No. 14-3178

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,

vs.

BEST BUY CO., INC.; BRIAN J. DUNN; JIM MUEHLBAUER
and MIKE VITELLI;
Defendants-Appellants.

Appeal from the United States District Court
for the District of Minnesota
No. 0:11-cv-00429-DWF-FLN
The Honorable Donovan W. Frank

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IBEW Local 98 Pension Fund, et al. v. Best Buy Co., Inc., et al.
Eighth Circuit No. 14-3178

CIRCUIT RULE 28A(i) SUMMARY OF THE CASE

This appeal is resolved by a single sentence in the Supreme Court's most recent guidance on class certification in securities class actions in *Halliburton Co. v. Erica P. John Fund, Inc.* ("*Halliburton II*"): "*Basic* itself 'made clear that the [fraud-on-the-market] presumption was just that, and could 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." 134 S. Ct. 2398, 2414 (2014) (emphasis added). Thus, the Supreme Court explains that price impact may be observable when a false statement is made – or at the time of its "correction." Defendants' assertion that "reference to back-end price reaction is contrary to *Halliburton II*" (Appellants' Opening Brief ("AOB") 11) is contradicted by the express language of *Halliburton II*.

There was absolutely no abuse of discretion by the district court. Following the procedure of *Halliburton II*, the district court considered plaintiffs' undisputed evidence establishing the fraud-on-the-market presumption for showing reliance at class certification, concluding plaintiffs had met their burden. (A360) The district court then considered defendants' attempt to rebut that presumption, but was unpersuaded by defendants' incomplete analysis – pointedly holding that defendants did not meet their burden because their evidence was limited to analysis of observable

price impact when the statements were made, and did not consider price impact on "correction" of the false statements. (A362-A363) Following *Halliburton II* and quoting the Seventh Circuit, the district court held price impact can be observed by stock price movement when the truth is revealed in situations where "an unduly optimistic statement stops a price from declining (by adding some good news to the mix)." (A361 (quoting *Schleicher v. Wendt*, 618 F.3d 679, 683 (7th Cir. 2010)) "[O]nce the truth comes out, the price drops to where it would have been had the statement not been made." *Id.*

The district court was well within its discretion in concluding defendants failed to meet their burden of rebuttal by failing to even address end-of-Class Period price impact. The district court's well-reasoned opinion should be affirmed.

Plaintiffs request 30 minutes to present their oral argument.

CORPORATE DISCLOSURE STATEMENT

Lead plaintiff Marion Haynes is not a "corporate party," does not issue stock, and is not controlled by any publicly held corporation.

TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Page

CASES

Page

Page

STATUTES, RULES AND REGULATIONS

Page

I. JURISDICTION

Plaintiffs agree with defendants' jurisdictional statement, except to the extent that defendants have exceeded this Court's grant of limited interlocutory appeal and raised issues as to which appeal is not appropriate at this time. This Court has jurisdiction under 28 U.S.C. §1292(e) to review an interlocutory order granting or denying class certification as provided by Federal Rule of Civil Procedure 23(f). This affords the Court limited jurisdiction for interlocutory review of class certification orders, but does not authorize interlocutory review of any other orders, or of issues beyond those necessary to a Rule 23 determination. Specifically, when seeking interlocutory review under Rule 23(f), "a party may appeal only the issue of class certification; no other issue may be raised." *Bertulli v. Indep. Ass'n of Cont'l. Pilots*, 242 F.3d 290, 294 & n.7 (5th Cir. 2001); *accord Franze v. Equitable Assurance*, 296 F.3d 1250, 1252 (11th Cir. 2002) ("Under Rule 23(f), our review is limited to the class certification issue . . . ."). Indeed, circuit courts have been "scrupulous about limiting Rule 23(f) inquiries to class certification issues." *McKowan Lowe & Co. v. Jasmine, Ltd.*, 295 F.3d 380, 389-90 (3d Cir. 2002). Thus, the merits issues raised by defendants – addressed in Argument B – are not cognizable on appeal under Rule 23(f).

II. ISSUE PRESENTED

Did the district court act within its broad discretion in certifying this class after thoroughly analyzing each component of Federal Rule of Civil Procedure 23 and applicable Supreme Court authority in a 20-page order and specifically considering and finding insufficient defendants' evidentiary attempt to demonstrate lack of stock price impact in order to rebut the well-established fraud-on-the-market presumption of reliance?

Apposite Authorities

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

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

Schleicher v. Wendt, 618 F.3d 679 (7th Cir. 2010);

FindWhat Investor Grp. v. FindWhat.com, 658 F.3d 1282 (11th Cir. 2011);

Federal Rule of Civil Procedure 23;

Federal Rule of Evidence 301.

III. STATEMENT OF THE CASE

A. Nature of the Case

Defendants appeal from the district court's certification of a class of investors alleging violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934 against Best Buy Co., Inc., its Chief Executive Officer, Brian J. Dunn, its Chief Financial Officer, Jim Muehlbauer, and its Enterprise Executive Vice President and President, Americas, Mike Vitelli, (collectively, "defendants") based on their misrepresentation of Best Buy's financial condition.

B. Course of Proceedings Relevant to Class Certification

IBEW Local 98 Pension Fund filed its initial complaint against Best Buy on February 18, 2011. (Docket No. "Dkt." 1) Rene LeBlanc filed a complaint on March 17, 2011. (*See* Dkt. 19) On June 7, 2011, the district court consolidated the related actions and appointed Marion Haynes as lead plaintiff, approving his selection of lead and liaison counsel. (Dkt. 18) Haynes and the Pension Fund jointly filed an amended complaint on July 22, 2011. (Dkt. 25) The district court dismissed the amended complaint on March 20, 2012 (Dkt. 41) and entered judgment the following day. (Dkt. 42)

On October 22, 2012, the district court vacated the judgment and granted plaintiffs' motion for further leave to amend (Dkt. 60); plaintiffs filed the operative First Amended Class Action Complaint for Violation of the Federal Securities Laws

("Complaint") one week later, on October 29, 2012. (Dkt. 61) On August 5, 2013, the district court granted in part and denied in part defendants' motion to dismiss the Complaint, upholding certain alleged false statements by defendants as stating a claim for securities fraud. (Dkt. 78)

Defendants requested permission to file a motion to reconsider that order on August 12, 2013. (Dkt. 80) On August 29, 2013, defendants also filed a motion to certify interlocutory appeal of the same order. (Dkt. 85) Following full briefing, the district court denied both the request and the motion on December 19, 2013. (Dkt. 122)

Lead plaintiff moved to certify a class of injured investors on January 31, 2014. (Dkt. 126) On February 21, 2014, defendants opposed the motion and requested that the district court stay proceedings, pending the Supreme Court's decision in *Halliburton II*. (Dkt. 156, 158) The court granted the stay. (Appellees' Separate Appendix ("SA") 444-445)

The Supreme Court issued its ruling in *Halliburton II* on June 23, 2014. 134 S. Ct. 2398. Lead plaintiff and defendants each submitted notices of supplemental authority regarding *Halliburton II*. (Dkt. 195, 197) Defendants did not request supplemental briefing or expert submissions. (*Id.*) On August 6, 2014, six weeks after the Supreme Court issued its opinion in *Halliburton II*, the district court followed the procedure prescribed by *Halliburton II* and certified the class. (Dkt. 200)

Defendants petitioned this Court for permission to appeal, pursuant to Federal Rule of Civil Procedure 23(f), on August 19, 2014. The following day, defendants requested the district court stay all proceedings, pending this Court's resolution of the 23(f) petition. (Dkt. 202) On September 11, 2014, the district court granted the stay. (Dkt. 223) This Court granted the 23(f) Petition on September 24, 2014. Following further briefing, the district court stayed this action on October 22, 2014, pending resolution of this appeal. (Dkt. 235)

C. Statement of Plaintiffs' Claims Upheld by the District Court

On August 5, 2013, the district court upheld securities fraud claims against Best Buy and three individuals who led Best Buy during the Class Period (September 14, 2010 - December 13, 2010): CEO Dunn, Executive Vice President Muehlbauer, and Enterprise Executive Vice President, and President of Best Buy for the Americas, Vitelli. (Dkt. 78)

1. Facts Relevant to Upheld Claims

Prior to the Class Period, Best Buy had issued aggressive financial guidance for its 2011 fiscal year:[1] revenues of $52-$53 billion, same store sales growth of 1%-3%,[2]

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[1] Best Buy's 2011 fiscal year ran from February 27, 2010 until February 26, 2011. (A56 n.2)

[2] "Same store sales" is a measure of revenue at stores, call centers, and websites operating for at least fourteen full months as well as revenue related to other comparable store sales channels." (A56 n.1)

and earnings per share of $3.45-$3.60. (A56-A57¶3; A72-A73¶¶38-40) But, Best Buy's first quarter financial results were extremely disappointing. (A57¶4; A77-A79¶¶49-52) Nonetheless, despite results reflecting demand weakness and slowing customer traffic, when defendants announced those first quarter results on June 15, 2010, they reiterated all aspects of Best Buy's fiscal year forecasts. (A57¶4; A81-A82¶55) Defendants assured investors that sales would accelerate to make up for the first quarter loss – "especially" in the fourth quarter. (*Id.*)

The Complaint alleges defendants also repeatedly assured investors that defendants could and would control and manipulate certain business "levers" to deliver on Best Buy's fiscal 2011 earnings guidance. (A69¶33) Specifically, defendants repurchased Best Buy shares, using "buybacks" as "a good way to improve returns for shareholders." (A70¶35) In other words, defendants held what they called a "lever" to achieve forecasted per share earnings by reducing the number of outstanding shares among which earnings would be divided. (*Id.*) Yet, defendants assured investors in March 2010 that Best Buy's earnings forecast was not based on increasing earnings through share repurchases. (A124-A125¶131)

