, was not evidence of a price impact, *see Erica P. John Fund, Inc.* v. *Halliburton Co.* ("*EPJF II*"), 309 F.R.D. 251, 260 (N.D. Tex. July 25, 2015), is directly at odds with *Halliburton II*. The district court's reasoning for disallowing this evidence — namely, that "class certification is not the proper procedural stage for the Court to determine, as a matter of law, whether the relevant disclosures were corrective," *EPJF II*, 309 F.R.D. at 260 — misapprehends what is required under *Halliburton II*. Specifically, the relevant question before the district court was not whether a disclosure is "corrective" as a matter of law but, rather, whether the defendant has presented evidence that "severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff" and shows that "the alleged misrepresentation had no price impact." *Halliburton II*, 134 S. Ct. at 2415 (quoting *Basic*, 485 U.S. at 248). Here, Halliburton's evidence that the supposed corrective disclosure did not "reveal the truth" about any alleged misrepresentation is unquestionably evidence that the alleged misrepresentation had no price impact. Indeed, it may be the *best* such evidence — certainly it is simpler evidence than that required to determine whether a company's stock price movement on a given

day was or was not statistically significant (evidence the district court was willing to consider, *see EPJF II*, 309 F.R.D. at 262-280).

The district court reasoned that it could not consider this evidence because it impermissibly sought to attack the elements of loss causation and materiality, which it held were not proper subjects at the class certification stage. *See EPJF II*, 309 F.R.D. at 260-61 (citing *Erica P. John Fund, Inc*. v. *Halliburton Co. et al*. ("*Halliburton I*"), 131 S. Ct. 2179 (2011) and *Amgen Inc.* v. *Connecticut Ret. Plans and Trusts Funds*, 133 S. Ct. 1184 (2013)). This refusal to consider evidence at the class certification stage because it overlaps with the "merits" has been repeatedly repudiated by the Supreme Court. In *Wal-Mart Stores, Inc*. v. *Dukes*, the Supreme Court noted that the required Rule 23 inquiry concerning predominance is often intertwined with the merits of the plaintiffs' underlying case — but "[t]hat cannot be helped," *Wal-Mart*, 131 S. Ct. at 2551, and is not a basis for foregoing the relevant Rule 23 inquiry at the class certification stage. Instead, the Supreme Court has held that the "rigorous" inquiry into whether the Rule 23 requirements are met must still be undertaken "even when that requires inquiry into the merits of the claim." *Comcast Corp*. v. *Behrend*, 133 S. Ct. 1426, 1433 (2013) (citing *Wal-Mart*, 131 S. Ct. at 2551-52).

The Supreme Court's holdings in *Halliburton I* and *Amgen* are not to the contrary. *Halliburton I* and *Amgen* held that a securities class action *plaintiff* is

not required to prove loss causation in order to invoke the *Basic* presumption (*Halliburton I*), or prove materiality at the class certification stage (*Amgen*). *See Halliburton I*, 131 S. Ct. at 2185-86; *Amgen*, 133 S. Ct. at 1195-97. Neither case addressed the question whether a *defendant* may present evidence that the only price impact alleged by plaintiff did not, in fact, relate to an alleged misrepresentation and that the *Basic* presumption, therefore, does not apply. The district court's conflation of the price impact inquiry with the prohibited inquiries in *Halliburton I* and *Amgen* is unfounded. *First*, *Halliburton I* dealt with plaintiff's burden to invoke the rebuttable *Basic* presumption of reliance — not the types of evidence a defendant may offer to rebut the presumption once it has been established.[2] *See Halliburton I*, 131 S. Ct. at 2186. The only Supreme Court decision to address the question at issue here, *Halliburton II*, held unequivocally that the court must consider *all* direct and indirect evidence that rebuts price impact and defeats Rule 23(b) predominance. *See Halliburton II*, 134 S. Ct. at 2417.

Second, both loss causation in *Halliburton I* and materiality in *Amgen* are different from price impact because, while the former are elements of the underlying 10b-5 claim, price impact relates to the predominance requirement

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[2] The *Halliburton I* Court also expressly distinguished loss causation from price impact: "[L]oss causation is a familiar and distinct concept in securities law; it is not price impact." *Halliburton I*, 131 S. Ct. at 2187. Most notably, unlike price impact, "[l]oss causation addresses a matter different from whether an investor relied on a misrepresentation." *Id*. at 2186.

