21-243

United States Court of Appeals

for the

Second Circuit

MARVIN PEARLSTEIN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Respondents,

– v. –

BLACKBERRY LIMITED (FORMERLY KNOWN AS RESEARCH IN MOTION LIMITED), THORSTEN HEINS, BRIAN BIDULKA, AND STEVE ZIPPERSTEIN,

Defendants-Petitioners.

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

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February 16, 2021

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae the Chamber of Commerce of the United States of America hereby certifies that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

Pursuant to Federal Rules of Appellate Procedure 29, 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 object to the filing of this motion.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Chamber is the Nation's largest business federation. It directly represents 300,000 members and indirectly represents the interests of over 3 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 before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community. Many of the Chamber's members are companies subject to the U.S. securities laws and therefore the Chamber has filed *amicus curiae* briefs in securities class action cases, including in Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014) ("Halliburton II") and Arkansas Teachers Retirement System v. Goldman Sachs Group, Inc., 955 F.3d 254 (2d Cir. 2020) ("Goldman II").

The decision below raises issues of general import concerning the ability of defendants to rebut the fraud-on-the-market presumption of reliance in connection with class certification in securities class actions. The district court permitted a class to be certified without providing Defendants any meaningful opportunity to present price impact evidence to show that the supposed corrective disclosures cited by Plaintiffs did not actually correct any prior alleged misstatements. In so doing, the district court contradicted this Court's authority and failed to appropriately consider all evidence relevant to price impact at the class-certification stage, regardless of whether that evidence overlaps to some extent with merits issues.

The district court compounded this error by also applying the incorrect legal standard to assess Defendants' price-impact challenge. The district court applied a lightened, permissive standard which merely looked to whether the alleged corrective disclosures were "relate[d] to," "concern[ing]," or "linked to the prior alleged misstatements, instead of the proper standard, which would have analyzed whether the corrective disclosures cited by Plaintiffs actually revealed any falsity in the prior alleged misstatements. As an alleged corrective disclosure does not provide evidence that an earlier alleged misstatement had price impact if that disclosure does not actually show that the prior statement was false, applying such a permissive standard imposes severe limitations on a defendant's ability to show that an alleged misstatement did not have any price impact at the time when they were allegedly corrected.

These issues, taken together, merit this Court's review. If permitted to stand, the decision below renders the fraud-on-the-market presumption of reliance essentially irrebuttable. This is especially true when combined with the now-ubiquitous "inflation maintenance" theory of securities fraud, as plaintiffs can now pursue securities fraud actions without any evidence that an alleged misstatement had any impact on share price at the time it was made. Upholding this standard would subject virtually every corporation with securities traded in the United States to potentially ruinous class action lawsuits whenever it discloses bad news, as that bad news need only to merely relate to the general subject of a prior alleged misstatement in order to obtain class certification.

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: February 16, 2021
New York, New York

Respectfully submitted,

/s/ Jared M. Gerber

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DECLARATION OF JARED M. GERBER IN SUPPORT OF MOTION BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Jared Gerber, 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 object the filing of the annexed *amicus curiae* brief. A copy of the proposed brief is annexed to this Motion.

3. The Chamber is the Nation's largest federation of business companies and associations. It directly represents 300,000 members and indirectly represents the interests of over 3 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—mainly 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 relevant 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: February 16, 2021
New York, New York

Respectfully submitted,

By: */s/ Jared M. Gerber*
Jared M. Gerber

CERTIFICATE OF COMPLIANCE

I hereby certify that on February 16, 2021, 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: February 16, 2021
New York, New York

/s/ Jared M. Gerber
Jared M. Gerber

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

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

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February 16, 2021

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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. The Chamber is the Nation's largest business federation. It directly represents 300,000 members and indirectly represents the interests of over 3 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 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 appeals, including in Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014) ("Halliburton II") and Arkansas Teachers Retirement System v. Goldman Sachs Group, Inc., 955 F.3d 254 (2d Cir. 2020) ("Goldman II").

[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 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.