The Class Period begins on September 14, 2010, when Best Buy reported its second quarter financial results – reflecting Best Buy's first decline in market share in 18 quarters and declines in key categories such as televisions. (A87-A88¶¶67-69) Best Buy was losing business to competitors like Target, Amazon, and Walmart – and

defendants knew it. (A87¶68) Best Buy did report earnings per share that beat analyst expectations for the second quarter, but the results were not based on strong revenue growth during the quarter. (A87¶67) Instead, the results were based on high margins on a limited line of wireless products and share repurchases – contrary to their earlier assurance that they would not need to use repurchases to achieve earnings. (*Id.*)

In the wake of two financially challenging and disappointing quarters, Best Buy issued a press release at 8:00 a.m. EDT on September 14, 2010. (A58¶6; A87-A88¶¶67-69) Defendants acknowledged that they would have to reduce Best Buy's fiscal 2011 *revenue* forecast by up to $1 billion. (*Id.*) Surprisingly, however, defendants actually *increased* Best Buy's *earnings* guidance for fiscal 2011 from $3.45-$3.60 to $3.55-$3.70, even while acknowledging that revenues would be decreased. (A85¶63; A87-A91¶¶69-72)

In a subsequent conference call with investors at 10:00 a.m. EDT on the same day, Executive Vice President Muehlbauer spoke about Best Buy's current financial progress toward achieving the financial goals articulated in the press release. (A58-A59¶7; A89-A91¶72) Despite two quarters of disappointing financial results, Muehlbauer told investors Best Buy's "earnings are essentially in line with our original expectations for the year" and Best Buy was "on track to deliver and exceed" the new increased earnings guidance. (*Id.*) Thus, defendants bolstered investors'

expectations – already inflated by the false (though dismissed) earnings guidance – by falsely telling the market Best Buy was then-currently "in line" and "on track" to meet or exceed that earnings guidance. (*Id.*)

Analysts pressed defendants to explain how "the revenue line specifically is going to accelerate to a pretty significant [necessary] extent" in order for Best Buy to achieve the earnings guidance projections. (A91-A94¶¶73-76) Indeed, the following day, an analyst from *Seeking Alpha* wrote an article titled, "Best Buy CEO's Irrational Exuberance: Is His Mouth Writing a Check His Company Cannot Cash?" (A96-A98¶82) Repeating the first and second quarter results as well as defendants' earnings guidance for the remainder of the year with no small amount of incredulity, the analyst wrote: "Sounds like wishful thinking for a company that has just reported two straight fiscal quarters in which they've [had] softer sales than they had expected." (*Id.*)

Nonetheless, defendants reassured analysts and investors on September 14, 2010: "We know during the holiday season that customers over-index their wallet share into [consumer electronic] products [and] [w]e have no reason to believe this holiday season is going to be any different." (A93-A94¶76) Informing investors about Best Buy's current progress toward achieving the increased earnings guidance, Muehlbauer boldly summed up: "Overall, we are pleased that we are on track to deliver and exceed our annual EPS [earnings per share] guidance." (A89-A91¶72)

Plaintiffs allege defendants knew on September 14, 2010, that Best Buy was not "on track" to meet or exceed the new fiscal 2011 earnings forecast – and that then-current earnings were not "in line" with the original earnings expectations. (A60¶12; A103-A104¶¶90-91) In fact, plaintiffs allege defendants knew that Best Buy's current financial condition had significant problems. (A59-A60¶¶9-11; A101-A102¶87; A104-A107¶¶92-99)

Just three months later, on December 14, 2010, defendants admitted that same store sales had continued to decline – as had trends in big revenue items, such as televisions, and Best Buy's overall market share. (A62¶¶16-17; A114-A115¶115) Only two weeks into the fourth quarter – and, significantly, well before Christmas and the bulk of the fourth quarter ending February 26, 2011 – defendants abruptly cut Best Buy's fiscal year 2011 earnings guidance from the recently-increased $3.55-$3.70 to $3.20-$3.40. (A62¶¶16; A114-A115¶115; A118¶119) The dramatic reduction was on top of $1.2 billion in share buybacks. (A131-A132¶144 (chart))

Defendants admitted the problem was not a change in the economy or consumer demand – but rather a continuation of declining sales trends and that defendants had been "too aggressive" when they announced the earnings guidance "earlier in the year." (A115-A116¶116) In particular, defendants admitted their forecast had been based on "looking for an *improvement* in the TV industry in the third quarter,

supported by a more promotional environment and pent-up consumer demand for new technologies." (*Id.*)

Remarkably, defendants did not even wait for the end-of-December holiday sales or the fourth quarter, which was typically responsible for more than 50% of Best Buy's net earnings. (A62¶¶17; A114-A115¶115; A143-A146¶173) Further, defendants had stopped all share repurchases as of November 27, 2010 – and did not make a single additional share repurchase until at least January 30, 2011. (A130¶142) The fact that defendants chose not to repurchase shares during the time period when the stock price was lowest supports a reasonable inference that defendants were using share repurchasing to mask business performance declines and to inflate earnings – rather than because of a genuine belief that Best Buy's shares were undervalued. (*Id.*)

Market response to defendants' December 14, 2010 disclosures was swift and dramatic. The stock price dropped 14% overnight, from $41.70 to $35.52. (A118¶120) Moreover, the volume of shares traded – 64 million – was the third-highest trading volume in Best Buy's 25-year trading history. (*Id.*)

2. District Court Order Upholding Two Alleged False Statements

The district court dismissed plaintiffs' claim regarding defendants' earnings forecast from Best Buy's September 14, 2011 press release. (A227-A232) The court held the forecast was not actionable because it was a forward-looking statement protected by the safe harbor provision of the Private Securities Litigation Reform Act

of 1995 ("PSLRA"), based on the court's conclusion that defendants' cautionary statements accompanying the earnings forecast were meaningful. (*Id.*)

Despite defendants' request that the court also dismiss the subsequent conference call statements as merely "confirm[ing] the company's comfort with the projection it is issuing" (Dkt. 66 at 4-8) – the same concept defendants continue to repeat on appeal (AOB3) – the court upheld those statements as independent statements of Best Buy's "present condition." (A232-A236) The court explained its decision to uphold the statements of current progress toward a future goal came "[a]fter carefully reviewing the case law and the arguments set forth by the parties." (A234) "Based on a thorough review of the record, and consideration of the parties' arguments, the Court concludes that Plaintiffs' allegations that Defendants made the 'on track' and 'in line' statements despite known negative trends are sufficient to satisfy the pleading requirements of the PSLRA." (A236)

The court specifically "acknowledge[d] that this [was] a departure from the Court's earlier ruling in the March 2012 Order," but ruled that "after a thorough review of the record, the parties' arguments, and the allegations in the FAC, the Court concludes that today's ruling is consistent with the law and facts presented, and that Plaintiffs' allegations as to these statements are sufficient to state a claim." (*Id.* n.6)[3]

[3] The court also dismissed one statement made by defendant Vitelli about TV sales as inactionable "hyperbole." (A236-A237)

Consistently, the court also upheld the §20(a) control person claim as to the "on track" and "in line" statements. (A238)

D. Evidence Submitted Regarding Class Certification

Lead plaintiff Haynes moved for certification of a class of plaintiffs injured by defendants' two upheld false statements from the conference call. (Dkt. 126) Haynes demonstrated that this case meets the Federal Rule of Civil Procedure 23(a) requirements of numerosity, typicality, commonality, and adequacy. (Dkt. 128) Defendants did not dispute those showings. (Dkt. 156) Haynes also demonstrated that a class action is superior to any other methods of litigating the claims asserted, pursuant to Federal Rule of Civil Procedure 23(b)(3). (Dkt. 128) Again, defendants did not dispute that showing. (Dk. 156)

The only contested aspect of plaintiffs' class certification motion was the showing that common questions of law and fact predominate over any individual questions, pursuant to Federal Rule of Civil Procedure 23(b)(3). (*Compare* Dkt. 128, *with* Dkt. 156) Defendants asserted individualized issues existed as to both damages and reliance, precluding a finding of predominance. (Dkt. 156) On appeal, however, defendants have abandoned their challenge as to damages and only contest predominance on the basis of their assertion that there are individualized issues of reliance. (AOB)

Accordingly, this summary of the class certification evidence offered in the district court will be limited to the reliance issue.

1. Plaintiffs' Evidentiary Showing, Establishing the Fraud-on-the-Market Presumption

In order to establish reliance through the "fraud-on-the-market" presumption, plaintiffs submitted unrebutted evidence showing that: (a) the alleged misrepresentations were publicly known; (b) Best Buy stock traded in an efficient market; and (c) plaintiffs traded the stock between the time the misrepresentations were made and when the truth was revealed. (Dkt. 128 at 16-22) Regarding market efficiency, plaintiffs specifically analyzed each of the *Cammer* factors (*Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989)) – average trading volume, analyst coverage, market makers, eligibility to file S-3 Registration Statement, and price reaction to new material information. *Id.* at 1286-87.

In support, plaintiffs also submitted the sworn declaration of Chartered Financial Analyst, Bjorn I. Steinholt, to analyze the efficiency of the market in which Best Buy shares traded. (A240) Steinholt explained that the scope of his analysis was "the economic issues relating to whether the market in which the common stock of Best Buy Co., Inc. . . . traded from September 14, 2010 through December 13, 2010, . . . was open, developed, and efficient, in that the market price of the Company's common stock during this time period quickly changed to reflect new,

material information concerning Best Buy as new information became available." (A242¶4)

Steinholt analyzed each of the *Cammer* factors. (A246-A256¶¶12-32) Specifically, regarding the final *Cammer* factor – price reaction to new material information – Steinholt performed an event study (SA11-SA376) and concluded that "Best Buy's common stock quickly incorporated new, material company specific information." (A253-A254¶28) Inexplicably, on appeal, defendants state that Steinholt "did no event study." (AOB6) He did. (SA11-SA376) The district court cited to it. (A364) Defendants just chose to omit that event study from their Appendix.

