United States Court of Appeals

for the

Fifth Circuit

Case No. 17-20503

ST. LUCIE COUNTY FIRE DISTRICT FIREFIGHTERS' PENSION TRUST FUND; FIRE AND POLICE RETIREE HEALTH CARE FUND, SAN ANTONIO, on behalf of themselves and all others similarly situated; UNIVERSAL INVESTMENT GESELLSCHAFT M.B.H.; SJUNDE AP-FONDEN; GAMCO GLOBAL GOLD, NATURAL RESOURCES & INCOME TRUST, lead plaintiff; GAMCO NATURAL RESOURCES, GOLD & INCOME TRUST,

Plaintiffs-Appellees,

– v. –

JOSEPH H. BRYANT; JAMES W. FARNSWORTH; JOHN P. WILKIRSON; PETER R. CONEWAY; HENRY CORNELL; JACK E. GOLDEN; N. JOHN LANCASTER; JON A. MARSHALL; KENNETH W. MOORE; J. HARDY MURCHISON; MICHAEL G. FRANCE; KENNETH A. PONTARELLI; SCOTT L. LEBOWITZ; MYLES W. SCOGGINS;

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, CASE NO. 4:14-CV-3428
THE HONORABLE NANCY F. ATLAS

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF REVERSAL

Of Counsel
STEVEN P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER LITIGATION CENTER
1615 H. St. NW
Washington, D.C. 20062
(202) 463-5337

VINCENT LEVY
DANIEL M. SULLIVAN
SARAH M. STERNLIEB
HOLWELL SHUSTER & GOLDBERG LLP
750 Seventh Avenue, 26th Floor
New York, New York 10019
(646) 837-5151

Attorneys for *Amicus Curiae*

D. JEFF VAN STEENBERGEN; MARTIN H. YOUNG, JR.; WILLIAM P. UTT; COBALT INTERNATIONAL ENERGY, INCORPORATED; GOLDMAN SACHS GROUP, INCORPORATED; RIVERSTONE HOLDINGS, L.L.C.; THE CARLYLE GROUP, L.P.; GOLDMAN SACHS & COMPANY; MORGAN STANLEY & COMPANY, L.L.C.; CREDIT SUISSE SECURITIES (USA), L.L.C.; CITIGROUP GLOBAL MARKETS, INCORPORATED; JP MORGAN SECURITIES, L.L.C.; TUDOR, PICKERING, HOLT & COMPANY SECURITIES, INCORPORATED; DEUTSCHE BANK SECURITIES, INCORPORATED; RBC CAPITAL MARKETS, L.L.C.; UBS SECURITIES, L.L.C.; HOWARD WEIL, INCORPORATED; STIFEL, NICOLAUS & COMPANY, INCORPORATED; CAPITAL ONE SOUTHCOAST, INCORPORATED; LAZARD CAPITAL MARKETS, L.L.C.; FRC FOUNDERS CORPORATION; ACM, LIMITED,

Defendants-Appellants.

CERTIFICATE OF INTERESTED PERSONS

Case No. 17-20503

St. Lucie County Fire District Firefighters' Pension Trust Fund, et al. v. Cobalt International Energy, Inc., 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.

Counsel for *Amicus Curiae*

1. Vincent Levy
   Daniel M. Sullivan
   Sarah M. Sternlieb
   HOLWELL SHUSTER & GOLDBERG LLP
   750 Seventh Avenue, 26th Floor
   New York, New York 10019
   Telephone: (646) 837-5151

2. Steven P. Lehotsky
   Janet Galeria
   U.S. CHAMBER LITIGATION CENTER
   1615 H. St. NW
   Washington, D.C. 20062
   Telephone: (202) 463-5337