SUMMARY OF ARGUMENT

If left uncorrected, the decision below threatens to make class certification all but automatic in securities class actions, thereby imposing potentially disastrous consequences on publicly traded companies in the United States. In essence, the district court permitted a class to be certified—with all of the settlement pressure that entails—without providing Defendants any meaningful opportunity to rebut the fraud-on-the-market presumption of reliance, as required by the Supreme Court's decision in Halliburton II. To the contrary, the district court accepted Plaintiffs' argument that it would be "inappropriate at the Rule 23 stage," Appx30, to allow Defendants to show that the supposed corrective disclosures cited by Plaintiffs did not correct the alleged misstatements—as would be required to establish that those alleged misstatements had price impact. Instead, the court applied a diminished standard that only considered whether the asserted corrective disclosures were "relate[d] to," "concern[ed]" or "linked" to the prior alleged misstatements. Appx31. When combined with the now-ubiquitous "inflation maintenance" theory of securities fraud, these rulings by the district court threaten to eliminate a defendant's ability to rebut the presumption of reliance at the class-certification stage, as they prevent defendants from offering evidence that alleged misstatements had no price impact on either the front-end (when they were made) or on the back-end (when they were supposedly corrected).

Accordingly, in certifying the class on this basis, the district court made at least two key errors. First, the district court accepted Plaintiffs' argument that it could not consider Defendants' showing that the alleged corrective disclosures were not corrective of the alleged misstatements at all, deeming those arguments "inappropriate" at the class-certification phase because "[l]oss causation [is a] common question[] that need not be adjudicated before a class is certified." Appx30-31 (citation omitted). That ruling contradicted this Court's authority, however, and failed to appreciate that a district court must consider all evidence relevant to price impact, even if that evidence overlaps to some extent with merits issues that should not be considered at the class-certification stage. See Ark. Tchrs. Ret. Sys. v. Goldman Sachs Grp., Inc., 879 F.3d 474, 485-86 (2d Cir. 2018) ("Goldman I").

Second, the lower court erred by applying a permissive standard in assessing Defendants' price-impact challenge to the corrective disclosures cited by Plaintiffs—asking only if those purported corrective disclosures were "relate[d] to," "concern[ing]" or "linked" to the prior alleged misstatements. Appx31. Under that expansive and amorphous standard, the district court determined that the disclosures identified by Plaintiffs could be considered "corrective"—and provide evidence that the earlier misstatements had price impact—merely because they concerned the same general "subject" as the alleged misstatements, even though

Defendants showed that they did not concern the same time period, geography, and events as those statements. Appx31. These holdings likewise contradict this Court's jurisprudence, under which a corrective disclosure must "reveal[] to the market the falsity of a prior statement," Goldman I, 879 F.3d at 480 n.3, and "describ[e] the precise fraud inherent in the alleged misstatements" or otherwise "constructively disclos[e] the fraud." In re Vivendi, S.A. Sec. Litig., 838 F.3d 223, 262 (2d Cir. 2016). In short, an alleged corrective disclosure does not provide any evidence that an earlier alleged misstatement had price impact if that disclosure does not actually show that the prior statement was false.

Because the district court's decision contravenes this Court's authority, renders the fraud-on-the-market presumption of reliance essentially irrebuttable, and threatens to impose significant costs on businesses and shareholders alike, the Court should grant the Petition for review.

ARGUMENT

I. THE DISTRICT COURT ERRED BY ACCEPTING PLAINTIFFS' CONTENTION THAT "CORRECTIVENESS" ARGUMENTS ARE INAPPROPRIATE AT THE CLASS-CERTIFICATION STAGE

In Halliburton II, the Supreme Court recognized that the fraud-on-the-market presumption of reliance is "just that"—a presumption, not conclusive evidence of the ultimate fact of price impact—and that defendants therefore have a right to present evidence to rebut the presumption prior to class certification. 573

U.S. at 279-80. To ensure defendants are afforded that right, the Supreme Court directed lower courts not 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 [fraud-on-the-market] presumption does not apply." Id. at 282. Here, Defendants proffered evidence that showed just that. While Plaintiffs allege that Defendants' misstatements maintained share price at an artificially high level and that subsequent "corrective disclosures" revealed the supposed truth, causing share prices to fall, Appx2, Appx30, Defendants established that the alleged corrective disclosures were not in fact "corrective" at all, as they did not reveal the falsity of any prior statements. Those purported corrective disclosures therefore provided no evidence that the earlier alleged misstatements had price impact. The district court, however, refused to conduct a full analysis of the alleged corrective disclosures because it agreed with Plaintiffs that these "correctiveness" arguments were "inappropriate at the Rule 23 stage" given that "[l]oss causation [is a] common question[] that need not be adjudicated before a class is certified." Appx30-31 (citation omitted). This determination was in error.

