No. 17-80001

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE INTUITIVE SURGICAL SECURITIES LITIGATION

On Petition for Permission to Appeal from
the United States District Court for the Northern District of California
The Honorable Edward J. Davila
Case No. 5:13-CV-01920-EJD

MOTION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-PETITIONERS

U.S. Chamber Litigation Center
Kate Comerford Todd
Janet Galeria
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5629

Cleary Gottlieb Steen & Hamilton LLP
Lewis J. Liman
Jared M. Gerber
Mark E. McDonald
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Chamber of Commerce of the United States of America hereby certifies that it is a non-profit membership organization, with no parent company and no publicly-traded stock.

Pursuant to Federal Rule of Appellate Procedure 29(b), the Chamber of Commerce of the United States of America (the "Chamber") respectfully moves this Court for leave to file the attached *amicus curiae* brief in support of Defendants-Petitioners. The Chamber has received Defendants-Petitioners' consent for the filing of this motion. Plaintiffs-Respondents have advised the Chamber that they do not consent to this motion.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Chamber is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of over three million business, trade, and professional organizations of every size, in every sector, and from every region of the United States. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. Many of the Chamber's members are companies subject to U.S. securities laws. To that end, the Chamber regularly files *amicus curiae* briefs in various securities class action appeals, including in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) ("*Halliburton II*").

This Federal Rule of Civil Procedure ("FRCP") 23(f) petition involves significant issues regarding the standards under which district courts can properly

certify securities class actions. These issues are directly relevant to the Chamber's mission and members.

DESIRABILITY AND RELEVANCE OF *AMICUS CURIAE* BRIEF

The decision below raises issues of general import concerning securities fraud plaintiffs' burden to satisfy the predominance requirement of FRCP 23(b)(3) at the class certification stage, particularly where, as here, defendants present evidence rebutting the fraud-on-the-market presumption on which class certification in such cases depends. Below, the District Court certified a class by erroneously relieving Plaintiffs of their burden, once Defendants submitted evidence rebutting the fraud-on-the-market presumption, to prove the requisite "price impact" directly. If permitted to stand, the decision below would subject virtually every corporation of decent size that happens to experience a stock price drop to potentially ruinous class action lawsuits without any threshold demonstration that the alleged misrepresentation forming the basis of the lawsuit impacted shareholders, effectively imposing a tax on U.S. businesses.

CONCLUSION

For these reasons, and those more fully expressed in its brief, the Chamber respectfully requests leave to file its *amicus curiae* brief in support of Defendants-Petitioners.

Dated: January 12, 2017

Respectfully Submitted,

By: /s/ Lewis J. Liman
Lewis J. Liman

Lewis J. Liman
Jared M. Gerber
Mark E. McDonald
Cleary Gottlieb Steen & Hamilton LLP
New York, New York 10006
(212) 225-2000

Kate Comerford Todd
Janet Galeria
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5629

Counsel for Amicus Curiae *Chamber of Commerce of the United States of America*

DECLARATION OF LEWIS J. LIMAN IN SUPPORT OF MOTION BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Lewis J. Liman, hereby declares, pursuant to 28 U.S.C. § 1746, as follows:

1. I am a member of the firm Cleary Gottlieb Steen & Hamilton LLP and counsel to the Chamber of Commerce of the United States of America (the "Chamber"). I am duly admitted to practice before this Court.

2. I submit this declaration in support of the motion by the Chamber to submit the attached brief as *amicus curiae*. The Chamber has received Defendants-Petitioners' consent for the filing of an *amicus curiae* brief. Plaintiffs-Respondents have advised the Chamber that they do not consent to the filing of the annexed *amicus curiae* brief. I do not know whether the Plaintiffs-Respondents intend to file a response. A copy of the proposed brief is annexed to this Motion.

3. The Chamber is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of over three million business, trade, and professional organizations of every size, in every sector, and from every region of the United States. An important function of the Chamber is to represent the interests of its members, many of which are companies subject to U.S. securities laws, in matters before Congress, the Executive Branch, and the courts. The Chamber has a strong interest in the issues presented in this

case, and the proposed brief addresses those important issues—namely, the standards under which district courts can properly certify securities class actions. In addition, the Chamber offers the Court information, based on the experience of its members, on the detrimental impact of the District Court's ruling misapplying the class action law established in *Halliburton II* and other Supreme Court cases.

