Appeal No. 14-3178

In the United States Court of Appeals for the Eighth Circuit

IBEW Local 98 Pension Fund, Marion Haynes, and Rene LeBlanc, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs-Appellees,

v.

Best Buy Co., Inc., Brian J. Dunn, Jim Muehlbauer, and Mike Vitelli,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Minnesota
Civil No. 11-cv-429 (DWF/FLN)
The Honorable Donavan W. Frank

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Summary of the Case

Halliburton Co. v. Erica P. John Fund, Inc. ("*Halliburton II*") established a defendant's right in a putative securities fraud class action to rebut the fraud-on-the-market presumption of classwide reliance by presenting "evidence that the misrepresentation did not in fact affect the stock price." 134 S. Ct. 2398, 2414 (2014). Because "price impact" is "an essential precondition for any Rule 10b-5 class action," direct or indirect "evidence showing that the alleged misrepresentation did not actually affect the stock's market price" defeats the presumption, "rendering class certification inappropriate." *Id.* at 2416.

In certifying a class in this case, the district court misapplied *Halliburton II*. The two alleged misrepresentations at issue both occurred during a 10:00 a.m. conference call on September 14, 2010. Defendants presented uncontradicted evidence that this conference call did not affect Best Buy's stock price. Best Buy's stock closed trading at virtually the same price it traded at the beginning of the conference call, showing unequivocally that the September 14 earnings call had no price impact. That was the opinion of former Securities and Exchange Commission Chief Economist Dr. Kenneth Lehn, the only expert who offered an event study addressing the question. This evidence rebutted the presumption of classwide reliance. The maintenance theory of price impact relied upon by the district court is irreconcilable with recent Supreme Court securities

law decisions. *See Halliburton II; Erica P. John Fund, Inc. v. Halliburton Co.* ("*Halliburton I*"), 131 S. Ct. 2179 (2011). And even if it comported with precedent, by its own terms the maintenance theory could not apply in this case. Without the presumption of reliance, Plaintiff cannot satisfy Rule 23(b)(3)'s predominance requirement and the district court 's order certifying a class cannot stand.

Defendants request 30 minutes to present their oral argument.

Corporate Disclosure Statement

Under Fed. R. App. P. 26.1(a) and 28(a)(1), Best Buy Co., Inc. states that it does not have any parent corporation, and no publicly held corporation owns more than 10% of its stock.

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Jurisdictional Statement

The district court had subject matter jurisdiction under 15 U.S.C. § 78aa and 28 U.S.C. § 1331 because the claims arise under §§ 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78(a), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. On August 6, 2014, the district court entered an order granting Lead Plaintiff's motion for class certification. Appellants timely petitioned under Fed. R. Civ. P. 23(f) for leave to appeal on August 19, 2014. *See* Fed. R. Civ. App. P. 5. This Court granted the Petition on September 24, 2014, and has jurisdiction over this appeal under 28 U.S.C. § 1292(e) and Fed. R. Civ. P. 23(f).

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Statement of Issue

1. Did the district court commit reversible error in granting class certification in this securities case when:

    A. Defendants presented uncontradicted evidence showing that the alleged misrepresentations had no price impact, thus rebutting the *Basic v. Levinson* presumption of classwide reliance, and

    B. The record contained no evidence that a subsequent stock price decline was caused by a "corrective disclosure" revealing the falsity of prior alleged misrepresentations?

Apposite Authorities:

Fed. R. Civ. P. 23

Fed. R. Evid. 301

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

Erica P. John Fund, Inc. v. Halliburton Co. ("*Halliburton I*"), 131 S. Ct. 2179 (2011)

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

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Statement of the Case

A. The Complaint and Initial Proceedings

In 2011, Lead Plaintiff Marion Haynes filed a putative class action under SEC Rule 10b-5, purporting to represent all purchasers of Best Buy stock between September 14, 2010 and December 14, 2010. Plaintiff alleged that Best Buy defrauded the market by making false statements at the beginning of its fiscal third quarter (3Q) about its future earnings prospects. The statements were made in a September 14, 2010 press release and in telephone conference with analysts that took place later the same day. Plaintiff also alleged that the stock price declined on December 14, 2010 when Best Buy announced at the beginning of its fiscal fourth quarter (4Q) that it had not met its prior earnings guidance.

1. The Alleged Misrepresentations

At 8:00 a.m. on September 14, 2010, before the stock market opened for trading, Best Buy issued a press release with its financial results for the second quarter of its 2011 fiscal year and its adjusted full-year earnings per share ("EPS") guidance forecast. In this press release, Best Buy increased its 2011 fiscal year guidance to $3.55–$3.70 per share based on the effect of share repurchases. Plaintiff's Complaint alleged that these statements were false and misleading. The district court dismissed with prejudice claims based on those allegations (*see* § A.3 *infra*), allowing the case to proceed only as to two alleged misrepresentations allegedly made during a conference

call two hours later, at 10:00 a.m, the same day. The challenged statements made during the conference call merely confirmed the guidance provided two hours earlier.

It is undisputed that, when the stock market opened at 9:30 a.m. EDT on September 14, Best Buy's stock price opened trading at $37.25, sharply higher than its prior day close of $34.65. (A255; A330.) The increase from the previous day's closing price occurred *before* Best Buy made the only alleged misrepresentations the district court found were actionable.

The two claimed misrepresentations were made during a 10:00 a.m. conference call with analysts on September 14, 2010. During this earnings conference call that began a half hour *after* the market opened, Best Buy CFO Jim Muehlbauer said:

- "So looking at the results for the first half of fiscal 2011, while there are many moving pieces that we manage, like always, we are pleased that our earnings are essentially *in line with our original expectations* for the year."
- "As you can see, we are essentially maintaining the operating expectations from our original guidance range, and just updating the impact of share repurchases made fiscal year-to-date. Overall, we are pleased that *we are on track to deliver and exceed our annual EPS guidance*."

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(A90; A101 (emphasis added).) It is the emphasized portions of the statements to which Plaintiff ties his claim.

At 10:00 a.m., when the earnings conference call began, Best Buy's stock traded at $36.76. (A330.) At 11:00 a.m., when the conference call ended, the stock traded at essentially the same price, $36.74. (*Id.*) Best Buy's stock closed trading that day at $36.73. (*Id.*)

2. The Purported Corrective Disclosure

On December 14, 2010, Best Buy issued a press release announcing that it had fallen short of its 3Q11 estimates, reporting a decline in sales and market share. Best Buy revised its EPS guidance for fiscal year 2011 to $3.20–$3.40. (Add4.) The December 2010 press release stated:

> Based on lower than expected sales and earnings in the fiscal third quarter, and given our current visibility to potential outcomes in the fiscal fourth quarter, we now expect annual earnings to be below our previous fiscal 2011 EPS guidance.

(A115.) In a conference call later that day, Best Buy explained that it revised the EPS guidance because "[w]hat we're learning now, as we have seen the customer play out, is that our top-line growth assumptions earlier in the year turned out to be too aggressive, based on the environment that we see for demand, specifically in the TV industry, and the continuing industry overall." (A214.)

Plaintiff alleged that the negative news resulted in a decline in Best Buy's stock price from $41.70 on December 13, 2010 to $35.52 on December 14, 2010. (Add5.)

3. The Motion to Dismiss Decisions

The district court dismissed Plaintiff's original complaint in its entirety on the ground that the statements upon which the complaint was based were forward-looking statements protected by the Private Securities Litigation Reform Act's (PSLRA) "safe harbor" provision (A43–49) but gave Plaintiff an opportunity to amend. After Plaintiff re-pled, on August 5, 2013, the district court entered an order partially granting Defendants' motion to dismiss the amended complaint. Reaffirming its prior dismissal order, it held that the financial forecast and EPS guidance in Best Buy's September 14, 2010 press release were not actionable. (Add3; A227–232.)

