16-450-cv

United States Court of Appeals for the Second Circuit

BARBARA STROUGO, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs-Respondents,

— v. —

BARCLAYS PLC, *et al.*,

Defendants-Petitioners.

FROM AN ORDER GRANTING CERTIFICATION OF CLASS
ENTERED ON FEBRUARY 2, 2016 BY THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
14-CV-5797 (SAS) THE HONORABLE SHIRA A. SCHEINDLIN

MOTION OF 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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RULE 26.1 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 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 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 plaintiffs' burden to invoke the fraud-on-the-market presumption of reliance to satisfy the predominance requirement of FRCP 23 at the class certification stage, and the effect of such presumption once established. The District Court certified a class here based on criteria applicable to many American businesses, without requiring any empirical showing of a cause and effect relationship between unexpected news and the market price of the stock. If permitted to stand, the decision below would subject virtually every corporation of decent size 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 their brief, the Chamber respectfully requests leave to file its *amicus curiae* brief in support of Defendants-Petitioners.

Dated: February 23, 2016

Respectfully Submitted,

By: /s/ Lewis J. Liman
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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 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 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 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: February 23, 2016

Respectfully Submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2016, 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
February 23, 2016

/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 PERMISSION TO APPEAL PURSUANT TO FED. R. CIV. P. 23(F)

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

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1(b) of the United States Court of Appeals for the Second Circuit, 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.

ARGUMENT

In Halliburton II, the Supreme Court reaffirmed that securities class action plaintiffs may rely on the "fraud-on-the-market" presumption arising from the existence of an efficient market—if proven—to satisfy their initial burden to show that a misrepresentation had a "price impact," and, thus, that the predominance requirement of Federal Rule of Civil Procedure ("FRCP") 23 is met. 134 S. Ct. at 2413 (citing Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988)). But, critically, the Court also held that defendants have the right to rebut that presumption at the class certification stage by "any showing that severs the link" between the alleged misstatement and the stock's market price. Halliburton II, 134 S. Ct. at 2415. In such instance, the burden shifts back to the plaintiffs to "*prove*—not simply plead" price impact under the "rigorous" standards required to satisfy the predominance requirement. Id. at 2403-04 (emphasis in original); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

As described further below, the Chamber agrees with Defendants-Petitioners that the decision below flouts these principles and invites the filing of meritless and abusive securities class actions. Indeed, under the District Court's reasoning, virtually every company whose securities trade in the United States is prey to a mammoth securities class action lawsuit.

This is not the only recent case in which a district court in this Circuit has misapplied FRCP 23's requirements to relieve plaintiffs of their burdens to prove market efficiency. This Court recently granted a petition pursuant to FRCP 23(f) in In re Goldman Sachs Group Securities Litigation, No. 15-3179 (Jan. 28, 2016), and currently has a FRCP 23(f) petition before it in In re Petrobras Securities Litigation, No. 16-463 (Feb. 16, 2016), both of which present strikingly similar concerns. There is a compelling need for this Court to review these issues and provide direction to the district courts regarding the minimum requirements for subjecting a company to a securities class action, "with all that entails." Halliburton II, 134 S. Ct. at 2415.

I. THE DECISION BELOW IS CONTRARY TO *HALLIBURTON II* AND OTHER SUPREME COURT DECISIONS

A. The District Court Erroneously Relieved Plaintiffs Of Their Burden Of Production To Invoke The *Basic* Presumption

The District Court held that Plaintiffs need not present any *direct* evidence of market efficiency—*i.e.*, a causal relationship between unexpected news and the market price—and instead may rely solely on *indirect* evidence of such efficiency, such as an exchange listing, trading volume, and analyst coverage. That decision fundamentally misunderstands the Basic inquiry. The Basic presumption is "premised on the understanding that in an efficient market, all publicly available information is rapidly incorporated into, and thus transmitted to

investors through, the market price." Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1195 (2013). However, Halliburton II made clear that the Basic presumption "does not alter the elements of the Rule 10b-5 cause of action," 134 S. Ct. at 2412, and that consequently Plaintiffs must offer *proof* of the Basic presumption's prerequisites, or else prove price impact directly. Id. at 2416. Thus, direct evidence of cause and effect is "the most important" factor to consider in establishing efficiency because, "[w]ithout the demonstration of . . . a causal relationship, it is difficult to presume that the market will integrate the release of material information about a security into its price." Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 207 (2d Cir. 2008).

The District Court's reasoning, however, would apply to most public companies,[2] effectively relieving plaintiffs of their obligation to prove market efficiency, creating an automatic presumption of predominance in most securities cases, and eviscerating the "rigorous" analysis that FRCP 23 requires. See Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013); Wal-Mart, 131 S. Ct. at 2551.

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[2] For example, according to a 2005 study by the Securities and Exchange Commission ("SEC"), 6,473 of the 9,428 public companies (68.7%) were listed on one of the "national" exchanges (NYSE, NASDAQ, and AMEX). See SEC, Background Statistics: Market Capitalization & Revenue of Public Companies I-5 (2005), https://www.sec.gov/info/smallbus/acspc/appendi.pdf.