4. Accordingly, the Chamber respectfully requests that the Court grant it leave to appear as *amicus curiae* in order to submit the accompanying brief.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: January 12, 2017

Respectfully Submitted,

By: /s/ Lewis J. Liman
Lewis J. Liman

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2017, I have served the Motion and attachments of *Amicus Curiae*, the Chamber of Commerce of the United States of America, in support of the Defendants-Petitioners, by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

Dated: New York, New York
January 12, 2017

/s/ Lewis J. Liman
Lewis J. Liman

Counsel for Amicus Curiae *Chamber of Commerce of the United States of America*

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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR LEAVE TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(F)

U.S. Chamber Litigation Center
Kate Comerford Todd
Janet Galeria
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5629

Cleary Gottlieb Steen & Hamilton LLP
Lewis J. Liman
Jared M. Gerber
Mark E. McDonald
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Counsel for Amicus Curiae

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, the Chamber of Commerce of the United States of America (the "Chamber"), submits this brief pursuant to Federal Rule of Appellate Procedure 29(b). The Chamber is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of over three million business, trade, and professional organizations of every size, in every sector, and from every region of the United States. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

Many of the Chamber's members are companies subject to U.S. securities laws who would be adversely affected if the decision below is permitted to stand. Further, the Chamber has long been concerned about the costs that securities class actions impose on the American economy. To that end, the Chamber regularly files *amicus curiae* briefs in various securities class action

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for the Chamber states that no counsel for a party authored this brief in whole or in part, and that no person—other than the Chamber, its members, or its counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

appeals, including in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) ("*Halliburton II*").

ARGUMENT

In *Halliburton II*, the Supreme Court established an important rule of law for securities class actions: Although the plaintiff in a securities case may, under *Basic Inc. 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 the right to rebut the plaintiffs' "indirect way of showing price impact" 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 2415-16. Critically, as explained below, where defendants come forward with such evidence, the burden shifts back to the plaintiffs to "*prove*—not simply plead" the requisite price impact under the "rigorous" standards required to satisfy the predominance requirement of Federal Rule of Civil Procedure ("FRCP") 23(b)(3). *Id.* at 2412 (emphasis in original); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

The Chamber agrees with Defendants-Petitioners that the District Court committed plain error by ignoring this crucial last step, and by instead

requiring *Defendants*, even after they had carried their burden of production to rebut the *Basic* presumption, to *disprove* that the alleged misrepresentations had the requisite price impact. Indeed, the District Court's flawed reasoning would render the fraud-on-the-market presumption effectively irrebuttable for the vast majority of public companies, contrary to *Basic* and *Halliburton II*. If not reversed, this decision will "'effectively convert Rule 10b-5 into a scheme of investor's insurance'" and invite automatic certification whenever there is a significant stock price drop without proof that any investor relied on the alleged misrepresentation. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345 (2005).

There is a compelling need for this Court to grant interlocutory review to provide guidance to the district courts in this Circuit on this important and recurring issue, as the Second, Fifth, and Eighth Circuits have recently done. Moreover, in light of the *in terrorem* effect of class certification in securities fraud cases, "with all that entails," *Halliburton II*, 134 S. Ct. at 2415, the time for the Court to do so is now.

I. THE DECISION BELOW IS CONTRARY TO *HALLIBURTON II* AND FEDERAL RULE OF EVIDENCE 301

A. The Fraud-On-The-Market Presumption Is Rebuttable And Plaintiffs, Not Defendants, Bear The Ultimate Burden Of Persuasion To Prove Predominance By Showing Price Impact

In *Basic*, the Supreme Court held that "'securities fraud plaintiffs can in certain circumstances satisfy the reliance element of a Rule 10b-5 action by

invoking a rebuttable presumption of reliance, rather than proving direct reliance on a misrepresentation.'" *Halliburton II*, 134 S. Ct. at 2408 (citing *Basic*, 485 U.S. at 246-47). The Court based that presumption on what is known as the "fraud-on-the market" theory, which holds that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Basic*, 485 U.S. at 246.

As the Supreme Court explained in *Halliburton II*, "the *Basic* presumption actually incorporates two constituent presumptions." 134 S. Ct. at 2414. First, if the plaintiff shows (1) that the alleged misrepresentations were publicly known, (2) that they were material, and (3) that the stock traded in an efficient market, the plaintiff "is entitled to a presumption that the misrepresentation[s] affected the stock price"—in other words, had a "price impact." *Id.* Second, if the plaintiff shows that it purchased the stock when the alleged misrepresentations affected the stock price, the plaintiff "is entitled to a further presumption that [it] purchased the stock in reliance on the defendant's misrepresentation[s]." *Id.* Price impact—*i.e.*, the "link between the alleged misrepresentation and [the stock price]"—is thus an "essential precondition" for class certification in a securities fraud action. *Id.* at 2415-16. "In the absence of price impact, *Basic*'s fraud-on-the-market theory and presumption of reliance collapse," and "[e]ach plaintiff would have to prove reliance individually, so

common issues would not 'predominate' over individual ones, as required by [FRCP] 23(b)(3)." *Id.* at 2414, 2416.