The district court refused, however, to dismiss Plaintiff's claims based on the conference-call statements made two hours later that Best Buy was "in line" and "on track" to meet those projections. (A234.) Although Plaintiff has conceded that the challenged statements were already implicit in, and inseparable from, the non-actionable earnings guidance itself, (A341–42), the district court held that the terms "in line" and "on track" could be "actionable as a statement of present condition" and permitted Plaintiff to proceed on a theory that "the falsehoods relate to the *non-forward looking aspect* of the statement[s]." (A233–34 (emphasis added).) Specifically,

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the Court accepted Plaintiff's theory that the "on track" and "in line" representations contained "statements of current facts, reflecting upon Best Buy's [then] current position and historical performance *up to that point in the fiscal year*." (A233 (emphasis added).) The district court declined to certify its ruling for interlocutory appeal under 28 U.S.C. § 1292(b). (Dist. Ct. Dkt. No. 122.)

B. Class Certification

The class certification proceedings focused on whether Plaintiff could sustain the fraud-on-the-market presumption necessary to establish that common issues of reliance predominated under Rule 23(b)(3). The only "evidence" plaintiffs proffered at class certification to invoke the presumption was the report of their economic expert, Bjorn I. Steinholt, CFA, who tried to demonstrate that Best Buy's stock price immediately reacted to the alleged fraud by testing the statistical significance of the stock price increase on September 14, 2010. (A343.) Mr. Steinholt did no event study[1] or scientific analysis of his own. Nor did he attempt to isolate the effects of the "in line" and "on track" statements; instead he mistakenly assumed that these statements were made in the press release "before the market opened." (A255.) Lumping the possible

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[1] An event study is a regression analysis which measures the effect of a publicly reported event on a company's stock price. *Halliburton II*, 134 S. Ct. at 2415.

effects of the actionable and non-actionable statements together, Mr. Steinholt opined that there was a significant increase in Best Buy's stock price from its September 13 closing price of $34.65 to its September 14 closing price of $36.73. (A255.)

In response, Defendants presented the expert declaration of Professor Kenneth M. Lehn, the former Chief Economist of the Securities and Exchange Commission. Professor Lehn performed an event study that focused on the price impact of the two statements claimed to be actionable. That uncontradicted study showed that *all* of the price increase on September 14, 2014 occurred *before* those statements were uttered. (A265.) By the time the market opened at 9:30 a.m. after the 8:00 a.m. press release, Best Buy stock was already trading at $37.25/share. (A330.) Indeed, Best Buy's stock price closed the trading day virtually unchanged from where it traded immediately before the 10:00 a.m. earnings call. (*Id.*) Thus, Professor Lehn's event study demonstrated that Best Buy's stock price reacted quickly to new information and that the challenged statements "had no discernible impact on Best Buy's stock price." (A267.)

In reply, Mr. Steinholt acknowledged that the "in line" and "on track" statements had no impact on the stock price. (A340–41.) He also admitted that the substance of the challenged statements was no different from the statements in the non-actionable press release. (A340.) Changing course, Plaintiff argued for the first time in reply that the December 14, 2010 price decline somehow demonstrated

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post facto that the "in line" and "on track" statements artificially propped up Best Buy's stock price on September 14 and throughout a three-month class period. (Dist. Ct. Dkt. No. 161 at 10–12.) But Plaintiff still made no effort to show any factual connection between the December 14 announcement which precipitated the stock decline and the September 14 conference call statements.

The district court nonetheless granted class certification. Contrary to Supreme Court teaching that class certification must be based on factual findings supported by evidence, the district court resorted to conjecture at odds with the record to create a link between the alleged misrepresentations and an increase in Best Buy's stock price. *First,* despite the lack of any price impact at or near the time of the "in line" and "on track" statements, the court found that price impact "*could*" exist because "Plaintiffs *allege* that the stock price rose generally (if not in a straight line) throughout the class period." (Add13 (emphasis added).) *Second,* without any evidentiary support, the district court surmised that a front-end price impact might have occurred because Best Buy's stock price dropped on December 14, 2010 with the release of negative information regarding holiday sales and their effect on Best Buy's earnings outlook. (Add13–14.)

On September 11, 2014, the district court issued an order staying all proceedings before it pending this Court's resolution of Defendants' petition to appeal the class certification decision. The

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district court acknowledged that "the question of certification in this action was difficult and involved evolving and novel issues of law that were material to the Court's decision. And though difficult to predict the outcome of the merits of the Rule 23(f) petition, the Court recognizes that, as with any appeal, the Eighth Circuit may disagree with this Court's conclusions, particularly considering the issues involved in this case." *IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*, No. 11-429 (DWF/FLN), 2014 WL 4540228, at *2 (D. Minn. Sept. 11, 2014).

Summary of Argument

In *Halliburton II*, the Supreme Court held that securities fraud defendants may rebut the *Basic* presumption of reliance—thus defeating class certification—by showing that the alleged misstatement did not impact the price of the issuer's stock. The inquiry is on the price impact of the misstatement itself, not the price impact of a subsequent statement that is alleged to correct the fraud. The price impact of an asserted corrective disclosure establishes "loss causation," which the Supreme Court has said should not be considered at the class certification stage. Thus, the district court erred by holding that Defendants needed to show *both* a lack of price impact of the misstatement itself *and* a lack of price impact of the corrective disclosure.

Defendants offered uncontroverted evidence that the alleged misstatements did not move Best Buy's stock price. Although Plaintiff initially tried to rely on the overall price movement on the day the alleged misstatements were made, Plaintiff's expert failed to recognize that all of this price movement occurred *before* the beginning of a 10:00 a.m. conference call in which the statements were made. That price movement could not have been caused by the alleged misstatements, but by earlier statements made in an 8:00 a.m. press release the same day. The district court held those prior statements to be non-actionable, and that ruling is not at issue on this appeal.

After his expert witness admitted his initial error, in order to show price impact, Plaintiff focused exclusively on the drop in the price of Best Buy stock on December 14, 2010, when Best Buy announced that it was revising downward its earnings projections for the year. Plaintiff told the district court that the downward earnings revision was a "corrective disclosure," and argued that the price decline created an inference of front-end stock price impact beginning three months earlier under the so-called "maintenance theory" of price impact, which posits that misstatements can prop up an existing stock price level even absent any evidence of price impact when the alleged misstatements were made. Although the district court accepted this *post hoc* improvisation, as a matter of law reference to back-end price reaction is contrary to *Halliburton II* and was not appropriate on the factual record of this case.

Plaintiff's argument fails on its own terms. Even under the maintenance theory, the December 14 disclosure was not "corrective" of the alleged misstatements made on September 14. The December 14 disclosure said that Best Buy was revising its earnings guidance downward because (i) Best Buy's sales in the third fiscal quarter (September to December) were less than anticipated and (ii) Best Buy was experiencing slower holiday-season sales than expected. All of the events discussed in Best Buy's December 14 downward revision announcement occurred *after* September 14. Dispositively, that announcement did not reveal any

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falsity in the challenged earlier statements that, as of September 14, Best Buy was "in line" and "on track" with earnings projections.

In response to defendants' rebuttal evidence showing no price impact from the challenged statements, Plaintiff failed to present facts that would meet their burden of persuasion on price impact even under a maintenance theory. The district court nevertheless accepted plaintiff's *assumption* that Best Buy's stock price was artificially inflated, and then erroneously characterized the decline in the stock price as a correction of that hypothetical inflation without any evidence to support that conclusion.

The district court compounded its legal error by applying the wrong evidentiary standard. The *Basic* presumption, like all presumptions, is governed by Federal Rule of Evidence 301. The Supreme Court's decision in *Basic* explicitly invokes Rule 301. Under Rule 301, a presumption is not evidence, nor does it shift the burden of proof. Rather, it merely placed on Defendants the burden of *producing* some evidence to show that the alleged misstatements had no impact on the price of Best Buy stock. Once Defendants produced such evidence, the presumption disappeared, and the burden of *proving* price impact, which at all times remained with Plaintiff, had to be satisfied with evidence, not speculation.

The district court erred in certifying a class based on Plaintiff's conjecture that the alleged misrepresentations "*could have* further inflated the price, prolonged the inflation of the price, or slowed the

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rate of the fall." (Add13 (emphasis added).) *Halliburton* requires more than speculation and conjecture. To certify a class, the district court must make appropriate factual findings. The district court failed to do that here.

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Standard of Review

This Court reviews a class certification decision for abuse of discretion, but reviews *de novo* any legal determinations underlying rulings on the Rule 23 criteria, including the question of whether the district court applied the correct standard of proof. *In re St. Jude Med., Inc. Silzone Heart Valve Prods. Liab. Litig.*, 425 F.3d 1116, 1119 (8th Cir. 2005); *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005) ("The district court's rulings on issues of law are reviewed *de novo*, and the court abuses its discretion if it commits an error of law.").