under Rule 23(b). *See Halliburton II*, 134 S. Ct. at 2416 ("Price impact is different [from materiality]. . . . [It] has everything to do with the issue of predominance at the class certification stage."). As the Supreme Court explained in *Halliburton II*, "if a defendant could show that the alleged misrepresentation did not, for whatever reason, actually affect the market price," a plaintiff, may still "prove that he directly relied on the defendant's misrepresentation in buying or selling the stock." *Halliburton II*, 134 S. Ct. at 2408. Accordingly, price impact evidence — unlike loss causation and materiality — goes directly to the Rule 23(b) predominance requirement. As the Supreme Court recognized in *Amgen*, this makes all the difference:

> [U]nlike materiality, market efficiency and publicity are not indispensable elements of a Rule 10b–5 claim. . . . Thus, where the market for a security is inefficient or the defendant's alleged misrepresentations were not aired publicly, a plaintiff cannot invoke the fraud-on-the-market presumption. She can, however, attempt to establish reliance through the "traditional" mode of demonstrating that she was personally "aware of [the defendant's] statement and engaged in a relevant transaction . . . based on that specific misrepresentation." . . . Individualized reliance issues would predominate in such a lawsuit. The litigation, therefore, could not be certified under Rule 23(b)(3) as a class action, but the initiating plaintiff's claim would remain live; it would not be "dead on arrival."

Amgen, 133 S. Ct. at 1199 (citations omitted) (quoting *Halliburton I*, 131 S.Ct., at 2185; *Amgen Inc. et al.* v. *Connecticut Ret. Plans and Trust Funds*, 660 F.3d 1170, 1175 (9th Cir. 2011)). In short, neither *Halliburton I* nor *Amgen* provides any

support for the district court's holding that it must assume that a supposed corrective disclosure was, in fact, corrective of an alleged misrepresentation and that a defendant may not present evidence to the contrary to rebut price impact. *See EPJF II*, 309 F.R.D. at 262. As set forth above, that holding is plainly at odds with *Halliburton II*.

The district court's refusal to consider evidence that a supposed corrective disclosure did not relate to a prior misrepresentation will lead to the very sort of "bizarre results" that the Supreme Court warned of in *Halliburton II*. *See Halliburton II*, 134 S. Ct. at 2415:

> 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. . . . 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.

Id. (emphasis added). In the Supreme Court's hypothetical, the evidence at the certification stage "shows an efficient market, on which the alleged misrepresentation had no price impact" — this situation, the Court made clear,

would be an inappropriate one for class certification. *Id*. Under the district court's rule, however, a court would make this very same error of improperly certifying a class because the court would never assess whether a misrepresentation had a price impact and *could never conclude that it did not*. Rather, under the district court's rule, the court would simply assume the price impact alleged by the plaintiff, notwithstanding any contrary evidence.

The district court's refusal to assess the contrary evidence on offer in this case was outcome-determinative. Halliburton presented an expert event study to the district court that showed that the alleged misrepresentation had no price impact because the *only* price impact in the parties' event studies was from a disclosure on December 7, 2001 that did not, in fact, "reveal the truth" about any alleged misrepresentation. *See EPJF II*, 309 F.R.D. at 279-280. Both the district court and this Court had previously held that there was *no link* between the supposed December 7, 2001 corrective disclosure and any alleged misrepresentation. *See Archdiocese of Milwaukee Supporting Fund, Inc*. v. *Halliburton Co*. ("*AMSF I*"), No. 3:02-CV-1152-M, 2008 WL 4791492, at *4 (N.D. Tex. Nov. 4, 2008) (holding that plaintiff failed to "actually link *any* alleged misrepresentations with the [allegedly corrective] disclosures." (emphasis in original)); *id*. at *11 ("The December 7, 2001 disclosure . . . was *new* negative information, unrelated to previous disclosures . . . ." (emphasis in original));

Archdiocese of Milwaukee Supporting Fund, Inc. v. *Halliburton Co*. ("*AMSF II*"), 597 F.3d 330, 338 (5th Cir. 2010) (holding that the Fund "failed to identify disclosures that had a *corrective* effect linked to a specific misrepresentation, as opposed to simply a *negative* effect." (emphases in original)); *id*. at 340 (holding 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*. at 341 (finding that Halliburton made public disclosures to "keep[] the market abreast of asbestos developments as they occurred" which "undermines any conclusion that the [later disclosures] corrected prior misrepresentations").

The district court did precisely what the Supreme Court said it could not: "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." *Halliburton II*, 134 S. Ct. at 2416. The district court's decision should be reversed.