As examples of dates on which new, material information became available regarding the value of Best Buy's common stock, Steinholt's event study analyzed September 14, 2010 and December 14, 2010. (A255-A256¶¶30-31) Summarizing extensive analysis, Steinholt opined that "new and material information was quickly incorporated into Best Buy's stock price during the relevant time period as one would expect in an efficient market." (A256¶32)

Steinholt declared: "Specifically, the evidence I have reviewed shows that new information about Best Buy was quickly disseminated to the market, analyzed by market participants and traded on, causing the information to quickly become reflected in the Company's common stock price." (*Id.*) Importantly, Steinholt "found

no evidence of market inefficiency." (*Id.*) Steinholt concluded that "the market in which Best Buy common stock traded during the Class Period was impersonal, open, well-developed, and efficient in that it quickly responded to incorporate and reflect new, material information as it became available." (*Id.*)

2. Defendants' Attempt to Rebut the Fraud-on-the-Market Presumption

Defendants did not dispute that: (a) the alleged misrepresentations were publicly known; (b) Best Buy stock traded in an efficient market; and (c) plaintiffs traded the stock between the time the misrepresentations were made and when the truth was revealed. (Dkt. 156) Thus, defendants did not dispute that plaintiffs made the requisite evidentiary showing to establish reliance through the fraud-on-the-market presumption.

Defendants opposed class certification for only two reasons. (*Id.*) First, defendants asserted a non-meritorious issue regarding individualized damages issues – which defendants have elected not to pursue on appeal. (*Id.*; *see* Argument B.3.) Second, defendants asserted that "the two Best Buy statements at issue in this case had no price impact on Best Buy's stock," and, according to defendants, thereby rebutted the fraud-on-the-market presumption. (Dkt. 156)

Availing themselves of precisely the opportunity to rebut the presumption that *Halliburton II* provides, defendants attempted to show that their "'on track' and 'in line' statements had no impact on the price of Best Buy stock," relying on an event

study conducted by Professor Kenneth Lehn. (Dkt. 156 at 20) Based on Lehn's declaration, defendants conceded "the information that Best Buy released prior to the market open on September 14 [the earnings press release] *did* have a positive impact on Best Buy's stock price," but asserted the two upheld "on track" and "in line" statements from the conference call after the market opened had "*no* discernable impact on Best Buy's stock price." (*Id.* at 25) According to defendants, that "indisputable evidence 'severs' the link reference in *Basic* and thereby rebuts the presumption." (*Id.* at 26)

But, defendants misrepresent Lehn's declaration. It did not state that the two upheld statements had no price impact. (A259-A271) Indeed, Lehn did not even dispute that Best Buy stock traded in an efficient market in which public, material statements are presumed to have price impact. (*Id.*) Instead, Lehn's declaration merely explained that he was asked to analyze "whether . . . the Alleged Misrepresentations had a *positive* impact on Best Buy's stock price."[4] (A264¶12 (emphasis added))

Lehn divided information for his event study into stock price movement before the market opened on September 14, 2010 – when the press release had been

[4] The only other question Lehn was asked to analyze was "whether Lead Plaintiff has identified a model for calculating on a class-wide basis only those damages attributable to the Alleged Misrepresentations" (A264¶12) – the "*Comcast*" issue which defendants have not pursued on appeal.

published, but the conference call statements had not yet been made – and stock price movement between the time the market opened and when it closed on September 14, 2010, the day on which the conference call statements were made. (A266¶16) Lehn thus showed that the stock price increased in a statistically-significant way after the press release was issued and did not increase again in a statistically-significant way after the conference call statements. (A266-A267¶¶17-18) That was the end of his reported analysis.

3. Plaintiffs' Additional Evidence Debunking Defendants' Asserted "Absence of Price Impact"

Plaintiffs responded with law, economic analysis, and case-specific evidence – all demonstrating that "[p]rice impact can be shown *either* by an increase in price following a fraudulent public statement *or* a decrease in price following a revelation of the fraud." (Dkt. 171 at 10) Accordingly, plaintiffs argued that Lehn's "testimony must be disallowed as his methodology is materially incomplete, unhelpful and unreliable," citing Federal Rule of Evidence 702 and case law. (*Id.* at 12) In this case, price impact was observable when the truth concealed by the Class Period misrepresentations (which maintained an already-inflated stock price by assuring investors that Best Buy was then-currently "on track" and "in line" to meet the earnings estimate) was disclosed on December 14, 2010. Defendants and their expert simply never addressed the December 14, 2010 disclosure. (A259-A271)

In support of plaintiffs' position, Steinholt provided a supplemental declaration, addressing defendants' attempt to show the absence of price impact and emphasizing the economic significance of market expectations. (A333-A349) Steinholt explained that "[t]he materiality of an alleged misrepresentation can be demonstrated either by: (a) a statistically significant price increase following a misrepresentation, OR (b) a statistically significant price decline following the disclosure of the relevant truth concealed by the misrepresentation."[5] (A338¶7) As background, Steinholt explained "[i]t is important to understand that the absence of a price increase following a misrepresentation does not necessarily mean that the alleged false and misleading statements were immaterial to investors. This is so because stock price evidence to demonstrate materiality at the time of a misrepresentation will only be available if the misrepresentation is materially different from market expectations." (*Id.*)

Steinholt provided the following useful example:

> [I]f investors expect a company to report earnings of $1 per share, and the company falsely reports earnings of $1 per share even though its actual earnings are only $0.60 cents per share, the stock price would not be expected to increase. However, this does not mean that the misrepresentation (overstatement of earnings per share by $0.40 cents) was immaterial. Instead, it means that the materiality of the misrepresentation (overstatement) cannot be assessed based on this price reaction because it only reflects the difference between investors' expectations ($1/share) and false earnings reported (also $1/share), not

[5] While "materiality" and "price impact" are distinct legal and economic concepts, the terms are interchangeable as used here.

> the difference between the truth ($0.60/share) and the false earnings reported ($1/share). Consequently, the materiality of such a misrepresentation is instead analyzed by examining the price decline, if any, following the disclosure of the relevant truth concealed by the misrepresentation.

(*Id.*)

Specifically addressing the facts of this case, Steinholt opined that it is "not at all surprising" Best Buy's stock price did not increase further after the conference call statements because "the economic substance of the information disclosed on the 2Q11 conference call had largely been disclosed in the 2Q11 earnings release prior to the market opening," and "was largely reflected in Best Buy's stock price." (A340¶11)

From an economic perspective, even if the press release earnings guidance is not actionable because it is protected as a forward looking statement with appropriately meaningful cautionary language under the safe harbor of the PSLRA, "this does not mean that investors did not give it great weight." (A340-A341¶12) It "simply means that investors who purchased prior to the conference call do not have any recoverable damages as they cannot establish liability." (*Id.*) Actionability considerations aside, the "economic substance of the information in the 2Q11 earnings release and the 2Q11 conference call is virtually the same and would have been expected to be interpreted similarly by investors." (A341-A342¶13) What defendants' upheld alleged false statements added to the mix of information was

(false) reassurance that Best Buy was currently "on track" and "in line" to meet or exceed the stated economic goal. (A58-A59¶7; A89-A91¶72)

Thus, plaintiffs explained in the district court that price impact can be shown where defendants' statements maintain an already-inflated stock price, preventing or showing dissipation of the fraud. (Dkt. 171 at 9-12) Defendants' suggestion that this theory was "[c]hanging course" (AOB7) or a "*post hoc* improvisation" (AOB11) is simply inaccurate; plaintiffs made precisely the same argument in response to defendants' motion to dismiss. (Dkt. 69 at 20 n.8)

Plaintiffs provided substantial legal authority – in addition to Steinholt's economic analysis – confirming that "'when an unduly optimistic statement stops a price from declining (by adding some good news to the mix), once the truth comes out, the price drops to where it would have been had the statement not been made.'" (*Id.* at 12 (quoting *Schleicher*, 618 F.3d at 683)) Plaintiffs explained that because defendants' upheld alleged false statements added some good news about Best Buy's current progress toward achieving the earlier-stated earnings goal, the price impact was observable on "December 14, 2010, the date the relevant truth was disclosed and Best Buy's stock price declined by 14%." (*Id.*)

Steinholt opined that this analysis of "what the alleged misrepresentation actually is" is crucial to understanding price impact. (A342¶14) Importantly, Steinholt highlighted that "Dr. Lehn never considers the alleged truth in his analysis of

the alleged misrepresentations." (*Id.*) "Nor does he even acknowledge that materiality (or price impact) is also routinely examined by analyzing the price movement following a corrective disclosure, in this case: Best Buy's stock price decline following the disclosure of the alleged truth on December 14, 2010." (*Id.*)

Steinholt concluded that the December 14, 2010 disclosure "effectively revealed to investors that Best Buy was not 'on track,' but 'far off pace,' to make the 2011 EPS guidance provided at the start of the Class Period." (A343¶16) As also shown in Steinholt's original declaration, Steinholt reiterated that the stock price impact of that information was "statistically significant at the 1% level." (*Id.*)

IV. DISTRICT COURT'S CERTIFICATION OF THE CLASS

The district court wrote a careful and thorough 20-page opinion, concluding class certification was appropriate in this case. (A350-A369) Important to the issue on appeal, the district court prudently delayed issuing its opinion until six weeks after the Supreme Court's ruling in *Halliburton II*. (*Id.*) Exercising abundant discretion, the court waited for clear guidance before analyzing defendants' challenge to the fraud-on-the-market presumption of reliance.