A district court abuses its discretion if it certifies a class that "does not meet the predominance requirements of Rule 23." *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 780 (8th Cir. 2013). It also abuses its discretion if "its conclusions rest on clearly erroneous factual determinations," *Blades*, 400 F.3d at 566, or if it fails to "conduct[] a rigorous analysis" of the issues, *Elizabeth M. v. Montenez*, 458 F.3d 779, 788 (8th Cir. 2006).

Recent Supreme Court decisions emphasize that grants of class action status require the same searching appellate review accorded denials of class certification. *See, e.g.*, *Halliburton II*, 134 S. Ct. at 2407; *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432–33 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551–53 (2011).

The Supreme Court has consistently reaffirmed that class certification requirements must be strictly construed and rigorously

analyzed. *See, e.g.*, *Halliburton II*, 134 S. Ct. at 2412 ("[P]laintiffs wishing to proceed through a class action must actually prove—not simply plead—that their proposed class satisfies each requirement of Rule 23 . . . ."); *Comcast*, 133 S. Ct. at 1432–33 ("Repeatedly, we have emphasized that it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, and that certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.") (internal quotation marks omitted).

Courts must make a substantive inquiry into whether the Rule 23 requirements have been met, even if that inquiry overlaps with merits issues. *See Comcast*, 133 S. Ct. at 1432; *Blades*, 400 F.3d at 575 ("in ruling on class certification, a court may be required to resolve disputes concerning the factual setting of the case," including "the resolution of expert disputes concerning the import of evidence"). Rule 23 cannot be used in a manner that would abridge or modify defendants' substantive rights to present all their defenses—including their right to inquire regarding individual reliance of each investor in this case. *Wal-Mart*, 131 S. Ct. at 2561.

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Argument

The linchpin determination in this case is whether Plaintiff has satisfied Rule 23(b)(3)'s predominance requirement—*i.e.* whether questions "common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). In order to obtain class certification, a plaintiff bears the burden of showing through evidence that questions capable of resolution on a classwide basis predominate over questions that require individualized resolution. *See id.*; *Halvorson*, 718 F.3d at 778; *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1029 (8th Cir. 2010) ("At the core of Rule 23(b)(3)'s predominance requirement is the issue of whether the defendant's liability to all plaintiffs may be established with common evidence."). "If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)." *Comcast*, 133 S. Ct. at 1432.

An essential element to any securities fraud claim is proof that each member of the putative investor class reasonably relied on the purported misrepresentations alleged in the Complaint when deciding to purchase Best Buy stock across a three-month period. "The reliance element [of a 10b-5 fraud action] ensures that there is a proper connection between a defendant's misrepresentation and a plaintiff's injury." *Halliburton II*, 134 S. Ct. at 2407 (internal quotation marks omitted).

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If applicable, the *Basic* presumption allows a plaintiff who meets the requisite evidentiary burden to substitute proof of the market's reliance on an alleged misrepresentation for proof of individual reliance. The fraud-on-the-market theory of reliance is premised on the notion that the market price of a security traded on a well-developed and efficient market promptly reflects all publicly available information. *See Basic*, 485 U.S at 247.

On class certification, "to invoke the *Basic* presumption, a plaintiff must prove that: (1) the alleged misrepresentations were publicly known, (2) they were material, (3) the stock traded in an efficient market, and (4) the plaintiff traded the stock between when the misrepresentations were made and when the truth was revealed." *Halliburton II*, 134 S. Ct at 2413. "[I]f reliance is to be shown through the *Basic* presumption," however, the "misrepresentation [must be] reflected in the market price at the time of the transaction." *Id.* at 2416 (internal quotation marks omitted).

The Supreme Court held in *Halliburton II* that the *Basic* presumption is rebuttable at the class certification stage. The Court emphasized that the presumption is only an "indirect proxy for price impact" and must give way to direct "evidence that an alleged misrepresentation did not actually affect the market price of the stock." 134 S. Ct. at 2415–17. "'[A]ny showing that severs the link between the alleged misrepresentation and . . . the price received (or

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paid) by the plaintiff . . . will be sufficient to rebut the presumption' because 'the basis for finding that the fraud had been transmitted through market price would be gone.'" 134 S. Ct. at 2415–16 (quoting *Basic*, 485 U.S. at 248). Defendants can rebut the fraud-on-the-market presumption of reliance with evidence that the alleged fraud did not have an impact on the stock price. *Id.* at 2417 ("[D]efendants 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.").

As the Supreme Court explained and the district court acknowledged, "without the presumption of reliance, a Rule 10b–5 suit cannot proceed as a class action: Each plaintiff would have to prove reliance individually, so common issues would not 'predominate' over individual ones, as required by Rule 23(b)(3)." *Halliburton II*, 134 S. Ct. at 2416; *see also* Add9 (noting that securities "class certification would be virtually impossible without" the rebuttable presumption, "as individual questions related to reliance would overwhelm common questions"). Under those circumstances, each putative class member's claim would remain intact and they could proceed individually or on a consolidated basis, but the class vehicle would be unavailable to them because Rule 23 (b)(3)'s predominance and superiority requirements cannot be met. *See Halliburton II*, 134 S. Ct. at 2408.

I. The District Court Misapplied *Halliburton I* and *Halliburton II* by Finding a Front-End Price Impact of the Alleged Misrepresentations Based on a Price Drop After the Alleged Corrective Disclosure Three Months Later

Contrary to *Halliburton I* and *Halliburton II*, the district court focused on the wrong time period, collapsing the distinct concepts of transaction causation and loss causation. The district court held that "price impact can be shown by a decrease in price following a revelation of the fraud." (Add13.) But the price movement upon the revelation of the fraud—*i.e.* the corrective disclosure—is the centerpiece of the loss causation analysis. *Halliburton I* expressly instructs that loss causation "*is not price impact*" and is not at issue at the class certification stage. 131 S. Ct. at 2186–87 (emphasis added). Instead, in a case based on alleged affirmative misrepresentations, the price impact focus is on transaction causation—*i.e.* the front-end price impact at the time the alleged misrepresentations were made.

In *Halliburton I*, the Supreme Court emphasized that in a securities fraud case, focusing on the stock price drop upon the corrective disclosure (*i.e.* the "back-end" price movement) was inappropriate. This is because back-end price movement has "nothing to do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively through the fraud-on-the market theory" (*i.e.* the "front-end" price impact). *Id.* at 2186. The Supreme Court could not have been clearer

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when it repeatedly emphasized this distinction between price impact and loss causation:

- "As we have explained, *loss causation is a familiar and distinct concept in securities law; it is not price impact.*" *Id.* at 2187 (emphasis added).
- "Loss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory." *Id.* at 2186.
- "The term 'loss causation' does not even appear in our *Basic* opinion. And for good reason: *Loss causation addresses a matter different from whether an investor relied on a misrepresentation*, presumptively or otherwise, when buying or selling a stock." *Id.* (emphasis added).[2]

Halliburton I makes clear that the *Basic* presumption of reliance must be predicated on price impact *at the time investors made their decision to purchase*:

> We have referred to the element of reliance in a private Rule 10b–5 action as "transaction causation," not loss causation. Consistent with that description, when considering whether a plaintiff has relied on a misrepresentation, we

[2] This principle was so clear that, in another case, Plaintiff's counsel summarized the law under *Halliburton I* as follows: "*Whether or not there was a statistically significant price decline as a result of a corrective disclosure has no bearing on class certification in a securities fraud case.*" Reply Mem. of Law in Supp. of Pls.' Mot. for Class Certification at 37, *Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.*, No. 10-2847 (N.D. Ala. Apr. 20, 2012) (emphasis added) (citing *Halliburton I*, 131 S. Ct. at 2186) (filed by Robbins Geller Rudman & Dowd LLP), *available at* 2012 WL 1536108.

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> have typically focused on facts surrounding the investor's decision to engage in the transaction. Under *Basic*'s fraud-on-the-market doctrine, an investor presumptively relies on a defendant's misrepresentation if that "information is reflected in [the] market price" of the stock at the time of the relevant transaction.

