Appeal No. __-____

In The United States Court of Appeals For the Eighth Circuit

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

Plaintiffs-Respondents,

v.

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

Defendants-Petitioners,

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

DEFENDANTS' PETITION UNDER FED. R. CIV. P. 23(f) FOR PERMISSION TO APPEAL AN ORDER GRANTING CLASS CERTIFICATION

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BEST BUY CO., INC.'S CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

On June 23, 2014, the United States Supreme Court decided *Halliburton v. Erica P. John Fund, Inc.* ("*Halliburton II*"), 134 S. Ct. 2398 (2014). That much-anticipated decision recognized the right of a defendant in a securities fraud class action to rebut the fraud-on-the-market presumption of classwide reliance at the class certification stage by presenting "evidence that the misrepresentation did not in fact affect the stock price." *Id.* at 2414.

Because "price impact" is "an essential precondition for any Rule 10b-5 class action," direct or indirect "evidence showing that the alleged misrepresentation did not actually affect the stock's market price" would defeat the presumption, "rendering class certification inappropriate." *Id.* at 2416.

In this first reported decision in the country to address the rebuttal right mandated by the Supreme Court,[1] the district court misapplied *Halliburton II* and departed from other established class certification requirements. This decision warrants immediate review.

The district court misapplied *Halliburton II* by disregarding undisputed empirical evidence showing that the allegedly fraudulent statements did not change the price of Best Buy's stock. Contrary to the holdings of *Halliburton II*, as

[1] On the same day that the district court issued its decision in this case, the Eleventh Circuit vacated and remanded a class certification order in light of *Halliburton II* to consider rebuttal evidence that the defendant's "stock price did not change in the wake of any of the alleged misrepresentations." *Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.*, No. 12-14168, 2014 U.S. App. LEXIS 15106, at *23 (11th Cir. Aug. 6, 2014).

well as *Erica P. John Fund, Inc. v. Halliburton Co.* ("*Halliburton I*"), 131 S. Ct. 2179, 2185 (2011), the district court adopted Plaintiff's price impact theory based not on evidence but conjecture that over a proposed three-month class period the "alleged misrepresentations *could have* further inflated the price, prolonged the inflation of the price, or slowed the rate of fall." (A13[2] (emphasis added).)

The district court's approach to price impact involved no factual analysis—let alone the "rigorous analysis" required by Rule 23—of the nexus between any purported price inflation and the statements at issue.[3] This led to fatal legal error when the court applied a presumption of reliance even though (i) the evidence showed that neither of the alleged misrepresentations inflated the price of Best Buy's stock and (ii) the purported "corrective disclosure" did not correct or reveal the truth about the alleged misstatements.

In nearly every securities case, a plaintiff can point to a price increase at some point during the class period or a price decrease at the end. But predicating certification on such generic observations would allow courts to avoid the fact-driven rigorous analysis required on class certification *and* render the fraud-on-the-market presumption effectively unrebuttable at class certification—exactly contrary to *Halliburton II*. The core holding of *Halliburton II* is that a presumption of reliance cannot stand in the face of a targeted event study and other empirical evidence demonstrating that alleged misstatements did not inflate the price of the

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[2] All cites are to Defendants'-Petitioners' Appendix filed contemporaneously.
[3] The district court's "price impact" finding was based entirely on generic recitals drawn from materially different, pre-*Halliburton II* cases and without reference to any supporting evidence in this case. *See* p. 14, *infra*.

stock. The Court should accept Defendants' Rule 23(f) petition and reverse the order certifying the class.

QUESTION PRESENTED FOR REVIEW

Is review appropriate under Rule 23(f) to correct the district court's departure from the Supreme Court's mandate that a securities class cannot satisfy Rule 23(b)(3)'s predominance requirement where the defendant rebuts a presumption of classwide reliance by showing that the alleged fraud did not cause any increase in the stock price, and a subsequent decline in stock price was unconnected to any disclosure of facts revealing the falsity of the allegedly fraudulent statements?

STATEMENT OF FACTS

I. The Complaint and Initial Proceedings

In 2011, Lead Plaintiff Marion Haynes filed a putative class action under SEC Rule 10b-5, purporting to represent all purchasers of Best Buy stock between September 14, 2010 and December 14, 2010. Plaintiff alleged that Best Buy made false statements about its future earnings prospects in a September 14, 2010 press release and telephone conference with analysts and that the stock price declined on December 14, 2010 when the company announced that it would miss those projections.

Three statements made on September 14, 2010 are relevant to this appeal:

> (1) Before the market opened, at 8:00:01 EDT, Best Buy issued a press release with its financial results for the second quarter of its

> 2011 fiscal year and its adjusted full-year earnings per share ("EPS") guidance forecast, *increasing its 2011 fiscal year guidance to $3.55–$3.70 per share* based on the effect of share repurchases.
>
> (2) During an earnings conference call with analysts that began at 10:00 a.m. EDT, Best Buy CFO Jim Muehlbauer said: "So looking at the results for the first half of fiscal 2011, while there are many moving pieces that we manage, like always, we are pleased that our earnings are essentially *in line with our original expectations* for the year."
>
> (3) During the same conference call, Muehlbauer also said, "As you can see, we are essentially maintaining the operating expectations from our original guidance range, and just updating the impact of share repurchases made fiscal year-to-date. Overall, we are pleased that *we are on track to deliver and exceed our annual EPS guidance*."

(A55 (emphasis added).)