II. THE DISTRICT COURT ERRED IN HOLDING THAT DEFENDANTS-APPELLANTS BEAR THE BURDEN OF PERSUASION AFTER THEY PRESENTED EVIDENCE TO REBUT THE *BASIC* PRESUMPTION OF RELIANCE

The Supreme Court has described the *Basic* presumption as a "useful device[] for allocating the burdens of proof between parties" in establishing whether a plaintiff actually relied on an alleged misrepresentation, which is a

required element in pleading a Rule 10b-5 claim. *See Basic*, 485 U.S. at 245. As the Supreme Court explained in *Halliburton II*, "the *Basic* presumption actually incorporates two constituent presumptions." *Halliburton II*, 134 S. Ct. at 2414. The first *Basic* presumption is that, on a showing by a plaintiff that a misrepresentation was public and material and the stock traded in an efficient market, the plaintiff "is entitled to a presumption that the misrepresentation affected stock price." *Id*. This part of the *Basic* presumption is "directed at price impact." *Id*. The second *Basic* presumption is that if the plaintiff shows that its stock purchase was made during the relevant period, the plaintiff "is entitled to a further presumption that [it] purchased the stock in reliance on the defendant's misrepresentation." *Id*.

As the Supreme Court has explained, however, "*Basic* emphasized that the presumption of reliance was rebuttable rather than conclusive" and that "'[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance.'" *Id*. at 2408 (quoting *Basic*, 485 U.S. at 248). In particular, a defendant may rebut the first constituent presumption of "price impact" in order to defeat the *Basic* presumption, because "[i]n the absence of price impact, *Basic*'s fraud-on-the-market theory and presumption of reliance collapse." *Id*. at 2414. "Defendants may seek to defeat

the *Basic* presumption at [the class certification] stage through direct as well as indirect price impact evidence." *Id*. at 2417.

What happens *after* a defendant has introduced price impact evidence is, in turn, governed by Federal Rule of Evidence 301 — a rule that the Supreme Court expressly relied on in first articulating the *Basic* presumption of reliance, *see Basic*, 485 U.S. at 245 (citing Fed. R. Evid. 301), and which, by its own terms, governs all "presumptions in civil cases." *See* Fed. R. Evid. 301. Rule 301 provides that "[i]n a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule *does not shift the burden of persuasion*, *which remains on the party who had it originally*." *Id*. (emphasis added).

It cannot be seriously questioned that a plaintiff who pleads a claim under Rule 10b-5 in a securities class action has the original burden of persuasion regarding the element of reliance on an alleged misrepresentation and predominance under Rule 23. *See Halliburton II*, 134 S. Ct. at 2416 ("[W]ithout the presumption of reliance . . . [e]ach plaintiff would have to prove reliance individually . . . ."); *id*. at 2412 ("The *Basic* presumption does not relieve plaintiffs of the burden of proving — before class certification — that . . . [the Rule 23(b)(3) predominance] requirement is met."). The application of Rule 301 to the *Basic*

presumption, therefore, plainly requires that, once a defendant has "rebut[ted] the presumption of reliance with evidence of a *lack* of price impact," *id*. at 2413 (emphasis in original), the burden of persuasion as to price impact and reliance shifts back to the plaintiff. In reaching a contrary conclusion, the district court relied primarily on (1) a single sentence in Justice Ginsburg's concurring opinion in *Halliburton II, EPJF II,* 309 F.R.D. at 258 ("[T]he 'Court recognizes that it is incumbent upon the defendant to show the absence of price impact.'" (quoting *Halliburton II*, 134 S. Ct. at 2417)); and (2) a law review article positing that "the fraud-on-the-market presumption is atypical and . . . does not neatly fit into the Rule 301 framework" because "a literal application of Rule 301 to the fraud-on-the-market presumption in a class certification hearing would allow defendants to preclude class certification by merely putting on a reputable expert that can opine with 95% confidence that a corrective disclosure had no effect on price," *EPJF II,* 309 F.R.D. at 259-260 (citing Merritt B. Fox, Halliburton II: It All Depends on What Defendants Need to Show to Establish No Price Impact, 70 Bus. Law 437, 458-59 (2014-15)).

Neither of these sources can bear the weight the district court placed on them. *First*, Justice Ginsburg's brief concurrence did not speak at all to the burden of persuasion *after* a defendant has presented evidence to rebut the *Basic* presumption of price impact. Rather, it addressed only the burden of production

that a defendant bears in order to defeat the *Basic* presumption. *Halliburton II*, 134 S. Ct. at 2417. And, of course, this concurrence was not joined by six Justices, and does not reflect the opinion of the Court. *Second*, the district court's suggestion that Rule 301 cannot be applied to the *Basic* presumption attacks a strawman version of Halliburton's position. The district court appeared to assume that applying Rule 301 to shift the burden of persuasion back to the plaintiff would somehow require the plaintiff to "prove reliance without the aid of the presumption" through direct evidence of the plaintiff's own reliance. *See EPJF II*, 309 F.R.D. at 260. Because this would involve proof of individual questions concerning reliance, class certification would never be appropriate. *See Halliburton II*, 134 S. Ct. at 2416.