Id. at 2186 (citations omitted).

Other courts, such as the Eleventh Circuit, have likewise emphasized the fundamental difference between the front-end reliance/transaction causation and back-end loss causation concepts:

> The [district court's] analysis [] appears to conflate the concepts of reliance and loss causation—two distinct elements of a Rule 10b–5 claim. As noted above, reliance polices the *front-end* causation question of whether the defendant's fraud in fact inflated the plaintiff's purchase price, while loss causation polices the back-end causation question of whether the fraud-induced inflation in the plaintiff's purchase price ultimately caused financial losses. . . . On remand, the parties should clarify their causation arguments, and specify whether their dispute actually goes to reliance or loss causation.

FindWhat Investor Grp. v. FindWhat.com, 658 F.3d 1282, 1314 n.32 (11th Cir. 2011) (emphasis added).[3]

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[3] The district court cited *FindWhat* for the proposition that a securities fraud claim can rest on misstatements which "further inflated the price, prolonged the inflation of the price, or slowed the rate of fall [of the price]." (Add13.) But *FindWhat* was not a class

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In *Halliburton II*, the Supreme Court reiterated that the fraud-on-the-market focus is on the front-end price impact of the misrepresentation:

- "[D]efendants should at least be allowed to defeat the [*Basic*] presumption at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price." *Halliburton II*, 134 S.Ct. at 2414.

- "While *Basic* allows plaintiffs to establish that precondition indirectly, it does not require courts 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 *Basic* presumption does not apply." *Id*. at 2416.

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certification decision. *FindWhat* was an appeal of a grant of summary judgment to defendants on the ground that there were no triable issues of fact concerning either *loss causation* or *damages*. 658 F.3d at 1306–07. The *FindWhat* court did not consider price impact (*i.e.* transaction causation) or the applicability of the fraud-on-the-market presumption because class certification was not before the court. *Id.* at 1309 (explaining that "[b]ecause the Defendants' summary judgment motion contested only the elements of loss causation and damages," the court would "accept (for present purposes only) the Plaintiffs' allegations concerning the other elements," including reliance). And because it was a summary judgment decision, the *FindWhat* court concluded only that plaintiffs had raised a genuine issue of material fact. Accordingly, the *FindWhat* court did not weigh the evidence as *Halliburton II* requires at the class certification stage.

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The Supreme Court even offered an example confirming that the relevant inquiry is on the stock price change on the misrepresentation date:

> Suppose a defendant at the certification stage submits an event study looking at the impact on the price of its stock from six discrete events, in an effort to refute the plaintiffs' claim of general market efficiency. . . . Suppose one of the six events is the specific misrepresentation asserted by the plaintiffs. . . . Now *suppose the district court determines that, despite the defendant's study, the plaintiff has carried its burden to prove market efficiency, but that the evidence shows no price impact with respect to the specific misrepresentation challenged in the suit. The evidence at the certification stage thus shows* an efficient market, on which *the alleged misrepresentation had no price impact.*

Id. at 2415 (emphasis added).

Critically, the Supreme Court's illustrative analysis did not require examination of the price change upon the "corrective disclosure" date. To the contrary, the Court held that a defendant could rebut price impact by presenting evidence "that the misrepresentation (*or* its correction) did not affect the market price of the defendant's stock." *Id.* at 2414 (emphasis added).[4] In other

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[4] The Supreme Court's disjunctive phrasing—"*or* its correction," not "*and* its correction"—makes it clear that a defendant carries its burden by presenting evidence that *either* (1) the alleged misrepresentation did not affect the stock price, *or* (2) the corrective disclosure (if there was one) did not affect the stock price.

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words, the absence of a stock price change on the misrepresentation date, in itself, establishes that the misrepresentation has no price impact.

The record in this case parallels precisely the paradigmatic scenario discussed by the Supreme Court. Here, as the district court acknowledged and Plaintiff conceded, the alleged misrepresentations did not move Best Buy's stock price. Plaintiff offered no evidence—much less the required reliable economic evidence—that the September 14, 2010 statements about Best Buy being "on track" and "in line" to meet its previously stated 2011 annual earnings guidance artificially inflated Best Buy's stock price on that day.

Best Buy, on the other hand, presented rebuttal evidence "showing that the alleged misrepresentation did not actually affect the stock's market price." *Halliburton II*, 134 S. Ct. at 2416. Specifically, Professor Lehn's uncontroverted analysis showed that there was no statistically significant movement of Best Buy's stock that can be attributed to the "on track" and "in line" statements on September 14. (A266–67.)

Not only was there no immediate price increase following the two statements made on the September 14, 2010 conference call, Best Buy's stock price actually declined. When Best Buy's conference call began at 10:00 a.m., Best Buy's stock traded at $36.76. (A330.) At 11:00 a.m., when the conference call ended, the stock price was two

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cents *lower*, at $36.74. (*Id.*) When the market closed on September 14, Best Buy's stock price was another cent lower, at $36.73. That closing price was $0.52 below the price at which it opened and very close to the price at which it had traded at both the start and end of the earnings call (during which the two allegedly false statements were made).

Best Buy's evidentiary showing of the lack of a statistically significant price increase resulting from the alleged misrepresentations rebutted the *Basic* fraud-on-the-market presumption. Without that presumption, Plaintiff cannot establish predominance as required by Rule 23(b)(3).

II. The District Court Disregarded Best Buy's Uncontroverted Rebuttal Evidence Showing That the Alleged "Confirmatory" Misstatements Did Not Affect the Stock Price and Contravened Rule 301 by Shifting the Burden of Persuasion to Defendants

It is undisputed that, as Professor Lehn demonstrated, the two alleged misrepresentations "had no discernible impact on Best Buy's stock price." (A262; A267.) Thus, Defendants rebutted the *Basic* presumption of reliance by "sever[ing] the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." *Basic*, 485 U.S. at 248; *see also In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480, 490 (S.D.N.Y. 2011) ("A showing that [challenged statements] did not lead to a distortion in price is sufficient to rebut the presumption.").

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Once Defendants produced rebuttal evidence establishing the lack of any connection between the "on track" and "in line" statements and any purported distortion of Best Buy's stock price, Plaintiff had the burden of persuasion to show, by a preponderance of the evidence, that the challenged statements had a price impact at the time each member of the proposed class purchased. Plaintiff could not rely on assertions once the presumption was rebutted, but was obligated to produce facts.

Basic expressly relied on Federal Rule of Evidence 301 in adopting a procedural "device for allocating the burdens of proof between parties." 485 U.S. at 245; *see also Lupyan v. Corinthian Colleges Inc.*, 761 F.3d 314, 320 (3d Cir. 2014) ("Federal Rule Evidence 301 provides the default rule for how presumptions operate in federal civil cases."). Yet the district court did not even cite Rule 301, much less conduct the required analysis. The district court instead misapplied *Basic* and *Halliburton II* by placing the burden of persuasion on Defendants.

A "presumption" is not evidence. *See New York Life Ins. Co. v. Gamer*, 303 U.S. 161, 171 (1938) (A "presumption is not evidence and may not be given weight as evidence."). Merely completing the *prima facie* stage of the rebuttable presumption does not mean plaintiffs have "prove[n]" that they "in fact" satisfy Rule 23(b)(3)'s predominance requirement. *Wal-Mart*, 131 S. Ct. at 2551. "The *Basic* presumption does not relieve plaintiffs of the burden of proving—

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before class certification—that [the Rule 23(b)(3) predominance] requirement is met." *Halliburton II*, 134 S. Ct. at 2412.

A presumption is only a "*procedural* device" whereby establishment of a basic fact gives rise to a presumed fact, unless the presumption is rebutted. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 521 (1993) (emphasis in original); *see Halliburton I*, 131 S. Ct. at 2185 (noting the *Basic* presumption is "just that, and could be rebutted by appropriate evidence"); *Lupyan*, 761 F.3d at 320 ("Specifically, the party the presumption operates against has the burden of producing evidence to rebut the presumption, while the actual burden of persuasion remains does not change."). Once a presumption is rebutted by the production of evidence contrary to the presumed fact, the presumption disappears, and is no longer of any effect.