Dated: October 17, 2017

/s/ Daniel M. Sullivan
Daniel M. Sullivan

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1
SUMMARY OF THE ARGUMENT 2
ARGUMENT 4
I. THE DISTRICT COURT MISAPPLIED *BASIC*'S BURDEN-SHIFTING FRAMEWORK 4
II. THE DISTRICT COURT COMPOUNDED ITS ERROR BY REQUIRING DEFENDANTS TO EXPLAIN UNRELATED STOCK DROPS 11
III. THE DISTRICT COURT'S DECISION WOULD INCREASE ABUSIVE SECURITIES CLASS ACTIONS AND PUNISH COMPANIES FOR DISCLOSING NEGATIVE INFORMATION 12
CONCLUSION 16
CERTIFICATE OF COMPLIANCE 17
CERTIFICATE OF SERVICE 18

TABLE OF AUTHORITIES

Cases

Basic Inc. v. Levinson, 485 U.S. 224 (1988) .... *passim*

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975)..............................13

City of Arlington v. F.C.C., 668 F.3d 229 (5th Cir. 2012)................................. 6, 11

Comcast Corp. v. Behrend, 569 U.S. 27 (2013) 2, 4, 5, 9, 10

Erica P. John Fund, Inc. v. Halliburton Co., No. 15-11096 (5th Cir. 2016) 2

Erica P. John Fund, Inc. v. Halliburton, 563 U.S. 804 (2011) 9

Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014)............. *passim*

IBEW Local 98 Pension Fund v. Best Buy Co., 818 F.3d 775 (8th Cir. 2016) 6

Ludlow v. BP, P.L.C., 800 F.3d 674 (5th Cir. 2015) 9, 10

Madison v. Chalmette Ref., L.L.C., 637 F.3d 351 (5th Cir. 2011) 4

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999)...12

Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.,
482 F.3d 372 (5th Cir. 2007)...13

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) 11

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148 (2008).............13

Strougo v. Barclays PLC, No. 16-1912 (2d Cir. 2016) 2

Rules

Fed. R. Civ. P. 23 .... *passim*

Fed. R. Evid. 301 .... 3, 6, 11

Other Authorities

Cornerstone Research, *Securities Class Action Filings—2017 Midyear Assessment* (2017), https://tinyurl.com/utal28 14

NERA Econ. Consulting, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* (Jan. 2017), https://tinyurl.com/huw5q8y 14

U.S Chamber Inst. for Reform, *Economic Consequences: The Real Cost of U.S. Securities Class Action Litigation* (Feb. 2014), https://tinyurl.com/yd96hm84 14

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the largest business federation in the world. It represents 300,000 members directly, and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases raising issues concerning the business community.

This appeal concerns interests central to the Chamber's mission. Many of the Chamber's members are public companies with exposure to securities class actions. Given the implications of class-certification decisions, the Chamber's members are keenly interested in ensuring that the courts faithfully apply Rule 23's strictures in securities cases. The district court's decision, which curtails the right of defendants to rebut the *Basic* presumption of reliance at the class-certification stage notwithstanding the Supreme Court's instructions in *Halliburton II* that they may do just that, directly affects the Chamber's members. The Chamber has filed

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than Amicus and its counsel made a monetary contribution to fund the preparation or submission of this brief.

amicus briefs in numerous cases, including *Halliburton II* itself, implicating issues much like those presented here. *See, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.* ("*Halliburton II*"), 134 S. Ct. 2398 (2014); *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 15-11096 (5th Cir. 2016); *Strougo v. Barclays PLC*, No. 16-1912 (2d Cir. 2016).

SUMMARY OF THE ARGUMENT

The district court's ruling fundamentally misapplied *Basic*'s burden-shifting framework at the class-certification stage. Defendants-appellants presented direct evidence that the representations challenged in plaintiffs' complaint did not affect the price of Cobalt securities. Rather than scrutinize defendants' evidence to evaluate whether the *Basic* presumption of reliance had been rebutted, the district court brushed the evidence aside in a footnote, reasoning that the issue goes to the merits. The court then accepted plaintiffs' allegations as true and certified a class.