Importantly, the *Basic* presumption is "rebuttable rather than conclusive." *Id.* at 2408. In particular, "[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.* Because of the *Basic* presumption's effect of relieving plaintiffs of their obligation to show individual reliance, thereby allowing them to satisfy the FRCP 23(b)(3) predominance requirement, the Court held that defendants must be afforded an opportunity to rebut that 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 ("FRE") 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 FRE 301), and which, by its own terms, governs all "presumptions in civil cases." *See* FRE 301; *see also IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*, 818 F.3d 775, 782 (8th Cir. 2016) (applying FRE 301 to *Basic* presumption). FRE 301 provides that "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). *See Nunley v. City of Los Angeles*, 52 F.3d 792, 796 (9th Cir. 1995) (noting FRE 301 adopts "bursting bubble" approach to presumptions).

Indeed, in a securities fraud class action, as in any class action, the burden of persuasion remains on the plaintiffs to demonstrate that the predominance requirement of FRCP 23(b) is met. *See, e.g.*, *Dukes*, 131 S. Ct. at 2551. The *Basic* presumption "does not relieve plaintiffs of [that] burden." *Halliburton II*, 134 S. Ct. at 2412. Rather, the *Basic* presumption provides a *means* by which a securities fraud class action plaintiff may initially satisfy its burden. *See id.* 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 predominance shifts back to the plaintiff. *See id.* at 2415 ("'*[A]ny showing* that severs the link between the alleged misrepresentation and [the price] . . . will be sufficient to rebut the presumption of reliance' because 'the basis for finding that the fraud had been transmitted through the market price would be gone.'") (emphasis added).

B. The District Court Erroneously Relieved Plaintiffs Of Their Burden Of Persuasion To Show Price Impact, Effectively Making The Fraud-On-The-Market Presumption Irrebuttable

In reaching the contrary conclusion that Defendants, in addition to having the initial burden of production to rebut the *Basic* presumption, must *also* "convince the court that their evidence is more probative of price impact than the evidence offered by Plaintiffs," Order at 22, the District Court erroneously shifted to Defendants what is Plaintiffs' ultimate burden to show price impact. The sole authority the District Court cited for this manifestly incorrect legal conclusion was an opinion of the Northern District of Texas on remand from *Halliburton II*. *See id.* (citing *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, 260 (N.D. Tex. 2015) ("*Halliburton III*")). But that decision, which is under interlocutory review by the Fifth Circuit, also ignored the clear import of *Halliburton II* and FRE 301, and thus provides no support for the District Court's conclusion here.

Moreover, this erroneous legal conclusion affected the District Court's entire price impact analysis. The District Court acknowledged that Defendants came forward with evidence rebutting the fraud-on-the-market presumption: Defendants presented undisputed expert evidence that the only alleged misstatements remaining in the case did *not* cause any statistically significant increase in the stock price. However, the District Court brushed aside this evidence, and instead focused on purported "corrective disclosures" identified by

the Plaintiffs on the theory that "[i]f a particular disclosure causes the stock price to decline at the time of disclosure, then the [prior] misrepresentation must have made the price higher than it would otherwise have been." Order at 22 n.13 (quoting *Halliburton III*, 309 F.R.D. at 262). Of course, that would only be true if the so-called "corrective disclosures" *reveal the fraud*; otherwise, the most that has been shown is that the stock price declined in response to unrelated news. The District Court, however, entirely relieved Plaintiffs of their burden to show such a link between the alleged misstatements and the subsequent price drops—*i.e.*, to prove price impact directly. *See* Order at 24-28.

By ruling that Defendants' evidence was insufficient to rebut the *Basic* presumption and shift the burden to Plaintiffs, the District Court adopted a test that would permit plaintiffs to satisfy the predominance requirement in every case simply by pleading market efficiency and without sustaining their burden to prove price impact. This test effectively creates an "irrebuttable and insurmountable" presumption, *Nunley*, 52 F.3d at 796, contrary to *Halliburton II* and FRE 301, and impermissibly relieves securities class action plaintiffs of their obligation to prove reliance under Section 10(b) and predominance under FRCP 23(b)(3).

II. THERE IS A COMPELLING NEED FOR IMMEDIATE REVIEW

The decision below would make certification of securities class actions a near certainty, and therefore encourage insubstantial securities fraud claims that bear little relation to any real culpability and serve only to extract large settlements from insured businesses by the threat of class-wide damages.

Both the Supreme Court and this Court have frequently acknowledged the threat of abuse and unfair settlement pressures that often attend the class treatment of securities fraud claims. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008) (noting "potential for uncertainty and disruption in a [securities fraud] lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975) (noting securities class action litigation poses "a danger of vexatiousness different in degree and kind from that which accompanies litigation in general"); *Ronconi v. Larkin*, 253 F.3d 423, 428 (9th Cir. 2001) (noting that securities fraud class actions "can extort a great deal of undeserved settlement money if the courts do not filter out the unfounded ones early enough to avoid huge litigation expenses").