The "introduction of evidence to rebut a presumption destroys that presumption, leaving only that evidence and its inferences to be judged against the competing evidence and its inferences to determine the ultimate question at issue." *Lupyan*, 761 F.3d at 320 (citation omitted). And once the presumption vanishes, the court must look at plaintiff's evidence without the presumption. *See St. Mary's*, 509 U.S. at 507 ("The ultimate burden of persuading the trier of fact . . . remains at all times with the [party relying on the presumption] . . . . In this regard it operates like all presumptions, as described in Federal Rule of Evidence 301 . . . .") (emphasis added);

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Cavalier Carpets, Inc. v. Caylor, 746 F.2d 749, 755 n.19 (11th Cir. 1984) (holding in 10b5-suit that presumption of classwide reliance "does not shift the burden of proof, *i.e.*, the risk of nonpersuasion, to the defendant in an omission case; rather, it simply shifts the burden of going forward with the evidence to the defendant. The presumption vanishes whenever the evidence would permit the trier of fact to conclude that the omitted information would not have affected the plaintiffs' decision to enter into the transaction in question."); *see also* 2 McCormick on Evidence § 344 (7th ed. 2013) ("[T]he only effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact. If that evidence is produced by the adversary, the presumption is spent and disappears.").[5]

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[5] The Supreme Court has explained each of the procedural steps governing the order of proof where a Rule 301 presumption applies. *See St. Mary's*, 509 U.S. at 507 (noting the steps it described "operate[] like all presumptions"). *First*, to invoke the presumption, either a plaintiff's evidence must establish the prima facie case by a preponderance of the evidence, or a judge must determine that any rational person would have to find the existence of facts constituting the prima facie case. *See id.* at 509–10 & n.3. *Second*, once created, the "presumption places upon the defendant the . . . burden of producing" evidence that, if believed by the trier of fact, would support a finding that the presumed fact does not exist. *Id.* at 506–507. *Third*, if "the defendant has succeeded in carrying its burden of production," the presumption "is no longer relevant," and the plaintiff must persuade the trier of fact by a preponderance of the evidence that the alleged fraud had been transmitted through to the market price. *Id.* at 510–11; *see also id.* at 504 ("[A]s in the case of all presumptions, *see* Fed. Rule Evid. 301, the ultimate burden of persuasion remained at all times with [plaintiff] . . . . [Defendants']

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The "quantum of evidence" needed to rebut a presumption "in a civil case is 'minimal.'" *Lupyan*, 761 F.3d at 320 ("[T]he presumption's only effect is to require the party [contesting it] to produce enough evidence substantiating [the presumed fact's absence] to withstand a motion for summary judgment or judgment as a matter of law on the issue.").

In the price impact context, a defendant rebuts the presumption of reliance by producing evidence that the misrepresentation did not in fact affect the stock price. *See Halliburton II*, 134 S. Ct. at 2414; *id*. at 2407 ("rebut . . . with evidence"); *id.* at 2417 ("defeat" the presumption with "price impact evidence"); *Basic*, 485 U.S. at 248 ("*Any showing* that severs the link . . . . will be sufficient to rebut the presumption.") (emphasis added). Once the defendant satisfies this burden of production, the presumption is "no longer relevant." *St. Mary's*, 509 U.S. at 510. At that point, the plaintiff bears the burden of proving by a preponderance of evidence that the alleged misstatement actually affected the market price.

Thus, once Defendants presented evidence here tending to show the non-existence of the presumed fact (price impact), a class

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production of evidence of nondiscriminatory reasons, whether ultimately persuasive or not, satisfied their burden of production and rebutted the presumption . . . .").

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could not be certified unless the Plaintiff presented evidence that proved price impact.[6] Plaintiff failed to do so.

III. The District Court Erred in Finding Price Impact Based on a Decline in Stock Price on December 14 that Was Not Tied to Any Correction of the Allegedly Fraudulent Statements

The district court erroneously accepted Plaintiff's resort to the maintenance theory of price impact to paper over his failure to submit any evidence in response to Defendants' evidentiary showing that the two challenged statements had no price impact. The "maintenance" theory posits that an issuer's allegedly false or misleading statements serve to "maintain" the stock at a constant price, thereby exactly counteracting the price declines that would otherwise have occurred.

The maintenance theory necessarily depends on a "corrective disclosure" that causes a stock drop. The theory is that front-end price impact from a challenged statement should be inferred even without a front-end price change if the stock price declines upon a subsequent public disclosure revealing that the prior statement was

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[6] *See, e.g., In re Moody's*, 274 F.R.D. at 490, 492–93 (denying class certification in 10b-5 action upon defendant's rebuttal which showed that in "no period within the proposed class period" did an "alleged misrepresentation cause[] a statistically significant increase" or "a corrective disclosure cause[] a statistically significant decline in the price"); *In re Zonagen, Inc. Sec. Litig.*, 322 F. Supp. 2d 764, 780–81 (S.D. Tex. 2003) (defendant "rebutted the presumption of reliance by presenting evidence that none of the statements remaining at issue in this case had an effect on the stock price").

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false when made. But a price decline alone is not enough—it must be tied to a correction of a previously made statement, showing that statement to have been false when made. To be corrective, a disclosure must reveal that a prior statement of fact was untrue when it was made. It cannot simply be other negative information about the company.

Unable to show that the September 14 statements had a price impact, Plaintiff pointed to the December 14 press release and subsequent stock drop. But the statements made on that date were not corrective disclosures with respect to the "on track" and "in line" statements at issue in this case.

The alleged misrepresentations here were Best Buy's statements on September 14 that it was "on track" and "in line" to meet its annual earnings estimate. The district court construed these as present-tense statements "reflecting upon Best Buy's [then] current position and historical performance up to that point in the fiscal year" (A233), and thus avoided the PSLRA safe harbor provisions. To qualify as a corrective disclosure, the subsequent statement would need to reveal that Best Buy was not, *as of September 14*, on track and in line to meet its projections.

That is not what was disclosed on December 14, 2010. Instead, Best Buy disclosed that its earlier projections—which the district court held were protected as a matter of law—turned out to be wrong due to a combination of events *occurring after September 14*.

Plaintiff cannot meet his burden under Rule 23 simply by saying that Best Buy made a forward-looking prediction on September 14 which turned out to be inaccurate and caused a price decline. That is fraud-by-hindsight and exactly what the safe-harbor provision of the PSLRA prevents. And because the future, predictive statements are the only statements that were revised by the December statements, as a matter of law the December statements cannot be considered corrections of the statements of September conditions.

A. A Disclosure Is "Corrective" Only if it Reveals a Prior Statement to Be False When Made

For a statement to be a "corrective disclosure," there must be a factual link between an alleged prior misstatement of fact and the asserted "corrective disclosure" which reveals the previously-concealed truth, causing a price decline at the end of the proposed class period. The new information must show that the prior statement of fact was *false* when made, not merely *wrong* in light of subsequent events. *Meyer v. Greene*, 710 F.3d 1189, 1197 (11th Cir. 2013); *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 175 n.4 (2d Cir. 2005) (corrective disclosures must "reveal to the market the falsity of the prior [misrepresentations]"). Although a corrective disclosure need not "precisely mirror the earlier representation," *In re Williams Sec. Litig. – WCG Subclass*, 558 F.3d 1130, 1140 (10th Cir. 2009), a plaintiff must show that the alleged corrective disclosure revealed the falsity of a prior statement of fact. *See Dura Pharms., Inc.*

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v. Broudo, 544 U.S. 336, 345 (2005); *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 256 n.19 (5th Cir. 2009) (under fraud-on-the-market theory, plaintiff must prove that the "decrease in price is related to an allegedly false, non-confirmatory positive statement made earlier").

Simply showing that the stock price declined following the release of negative information is insufficient. The law requires more—a direct link between the corrective disclosure and the alleged misrepresentation: a plaintiff must show loss from the decline in stock price upon the corrective disclosure of a previously concealed fact that "'ma[de] its way into the marketplace.'" *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 229 (5th Cir. 2009) (quoting *Dura*, 544 U.S. at 342–43). A stock price drop caused by some other reason, such as "a result of 'changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions,' or other factors independent of the fraud," is irrelevant. *Id.*

B. Plaintiff Offered No Evidence Showing the Required Factual Link Between the Asserted Corrective Disclosure and the Alleged Misstatements

The district court's class-certification order rested on its conclusion that that Best Buy's December 14, 2010 downward revision of earnings projections constituted a corrective disclosure, reasoning that the stock price drop on that day demonstrated price impact from the challenged statements that continued across three months. (Add5 (incorrectly characterizing the December 14, 2010

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disclosures as revealing the falsity of a challenged factual misrepresentation made on September 14 by revealing "Best Buy's true financial condition and revenue and earnings prospects for FY11").) This conclusion was simply unsupported by either the law or the uncontroverted record before the district court.