It is well-settled that a district court must make a "definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues." In re IPO Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006). As the Supreme Court has observed, a district court must make "a rigorous analysis" that Rule 23 has been satisfied, and "[f]requently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim" because "[t]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011) (citation omitted). As a result, a district court cannot refuse to consider a price impact argument at the class-certification stage merely because it involves evidence that overlaps to some extent with a merits issue, like loss causation or materiality. See, e.g., In re Allstate Corp. Sec. Litig., 966 F.3d 595, 608 (7th Cir. 2020) (vacating class certification because "a district court must be willing to consider [price impact] evidence offered by the defense" even if "the same evidence is likely to have obvious implications for the off-limits merits issues of materiality and loss causation"). Indeed, this Court held as much in Goldman I, agreeing that it was error for the district court to decline to consider price-impact evidence offered by the defendants on the grounds that the evidence was also relevant to a merits element, which the district court did not "[think] it could consider at the class certification stage." 879 F.3d at 485-86 (acknowledging that "price impact touches on" merits issues that are "not an appropriate consideration at the class certification stage," but holding it nonetheless "differs . . . in a crucial respect" because it is the "fundamental premise" underlying the presumption of reliance and therefore "has everything to do with the issue of predominance at the class certification stage") (citations omitted) (internal quotation marks omitted).

The court below therefore erred when it accepted Plaintiffs' argument that "Defendants' 'correctiveness' arguments are inappropriate at the Rule 23 stage." Appx30.

II. THE DISTRICT COURT'S LENIENT STANDARD FOR CORRECTIVE DISCLOSURES AT CLASS CERTIFICATION RENDERS THE PRESUMPTION OF RELIANCE IRREBUTTABLE

By providing uncontradicted evidence that the supposed "corrective disclosures" cited by Plaintiffs concerned time periods, geographies, and events unrelated to the earlier alleged misstatements, Defendants established that none of those asserted corrective disclosures actually revealed the falsity of any prior alleged misstatement, and therefore proved that any share price decline following those disclosures could not provide evidence that the alleged misstatements had price impact. Pet. at 15-18. However, based on its view that "Plaintiffs are *not* required to show loss causation" at the class-certification stage, Appx31, the district court declined to consider whether the alleged corrective disclosures actually corrected the challenged statements, as required to show that those statements actually had price impact. Instead, the district court applied a more permissive standard, asking only whether the purported corrective disclosures "relate[d] to," "concern[ed]" or were "linked" to the alleged misstatements. Id. In other words, the district court held that, at the class-certification stage, a purported corrective disclosure need only involve the same "subject" as the alleged misrepresentations, without requiring any evidence that it actually revealed the challenged statements were false. Id. That ruling was incorrect.

This Court has held that one can infer that a defendant's share price was artificially inflated if a corrective disclosure revealing an earlier misstatement led to a decline in the defendant's share price. See Goldman II, 955 F.3d at 265. However, this logic only applies where the alleged corrective disclosure actually "reveals to the market the falsity of a prior statement." Goldman I, 879 F.3d at 480 n.3; see also Lentell v. Merrill Lynch & Co., 396 F.3d 161, 175 n.4 (2d Cir. 2005) (stating allegations cited by plaintiffs "do not amount to a corrective disclosure . . . because they do not reveal to the market the falsity of the prior [statements]"). Absent a showing that an alleged corrective disclosure "describe[s] the precise fraud inherent in the alleged misstatements," or at least "constructively disclos[es] the fraud," Vivendi, 838 F.3d at 262, there is no basis to conclude that a subsequent share price decline actually reflects the price impact of the earlier misstatement. The district court thus erred when it concluded that price impact could be found at the class-certification stage where a corrective disclosure is merely "relate[d] to," "concern[ed]," or was "linked" to the general "subject" of the alleged misstatements, without requiring that it reveal the alleged fraud.[2]