The court then applied the law. As *Halliburton II* instructs, the court first considered whether plaintiffs had made the requisite evidentiary showing to establish reliance with the fraud-on-the-market presumption: "'(1) that the alleged misrepresentations were publicly known, (2) that they were material, (3) that the stock

traded in an efficient market, and (4) that the plaintiffs traded the stock between the time the misrepresentations were made and when the truth was revealed.'" (A358-A360 (quoting *Halliburton II*, 134 S. Ct. at 2414)) Addressing the only one of those issues where an analysis of evidence was necessary, the court held that "Plaintiffs have made a sufficient showing of market efficiency."[6] (A360) Indeed, the court noted that "Defendants do not challenge market efficiency." (*Id.*) "Nor could they reasonably dispute that Best Buy stock traded in an open and efficient market." (*Id.*)

As *Halliburton II* instructs, the court then addressed defendants' attempt to rebut the presumption, concluding defendants "have not submitted evidence sufficient to rebut the presumption of reliance." (A361; *see also* A363) The court acknowledged plaintiffs' theory of the case: "that Best Buy's stock price rose after the alleged misstatements and later declined after Best Buy revealed information on December 14, 2010." (A361) The court found defendants' evidence failed to show an absence of price impact because defendants only considered half of that story. The court explained that defendants "have not offered evidence to show that Best Buy's stock price did not decrease when the truth was revealed." (A362-A363) Indeed, the

[6] "Even though materiality is a prerequisite for invoking the *Basic* presumption, [the Supreme Court] held [in *Amgen*] that it should be left to the merits stage, because it does not bear on the predominance requirement of Rule 23(b)(3)." *Halliburton II*, 134 S. Ct. at 2416.

court noted that defendants' expert, Lehn, "does not mention the stock price's reaction to the information revealed on December 14, 2010." (A363 n.6)

The court analyzed case law from both the Seventh and Eleventh Circuits to support its conclusion that "price impact can be shown by a decrease in price following a revelation of the fraud," rejecting defendants' assertion that a material misrepresentation must always cause the stock price to rise. (A362) Specifically, the court quoted a brief passage squarely on point:

> "When an unduly optimistic false statement causes a stock's price to rise, the price will fall again when the truth comes to light. Likewise when an unduly optimistic statement stops a price from declining (by adding some good news to the mix): once the truth comes out, the price drops to where it would have been had the statement not been made."

(A361 (quoting *Schleicher*, 618 F.3d at 683))

The district court found defendants' failure to address the stock price impact of the revelation of defendants' false statements was fatal to their attempt to rebut the presumption. Defendants' partial analysis of price impact – only analyzing positive stock price movement at the time of the statements – was simply not dispositive of the issue. "Even though the stock price may have been inflated prior to the earnings phone conference, the alleged misrepresentations could have further inflated the price, prolonged the inflation of the price, or slowed the rate of fall. This impact on the

stock price can support a securities fraud claim . . . [and] can be shown by a decrease in price following a revelation of the fraud." (A362)[7]

In other words, there were myriad possibilities – including plaintiffs' theory of the case (A362) – that defendants' partial analysis did not address. As the court recognized, plaintiffs alleged "the stock price rose generally (if not in a straight line) throughout the class period" and plaintiffs' theory is that "the relevant damages in this case occurred on December 14, 2010, when the alleged truth concealed by the alleged misrepresentations came to light and Best Buy's stock price declined as a result." (A362) It was insufficient for defendants to show only that the stock price did not increase when the actionable false statements were made. Because defendants "have not offered evidence to show that Best Buy's stock price did not decrease when the truth was revealed," the court concluded "Defendants have not submitted evidence sufficient to rebut the presumption of reliance." (A362-A363)

The court did limit the class definition, however, to exclude shareholders who bought and sold before the upheld statements. (A364-A365) Thus, the court carefully considered defendants' point about "the potential gap in damages from the time of the opening of the market on September 14, 2010, until the time of the false statements during the earnings phone conference" and amended the class accordingly. (*Id.*) The

[7] Internal citations and quotation marks omitted throughout unless otherwise noted.

court concluded that any individualized "issues regarding the timing of a particular investor's purchase in relation to the fraudulent statements . . . will not predominate over the common ones." (A365)

V. STANDARD OF REVIEW

This Court reviews class certification for abuse of discretion. *Bouaphakeo v. Tyson Foods Inc.*, 765 F.3d 791, 796 (8th Cir. 2014) (citing *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1029 (8th Cir. 2010)). "The district court is accorded broad discretion to decide whether certification is appropriate, and we will reverse only for abuse of that discretion." *Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 645 (8th Cir. 2012) (quoting *Rattray v. Woodbury Cnty.*, 614 F.3d 831, 835 (8th Cir. 2010)). That broad discretion is accorded in recognition of "the essentially factual basis of the certification inquiry and . . . the district court's inherent power to manage and control pending litigation." *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 325 (5th Cir. 2008).

VI. SUMMARY OF ARGUMENT

Defendants' appeal is narrow. The only element of the district court's class certification order that defendants challenge is the court's finding that the common issue of investors' reliance on the upheld alleged false statements predominates over any individual reliance issues.

Even as to that limited issue, defendants did not dispute in the district court and do not dispute on appeal that plaintiffs established each of the prerequisites for invoking the fraud-on-the-market presumption. (A360) As *Halliburton II* explained, plaintiffs thereby established price impact with indirect evidence. 134 S. Ct. at 2415. Accordingly, defendants have conceded the district court was correct in holding plaintiffs met their burden of persuasion to show the common issue of reliance predominates over individual ones.

Moreover, defendants do not dispute that, once plaintiffs established price impact with indirect evidence, it became defendants' burden to rebut that presumption with direct evidence showing the absence of price impact that, "if believed by the trier of fact, would support a finding that [price impact did] not exist." (AOB28 n.5 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993))) Even further, defendants do not dispute they had ample opportunity to make that evidentiary showing.

Although defendants baldly assert "the district court misapplied *Halliburton II*" (AOB, Summary of the Case at 1), defendants raise no legal error. Instead, defendants' only issue is their dissatisfaction with the district court's fact-bound result after it correctly applied *Halliburton II* and considered defendants' evidence. Dissatisfaction with the court's conclusion is not a basis for demonstrating that the district court abused its broad discretion.

Crucially, defendants' expert did not opine that the "in line" and "on track" statements had no impact on the stock price. (A259-A271) Rather, defendants' rebuttal attempt was based on an incomplete analysis because defendants chose to limit their expert to an examination of "positive" price impact when the statements were made, rather than allowing their expert to also consider negative price impact when the concealed truth was revealed. (A363 n.6 ("In his Declaration, Professor Lehn explains that he was asked to analyze whether the alleged misrepresentations 'had a positive impact on Best Buy's price,' but does not mention the stock price's reaction to the information revealed on December 14, 2010.")))

The district court was well within its discretion in finding that incomplete analysis to be unpersuasive in showing the absence of price impact as a whole. Applying the standard defendants concede applies (AOB28-29), their proffered evidence – even if believed – is insufficient to show the absence of price impact because it failed to consider price impact "on correction" of the false statements. *Halliburton II*, 134 S. Ct. at 2414. The district court was well within its discretion in following the Supreme Court and other circuit courts that have held price impact can be demonstrated by stock price decline "once the truth comes out." (A361 (quoting *Schleicher*, 618 F.3d at 683))

As the court explained in clarifying why defendants failed to meet their burden, "the alleged misrepresentations could have further inflated the price, prolonged the

inflation of the price, or slowed the rate of fall." (A362) Any of those price impacts could "support a securities fraud claim." (*Id.*) Thus, defendants failed to satisfy their burden of rebuttal – as the district court reasonably concluded.

Defendants' attempts to interject review of the court's earlier dismissal order, and unpreserved and untimely issues regarding loss causation, must be rejected as outside the limited scope of this Court's Rule 23(f) grant of permission to appeal. Further, defendants' nonmeritorious damages assertion made in the district court is waived because defendants have elected not to appeal it.

This Court should affirm the district court's carefully analyzed and well-reasoned opinion.

VII. ARGUMENT

A. Issue on Appeal: the District Court Did Not Abuse Its Discretion in (1) Applying Supreme Court Guidance from *Halliburton II*; (2) Considering Defendants' Evidence; and (3) Concluding that Defendants' Evidence Did Not Establish Absence of Price Impact

A district court may certify a class under Rule 23(b) if "questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Federal Rule of Civil Procedure 23(b); *Bouaphakeo*, 765 F.3d at 796.

On appeal, defendants challenge only one issue regarding the court's extensive class certification analysis: whether the common issue of reliance based on the fraud-on-the-market presumption predominates over any individualized reliance issues. The court was well within its discretion in following the Supreme Court's guidance in *Halliburton II*, closely considering defendants' evidence, and simply finding that defendants' incomplete analysis of positive stock price movement – at the time of the misrepresentations only – was inadequate to show an absence of any overall stock price impact.

1. Defendants Concede that Plaintiffs Made the Required Showing to Demonstrate that the Fraud-on-the-Market Presumption of Reliance Applies

In this securities fraud class action, plaintiffs established reliance through the "fraud-on-the-market" presumption which "rests on the premise that certain well developed markets are efficient processors of public information" and, thus, "the 'market price of shares' will 'reflec[t] all publicly available information.'" *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, __ U.S. __, 133 S. Ct. 1184, 1192 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 246 (1988)). Where transactions are not "face-to-face" and "the market is interposed between seller and buyer," the market "transmits information to the investor in the processed form of a market price." *Basic*, 485 U.S. at 244. "The market is acting as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the

market price." *Id.* "As a result, whenever the investor buys or sells stock at the market price, his 'reliance on any public material misrepresentations . . . may be presumed for purposes of a Rule 10b-5 action.'" *Halliburton II*, 134 S. Ct. at 2408 (quoting *Basic*, 485 U.S. at 247).

The *Basic* presumption is alive and well. As the Supreme Court reiterated last year: "More than 25 years ago, we held that plaintiffs could satisfy the reliance element of the Rule 10b-5 cause of action by invoking a presumption that a public, material misrepresentation will distort the price of stock traded in an efficient market, and that anyone who purchases the stock at the market price may be considered to have done so in reliance on the misrepresentation." *Halliburton II*, 134 S. Ct. at 2417. Specifically considering and rejecting arguments from defendants and supporting *amici curiae* – including both *amici curiae* that have filed briefs in this appeal – the Supreme Court decided to "adhere to that decision and decline[d] to modify the prerequisites for invoking the presumption of reliance."[8] *Id.* at 2417. Indeed, the Court recognized that the presumption is based "on the fairly modest premise that 'market professionals generally consider most publicly announced material statements

[8] The Securities Industry and Financial Markets Association ("SIFMA") and the Chamber of Commerce of the United States of America ("Chamber") both filed *amicus curiae* briefs in *Halliburton II*, urging that *Basic* be overruled or modified. *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317, 2013 U.S. Briefs 317 (Jan. 6, 2014).

about companies, thereby affecting stock market prices.'" *Id.* at 2410 (citing *Basic*, 425 U.S. at 248).