Even under a maintenance theory of price inflation, the December 14 price decline is relevant only if the December 14 disclosure revealed the falsity of a factual representation made in the two September 14 statements. It did not. Nothing in the December 14 announcement revealed any fact purportedly concealed by the alleged September 14 misrepresentations.

This can be seen by simply comparing the December 14 statement to the two September 14 statements. Nothing about the announcement on December 14 revealed that Best Buy's previous statements about its then "current position and historical performance" were false when made. Dispositively, the information that allegedly caused the December 2010 price drop—Best Buy's third fiscal quarter (September to November) sales and financial results, and its updated assessment of the company's projected earnings based on those results (Add4)—*did not even exist* on September 14, 2010, and, thus, cannot be the alleged truth concealed by the alleged misrepresentations. In other words, the December 14 disclosure that Best Buy would miss its EPS guidance did not reveal

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that it was not "on track" or "in line" to meet that guidance three months earlier.

In re Moody's is on point. There, defendants' event study showed that none of the alleged misstatements were "associated with a statistically significant and positive abnormal return." 274 F.R.D. at 492. As here, plaintiff asserted a "corrective disclosure" as evidence of front-end price impact, but the court concluded that such disclosure did not reveal the falsity of the challenged statements "and therefore it cannot serve as a basis for certifying the class." *Id.* at 493.

In this case, the district court allowed Plaintiff's case to proceed only to the extent Plaintiff's claim involved "statements of present condition" and the "falsehoods relate to the *non-forward looking aspect of the statement[s]*." (A233 (emphasis added).) None of the supposedly corrective information disclosed in December 2010 even referenced Best Buy's condition as of September 2010, let alone corrected any non-forward looking aspect of the prior statements. Indeed, none of the December 2010 analyst and media accounts cited by Plaintiff's expert even refer to Best Buy's financial condition in September 2010. (Dist. Ct. Dkt. No. 131-4 at 227–366.) Plaintiff pointed only to the fact that the projections turned out to not be accurate.

But to establish the price impact of the "non-forward looking" aspect of those statements that the district court said were

actionable, Plaintiff had to do more than show a price decline resulting from the revision of the forward-looking statements. Otherwise, the district court's dismissal of claims based on those statements would be meaningless. Plaintiff had to show that the disclosure revealed that there was something false about the "on track" and "in line" statements at the time the statements were made.

A review of two key paragraphs of the declaration submitted by Plaintiff's expert on price impact confirms the absence of the required linkage. In paragraph 15, Mr. Steinholt quoted the asserted corrective disclosure, the December 14 statement. There, Best Buy announced that its 2011 guidance was being reduced "based on" *events occurring post-September 14*: "lower than expected sales and earnings *in the fiscal third quarter*, and given our current visibility to potential outcomes in the fiscal fourth quarter." (A343.) In order to reach his conclusion that the December 14 statement was "corrective" Mr. Steinholt needed to recast the actual content of the December 14 statement.

He did so in paragraph 16, mischaracterizing the December 14 statement as an acknowledgment by Best Buy that the challenged statements were false when made. Mr. Steinholt did this by introducing his asserted conclusion about linkage with contrary-to-fact editorialization: "in other words," he stated, the December announcement revealed the truth that as of September 14 "Best Buy

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was not 'on track'" to meet its 2011 EPS guidance. (A343). But that is nowhere to be found in the December 14 statement itself.

When Mr. Steinholt says "in other words" it really means he is replacing Best Buy's words with his own. A rhetorical head-fake does not supply the evidence required to meet plaintiffs' burden of persuasion to show a linkage between the asserted misstatements and a corrective disclosure.[7]

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[7] This case differs fundamentally from cases finding a price impact based on the maintenance theory where the disclosure of the truth was directly tied to a prior confirmatory statement. *See, e.g., Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248, 1259 (11th Cir. 2014) (remanding to the district court "to review all the facts and conduct the inquiry now required in the wake of *Halliburton II*"). The factual predicate central to the authority the district court relied on to justify deriving price impact from a subsequent price decline is missing here. *C.f. FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1316–17 (11th Cir. 2011) (alleged concealment of use of "click fraud" practices, stock price declined when it was revealed that the defendant did rely on "click fraud" at time it denied use); *Schleicher v. Wendt*, 618 F.3d 679, 684 (7th Cir. 2010) (alleged concealment of information about $900 million in guarantees, price declined when information was disclosed); *In re Pfizer Inc. Sec. Litig.*, 936 F. Supp. 2d 252, 260–61 (S.D.N.Y. 2013) (concealment of clinical studies showing risks associated with two pharmaceutical products, price declined when those concealed risks were disclosed). In none of these other cases did the court find price impact based upon a price decline untethered to the revelation of the falsity of the allegedly fraudulent statements.

Mr. Steinholt committed the same error in this case as he was recently criticized for, and for which his testimony was excluded, in another securities case. *See In re Novatel Wireless Sec. Litig.*, No. 08-cv-1689 AJB(RBB), 2013 WL 494361, *4 (S.D. Cal. Feb. 7, 2013) (excluding Steinholt testimony which was "based upon Plaintiffs' allegations taken as a whole, including the channel stuffing allegations which are no longer at issue in this case. . ." because "Steinholt did not simply fail to account for the channel stuffing allegations; rather, he specifically incorporated these allegations into his analysis and treated them as fraud-related factors").

Here, as in *Novatel*, Mr. Steinholt failed to account for the effect of non-actionable statements in his economic analysis. The district court expressly adopted this flawed approach in speculating on price impact . (Add12–13 ("The fact that non-actionable statements made in the press release may have caused initial upward movement in Best Buy's stock price *does not necessarily mean* that misrepresentations made during the earnings conference call that occurred shortly thereafter did not also impact the stock price.") (emphasis added).)

Without a nexus between alleged misstatement and alleged "corrective disclosure," the support for the district court's conclusion that "the alleged misrepresentations could have further inflated the price, prolonged the inflation of the price, or slowed the rate of fall" vanishes. So does its premise that "price impact can be

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shown by a decrease in price following a revelation of the fraud." (Add13.) The district court erred in considering the December 14, 2010 price decline as evidence of price impact. That error was fundamental to the court's decision to certify the class in this case, and requires reversal.[8]

IV. Best Buy's "On Track" and "In Line" Statements Were Inseparable from Its Non-Actionable Forward-Looking Statements, and Thus Could Not Have Had Any Price Impact

It is fundamentally anomalous to presume that the putative class relied in common on the two alleged misrepresentations when not only was there no evidence that those statements distorted the market price, when it is at the same time conceded by Plaintiff that the alleged misrepresentations were inseparable from Best Buy's non-actionable earnings projections announced earlier the same morning. A class can be certified only if there is price impact resulting from actionable misstatements. *Halliburton II*, 134 S. Ct at 2414 (holding that absence of price impact is shown where "the

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[8] Plaintiff highlights Best Buy's December 14, 2010 acknowledgement that its "growth assumptions earlier in the year turned out to be too aggressive." (Add4–5.) But that statement, at most, reflects a modification of the non-actionable forward looking statements. Put simply, nothing in the record suggests that on December 14 Best Buy revealed that as of September 14 the company was not "on track to deliver and exceed [its] annual EPS guidance" or that its earnings were not "essentially in line with [Best Buy's] original expectations for the year" when those statements were made.

particular misrepresentation at issue did not affect the stock's market price").

The district court's decision on defendants' motion to dismiss defined the scope of the misstatements that might be actionable in this case. Plaintiff's complaint sought to hold Defendants' liable for both Best Buy's earnings projections in its 8:00 a.m. press release, and statements confirmatory of that 8:00 a.m. release made in the 10:00 a.m. conference call. The district court dismissed the claims challenging the 8:00 a.m. press release, holding that the 8:00 a.m. earnings projections were forward-looking and therefore non-actionable. The district court allowed Plaintiff to proceed on a narrow theory—challenging *only* the "non-forward looking aspects" of Best Buy's 10:00 a.m. statements that it was "on track" or "in line" with future earnings guidance.