B. The District Court Erroneously Relieved Plaintiffs Of Their Burden Of Persuasion Once The Presumption Was Rebutted

In Halliburton II, the Supreme Court made clear that market efficiency—even if shown—does not establish an irrebuttable presumption of price impact, and that, at the class certification stage, the defendant can rebut the plaintiffs' "indirect way of showing price impact" (*i.e.*, via the fraud-on-the-market presumption) by providing "direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price." 134 S. Ct. at 2415-16. The burden then shifts back to plaintiffs to prove price impact, which is "an essential precondition for any Rule 10b-5 class action." Id. at 2416.

Here, Defendants came forward with undisputed evidence that the only alleged misstatements remaining in the case did not cause any statistically significant price increase. The District Court, however, brushed this evidence aside and instead relied on Plaintiffs' mere allegations that the supposed misrepresentations "maintained" inflation in the stock price because it believed Defendants bore the ultimate burden to prove lack of price impact. But, under Federal Rule of Evidence ("FRE") 301—which governs the effects of the fraud-on-the-market presumption, see Basic, 485 U.S. at 245 (citing FRE 301)—when a defendant produces evidence which, "when viewed in the light most favorable to [defendant], would permit a reasonable jury to infer" that the presumption is incorrect, the presumption is rebutted and "ceases to operate." ITC Ltd. v.

Punchgini, Inc., 482 F.3d 135, 149 (2d Cir. 2007). The burden then shifts back to the plaintiff to prove the fact without benefit of the presumption. Id.

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 in every case to satisfy the predominance requirement simply by pleading market efficiency and without sustaining their burden to prove price impact. This test effectively creates an irrebuttable presumption contrary to Halliburton II and FRE 301.

C. The District Court's Application Of The *Affiliated Ute* Presumption Would Make Certification Automatic In All Securities Fraud Cases

Finally, having eviscerated Halliburton II's requirement to show price impact, the District Court then issued a ruling that—if followed—would relieve Plaintiffs even of the relaxed Basic burden. It held Plaintiffs could invoke the presumption articulated in Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972), on the theory that the alleged misrepresentations were also omissions because Defendants failed to disclose the facts that made such statements allegedly false. That is not the law. See Starr ex rel. Estate of Sampson v. Georgeson S'holder, Inc., 412 F.3d 103, 109 n.5 (2d Cir. 2005). If it were, plaintiffs could satisfy the Affiliated Ute burden by pleading every misstatement as an omission. See Joseph v. Wiles, 223 F.3d 1155, 1163 (10th Cir. 2000) (noting that this approach would "swallow the reliance requirement" entirely).

II. THERE IS A COMPELLING NEED FOR IMMEDIATE REVIEW

The District Court's errors, particularly when taken together, 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 in kind from that which accompanies litigation in general"); Hevesi v. Citigroup Inc., 366 F.3d 70, 80 (2d Cir. 2004) (noting that "settlements in large class actions can be divorced from the parties' underlying legal positions" given pressure they create on defendants).

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 the Southern District of New York where Basic and Halliburton II have been misapplied, implicating precisely the risks of vexatious lawsuits.

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, according to research by the Stanford Law School Securities Class Action Clearinghouse ("Stanford Clearinghouse").[3] 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).

Plaintiffs' targeting of defendants likewise often has little to do with the merits. While the implied private right of action under Section 10(b) and Rule 10b-5 is intended to provide a remedy for investors who suffer genuine injury from securities fraud, securities class actions are routinely filed in the wake of almost any negative announcement by a company that corresponds to a stock price decline. Statistics from the Stanford Clearinghouse demonstrate that securities

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

fraud suits often target particular industry sectors, in many cases ensnaring a large portion of the publicly traded companies in a given industry.[4] For example, in 2010, new securities fraud class actions were filed against 5.4 percent of S&P 500 companies, but the figures were 15.4 percent for healthcare companies, 10.3 percent for financial companies, and 7.7 percent for energy companies.[5]

Even absent the District Court's hyper-lenient approach to certifying securities class actions, securities fraud class actions led to over $1 billion in settlements in 2014 (the last year for which such data is available), with an average settlement of $17 million per case.[6] Defense costs in these cases have been estimated to range from 25 to 35 percent of the settlement value. See John C. Coffee, Jr., Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation, 106 Colum. L. Rev. 1534, 1546 (2006). The District Court's approach, if permitted to stand, would only exacerbate these burdens. Such costs are not isolated to companies against which suits have been brought. They are

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[4] See Stanford Clearinghouse, Securities Class Action Filings: 2013 Mid-Year Assessment 8 (2013), http://securities.stanford.edu/clearinghouse_research/2013_YIR/Cornerstone-Research-Securities-ClassAction-Filings-2013-MYA.pdf.

[5] Id. Because securities fraud cases can take multiple years to resolve, the filing of a significant number of cases against an industry in one year can mire that industry in litigation for years to come.

[6] See Stanford Clearinghouse, Securities Class Action Settlements: 2014 Review and Analysis 3 (2015), http://securities.stanford.edu/research-reports/1996-2014/Settlements-Through-12-2014.pdf.

spread to 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 W. Bratton & Michael L. 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.") (citation omitted).

This Court's review is urgently needed to address the extreme burdens and minimal benefits created by the District Court's approach.

CONCLUSION

For the foregoing reasons, the Court should grant the Defendants-Petitioners' FRCP 23(f) petition.

Dated: February 23, 2016

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CERTIFICATE OF COMPLIANCE

This brief complies with the page limitations of Fed. R. App. P. 29(d) because does not exceed 10 pages, one-half the maximum length 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(a)(7)(B)(iii).

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: February 23, 2016

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