15-3179-cv

United States Court of Appeals
for the Second Circuit

IN RE GOLDMAN SACHS GROUP, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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 take no position with regards 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 class action appeals, including in Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014) ("Halliburton II").

This Federal Rules of Civil Procedure ("FRCP") 23(f) petition involves significant issues regarding the standard 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 District Court's holding raises issues of general import concerning the standard a defendant must meet to rebut the fraud-on-the-market presumption at the class certification stage. The District Court's decision established a standard that to "rebut" the presumption, the defendant must "demonstrate a complete absence of price impact" – that is inconsistent both with Halliburton II and Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), and with Federal Rule of Evidence 301, and is so high that as a practical matter it could never be met. If not reversed, it would undermine the "rigorous" standards Wal-Mart and Halliburton II require plaintiffs to meet for class certification and generate the "in terrorem" effect that application of those standards is intended to forestall.

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: October 15, 2015

Respectfully Submitted,

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DELCARATION 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 take no position with regards 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 standard under which district courts can properly certify securities class actions. In the attached *amicus curiae* brief, 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 well-settled Supreme Court cases, as well as the federal law governing the burden of producing evidence to rebut presumptions.

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: October 15, 2015

Respectfully Submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2015, 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, to be made 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.

Further, I hereby certify that on October 15, 2015, I have sent the Motion and attachments of *Amicus Curiae*, the Chamber of Commerce of the United States of America, in support of the Defendants-Petitioners via electronic mail to the following parties:

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Dated: New York, New York
October 15, 2015

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15-3179-cv

United States Court of Appeals for the Second Circuit

ARKANSAS TEACHERS RETIREMENT SYSTEM, WEST VIRGINIA INVESTMENT MANAGEMENT BOARD, PLUMBERS AND PIPEFITTERS PENSION GROUP,

Lead Plaintiffs-Respondents,

— v. —

GOLDMAN SACHS GROUP, INC., LLOYD C. BLANKFEIN, DAVID A. VINIAR, GARY D. COHN,

Defendants-Petitioners,

SARAH E. SMITH,

Defendant.

(Caption Continued on Inside Cover)

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)

On Petition from an Order Granting Class Certification Entered on September 24, 2015 by the United States District Court for the Southern District of New York
Case No. 10 CIV. 03461 (PAC)

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Consolidated Plaintiffs-Respondents,

PENSION FUNDS,

Plaintiff.

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.

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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 has received Defendants-Petitioners' consent for the filing of this brief. Plaintiffs-Respondents have advised the Chamber that they take no position with regards to this brief.

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 are adversely affected by the District Court's decision relieving the Plaintiffs of their burden to show

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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.

price impact once the Defendants made a showing of absence of price impact. Further, the Chamber has long been concerned about the costs that class action lawsuits—and particularly securities class actions—impose on the American economy. To that end, the Chamber regularly files *amicus curiae* briefs in various class action appeals, including in Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014) ("Halliburton II").

SUMMARY OF ARGUMENT

In Halliburton II, the Supreme Court established an important rule of securities class action law: Although the plaintiff in a securities class action can rely on the existence of an efficient market as "indirect" evidence to satisfy its initial burden to show that a misrepresentation had "price impact" and, thus, that the predominance standard is satisfied, the defendant has a right to rebut that presumption at the class certification stage with "direct, more salient evidence showing that an alleged misrepresentation did not actually affect the stock's market price" and that in such instance the burden would then shift back to the plaintiff to show price impact under the "rigorous" standards required to satisfy Federal Rule of Civil Procedure ("FRCP") 23. 134 S. Ct. at 2404; see Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011). That ruling was well-grounded in class action law. Class actions remain "an exception to the

usual rule that litigation is conducted by and on behalf of the individual named parties only." Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013). The Supreme Court has also warned of the "in terrorem" impact of securities fraud class actions. See, e.g., Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975).

The decision below flouted the rule set forth in Halliburton II. The District Court first declined to follow this Court's repeated holdings that similar statements about a financial services firm's business principles and conflicts controls are "too general" for reasonable investors to rely on them. E.g., City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 185-86 (2d Cir. 2014). Under these decisions the challenged statements by definition could not cause a price impact. Br. of Defendants-Petitioners at 9-10, 14. The court also affirmatively acknowledged that the "misstatements had no impact on the stock price when made" (In re Goldman Sachs Grp., Inc. Sec. Litig., No. 10 Civ. 3461 (PAC), slip op. at 11 (S.D.N.Y. Sept. 24, 2015)), that "there was no movement in Goldman's stock price" on 34 prior dates when corrective information was disclosed (id.), and that even on Plaintiffs' alleged corrective disclosure dates, there was evidence of "a price decline for an alternate reason." Id. at 13.

The court nonetheless held that Defendants had not rebutted the presumption of reliance because they did not offer "conclusive evidence that no link exists between the price decline and the misrepresentation" and "Defendants cannot demonstrate a complete absence of price impact." Id. In effect, the court ruled that *Plaintiffs* had met the "rigorous" standard established by Wal-Mart and demonstrated "price impact" because *Defendants* had not ruled out every conceivable basis for price impact that Plaintiffs might demonstrate but had not demonstrated from evidence. That ruling sets up an insuperable bar for defendants seeking to rebut the presumption of reliance and, contrary to Halliburton II, effectively makes the showing of market efficiency an irrebutable presumption that also conflicts with the plain language of Federal Rule 301, which explicitly applies to presumptions. It should be reviewed by this Court.