This was reversible error. The Supreme Court held in *Comcast Corp. v. Behrend*, in no uncertain terms, that a plaintiff seeking certification of a Rule 23(b)(3) class must prove as a matter of fact—not pleading—that common issues predominate, even where the factual disputes (and evidence) relevant to the certification decision overlap with the merits. And in *Halliburton II*, although the Court reaffirmed the *Basic* presumption of reliance (which assumes, among other things, that material misrepresentations affect the price of a security traded on an

efficient market), the Court held that it was just that—an evidentiary presumption. As such, the Court held, securities defendants resisting class certification *can* offer direct evidence tending to disprove the *Basic* presumption, and if they succeed in that effort, no class will be certified. Federal Rule of Evidence 301, which governs evidentiary presumptions in civil cases, is to the same effect. The district court's failure even to consider defendants' evidence was thus clear error.

And the district court compounded its error by requiring defendants to make a further showing—namely, to provide an explanation for price drops that were factually unrelated to the misstatements alleged in plaintiffs' complaint. This, again, misunderstands *Basic*'s teachings. Once defendants produce evidence tending to disprove price impact, the *Basic* presumption disappears from the case, and defendants have no burden to do anything more. Instead, under Federal Rule of Evidence 301, the burden remains on plaintiffs to establish reliance, which they cannot do class-wide, thus defeating class certification.

The district court's judgment was therefore erroneous and, if affirmed, it is bound to exacerbate the many ills associated with improperly certified class actions—including the imposition of unwarranted defense costs and undue settlement pressures on innocent securities issuers. This Court should reverse the district court's class-certification decision.

ARGUMENT

I. THE DISTRICT COURT MISAPPLIED *BASIC*'S BURDEN-SHIFTING FRAMEWORK

A. Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," and the exception is justified only "if the 'trial court is satisfied, after a rigorous analysis, that the prerequisites of'" Rule 23, including the predominance requirement, are met as a matter of fact, not just a matter of pleading. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Wal-mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011)). "[T]he party seeking certification [] bears the burden of establishing that the requirements of Rule 23 have been met." *Madison v. Chalmette Ref., L.L.C.*, 637 F.3d 551, 554–55 (5th Cir. 2011). This much is common, and well-trod, ground.

It is also common ground that, if the putative class representative in a securities class action raising Rule 10b-5 claims is unable to show reliance by class members through a common method, there can be no class action under Rule 23(b)(3), because individual issues will predominate. The only way to certify a class in such cases is to invoke the fraud-on-the-market presumption established in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). *Basic*'s presumption of reliance really comprises two "constituent presumptions": First, "if a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded

in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price." *Halliburton II*, 134 S. Ct. at 2414. And second, "if the plaintiff also shows that he purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased the stock in reliance on the defendant's misrepresentation." *Id.* "[W]ithout the[se] presumption[s]," the Supreme Court has held, "a Rule 10b-5 suit cannot proceed as a class action" under Rule 23(b)(3). *Id.* at 2415.

But *Basic* is not a blank check. On the contrary, the Supreme Court was careful in *Basic* to state that the plaintiff must prove the prerequisites for the presumption to apply, and that defendants may rebut the presumption with appropriate evidence. *Basic*, 485 U.S. at 248–49. Therefore, in considering whether to certify a Section 10(b) class, a district court's "duty to take a close look at whether common questions predominate over individual ones" (*Comcast*, 569 U.S. at 34) must include a careful scrutiny of whether the plaintiff has proved the *Basic* presumption applies and whether the defendant has rebutted it. This fact-specific inquiry, *Halliburton II* confirmed, includes consideration of evidence presented by the defendants showing the absence of "price impact." Short-circuiting these inquiries violates the Supreme Court's clear commands, and vitiates Rule 23's protections.

B. Central to the proper application of *Basic* is a burden-shifting framework. *Basic* articulated an evidentiary presumption under Federal Rule of Evidence 301, which governs "all presumptions in civil cases . . . unless a federal statute or these rules provide otherwise." Fed. R. Evid. 301; *see Basic*, 485 U.S. at 245 (citing Fed. R. Evid. 301). Rule 301 states, "[t]he 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." Fed. R. Evid. 301. Thus, "the *only* effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact" to the defendant. *City of Arlington v. F.C.C.*, 668 F.3d 229, 256 (5th Cir. 2012) (emphasis in original). Once the defendant produces evidence that would permit a reasonable jury to infer the presumption is incorrect, "the presumption simply disappears from the case." *Id.*; *see also IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 782 (8th Cir. 2016).