But the district court failed to explain why applying Rule 301 to shift the burden of persuasion back to the plaintiff after a defendant offers proof that there was no price impact would preclude the plaintiff from introducing competent, competing evidence on a classwide basis in an attempt to persuade the court that there was, in fact, a price impact. Indeed, that is what Plaintiff attempted in this case: after Halliburton provided its expert evidence on price impact, Plaintiff attempted to rebut that showing on a classwide basis with its own expert evidence. (*See* ROA.14479; Fund Sealed Resp., ECF No. 590 (Oct. 31, 2014) (referenced at ROA.82)). Where a plaintiff is unable to offer evidence to rebut a defendant's

showing that there is no classwide impact, however, the refusal to certify a class is not an anomalous result but, rather, the necessary consequence of the Supreme Court's decision in *Halliburton II* and Rule 301.

III. THE DISTRICT COURT'S DECISION THREATENS TO INCREASE ABUSIVE SECURITIES CLASS ACTION LITIGATION AND HARM U.S. BUSINESSES

Halliburton II announced a rule that provided defendants a meaningful opportunity to ensure that class certification is available in securities cases only when Rule 23's requirements are met. The district court's decision, on remand from the Supreme Court, is impossible to square with that rule. That is reason enough to reverse. If the district court's decision were to be accepted by this Court, the potential harm to American commerce would be grave. The Supreme Court has recognized that the more the class action mechanism is expanded, "the greater the likelihood of abuse." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 842 (1999). The consequence of the district court's decision is to dramatically lower the bar for class certification in securities class actions where a plaintiff has alleged a supposed corrective disclosure — which, under the district court's opinion, may be *any* piece of bad news with a negative effect on a company's stock price. The district court's opinion lays out a roadmap for enterprising plaintiffs' lawyers to ensure that a defendant may never exercise its

right under *Halliburton II* to present evidence at the class certification stage that there was no price impact from an alleged misrepresentation.[3]

Stripped of that right to fully rebut price impact, many U.S. businesses would face inexorable pressure to settle even clearly non-meritorious class action claims. "As a practical matter, the certification decision is typically a game-changer, often the whole ballgame, for plaintiffs and plaintiffs' counsel." *Marcus* v. *BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012) (citation omitted). "[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011). The certification of a nationwide securities class will ensure that "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at

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[3] The issues before the Court on Defendants-Appellants' appeal are not unique to the parties or facts in this action, but are instead typical of present-day securities class action litigation against public companies. Specifically, securities class action complaints now often allege price impact on the basis of a drop in a stock's price after a purportedly corrective disclosure "reveals the truth" about a prior alleged misrepresentation — not because the alleged misrepresentation initially caused an increase in the stock's price. (*See* Fox, *supra*, at 441 ("In fraud-on-the-market litigations, the focus is usually on the price change at the time of the disclosure correcting the misstatement.").) Whether a defendant may present evidence to rebut the allegation that a purported corrective disclosure does not, in fact, show price impact and whether making such a showing shifts the burden of persuasion back to plaintiff are questions of law that will continually recur in securities class action litigation filed in this Circuit and throughout the United States.

trial." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975). Because "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs," even a defendant with the most surefire defense "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand*, 437 U.S. at 476; *see also* Fed. R. Civ. P. 23(f) Advisory Committee Notes to 1998 Amendments ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

The district court's decision accordingly threatens to open the door to a flood of meritless class-action litigation against the Nation's businesses. The costs will be borne by shareholders and the U.S. economy and capital markets.

CONCLUSION

For the reasons set forth above, the district court's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4886 words, exclusive of the certificate of interested persons, table of contents, table of authorities, certificate of service, certificate of digital submission and this certificate of compliance, which are exempted by Fed. R. App. 32(a)(7)(B)(iii).

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February 16, 2016

CERTIFICATE OF SERVICE

I, Brendan P. Cullen, counsel for amicus curiae, certify that, on February 16, 2016, a copy of the foregoing Brief of Amicus Curiae the Chamber of Commerce of the United States of America In Support of Appellants was filed electronically through the appellate CM/ECF system with the Clerk of Court. All counsel of record in this case are registered CM/ECF users.

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