In *Halliburton II*, the Supreme Court attempted to cabin these lawsuits by permitting them to proceed as a class only when plaintiffs demonstrate price impact (by invoking the *Basic* presumption or, if rebutted, by sustaining their

burden to prove price impact directly). 134 S. Ct. at 2416-17. Unfortunately, this case is representative of others in which district courts have misapplied *Basic* and *Halliburton II*, implicating precisely the risks of vexatious lawsuits the rule of those decisions is intended to avoid. Given the costs of such litigation and the potential for ruinous liability—even if remote—settlement is a virtual certainty in cases that survive a motion to dismiss, regardless of merit.[2] Studies have shown that such settlements often have more to do with the defendant's insurance limits than with the strength of the plaintiffs' claims. *See Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010) (citing studies).

According to research conducted by the Stanford Law School Securities Class Action Clearinghouse ("Stanford Clearinghouse"), securities fraud class actions led to over $3 billion in settlements in 2015 (the last year for which such data is available), with an average settlement of $37.9 million per case.[3]

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[2] *See* Stanford Law School Securities Class Action Clearinghouse & Cornerstone Research, *Securities Class Action Filings: 2015 Year In Review,* p.12 (2016) (less than 1% of securities class action filings from 1997 to 2014 have reached trial verdict), http://securities.stanford.edu/research-reports/1996-2015/Cornerstone-Research-Securities-Class-Action-Filings-2015-YIR.pdf.

[3] *See* Stanford Clearinghouse, *Class Action Settlements: 2015 Review and Analysis*, p.1 (2016), http://securities.stanford.edu/research-reports/1996-2015/Settlements-Through-12-2015-Review.pdf.

Defense costs in these cases have been estimated to range from 25 to 35 percent of the settlement value. *See* John C. Coffee, *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1546 (2006). Such costs are not isolated to companies against which suits have been brought. They are spread to the shareholders of all U.S. public companies, which will pay more for insurance, pay more to access capital, and be placed in a worse competitive position than their overseas counterparts.

For all these costs, excessive securities class actions come without corresponding benefits in the form of effective fraud deterrence. *See* William M. Bratton & Michael Wachter, *The Political Economy of Fraud on the Market*, 160 U. Pa. L. Rev. 69, 72-73 (2011). In fact, most often the only result of near inevitable settlements is a wealth transfer from one group of innocent shareholders to another—of course, with a healthy cut for the plaintiffs' lawyers. *See* Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 Ariz. L. Rev. 639, 648 n.43 (1996) ("[I]n the average settlement, 68.2% comes from the insurer and 31.4% from the issuer, with only 0.4% coming from individual defendants.").

Given the importance of this issue, the Second, Fifth, and Eighth Circuits have each granted interlocutory review to consider district court decisions that, like the one below, relieved plaintiffs of their burden, once the fraud-on-the-

market presumption was rebutted, to show price impact directly. *See Barclays Bank PLC v. Waggoner*, No. 16-450 (2d Cir. June 15, 2016); *In re Petrobras Sec. Litig.*, No. 16-1914 (2d. Cir. June 15, 2016); *In re Goldman Sachs Group, Inc. Sec. Litig.*, No. 16-250 (2d. Cir. Jan. 28, 2016); *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 15-90038, 2015 WL 10714013 (5th Cir. Nov. 4, 2015); *Best Buy*, No. 14-8020 (8th Cir. Sept. 24, 2014). The Eighth Circuit has already ruled that the lower court "misapplied the price impact analysis" set forth in *Halliburton II* by relieving plaintiffs of their burden of persuasion once defendants submitted evidence rebutting the *Basic* presumption. *Best Buy*, 818 F.3d at 777, 783. This Court should similarly grant review of this critically important question for securities class action litigation.

CONCLUSION

The Court should grant the FRCP 23(f) petition.

Dated: January 12, 2017

Respectfully Submitted,

By: /s/ Lewis J. Liman
Lewis J. Liman

Lewis J. Liman
Jared M. Gerber
Mark E. McDonald
Cleary Gottlieb Steen & Hamilton LLP
New York, New York 10006
(212) 225-2000

Kate Comerford Todd
Janet Galeria
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5629

Counsel for Amicus Curiae *Chamber of Commerce of the United States of America*

CERTIFICATE OF COMPLIANCE

This brief complies with the page limitations of Fed. R. App. P. 29(a)(5) because it contains 2,599 words, which is less than one-half the maximum number of words authorized for a party's principal brief by Fed. R. App. P. 5(c), excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: January 12, 2017

/s/ Lewis J. Liman
Lewis J. Liman

Counsel for Amicus Curiae *Chamber of Commerce of the United States of America*