In moving for certification, plaintiffs submitted evidence establishing the prerequisites of the *Basic* presumption: that (1) the alleged misrepresentations were publicly known; (2) Best Buy stock traded in an efficient market; and (3) plaintiffs traded the stock between the time the misrepresentations were made and when the truth was revealed. (Dkt. 128 at 16-22; A240) Plaintiffs' evidence on those three prerequisites was unrebutted. (A156) Hence, the fraud-on-the-market presumption of reliance was properly established. *Basic*, 485 U.S. at 248 n.27; *Halliburton II*, 134 S. Ct. at 2408.

Despite *Basic* and *Halliburton II*, the *amicus curiae* brief filed by the Chamber of Commerce comes close to suggesting that the presumption is insufficient to establish reliance. (Brief for Chamber ("CC") 14-16) Relying on *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541 (2011) "and its progeny," the Chamber asserts that "the burden is on the Plaintiff at class certification to prove each of the Rule 23(a) and 23(b)(3) factors by a preponderance of the evidence." (CC14) While that sentence is literally accurate, it seems to overlook that the very purpose of *Basic*'s presumption is to allow a plaintiff to prove reliance through a preponderance of "indirect" evidence – as plaintiffs did here. *Halliburton II*, 134 S. Ct. at 2415. The Chamber continues, asserting that "proof with respect to the predominance element in

a securities fraud class action as it pertains to reliance comes from evidence of price impact." (CC15; *see also* CC23) Again, however, the Chamber seems to overlook the fundamental premise of both *Basic* and *Halliburton II*: "Under *Basic*'s fraud-on-the-market theory, market efficiency and the other prerequisites for invoking the presumption constitute *an indirect way of showing price impact*." *Halliburton II*, 134 S. Ct. at 2415 (emphasis added). Thus, the Chambers' assertion – like defendants' assertion that "'price impact' is 'an essential precondition for any Rule 10b-5 class action'" (AOB, Summary of the Case at 1) – is accurate only if it is understood in the context of defendants' further concession that price impact can be established through "direct" or "indirect" evidence (*id.*), meaning by the fraud-on-the-market presumption.

The prerequisites for the presumption (publicity, market efficiency, and the timing of investors' stock purchase) must be established with proof at the class certification stage – as they undisputedly were here (Dkt. 128 at 16-22; A240-A257; A360) – not by "mere allegations" as the Chamber suggests is accepted.[9] (CC16) Thus, the Chamber's alarmist concern about "permitting a securities class action in virtually every case that involves a widely-traded security and a stock price drop" (*id.*)

[9] The "allegations" the Chamber seems to be addressing are those referenced by the district court in explaining why defendants' partial price impact analysis was incomplete and failed to account for any number of fact scenarios where price impact would be demonstrated on revelation of the fraud, including what plaintiffs allege here. That issue is discussed fully in Argument A.2.b. and A.2.c.

is grossly overstated and inconsistent with both the district court's well-reasoned opinion here as well as with the body of relevant law.

2. Defendants Had the Opportunity to Rebut the Presumption, Made an Evidentiary Attempt to Do So, but Failed to Meet Their Burden of Showing the Alleged Fraud Had No Price Impact

Once a plaintiff has established the fraud-on-the-market presumption – at the class certification stage, by showing publicity, market efficiency, and the timing of investors' stock purchase – defendants have "an opportunity to rebut the presumption of reliance with respect to an individual plaintiff by showing that he did not rely on the integrity of the market price in trading stock." *Halliburton II*, 134 S. Ct. at 2412. Thus, *Halliburton II* holds that the fact that *Basic*'s presumption is "rebuttable" means that "defendants must be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock." *Id.* at 2417.

As shown below, defendants concede that the burden of showing an absence of price impact was theirs. Defendants do not dispute they had a full opportunity to make such a showing here. Although not required to do so, plaintiffs submitted reply argument and evidence demonstrating why defendants' evidence could not show absence of price impact. The district court found defendants failed to meet their burden.

a. Defendants Concede that, to Rebut the Presumption, They Had to Produce Evidence Sufficient to Prove There Was No Price Impact

Defendants had the burden of rebutting the fraud-on-the-market presumption. As defendants concede, "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." (AOB28 n.5 (quoting *St. Mary's*, 509 U.S. at 506-507)) Only if and when a defendant "'has succeeded in carrying its burden of production'" does the burden shift back to the plaintiffs to establish price impact with direct evidence.[10] (*Id.*)

Indeed, the Supreme Court has clearly explained the operation of "all presumptions" places on defendants the burden of rebutting a fact established by presumption – here, reliance – with "the introduction of admissible evidence . . . which, if believed by the trier of fact, would support a finding" that the presumed fact is not accurate. *St. Mary's*, 509 U.S. at 507. While the ultimate burden of persuasion on reliance in a §10b(5) securities fraud case remains with plaintiffs, plaintiffs meet that burden by proving the elements of the fraud-on-the-market presumption (*Basic*, 485 U.S. at 248 n.27; *Halliburton II*, 134 S. Ct. at 2408), subject

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[10] Thus, defendants' argument demonstrates why the Chamber is in error in asserting that the "bursting bubble theory" – meaning that a defendant may defeat a presumption by offering any evidence at all that opposes it – is "prevailing." (CC17-18 & n. 2)

to an opportunity for defendants to produce evidence that – if believed – would rebut the presumption. *St. Mary's*, 509 U.S. at 507.

The commentary to Rule 301 of the Federal Rules of Evidence, which governs presumptions in civil cases, says exactly that. Federal Rules of Evidence 301 Advisory Committee's Note ("The so-called 'bursting bubble' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too 'slight and evanescent' an effect."). The Advisory Committee Notes to Rule 301 clarify that a presumption, such as the presumption of reliance, "plac[es] upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it." (*Id.*) Presumptions in civil cases are designed to have real meaning; simply lobbing some evidence into the air is not enough to defeat them.

Halliburton II specifically addressed this concern, holding that any lower burden for defendants to rebut the presumption would eviscerate the meaning of the presumption. 134 S. Ct. at 2414. The Supreme Court considered and rejected arguments by defendants and *amici* there that plaintiffs should be required to affirmatively demonstrate price impact with direct evidence: "requiring plaintiffs to prove price impact directly" would "take away the first constituent presumption" from

Basic – that "the misrepresentation affected the stock price." *Id.* The Supreme Court expressly held plaintiffs do not need to prove price impact with direct evidence to invoke the fraud-on-the-market presumption: "For the same reasons we declined to completely jettison the *Basic* presumption, we decline to effectively jettison half of it by revising the prerequisites for invoking it." *Id.*

Instead, the Supreme Court clarified that any possibility "a public, material misrepresentation might not affect a stock's price even in a generally efficient market" is addressed by defendants' "opportunity to rebut the presumption." *Id.* Crucial to this appeal, "appropriate evidence" to rebut the presumption "include[s] evidence that the asserted misrepresentation (or its correction) did not affect the market price of the defendant's stock." *Id.* (citing *Halliburton I*, 131 S. Ct. at 2185; *Basic*, 485 U.S. at 248). "[T]he Court recognize[d] that it is incumbent upon the defendant to show the absence of price impact." *Halliburton II*, 134 S. Ct. at 2417 (Ginsburg, J., concurring).

Few courts have had the opportunity to apply the Supreme Court's recent guidance. The Eleventh Circuit recently remanded a case at the class certification stage "to allow consideration of [defendant's] evidence of price impact" in light of *Halliburton II* because *Halliburton II* was decided between the time the district court certified the class and the time the Eleventh Circuit reviewed that order. *Local 703, I. B. of T. Grocery & Food Emps' Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248,

1252 (11th Cir. 2014). In ordering remand, the Eleventh Circuit emphasized that "work on remand will be limited in scope" because "*Halliburton II* by no means holds that in every case in which such evidence is presented, the presumption will always be defeated." *Id.* at 1259.

Analogously, in a pre-*Halliburton II*, case, the Seventh Circuit addressed the presumption of reliance in a §10(b) securities fraud action involving alleged omissions (prior to *Basic*) and held defendants failed to rebut the presumption that plaintiffs relied on an omission of material information where defendants did not "conclusively prove[]" that plaintiffs did not rely on defendants' material misstatements. *Michaels v. Michaels*, 767 F.2d 1185, 1200 (7th Cir. 1985) (citing *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972)). Similarly, in a case involving a presumption regarding written acknowledgement of disclosures, the Seventh Circuit held that "to overcome the presumption," the other party "needed to produce enough evidence to permit a reasonable jury to find" that the opposite of the presumption was true. *Marr v. Bank of Am., N.A.*, 662 F.3d 963, 967 (7th Cir. 2011). Indeed, that is the standard that defendants acknowledge applies here. (AOB28 n.5 ("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." (quoting *St. Mary's*, 509 U.S. at 506-507))

Consistently, lower courts have adopted a preponderance of the evidence standard in analyzing defendants' attempts to rebut the *Basic* presumption under *Halliburton II*. "[O]nce a plaintiff shows entitlement to a presumption of reliance, the defendant is burdened with the daunting task of proving that the publicly known statement had no price impact." *Aranaz v. Catalyst Pharm. Partners Inc.*, 302 F.R.D. 657, 670, 673 (S.D. Fla. 2014) ("[A] defendant may refute the presumption of reliance by rebutting either constituent presumption by a preponderance of the evidence."). In district courts in the Second Circuit, where defendants were permitted to rebut the fraud-on-the-market presumption at class certification before *Halliburton II*, courts also hold that defendants bear the burden of rebutting the presumption by a preponderance of the evidence. *Pa. Ave. Funds v. Inyx Inc.*, No. 08 Civ. 6857 (PKC), 2011 U.S. Dist. LEXIS 72999, at *24 (S.D.N.Y. July 5, 2011) ("Once a plaintiff establishes that the fraud-on-the-market presumption applies, defendants bear the burden of rebutting the presumption by a preponderance of the evidence.").