ARGUMENT

I. THE DISTRICT COURT'S DECISION IS CONTRARY TO HALLIBURTON II

In Halliburton II, the Supreme Court held that, in order to sustain a securities class action lawsuit, the plaintiff must show that an alleged misrepresentation or omission had an impact on stock price and that it can satisfy its initial burden of doing so by demonstrating that the

defendant's stock traded in an efficient market. 134 S. Ct. at 2408, 2413. In so holding, however, the Court also made clear that a showing of market efficiency did not establish an irrebutable presumption of price impact, and that, at the class certification stage, the defendant can rebut the plaintiff's "indirect way of showing price impact" by providing "direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price." Id. at 2415-16. It further reiterated that such rebuttal can be made by "'[a]ny showing that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff.'" Id. at 2415 (quoting Basic v. Levinson, 485 U.S. 224, 248 (1988)). The presumption is "'just that, and c[an] be rebutted by appropriate evidence,' including evidence that the asserted misrepresentation (or its correction) did not affect the market price of the defendant's stock." Id. at 2414.

As the Court stated, "[p]rice impact is … an essential precondition for any Rule 10b-5 class action." Id. at 2416. When a plaintiff shows market efficiency, "but . . . the evidence shows no price impact with respect to the specific misrepresentation challenged in the suit . . . the basis for finding that the fraud had been transmitted through market price would be gone. And without the presumption of reliance, a Rule 10b-

5 suit cannot proceed as a class action . . ." because a plaintiff cannot satisfy all of the FRCP 23 requirements. Id. at 2415-16 (internal quotation marks and citation omitted).

That ruling was well-grounded in class action law. Class actions remain "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Comcast Corp., 133 S. Ct. at 1432. Further, "[t]o come within the exception, a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with [FRCP] 23." Id.; Halliburton II, 134 S. Ct. at 2412 (stating that "plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of [FRCP] 23, including (if applicable) the predominance requirement of [FRCP] 23(b)(3)").

The decision below, however, eviscerates the import of Halliburton II. The District Court did not dispute that Defendants had presented "appropriate evidence" and that such evidence "sever[ed] the link between the alleged misrepresentation and . . . the price received (or paid) by the [P]laintiff[s]." Id. at 2415-16. It held, however, that Defendants had not rebutted the fraud-on-the-market presumption and no burden shifted to Plaintiffs because Defendants did not offer "conclusive

evidence that no link exists between the price decline and the misrepresentation" and "Defendants cannot demonstrate a complete absence of price impact." In re Goldman Sachs Grp., Inc. Sec. Litig., slip op. at 13. The court's holding requires Defendants not only to present their own affirmative evidence showing no price impact but also to present evidence foreclosing evidence that Plaintiffs could—but did not—present showing the existence of price impact. In effect, the plaintiff need prove only an efficient market. Unless the defendant rules out all possibility of price impact, the class certification standard is satisfied without any burden-shifting to plaintiffs. The test sets up an insuperable bar for defendants seeking to rebut the presumption of reliance and it effectively creates an irrebutable presumption contrary to Halliburton II.

II. THE DISTRICT COURT FAILED TO APPLY FEDERAL RULE OF EVIDENCE 301 IN ALLOCATING THE BURDEN OF PROOF

The District Court's ruling also failed to apply Federal Rule of Evidence 301. On the Supreme Court's account, the fraud-on-the-market presumption did not emerge from the ether. It is based on Rule 301, see Basic, 485 U.S. at 245 (citing Fed. R. Evid. 301), and Rule 301 therefore must describe the effects of the presumption. But Rule 301 does not—as the court below effectively ruled—establish an irrebutable presumption. It

established a rebuttable presumption: "[U]nless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally." Fed. R. Evid. 301.

Hence, this Court has applied the "bursting bubble" view and held that, in the absence of statutory mandate or rule otherwise, "the ultimate risk of nonpersuasion must remain squarely on [the party employing the presumption] in accordance with established principles governing civil trials." Ruggiero v. Krzeminski, 928 F.2d 558, 563 (2d Cir. 1991). Moreover, the burden on the party opponent is not high. When a party against whom a presumption is invoked produces evidence which, "when viewed in the light most favorable to [defendants], would permit a reasonable jury to infer" that the presumed fact was incorrect, the presumption is rebutted. ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 149 (2d Cir. 2007).

The court below did not properly apply Rule 301. It did not identify a rule or statute that altered the burdens under Rule 301. Indeed, no such rule or statute exists. And, contrary to Punchgini, it did not view the evidence presented by Defendants "in the light most favorable" to them

and ask whether that evidence would "permit" the jury to find the presumed fact was incorrect. Instead, the District Court asked whether the evidence—viewed in the light most favorable to Plaintiffs—*required* the jury to find against Plaintiffs.

That was error. Once Defendants produced evidence from which a jury could have found that an absence of price impact, under Rule 301 the burden should have shifted back to the Plaintiffs to produce evidence sufficient to satisfy their ultimate burden of persuasion that the alleged misrepresentations had a price impact. This they did not do. In fact, Plaintiffs offered no evidence of price impact, much less evidence that satisfied the burden of persuasion. Accordingly, the Court should grant review to determine the effect of Rule 301 on the fraud-on-the-market theory.

CONCLUSION

For the foregoing reasons, the Court should grant the Defendants-Petitioners' FRCP 23(f) petition and review the District Court's class certification.

Dated: October 15, 2015

Respectfully Submitted,

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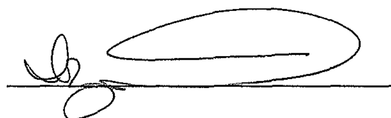
CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 1,965 words, 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: October 15, 2015



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