The district court's motion to dismiss ruling is not on review in this appeal, but that ruling defines the contours of the misrepresentations at issue for purposes of the class certification determination. In light of the district court's ruling on the motion to dismiss, Plaintiff needed to show price impact from something *other* than the forward-looking aspects of the "in line" and "on track" statements. But Plaintiff offered nothing else.

In fact, Plaintiff's own expert admitted it was "hardly surprising" that the market didn't react to the "on track" and "in line" statements because their "economic substance" was already

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disclosed in Best Buy's projections. Thus, Plaintiff's own economic analysis confirms that the "in line" and "on track" statements had no "non-forward looking" economic substance.

The fact that the "in line" and "on track" statements are inseparable from the earnings projections themselves and have no separate economic substance is confirmed by substantial precedent.

Although a statement that a company is "on track" to achieve a projection is made in the present (rather than future) tense, such statements are not actionable because they do not make a "specific verifiable representation about the present state of affairs." *Rochester Laborers Pension Fund v. Monsanto Co.*, 883 F. Supp. 2d 835, 853 (E.D. Mo. 2012) ("Statements that Monsanto . . . was 'on track' 'while in the present tense, are inherently forward-looking.'"); *see also Police Ret. Sys. v. Intuitive Surgical, Inc.*, No. 10-03451-LHK, 2012 WL 1868874, at *10 (N.D. Cal. May 22, 2012) (statement that revenue is "on track to grow 55% this year" is forward-looking).

Federal courts of appeals universally have held that these types of statements are not actionable because they are merely reaffirmations of a forward-looking projection protected under the safe harbor established by the PSLRA. In *Institutional Investors Group v. Avaya, Inc.*, for example, the Third Circuit addressed whether statements that a company was "on track" to achieve its financial goals and projections were actionable under the federal securities laws. 564 F.3d 242 (3d Cir. 2009). The Third Circuit concluded that

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the statements were non-actionable because they "cannot meaningfully be distinguished from the future projection of which they are a part," rather than statements of current fact. *Id.* at 255. The court further concluded that, to the extent that the statements contained assertions about the present, the "assertions of current fact are too vague to be actionable." *Id.* at 255; *see also id.* at 256 ("The 'on track' . . . language here . . . expresses only defendants' continuing comfort with the earlier, October annual projection, which they were then reiterating; that is, it amounts in essence to a reaffirmation of that projection. It does not transform the statements or any part of them, into non-forward-looking assertions outside of the Safe Harbor.").[9]

Applying the *Basic* presumption based on Best Buy's statements that it was "in line" with and "on track" to meet its projections—

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[9] Other federal circuit courts agree. *See, e.g., In re Aetna, Inc. Sec. Litig.*, 617 F.3d 272, 279–80 (3d Cir. 2010) (defendants' statement that it was "achieving premium yields that are in line with [its] medical cost trends" was a "forward-looking statement"); *Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 379 (5th Cir. 2004) (acknowledging statement that company "would be on track" to report earnings per share was a forward-looking statement); *The Marsh Grp. v. Prime Retail, Inc.*, 46 F. App'x 140, 146–47 (4th Cir. 2002) (acknowledging that "[a]ll projections can be characterized as presently held beliefs" and noting that a statement that the company was 'on track' for increased earnings was forward-looking); *Ronconi v. Larkin*, 253 F.3d 423, 430 (9th Cir. 2001) (holding statement that company's plan to consolidate sales force was "on track" and would cut expenses was forward-looking).

acknowledged by Plaintiff to be inseparable from the non-actionable projections announced two hours earlier—would circumvent the PSLRA safe harbor and defy common sense. (A341–42 (Plaintiffs' expert acknowledges that the statements were "virtually the same").)

In response to Defendants' uncontradicted rebuttal evidence that the challenged confirmatory statements had no price impact, Plaintiff never contended—much less tried to support such a claim—that the challenged statements moved Best Buy's stock price. To the contrary, the sole "positive price impact" Plaintiff's expert asserted occurred on September 14 was the increase that occurred "before the market opened" attributable to the earning guidance in the press release. (A255.) Thus, there is no dispute that any "inflation" in Best Buy's stock would have been the same had the challenged confirmatory statements never been made. This fact severs the necessary link between those statements and Plaintiff's alleged losses.

In all the cases cited by the district court, the defendant had made continued misrepresentations perpetuating the same original actionable misrepresentation. This fact led these courts to conclude the defendant deliberately maintained pre-existing artificial "inflation" in the stock price which had been caused by the prior actionable misrepresentation issue. For example, *FindWhat* involved allegations that an Internet commerce company maintained an

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artificially inflated stock price by repeating false statements denying that the company engaged in a practice known as "click fraud" to boost its revenues, when it was aware all along that its "click fraud" was the driver of its revenue derived from "pay-per-click" advertising services. *See FindWhat*, 658 F.3d at 1314–17.

Unlike cases such as *FindWhat*, where inflation was introduced into the price by actionable misstatements, here the evidence shows that any so-called "inflation" entered the price upon announcement of the non-actionable earnings projections. And Plaintiff has conceded that the alleged confirmatory misstatement had no separate "economic substance" from those earlier *non-actionable* earnings projections. Plaintiff's maintenance theory of front-end of inflation is illusory; it is manufactured from a back-end decline untethered to the challenged statements, which themselves merely track legally protected projections made two hours earlier. Indeed, Plaintiff's entire theory of price impact represents an end-run around the PSLRA safe harbor and the district court's dismissal order.

V. The District Court Erred By Speculating That Price Inflation Could Have Persisted Throughout a Three-Month Class Period

Contrary to *Halliburton II* and other Supreme Court decisions, the district court erroneously considered Defendants' evidence showing a lack of price impact to be defeated by mere pleading allegations, the court's own conjecture, and the district court's

observation of a general upward trend in Best Buy stock during the class period. Those errors also require reversal.

A. Under *Halliburton II*, Defendants' Evidence of a Lack of Price Impact Cannot Be Defeated Solely By Reference to Allegations and Conjecture

Supreme Court law requires a district court to make a definitive assessment that the Rule 23(b)(3) predominance requirement has been met. *Comcast*, 133 S. Ct. at 1432–33. This assessment cannot be made without determining whether defendants can successfully rebut the fraud-on-the-market presumption. *Halliburton II*, 134 S. Ct. at 2416–17. The district court failed to make that assessment here.

Instead, it based its price impact conclusion upon nothing more than its own general observation that "Plaintiffs *allege that the stock price rose generally (if not in a straight line) throughout the class period*, and then fell sharply after Best Buy revealed its true financial condition on December 13, 2010." (Add13 (emphasis added).) Contrary to the requirement that Rule 23 findings be based on evidence, the district court relied on an allegation in plaintiffs' complaint and nothing more for its observation. (*Id.*) It then compounded its error by speculating, without any empirical basis, that the alleged confirmatory statements "*could have further inflated the price, prolonged the inflation of the price, or slowed the rate of fall.*" (*Id.*) (emphasis added). This was sheer conjecture and nothing more.

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The district court's reasoning was flatly contrary to the Supreme Court's requirement that Rule 23 "does not set forth a mere pleading standard" and "a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23," *Comcast*, 133 S. Ct. at 1432. There is nothing in the record supporting the district court's supposition that the alleged misstatements artificially perpetuated an inflated share price every day across a three-month period. Not even Plaintiff made this argument, which finds no support in any evidence, Best Buy's trading price during the relevant period, or in law.

The district court also failed to make the factual findings and determinations required by Rule 23 to support certification of a class. It did so even though the Supreme Court and circuit courts have repeatedly emphasized the crucial importance of enforcing this requirement. *See, e.g.*, *Comcast*, 133 S. Ct. at 1432–33; *Wal-Mart*, 131 S. Ct. at 2551–53; *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 117 (2d Cir. 2013) ("To certify a class, a district court must 'make a definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues, . . . must resolve material factual disputes relevant to each Rule 23 requirement,' and must find that each requirement is 'established by at least a preponderance of the evidence.'"); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 298 (1st Cir. 2000) ("[A]rguments woven entirely out of gossamer

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strands of speculation and surmise [may not] tip the decisional scales in a class certification ruling.").