Despite acknowledging their burden of rebutting the presumption with evidence sufficient to "support a finding that the presumed fact does not exist" (AOB28-29 n.5), defendants attempt to soften their burden by suggesting they need only proffer "some evidence" (AOB12) or evidence "tending to show" (AOB29) an absence of price impact. Their own argument admits the opposite. (AOB28-29 & n.5) The Supreme Court establishes that they may only rebut the well-established presumption

of reliance by "'producing' evidence that, if believed by the trier of fact, would support a finding" of the absence of price impact. (AOB28-29 n.5)

b. Defendants Tried, but Failed, to Meet Their Burden of Rebutting the Presumption

Defendants failed to rebut the presumption. They did not introduce "admissible evidence . . . which, if believed by the trier of fact, would support a finding" that the presumed fact is not accurate. *St. Mary's*, 509 U.S. at 507.

The problem was that defendants only provided a partial analysis of price impact – not a complete one. As the district court recognized, "Professor Lehn [defendants' expert] explains that he was asked to analyze whether the alleged misrepresentations 'had a positive impact on Best Buy's price,' but does not mention the stock price's reaction to the information revealed on December 14, 2010." (A363 n.6)

Following both well-established legal principles and common sense, the district court recognized that the price impact of misstatements that falsely support existing expectations and maintain price inflation – such as the alleged misstatements here – will be observable on revelation of the truth rather than at the time of the statements. (A362) "'[W]hen an unduly optimistic statement stops a price from declining (by adding some good news to the mix): once the truth comes out, the price drops to where it would have been had the statement not been made.'" (A361 (quoting *Schleicher*, 618 F.3d at 683))

In other words, defendants' expert did not analyze the relevant time period when the price impact of the alleged misrepresentations would have been expected to be observable. Given that defendants' expert did not consider the full picture of potential stock price impact, he could not possibly have established that the "alleged misrepresentation[s] did not actually affect the market price of the stock." *Halliburton II*, 134 S. Ct. at 2417. The district court was well within its discretion in so concluding.

Crucially, what *Halliburton II* requires is that defendants be "afforded an opportunity" to make a showing of the absence of price impact. *Id.* Defendants here do not dispute they had that opportunity. Defendants never requested – before or after *Halliburton II* – any further opportunity to provide additional evidence in the district court. Defendants do not suggest there was any evidence the district court did not consider. Indeed, defendants have further waived any (unpreserved) request to consider additional evidence by not raising any such issue in their Opening Brief. *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 634 (8th Cir. 2007) ("[P]oints not meaningfully argued in an opening brief are waived."). They had every opportunity *Halliburton II* requires.[11]

[11] *Amicus curiae* SIFMA's assertion that the "District Court's approach effectively denied Best Buy the opportunity to rebut the *Basic* presumption, thus making that presumption irrebuttable, contrary to the holdings of *Basic* and *Halliburton II*" (SIFMA6-7) is inaccurate.

Instead of meeting their evidentiary burden, defendants chose to make a legal assertion – which they now repeat on appeal. (AOB, Summary of the Case at 1) Citing *Halliburton I* and *Halliburton II*, defendants assert the "maintenance theory of price impact relied upon by the district court is irreconcilable with recent Supreme Court securities law decisions.") (AOB1-2) But, *Halliburton II* actually quotes *Schleicher* – the case quoted by the district court regarding price impact where a false statement maintains an already-inflated stock price – regarding the impact of false statements on an already-inflated stock price. *Halliburton II*, 134 S. Ct. at 2410 ("'That the . . . price [of a stock] may be inaccurate does not detract from the fact that false statements affect it, and cause loss,' which is 'all that *Basic* requires.'" (quoting *Schleicher*, 618 F.3d at 685)). "Defendants whose fraud *prevents* preexisting inflation in a stock price from dissipating are just as liable as defendants whose fraud introduces inflation into the stock price in the first instance." *FindWhat*, 658 F.3d at 1315; *accord In re Pfizer Inc. Sec. Litig.*, 936 F. Supp. 2d 252 (S.D.N.Y. 2013). Defendants' contrary assertion is unsupported.

Thus, despite defendants' repeated statements that evidence of the absence of price impact at the time of the alleged misstatements themselves shows "unequivocally" the absence of any price impact (*e.g.*, AOB, Summary of the Case at 1; *see also* AOB10, 43), their assertion fails to support their appeal. Supreme Court law is contrary. *Halliburton II*, 134 S. Ct. at 2410, 2414. The district court plainly

cannot be held to have abused its discretion for following Supreme Court law. *Bouaphakeo*, 765 F.3d at 796.[12]

Specifically, *Halliburton II* confirms that *Basic* has long held the fraud-on-the-market presumption "'could 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." 134 S. Ct. at 2414 (citing *Halliburton I*, 131 S. Ct. 2179) (emphasis added). Thus, the Supreme Court expressly holds price impact may be observable at the time of "correction" of the "asserted misrepresentation." *Id.* Defendants simply did not address this aspect of price impact. By overlooking it entirely, they failed to rebut the well-established presumption.

Applying *Halliburton II*, at least one other district court has rejected as "flawed" a very similar attempt to show the absence of price impact merely by showing the stock price did not increase following the alleged misrepresentations. *McIntire v. China MediaExpress Holdings, Inc.*, No. 11-cv-0804 (VM), 2014 U.S. Dist. LEXIS 113446, at *39-*40 (S.D.N.Y. Aug. 15, 2014). There, as here, defendants overlooked that price impact can be observable at the end of the class

[12] For precisely the same reasons, the same assertions by SIFMA (*e.g.*, SIFMA5, 7, 12) and Chamber (*e.g.*, CC12) also fail. It is simply inaccurate that "[p]roving that the alleged misstatement failed to cause a price increase on the day it was made completely rebuts the *Basic* presumption in this case." (SIFMA12)

period when a misrepresentation "maintain[s] an already-inflated stock price." *Id.* at *40.

In a footnote, defendants weakly attempt to assert that the "or" in *Halliburton II*'s "or its correction" means defendants can show the absence of any price impact by showing either no impact at the time of the statement or showing no impact at the time of the correction. (AOB23 n.4) The assertion is not supported by the grammatical construction of the sentence, is illogical as a matter of common sense, and would mean absence of price impact could be shown in virtually every case – quite the opposite of Justice Ginsburg's statement in concurrence that "[t]he Court's judgment, therefore, should impose no heavy toll on securities-fraud plaintiffs with tenable claims." *Halliburton II*, 134 S. Ct. at 2417 (Ginsburg, J., concurring). Defendants' position that price impact at "correction" is irrelevant is simply wrong.

Indeed, in yet another footnote, defendants acknowledge the body of Circuit-level case law, recognizing the concept that false statements that maintain an already-inflated market expectation will have an observable price impact when the truth is eventually revealed. (AOB37 n.7)[13] Defendants then attempt – in the same footnote – to factually distinguish this case from other maintenance cases. (*Id.*) First, since

[13] *Amicus curiae* SIFMA overlooks this Circuit-level authority cited by defendants in dismissively suggesting that "the price maintenance theory" has only been "adopted by certain district courts." (SIFMA13)

defendants' position in the district court – and here – was that price impact on correction is irrelevant, and since defendants made no effort whatsoever to address price impact on correction in their attempt to show the absence of price impact, their footnote is much too little and much too late. Second, defendants' asserted distinction – that the correction here was "untethered" to their false statements (*id.*) – is inaccurate. At the end of the Class Period, on December 14, 2010, defendants admitted both that Best Buy would not make its earnings guidance and also that the missed guidance had depended on "an improvement in the TV industry in the third quarter" (A115-A116¶116) – demonstrating that at the time defendants spoke, Best Buy was not "in line" or "on track" to meet guidance. The correction was indeed tethered to the false statements.

Finally, defendants' attempt to convert analysis of price impact into an analysis of loss causation (*e.g.*, AOB11) must await a later stage of the litigation. Although closely related to price impact, loss causation is not appropriately considered at class certification. *Halliburton I*, 131 S. Ct. at 2186. The distinction is addressed in more detail at Argument B.2. below.

c. Although Not Required to Do So, Plaintiffs' Expert Provided Compelling Evidence Revealing the Fallacy of Defendants' Asserted Absence-of-Price-Impact Theory

Defendants' failure to rebut the undisputedly well-established fraud-on-the-market presumption ends the analysis.[14] They concede they had the burden to rebut. (AOB28-29 & n.5) They elected to limit their expert's analysis to a partial consideration of price impact and to make a legal argument that the full analysis was not necessary. Because their legal assertion does not withstand scrutiny (*Halliburton II*, 134 S. Ct. at 2410, 2414), they are left with a partial economic analysis that fails to address the full question of price impact – both when the statements confirming already-false market expectations were made *and* when Best Buy's true condition was revealed. Thus, they have failed to rebut the presumption and plaintiffs have carried their burden of proof regarding reliance by establishing the prerequisite elements of the fraud-on-the-market presumption.[15]

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[14] Of course, in the opposite situation, had defendants successfully rebutted the fraud-on-the-market presumption, plaintiffs would have been allowed to challenge that evidence with existing and additional direct evidence of reliance. *Halliburton II*, 134 S. Ct. at 2417 ("allowing consideration of direct evidence as well" at class certification).