The operation of *Basic*, as the Supreme Court described it in *Halliburton II*, follows this same course. "Under *Basic*'s fraud-on-the-market theory, market efficiency and the other prerequisites for invoking the presumption constitute an *indirect way* of showing price impact." *Halliburton II*, 134 S. Ct. at 2415 (emphasis added). That "indirect proxy" does not "preclude direct evidence" from the defendant, even at the class-certification stage. *Id.* In other words, the

defendant may rebut the presumption—and make it disappear from the case—by introducing evidence showing that, as a matter of fact, the alleged misrepresentation did not affect the stock price (i.e., lacked "price impact"). *Id.* Once the defendant has presented "direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price," the Supreme Court has held, then "the *Basic* presumption does not apply." *Id.* at 2416. And without that presumption, there can be no class action.

C. Against this background, the district court's error is plain. In the proceedings on appeal, defendants-appellants sought to introduce evidence of no price impact in order to rebut *Basic*'s presumption. Defendants-appellants showed that the alleged misstatements did not affect the price of Cobalt's stock when the statements were made. *See* Def. Br. at 35. Plaintiffs, however, claimed that the alleged misstatements must have affected the market price because, when the truth supposedly came out in so-called corrective disclosures, the price dropped. Against these allegations, and in an effort to demonstrate as a matter of fact that there was no price impact, defendants produced evidence showing that the supposed corrective disclosures did not in fact correct the alleged misstatements, which meant that there was no evidence of a decline in stock price related to the correction of an alleged misstatement.

But the district court declined to consider defendants' evidence in a short footnote. The only reason the court gave was that "whether the statements were corrective" is a question for the merits and therefore "has no bearing on the predominance inquiry for class certification." Op. at 16 n.2.

This wave-of-the-hand holding violated both Rule 23 and the *Basic* line of cases culminating in *Halliburton II*. For one thing, it is hard to conceive of a clearer violation of the Supreme Court's command that Rule 23 "does not set forth a mere pleading standard," and that the necessary analysis "will frequently entail overlap with the merits of the plaintiff's underlying claim." *Comcast*, 569 U.S. at 33-34 (quotation marks omitted). The district court had a "duty to take a close look at whether common questions predominate over individual ones" as a matter of fact, but instead of giving the evidence that "close look," the court closed its eyes. *Id.* (quotation marks omitted).

Beyond that, *Halliburton II* squarely held that defendants may rebut the *Basic* presumption at the class-certification stage by offering evidence demonstrating a lack of price impact. 134 S. Ct. at 2411. If a defendant has the right to rebut the presumption by presenting evidence showing that the alleged misstatement did not affect the stock price when made, as it surely does (*id.*), then it must also have the right to rebut a plaintiff's alternative method of showing class-wide price impact via corrective disclosures. And if the defendant's evidence

establishes that the market price did not move when the alleged misrepresentation was made or when it was corrected, then the plaintiff is left without a means of proving reliance on a class-wide basis. The result is that reliance must be proved individually, a class-member-by-class-member inquiry that overwhelms any common issues and defeats class certification. *See id.* at 2416 ("Price impact is thus an essential precondition for any Rule 10b-5 class action.").

D. In their response to defendants' petition under Rule 23(f), plaintiffs sought to defend the district court's ruling on the basis that, in *Erica P. John Fund, Inc. v. Halliburton* ("*Halliburton I*"), 563 U.S. 804 (2011), the Supreme Court held that a plaintiff need not prove loss causation to certify a class. But context is critical. The fact that a *plaintiff* does not bear the burden of proof on the question of *loss causation* at the class-certification stage, which is the holding of *Halliburton I*, does not mean that *defendants* should be unable to adduce evidence tending to negate *price impact* in order to rebut *Basic*'s presumption of reliance, as the district court here held. Indeed, *Halliburton II* holds precisely the contrary.