As *Halliburton II* makes clear, and post-*Halliburton II* cases also show, whether defendants have presented evidence rebutting the presumption is a highly fact-dependent determination. For example, in *Regions Financial*, the Eleventh Circuit vacated and remanded an order certifying a securities class "for the District Court to reconsider, in light of *Halliburton II*, whether Regions rebutted the *Basic* presumption." 762 F.3d at 1261. In the context of concluding that plaintiffs had shown market efficiency (which is not challenged here), *Regions Financial* stated that plaintiffs could meet their *initial* burden under *Basic* without identifying the price impact of an alleged misrepresentation, because confirmatory misrepresentations that do not alter the mix of information available to the market are not expected to affect a company's stock price. *Id.* at 1256–57. *Regions Financial* did not address a situation, as here, where defendants do not challenge plaintiff's initial burden under *Basic*, but rather Defendants have produced evidence to rebut the *Basic* presumption.[10]

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[10] *See also Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.*, No. 10-2847, 2014 WL 6661918 (N.D. Ala. Nov. 19, 2014) (on remand finding presumption was not rebutted where, unlike here, evidence showed direct correlation between inflated stock price and asserted misstatements of fact during class period about issuer's book value owing to goodwill that were subsequently revealed to be false when made); *Aranaz v. Catalyst Pharm. Partners*

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Where, as here, there is no evidence that the alleged misstatement "maintained" an inflated stock price, and there is "no way to test the theory," any confirmatory misrepresentation theory must be rejected as "based not on facts but on speculation." *In re Credit Suisse First Boston Corp. (Lantronix, Inc.) Analyst Sec. Litig.*, 250 F.R.D. 137, 145 (S.D.N.Y. 2008) (rejecting maintenance theory promoted by plaintiff's expert as "based not on facts but on speculation"); *In re N. Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d 446, 460–61 (S.D.N.Y. 2010) (a plaintiff relying on a "price maintenance" theory must "rule out causes for that maintenance other than the defendants' purported failure to disclose certain information").

Plaintiff's expert did not even attempt to undertake such an analysis. In fact, Mr. Steinholt's flawed and unreliable analysis offered no opinion whatsoever as to "what in fact happened to [Best Buy's] stock price when [the initial alleged] representations were actually made," *N. Telecom*, 116 F. Supp. 2d at 461, and said nothing suggesting that price effect persisted for three months. To accept Plaintiff's approach would undermine the requirement that courts

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Inc., No. 13-23878-UU, 2014 WL 4814352, at *13 (S.D. Fla. Sept. 30, 2014) (evidence did not rebut presumption where, unlike here, the stock price experienced "a clear and drastic spike [42%] following the alleged misrepresentation and an equally dramatic decline following the revelation of the truth, but all agree that the publications containing the misrepresentation and its revelation respectively caused those price swings").

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undertake a "rigorous analysis" of whether the prerequisites for class certification are satisfied in this case.

Rather than holding Plaintiff to his burden of persuasion under Rule 23, the court's analysis of "price impact" rested on a "mere pleading standard" which Rule 23 forbids. *Wal-Mart*, 131 S. Ct. at 2551. The court made no finding that the statements at issue had any effect on the price of Best Buy's stock—instead speculating, without any empirical basis, that they "*could have* further inflated the price, prolonged the inflation of the price, or slowed the rate of the fall." (Add13 (emphasis added).) In the face of Best Buy's evidence that the stock price did not react to the statements at issue, the district court's resort to speculation about possible alternative theories of price impact is inconsistent with Rule 23.

B. The District Court's Conclusion that the Misstatements Had a Gradual Effect Throughout the Three-Month Class Period Is Inconsistent with the Efficient Market Theory that Underpins the *Basic* Presumption

Compounding its error, the district court's price impact speculation was factually inconsistent with the only legitimate inference that could be drawn from the evidence Defendants submitted about the effect of the two challenged statements.

Best Buy presented uncontroverted evidence that the alleged misrepresentations caused no distortion in Best Buy's stock price—*i.e.* that on the day the two confirmatory statements were made, its stock price actually declined after the statements were made. In the

face of this evidence, the district court pointed to Plaintiff's "alleg[ation] that the stock price rose generally (if not in a straight line) throughout the class period" (Add13.) There is no evidentiary basis for the district court's conclusion that the alleged misstatements had a gradual effect on the price of Best Buy stock throughout the three-month class period.

In fact, the district court's conclusion contradicts the fundamental premise of the *Basic* presumption, which is that the market for the security is efficient. If Best Buy's stock does not trade in an efficient market, the *Basic* presumption cannot apply and class certification must be denied. If Best Buy's stock does trade in an efficient market, then the market quickly incorporated new information, and the alleged misstatements could not have been the cause of the fact that Best Buy's "stock price rose generally" during the class period.

Moreover, the district court's observation that the stock price gradually increased but not in a "straight line" would apply equally to the stock of every widely traded company that trended upwards over an extended period. Instead of requiring, as *Halliburton II* instructs, that defendants show an absence of price impact of the alleged misstatements, the district court's decision would require defendants to affirmatively prove the reason for each stock price movement over the class period, in order to overcome conjecture that subsequent price movements "could have" resulted from the

misstatements. This standard of proof clearly places a far higher burden on a securities defendant than any Supreme Court precedent recognizes.

The unfairness of this approach is underscored by the fact that here the district court made its counter-factual conclusion without reference to any Best Buy, sector, or other economic news during the three-month class period.[11] Contrary to the requirement that Rule 23 findings be supported by fact, the district court simply assumed, without evidence or analysis, two statements confirmatory of a non-actionable statement on day one of the Class Period continued to

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[11] Indeed, because Plaintiff relied exclusively on the back-end price decline to argue that the challenged statements "maintained" inflation, he must present evidence that distinguishes between the impact of a corrective disclosure and the impact of the "tangle of [other] factors" that may have caused the stock price decline. *Dura*, 544 U.S. at 342–43. Plaintiff presented no evidence identifying the stock price decline allegedly caused by the corrective disclosure, separate and apart from the decline caused by the other negative information unrelated to the alleged fraud. Absent any evidence properly accounting for the many pieces of information discussed by market participants, the only thing a fact-finder would know is that the Company's stock price reacted to negative information, which by no means is predicate for a fraud-on-the-market presumption. *See Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse First Boston*, 853 F. Supp. 2d 181, 190 (D. Mass. 2012) ("To establish a causal link between stock price movement and misrepresentations or corrective disclosures, an economist must control for confounding factors, *i.e.*, other industry-or company-specific information released to the market unrelated to the alleged fraud.").

affect the stock price for three months. Given this utter failure of proof, the order certifying a class cannot stand.

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Conclusion

Careful gatekeeping at the Rule 23 stage protects not only judicial efficiency and fundamental fairness; it also safeguards the productivity of the U.S. economy. As the Supreme Court has emphasized, vexatious litigation is a special problem in securities law. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975) (private 10b-5 litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general"). Given the high costs of defending private securities actions and the potentially devastating liability, defendants are especially vulnerable to meritless suits designed to exert intense settlement pressure. But the securities laws are not intended "to provide investors with broad insurance against market losses." *Dura*, 544 U.S. at 345.

Allowing classes to be certified based on a judicially created presumption where the evidence shows that the statements did not affect the stock price at all does not deter fraud. Rather, it punishes innocent defendants (and their current shareholders) who must settle cases after certification to avoid the massive risks and expense of litigation. As the Supreme Court has stated, a ruling that promotes settlement of meritless cases improperly "transform[s] a private securities action into a partial downside insurance policy." *Id.* at 347–48. The Court should not endorse a certification order that

unjustifiably does just that, and the order granting class certification should be reversed.

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Certificate of Brief Length

The undersigned counsel for Appellants Best Buy Co., Inc., Brian J. Dunn, Jim Muehlbauer, and Mike Vitelli, certifies that this brief complies with the requirements of Fed. R. App. P. 32(a)(7)(B) in that it is printed in 14 point, proportionately spaced typeface utilizing Microsoft Word 2010 and contains 12,075 words, including headings, footnotes, and quotations.

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