[15] Of course, plaintiffs will still be required to prove materiality at trial, satisfying the final prerequisite for the fraud-on-the-market presumption. But, that element is not relevant to class certification. *Halliburton II*, 134 S. Ct. at 2416. "Even though materiality is a prerequisite for invoking the *Basic* presumption, we held that it should be left to the merits stage, because it does not bear on the predominance requirement of Rule 23(b)(3)." *Id.*

Still, plaintiffs' expert provided additional analysis in the district court, in response to defendants' experts' partial analysis, to clarify that defendants failed to fully address the price impact of their alleged false statements. (A333-A349) Defendants' insistence on appeal that Steinholt "admitted" the "in line" and "on track" statements had "no impact on the stock price" (*e.g.*, AOB7) and "admitted" some "initial error" (AOB11) are plainly inaccurate. Instead, Steinholt clearly explained it was "not at all surprising" that "there were only relatively small changes to Best Buy's stock price" following the alleged false statements – since they were consistent with already-inflated market expectations (whether or not the statements setting those earlier expectations were legally actionable). (A340¶11) Steinholt further explained that, in this factual situation, one would expect to observe price impact when the false statements were corrected. (*Id.*) Thus, contrary to defendants' suggestion, based on comparison to an unrelated case in which Steinholt also provided expert analysis, that Steinholt failed to account for allegations no longer at issue (AOB38), Steinholt carefully explained the economic impact of the nonactionable statements as well as the price impact of the actionable ones.[16]

[16] Defendants' aspersion regarding the unrelated case is patently false. There, one set of allegations was dismissed after Steinholt's initial analysis and the court asked Steinholt to explain the impact of that change in his analysis.

Moreover, Steinholt highlighted the analysis that Lehn overlooked. (A342¶14) He explained "Dr. Lehn never considers the alleged truth in his analysis of the alleged misrepresentations." (*Id.*) Thus, defendants made no attempt to analyze what the impact on the stock price would have been if the market had learned from the beginning of the Class Period that defendants were far off pace and unlikely to make their earnings guidance and that TV sales would have to improve sufficiently to support those expectations – as opposed to already being "on track" and "in line" to make it. (*Id.*; A58-A59¶7; A89-A91¶72) As Steinholt explained, "Dr. Lehn's error is that he blindly assumes that the stock price immediately prior to a misrepresentation reflects the alleged truth." (A346¶22) "This is sometimes true, but far more often it is not." (*Id.*)

Defendants also repeatedly challenge both Steinholt's analysis and plaintiffs' briefing for not having specifically described how false statements can maintain an already-inflated stock price at earlier stages of the litigation. (AOB7-8, 11) But, as shown above, plaintiffs did describe how the upheld statements "served to maintain the artificial inflation" in opposing defendants' earlier motion to dismiss the Complaint. (Dkt. 69 at 20 n.8) Moreover, defendants overlook that plaintiffs had no reason to discuss this in detail. Plaintiffs alleged particularized false statements, pled a sufficiently strong inference of scienter, and alleged every other element of a securities fraud claim with enough specificity to satisfy the extremely demanding

pleading requirements of the PSLRA. (A236) Plaintiffs next established every requirement for class certification, including each of the prerequisites for the fraud-on-the-market presumption for pleading and proving reliance – none of which defendants dispute. (A360) Plaintiffs never had a burden of demonstrating price impact with direct evidence. *Halliburton II*, 134 S. Ct. at 2414. As defendants have conceded, the body of law regarding price impact of statements that maintain an already-inflated stock price is well settled. (AOB37 n.7) There was no need for plaintiffs to address defendants' challenge to the law until they made it.

Defendants also assert Steinholt did not provide an event study related to the Class Period (AOB, Summary of the Case at 1) – which is simply inaccurate. (*See* SA11-SA376) Indeed, the district court referenced it (A360) and *amicus curiae* SIFMA acknowledges it. (SIFMA7) As Steinholt declared in the district court, he "perform[ed] a daily event analysis to determine whether 'Best Buy's stock price quickly incorporated new, material information,' as required by *Cammer* factor five." (A340-A341 n.19) Steinholt further explained that, based on the data from that event study, "there is no dispute that there . . . was a statistically significant price decline following the disclosure of the alleged truth." (A348-A349¶28)

3. Because Defendants Failed to Rebut the Well-Established Presumption, the District Court Was Plainly Within Its Discretion in Applying the Fraud-on-the-Market Presumption of Reliance to Certify the Class

"Having already concluded that the district court applied the correct legal standard . . . , we will reverse [its] rulings only upon a showing that it abused its discretion in a way which 'affected a party's substantial rights.'" *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 614 (8th Cir. 2011) (quoting *Weitz Co. v. MH Washington*, 631 F.3d 510, 525 (8th Cir. 2011)).

Here, the district court applied the correct legal standard. The court analyzed whether plaintiffs satisfied their burden to establish the prerequisites for the fraud-on-the-market presumption. (A358-A360) Having concluded they did, the court then considered whether defendants satisfied their burden to rebut the presumption. (A361-A362) Following Supreme Court law, the court concluded defendants did not satisfy their burden. (A361-A363) Finding no other obstacle to certification, the district court certified the class. (A367) Notably, the court carefully limited the class definition to exclude investors who purchased after the non-actionable statements, but before the actionable ones. (*Id.*) The court plainly did not abuse its discretion.

Defendants' concern seems to be based on a misapprehension that the district court "resorted to conjecture" to support its analysis of price impact. (AOB8) But, defendants argue as though the "conjecture" that "price impact 'could' exist" and

"might have occurred" (*id.*) were made in support of plaintiffs' evidentiary burden – rather than in criticism of defendants' failure of rebuttal. Of course, the opposite is true. When the district court opined that "the alleged misrepresentations could have further inflated the price, prolonged the inflation of the price, or slowed the rate of fall," concluding "[t]his impact on the stock price can support a securities fraud claim" (A362), the court was explaining why defendants' partial analysis had failed to show the absence of price impact. As another district court, applying *Halliburton II*, explained: "Because Defendants have the burden of showing an absence of price impact, they must show that price impact is *inconsistent* with the results of their analysis. Thus, that an absence of price impact is consistent with their analysis is insufficient." *Aranaz*, 302 F.R.D. at 672. The district's appropriate assessment here of defendants' failure to rebut was not an abuse of discretion.

Defendants also suggest that the district court reached a "conclusion" that the upheld alleged false statements had a "gradual effect on the price of Best Buy stock throughout the three-month class period." (AOB50; *see also* AOB8) Although neither defendants nor their expert has ever disputed market efficiency and the district court held there was no reasonable basis for doing so (A360), defendants now assert that this "conclusion" suggests the market was inefficient as the statements would have been incorporated into the stock price more quickly. (*Id.*) In fact, the district court made no such conclusion. Rather, it merely stated "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 1[4], 2010" (A362) – facts which are wholly consistent with the court's finding of market efficiency and plaintiffs' theory, recognized by the court, that "the relevant damages" – and observable price impact – "occurred on December 14, 2010." (*Id.*)

In their (waived) attempt to now challenge market efficiency, defendants overlook that the upheld alleged false statements bolstered the stock price that was already inflated by the alleged false (though protected) earnings projection. The issue is not the speed with which the actionable false statements were incorporated into the stock price, but the fact that they continued to be part of the public mix of information and thereby distorted Best Buy's stock price throughout the entire Class Period.[17] "The efficient market hypothesis, premised upon the speed (efficiency) with which new information is incorporated into the price of a stock, does not tell us how long the inflationary effects of an uncorrected misrepresentation remain reflected in the price of a security." *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 234 (2d Cir. 2014). The district court's finding that there was an efficient

[17] *Amicus curiae* SIFMA's footnoted challenge to market efficiency (SIFMA at 10 n.3) overlooks that defendants conceded market efficiency in the district court – and its challenge to Steinholt's opinion that material information concerning Best Buy was incorporated "within one day" (SIFMA at 10) omits that Steinholt was referring to public information, not concealed truths.

market, where all Cammer factors were met and efficiency was not even contested, was correct, and noting that the stock price increased throughout the class period until the truth was revealed and it dramatically fell, certainly does not transform that finding into an abuse of discretion.

Certainly, certification of this class does not resolve the issue of defendants' liability. Class certification "is inherently tentative," (*Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978)), and may "require revisiting upon completion of full discovery." 644 F.3d at 613 (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005)). "As class certification decisions are generally made before the close of merits discovery, the court's analysis is necessarily prospective and subject to change, *Blades*, 400 F.3d at 567, and there is bound to be some evidentiary uncertainty." *Id.*

Importantly, at this stage, the district court's order was thorough and careful. The court closely analyzed defendants' attempt to rebut the fraud-on-the-market presumption with evidence of the absence of stock price impact and simply concluded "Defendants have not submitted evidence sufficient to rebut the presumption of reliance." (A361) There was no abuse of discretion. The class certification should be affirmed.

B. Issues Not on Appeal

Defendants' appeal surreptitiously attempts to extend beyond the carefully established borders of class certification analysis. But, they may not use this appeal as a vehicle to (1) untimely and without permission, seek interlocutory review of the court's denial of their motion to dismiss; (2) prematurely challenge unpreserved loss causation issues; or (3) challenge certification on the basis of damages issues they have not appealed.