Nor will plaintiffs fare better in relying upon this Court's decision in *Ludlow v. BP, P.L.C.*, 800 F.3d 674 (5th Cir. 2015), which they also invoked at the petition stage. That case concerned the Supreme Court's instructions in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), that a plaintiff seeking class certification must adduce a common method of ascertaining damages. Applying that principle, this

Court in *Ludlow* held that a securities plaintiff's ability to offer a common method of calculating damages did not turn on whether events alleged by the plaintiffs to be "corrective" were corrective as a matter of fact. 800 F.3d at 688. This was especially so because, in *Ludlow* (unlike here), at least "[s]ome" of the corrective events were "unequivocally connected to the alleged misrepresentations." *Id.* at 687. In other words, while the damages approach the plaintiffs presented in *Ludlow* might not succeed in proving all the damages they sought, it furnished a "class-wide *approach*" to determining damages, which is what *Comcast* requires. *See id.* at 686 (quoting district court). *Ludlow*'s holding, therefore, has nothing to do with the question presented here: Whether a defendant can adduce evidence rebutting price impact in order to negate the *Basic* presumption. To that quite different question, again, *Halliburton II* supplies an affirmative answer.

* * * *

This is not a close case. All agree that Cobalt's stock price did not change at the time of the alleged misstatements. That means the *Basic* presumption should disappear from the case, and with it the ability to certify a class, if defendants offer evidence that there was no price impact at the time of any corrective disclosure. In other words, if the allegedly corrective disclosures that plaintiffs recite did not in fact correct the alleged misstatements they challenge, then defendants will have displaced the presumption of price impact with direct evidence of its absence. To

paraphrase the Supreme Court, although the evidence defendants presented "is also highly relevant at the merits stage," there is "no reason to artificially limit the inquiry at the class certification stage to indirect evidence of price impact." *Halliburton II*, 134 S. Ct. at 2417.

II. THE DISTRICT COURT COMPOUNDED ITS ERROR BY REQUIRING DEFENDANTS TO EXPLAIN UNRELATED STOCK DROPS

Not only did the district court deny defendants here their right to present evidence rebutting the *Basic* presumption, it imposed upon them an additional, unnecessary burden. Specifically, the district court required defendants, in order to rebut the *Basic* presumption, to provide alternative explanations for the price drops plaintiffs associated with the supposed corrective disclosures, drops that defendants had shown to be unrelated to the alleged fraud underlying the suit.

As explained above, defendants met their burden under *Halliburton II*, thus taking the *Basic* presumption out of this case, when they presented evidence that severed the link between the alleged misstatements and changes in the price of Cobalt securities. This left the burden of persuasion on the question of predominance—unmitigated by any presumption—squarely and entirely on plaintiffs. *See* Fed. R. Evid. 301; *Basic*, 485 U.S. at 245; *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993) (describing burden shifting framework under Rule 301); *City of Arlington*, 668 F.3d at 256 ("The burden of

persuasion with respect to the ultimate question at issue remains with the party on whom it originally rested.”).

Nowhere in any case applying *Basic* has the Supreme Court ever suggested that the non-moving party is required to not only (1) “sever[] the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff” (*Halliburton II*, 134 S. Ct. at 2408), but also (2) sever the link between disclosures unrelated to the alleged misrepresentation and the stock’s price. No surprise, for such requirement would make no sense. The first showing displaces the presumption of reliance, shifting back to *plaintiffs* “the burden of proving—before class certification—that [predominance] is met.” *Halliburton II*, 134 S. Ct. at 2412. There was no basis to require *defendants* to make a further showing when the *Basic* presumption had been displaced, and with it plaintiffs’ ability to prove predominance and to certify a class.