Moreover, particularly when combined with securities plaintiffs' increasingly frequent invocation of the "inflation maintenance" theory, the district court's rule makes the *Basic* presumption of reliance essentially irrebuttable. Under the inflation maintenance theory, a court can assume that "statements have price impact not because they introduce inflation into a share price, but because they 'maintain' it." Goldman II, 955 F.3d at 264 (citation omitted). As a result, defendants generally cannot rebut the presumption of reliance in "inflation maintenance" cases by showing that there was no stock price movement on the date of the alleged misstatements—since the very rationale underlying the "inflation maintenance" theory is that the alleged misstatements have no such

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[2] The court below cited only one district court decision in support of its holding that "[a]t this stage of the litigation . . . the alleged disclosure need only 'relate[] to,' 'concern,' or be 'linked' to a specific alleged misrepresentation." Appx31 (citing In re Chi. Bridge & Iron Co. N.V. Sec. Litig., 2020 WL 1329354, at *6-7 (S.D.N.Y. Mar. 23, 2020)). In the cited decision, however, the court did not purport to apply that standard. To the contrary, it explicitly declined to adopt an "articulation of a 'correctiveness test'" at the class certification stage under which only "a limited analysis" is appropriate that considers "whether the information in the alleged corrective disclosure relates to the same subject matter [as the misrepresentation] or is wholly unrelated." In re Chi. Bridge & Iron, 2020 WL 1329354, at *5-6 (citation omitted). Instead, the decision cited by the court below applied "clear" case law requiring not only that the corrective disclosure be "linked" to a specific alleged misstatement, but also that it be "corrective" of that statement. Id. at *6 ("The analysis must focus on whether the disclosure was, in fact, corrective.").

"front-end" price impact. See id. at 265-69. By adopting an expansive standard for analyzing purported corrective disclosures identified by plaintiffs at the class certification phase, the decision below likewise threatens to impose severe limitations on a defendant's ability to show that the alleged misstatements had no price impact on the "back-end" when they were allegedly corrected. Thus, the ruling below will render the presumption of reliance irrebuttable in any case where plaintiffs self-servingly invoke the "inflation maintenance" theory and then identify a stock price drop related to the general "subject" of a prior alleged misstatement. Such a result would eviscerate the Supreme Court's holding in Halliburton II 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." 573 U.S. at 284.

III. IF LEFT INTACT, THE DECISION BELOW THREATENS TO MAKE CERTIFICATION AUTOMATIC IN SECURITIES CLASS ACTIONS, UNNECESSARILY HARMING BUSINESSES

This Court has recognized that "class certification places inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability." Hevesi v. Citigroup Inc., 366 F.3d 70, 80 (2d Cir. 2004) (citations omitted) (internal quotation marks omitted). That risk is particularly acute in the securities class-action context. See Blue Chip Stamps v.

Manor Drug Stores, 421 U.S. 723, 739 (1975) ("There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general."); see also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 149 (2008) (noting potential for "plaintiffs with weak claims to extort settlements from innocent companies" in securities cases).

By essentially eliminating a defendant's ability to disprove price impact when an alleged misstatement was supposedly corrected, the decision below threatens to make class certification automatic in securities class actions, and will therefore only exacerbate the well-recognized harms that such actions can impose on businesses and investors alike. See, e.g., Goldman II, 955 F.3d at 269 (noting "the widespread understanding that class certification can pressure defendants into settling large claims, meritorious or not, because of the financial risk of going to trial"); see also U.S. Chamber Inst. for Legal Reform, Containing the Contagion: Proposals to Reform the Broken Securities Class Action System 2 (Feb. 2019).

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

Dated: February 16, 2021
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 29 and FED. R. APP. P. 5(c) because the brief contains 2,529 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f). This Petition 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 the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: February 16, 2021
New York, New York

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