1. Defendants Improperly Seek Untimely and Inappropriate Interlocutory Review of the District Court's Denial of Their Motion to Dismiss the Alleged Misrepresentations on Falsity Grounds

This Court's limited grant of interlocutory review of class certification is not – and cannot be – an opportunity for defendants to seek review of the district court's earlier denial of their motion to dismiss. 28 U.S.C. §1292(e); *Bertulli*, 242 F.3d at 294 & n.7. Indeed, that is especially true here, where the district court previously denied defendants' Motion for Certification Pursuant to 28 U.S.C. §1292(b) of precisely the same order (Dkt. 122) – as defendants admit. (AOB6)

In moving to dismiss plaintiffs' Complaint, defendants had asserted the "on track" and "in line" statements were forward-looking statements because they were merely "an affirmation of the projected guidance" (Dkt. 66 at 7) – just as they now repeat on appeal. (AOB3) "[T]hus," according to defendants, "like the earnings guidance itself, the statement that Best Buy is on track to meet or exceed that

guidance, is protected under the safe harbor provision of the PSLRA." (*Id.*) "Likewise," according to defendants, "Best Buy's statement that its earnings as of the first half of the year were essentially 'in line' with its projections was forward-looking because there is nothing that separates the 'essentially in line with' language from the forecast ('our original expectations')." (*Id.*)

The district court understood, considered, and rejected defendants' assertion. The court summarized: "Defendants contend that statements that use identical or similar language (*e.g.*, 'on track' and 'in line') have been protected in the same way that the other forward-looking language is protected because such statements simply confirm the company's comfort with the projection that it is issuing and act as an affirmation of the projected guidance." (A232) But, the court was persuaded by plaintiffs' argument that the alleged false statements were actually "statements of current facts reflecting upon Best Buy's current position and historical performance up to that point in the fiscal year." (A233) Plaintiffs' arguments highlighted the significance of the historical nature of the "on track" and "in line" statements because they came on the heels of two quarters of accelerating declines in key business metrics. "After carefully reviewing the case law and the arguments set forth by the parties, the Court conclude[d] that Best Buy's statements claiming that it was 'on track to meet or exceed our annual guidance' and that 'earnings are essentially in line

with our original expectations for the year' are not forward-looking and are, therefore, actionable as a statement of present condition." (A234)

The district court further held plaintiffs alleged a strong inference of scienter, sufficient to meet the demanding pleading standards of the PSLRA. (A235-A236) Specifically, the court recognized the Complaint alleges significant detail regarding the extent of defendants' knowledge that their statements were false descriptions of Best Buy's current condition:

> [A]s of September 14, 2012, Defendants knew that Best Buy was not currently 'on track' to make and beat the new EPS forecast based on the following facts: (1) Best Buy's comparable store sales had been well-below expectations; (2) Best Buy's in-store traffic had been declining; (3) Best Buy's comparable store sales of televisions had been declining; (4) Best Buy's comparable store sales of gaming products have been declining; (5) Best Buy's inventories were growing because of slow sales; (6) revenue growth had underperformed in 1Q11 and 2Q11; and (7) to reach its forecasts, Best Buy would have to achieve dramatically accelerated sales growth.

(A235) Defendants requested leave to file a motion for reconsideration and also filed a Motion to Certify Interlocutory Appeal Pursuant to 28 U.S.C. §1292(b). Both motions were denied. (Dkt. 122)

Nonetheless, on appeal of class certification, defendants now attempt to reprise their earlier assertion – despite the fact it was carefully considered and rejected by the district court and has no place in this later, separate appeal. (*E.g.*, AOB44) Contrary to the law of this case, defendants insist the alleged false statements "merely track

legally protected projections made two hours earlier." (*Id.*) Remarkably, defendants actually assert 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." (AOB41) They overlook that the district court has already ruled to the contrary in this case, after reviewing that "substantial precedent."

Audaciously, defendants suggest it is plaintiffs – not defendants – who are attempting to make an "end-run" around the district court's dismissal order. (AOB44) Yet, in the guise of discussing "price impact," defendants persist in recasting the "on track" and "in line" statements as "forward looking." (AOB32) They misleadingly state "plaintiff has conceded that the alleged confirmatory misstatement had no separate 'economic substance' from those earlier non-actionable earnings projections" (AOB44), overlooking that the later statements reassured investors about then-current progress toward the stated economic goal.[18]

Pressing further, defendants assert – on their own authority – the absence of scienter (AOB34-35), despite the district court's holding that a strong inference of

[18] Following defendants' lead, *amicus curiae* SIFMA inaccurately asserts that the upheld statements are "informationally identical" to the dismissed ones. (SIFMA7) Similarly, relentlessly insisting that the upheld statements about current progress toward a goal had no separate meaning from the statement of the goal itself, *amicus curiae* Chamber inaccurately characterizes them as forward-looking statements, rather than current statements about present progress toward a goal. (CC21)

scienter was pled. (A235-A236) Overlooking that the district court upheld specific, detailed factual allegations pleading a strong inference of defendants' scienter, defendants assert "Plaintiff pointed only to the fact that the projections turned out to not be accurate." (AOB35) That is simply wrong. Building the consummate straw man, defendants insist "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." (AOB32) But, plaintiffs did not allege forward-looking statements, but current ones – as the district court held. (A234) Plaintiffs did not allege the statements turned out to be inaccurate, but rather were made with scienter – as the district court also held. (A235-A236) And, plaintiffs had no burden at class certification to show either price decline or causation. *Halliburton I*, 131 S. Ct. at 2187; *Halliburton II*, 134 S. Ct. at 2414.

Apart from the fact that defendants' appeal of the district court's denial of their motion to dismiss is entirely untimely and procedurally improper, their assertion has no merit. The district court was absolutely correct. Defendants' (dismissed) statement that Best Buy expected to achieve a particular earnings goal by the end of the year may have been forward looking. But, defendants' (upheld) statements that Best Buy was then "on track" and "in line" to meet or "exceed" that goal were statements of current condition, actionable under the securities laws – especially since

defendants have now admitted their earnings estimate actually depended on "an improvement in the TV industry in the third quarter." (A115-A116¶116)

The "on track" and "in line" statements were properly upheld as current statements, alleged with sufficient particularity to satisfy the PSLRA. That ruling is not properly on appeal. This Court should not address it.

2. Although They Purport Not to, Defendants Inappropriately Challenge Loss Causation for the First Time on Appeal Despite the Fact that It Is Not Properly Considered at the Class Certification Stage – and Was Never Raised in Any Context in the District Court

Defendants also attempt a backdoor challenge regarding loss causation – even though (a) loss causation is not properly addressed at class certification (*Halliburton I*, 131 S. Ct. at 2187); (b) defendants never challenged loss causation in the district court at class certification or any other stage; and (c) defendants' expert never addressed the end-of-Class Period price impact, leaving defendants without any evidentiary basis for supporting their attempts to interpose a linkage requirement in the price impact analysis or suggest that it was not met here.

Halliburton I held it was error to require proof of loss causation at the class certification stage. *Id.* Indeed, the Court specifically held "loss causation is a familiar and distinct concept in securities law; it is not price impact." *Id.*

Nonetheless, quoting from the Supreme Court's seminal *loss causation* opinion, *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005), defendants assert plaintiffs "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." (AOB51 n.11) Defendants are incorrect. Their loss causation challenge is specifically disallowed at the class certification stage. *Halliburton I*, 131 S. Ct. at 2187.

Defendants here are especially poorly positioned to say anything at all about loss causation – even if it were relevant to class certification – because they never challenged loss causation in the district court. They did not challenge it in either of their two motions to dismiss. (Dkt. 29, 36, 66, 72) They did not challenge it in opposing class certification. (Dkt. 156)

Finally, defendants' discussion of loss causation and corrective disclosures (*e.g.*, AOB11, 31, 34-37) again confuses the parties' respective burdens in suggesting that plaintiffs need to demonstrate anything whatsoever regarding the end-of-Class Period price impact. Given that plaintiffs had no burden to directly prove price impact (*Halliburton II*, 134 S. Ct. at 2414), they certainly had no burden to parse the causal relationship or linkage between the alleged false statements on September 14, 2010 and the December 14, 2010 admissions. Showing the absence of price impact, to rebut the presumption, was *defendants'* burden – and they chose to attempt it by looking only at positive impact when the alleged false statements were made. (A363) Defendants presented no evidence regarding "the stock price's reaction to the

information revealed on December 14, 2010." (*Id.* n.6) By limiting their consideration to a partial analysis, they failed to rebut the presumption. (A363)

Thus, even if linkage were a relevant consideration here, the only expert who opined on the linkage between the alleged false statements on September 14, 2010 and the December 14, 2010 admissions was Steinholt. (A343) Steinholt opined that "the 3Q11 earnings release [on December 14, 2010] effectively revealed to investors that Best Buy was not 'on track,' but 'far off pace,' to make the 2011 EPS guidance provided at the start of the Class Period." (*Id.*)[19] According to Steinholt, "[i]n my opinion, the information contained in the Company's [December 14, 2010] press release clearly caused the statistically significant price decline in Best Buy's stock price." (*Id.*)

Defendants' expert, Lehn, did not address events at the end of the Class Period. (A363 n.6) Defendants presented no evidence whatsoever regarding linkage or lack thereof. (*Id.*) Defendants simply failed to meet their burden of showing the absence of price impact – and now scramble to shift that burden elsewhere.

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[19] Because Steinholt begins his explanatory sentence with "[i]n other words," defendants accuse him of a "rhetorical head-fake" and assert that his explanation "does not supply the evidence required to meet plaintiffs' burden of persuasion to show a linkage between the asserted misstatements and a corrective disclosure." (AOB37) Defendants' challenge to Steinholt's syntax is without merit; moreover, as demonstrated, plaintiffs had no such burden.

3. Defendants Do Not Appeal the District Court's Correct Holding that *Comcast* Did Not Change Settled Law that Common Questions Can Predominate Even If Individualized Damages Issues Exist

Although defendants raised meritless challenges to certification in the district court on the basis of *Comcast Corp. v. Behrend*, __ U.S. __, 133 S. Ct. 1426 (2013) and issues related to damages calculations, defendants do not raise that issue on appeal. It is waived. *Ahlberg*, 481 F.3d at 634 ("[P]oints not meaningfully argued in an opening brief are waived.").

VIII. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court affirm the district court's certification order because the district court was well within its discretion in ruling that lead plaintiffs carried their burden of establishing that class treatment of this case is appropriate under Federal Rules of Civil Procedure 23.

DATED: January 26, 2015

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RULE 32(a)(7)(C) CERTIFICATE

The undersigned counsel certified that Appellees' Brief uses a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief comprises 13,949 words according to the word count provided by Microsoft Word 2010 word processing software.

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CERTIFICATE OF VIRUS FREE

The undersigned counsel certifies under Eighth Circuit Rule 28A(h)(2) that the Appellees' Brief has been scanned for computer viruses and that the document is virus free.

DATED: January 26, 2015

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DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is Post Montgomery Center, One Montgomery Street, Suite 1800, San Francisco, California 94104.

2. I hereby certify that on January 26, 2015, I electronically filed the foregoing document: **APPELLEES' BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

3. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

4. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 26, 2015, at San Francisco, California.

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