III. THE DISTRICT COURT’S DECISION WOULD INCREASE ABUSIVE SECURITIES CLASS ACTIONS AND PUNISH COMPANIES FOR DISCLOSING NEGATIVE INFORMATION

A. Having granted defendants’ petition under Rule 23(f), this Court is obviously aware of the need to ensure that securities class actions are certified only when warranted. As a general matter, class actions enable plaintiffs to litigate claims they otherwise could not, which creates a “greater [] likelihood of abuse.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842 (1999). With respect to securities

class actions in particular, the Supreme Court and other federal courts have warned repeatedly of the significant costs and pressures that improperly certified classes can place upon businesses. The "potential for uncertainty and disruption in a [securities fraud] lawsuit allow[s] plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 163 (2008); *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007) (same). If not properly controlled, class certification ensures 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 proportion to its prospect of success at trial." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975).

The district court's decision is a textbook case in point. By turning a blind eye to evidence rebutting price impact, the district court's ruling deprives defendants of a fundamental safeguard the Supreme Court recognized in both *Basic* and *Halliburton II*. Moreover, by requiring defendants to present an alternative explanation for a back-end price drop, the district court further raised the bar, and the risks of an improperly certified class, on defendants. The result is to make the *Basic* presumption effectively irrebuttable at the class-certification stage, improperly ratcheting up the settlement pressure when no class action is warranted.

B. The burdens of litigating securities class actions are ever increasing, and the decision of the district court, if affirmed, would only exacerbate this state of affairs. In the first half of 2017, 226 securities class cases were brought—135% above the 1997-2016 average of 96 cases. Cornerstone Research, *Securities Class Action Filings—2017 Midyear Assessment*, 5–6 (2017), https://tinyurl.com/utal28. At this rate, filing activity this year is predicted to be at its highest level in the past 21 years. *Id* at 6.

Moreover, the escalating cost of litigating securities class actions places enormous pressure on companies to settle securities class actions as early as possible. The aggregate amount paid to settle securities class actions in 2016 was about $6.4 billion (NERA Econ. Consulting, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* 35 (Jan. 2017), https://tinyurl.com/huw5q8y), with an average settlement of $72 million (*id.* at 28). And these numbers do not account for defense costs, which are estimated to be 25 to 35% of the settlement, with some reaching over 50% of the settlement. U.S. Chamber Inst. For Reform, *Economic Consequences: The Real Cost of U.S. Securities Class Action Litigation* 10 n.20 (Feb. 2014), https://tinyurl.com/yd96hm84 (citing John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1546 (2006)).

C. The decision below has another, even more perverse consequence. Under the district court's reasoning, any piece of information that emerges around the time of a decline in stock price could irrebuttably support an order certifying a class, no matter how tenuous the link between the piece of information that allegedly led to the price decline and the alleged misrepresentation challenged in the complaint. Thus, the unintended consequence of the district court's fast-track approach to class certification, with all its attendant costs and settlement pressure, is to punish companies that, faced with new information likely to result in a decline in a stock price, decide to keep investors informed. The approach will instead reward companies that keep mum—precisely the harm for which plaintiffs claim to seek a remedy. That result, so antithetical to the disclosure ethic that animates the securities laws, harms both corporations and their shareholders. It has no basis in law and should not be countenanced.

CONCLUSION

The Court should reverse the district court's order certifying a class.

Dated: October 17, 2017

Respectfully submitted,

By: /s/ Daniel M. Sullivan
Daniel M. Sullivan

Of Counsel
Steven P. Lehotsky
Janet Galeria
U.S. CHAMBER
LITIGATION CENTER
1615 H. St. NW
Washington, D.C. 20062
Telephone: (202) 463-5337

Vincent Levy
Daniel M. Sullivan
Sarah M. Sternlieb
HOLWELL SHUSTER & GOLDBERG LLP
750 Seventh Avenue, 26th Floor
New York, New York 10019
Telephone: (646) 837-5151
Facsimile: (646) 837-5150

Attorneys for *Amicus Curiae*
The Chamber of Commerce
Of the United States of America

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 3515 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).

2. 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 this brief has been prepared in Microsoft Word in a proportionally spaced typeface using Times New Roman 14 point font.

Dated: October 17, 2017

/s/ Daniel M. Sullivan

Daniel M. Sullivan

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on October 17, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 17, 2017

/s/ Daniel M. Sullivan
Daniel M. Sullivan