Best Buy's 8:00 a.m. press release also disclosed a decline in comparable store sales, lower sales in home theater and entertainment hardware and software, decreased store traffic, and a decline in market share. (A3–4.) When asked by analysts to explain how, in the face of these facts, "the revenue line specifically [could] accelerate to a pretty significant necessary extent" to make the EPS guidance projections, Best Buy responded that it expected to meet the projections with increased consumer electronic sales over the holiday season. (A62.) According to the Complaint, news of Best Buy's earnings projections caused the price of its stock to rise from a September 13, 2010 closing price of $34.65/share to $36.73/share at the end of the next day. (A28.)

On December 14, 2010, Best Buy issued a press release announcing that it had fallen short of its 3Q11 estimates, reporting a decline in sales and market share.

Best Buy revised its EPS guidance for fiscal year 2011 to $3.20–$3.40. (A4.)[4] The district court ultimately accepted Plaintiff's theory that news of Best Buy's third quarter results and revised projections supposedly "corrected" Best Buy's September statements that—as of September 14—its earnings were "in line" with expectations and "on track" to meet its EPS guidance. Plaintiff alleged that the negative news resulted in a decline in Best Buy's stock price from $41.70/share on December 13, 2010 to $35.52/share on December 14, 2010. (A5.)

After dismissing Plaintiff's original complaint and then giving Plaintiff an opportunity to amend, on August 5, 2013, the district court entered an order partially granting Defendants' motion to dismiss. It held that the financial forecast and EPS guidance in Best Buy's September 14, 2010 press release were not actionable because they were forward-looking statements protected by the Private Securities Litigation Reform Act's "safe harbor" provision. (A196–200.) But it denied Best Buy's motion to dismiss regarding the statements made two hours later during the conference call —statements Plaintiff concedes are substantially identical to the non-actionable statement—that Best Buy was "in line" and "on track" to meet those projections. (A205.) Although Plaintiff conceded that the

[4] The December 2010 press release stated, "[b]ased on lower than expected sales and earnings in the fiscal third quarter, and given our current visibility to potential outcomes in the fiscal fourth quarter, we now expect annual earnings to be below our previous fiscal 2011 EPS guidance." (A84.) In a conference call later that day, Best Buy explained that it revised the EPS guidance because "[w]hat we're learning now, as we have seen the customer play out, is that our top-line growth assumptions earlier in the year turned out to be too aggressive, based on the environment that we see for demand, specifically in the TV industry, and the continuing industry overall." (A183.)

challenged statements were already implicit in, and inseparable from, the non-actionable earnings guidance itself, the district court held that the terms "in line" and "on track" could be "actionable as statements of present condition" and permitted Plaintiff to proceed on a theory that "the falsehoods relate to the *non-forward looking aspect* of the statement[s]." (A202–03 (emphasis added).)

II. The Class Certification Decision

The class certification motion focused on whether Plaintiff could sustain the fraud-on-the-market presumption necessary to establish that common issues of reliance predominated under Rule 23(b)(3). To invoke the presumption, Plaintiff's expert tried to demonstrate that Best Buy's stock price immediately reacted to the alleged fraud by testing the statistical significance of the stock price increase on September 14, 2010. (A704.) But Plaintiff's expert did not attempt to isolate the effects of the "in line" and "on track" statements and mistakenly assumed that they were made in the press release "before the market opened." (A699.) Lumping the possible effects of the actionable and non-actionable statements together, Plaintiff's expert found a significant increase in the stock price from its September 13 closing price of $34.65/share to its September 14 closing price of $36.73/share. (A224.)

Defendants presented the expert declaration of Professor Kenneth M. Lehn, the former Chief Economist of the Securities and Exchange Commission, and an event study that focused on the price impact of the two statements claimed to be actionable. That uncontradicted study showed that *all* of the price increase on September 14, 2014 occurred *before* those statements were uttered. (A626.) By the

time the market opened following the 8:00 a.m. press release, Best Buy stock was already trading at $37.25/share. (A691.) Indeed, Best Buy's stock price *declined* after the "in line" and "on track" statements were made shortly after 10:00 a.m., closing at $36.73/share. (*Id.*) Thus, Lehn's event study demonstrated that the challenged statements "had no discernable impact on Best Buy's stock price." (A628.)

In reply, Plaintiff's expert acknowledged that the "in line" and "on track" statements had no impact on the stock price, and admitted that the substance of the challenged statements was no different from the statements in the non-actionable press release. (A701.) Changing course, Plaintiff argued for the first time that the December 14, 2010 price decline somehow demonstrated *post facto* that the "in line" and "on track" statements artificially inflated Best Buy's stock price on September 14 and throughout a three-month class period. (A789–91.) But Plaintiff still made no effort to show any connection between the December decline and the challenged statements.

The district court nonetheless granted class certification, finding that Plaintiff was entitled to a fraud-on-the-market presumption of reliance and therefore met Rule 23(b)(3)'s predominance requirement. Contrary to Supreme Court teaching that class certification must be based on factual findings supported by evidence, the district court resorted to conjecture at odds with the record to create a link between the alleged misrepresentations and an increase in Best Buy's stock price. *First*, without any evidentiary support, the court found that—despite the lack of any price impact at or near the time of the "in line" and "on track" statements—

such impact *could* exist because "Plaintiffs allege that the stock price rose generally (if not in a straight line) throughout the class period." (A13.) *Second*, the district court surmised that front-end price impact might have occurred because Best Buy's stock price dropped on December 14, 2010 with the release of negative information regarding holiday sales and their effect on Best Buy's earnings outlook. (A13–14.)

REASONS FOR GRANTING THE PETITION

I. Overview

This Court has broad discretion to accept interlocutory review of important issues affecting the development of the law of class actions. Fed. R. Civ. P. 23(f) advisory committee's note (1998) (explaining that "[t]he court of appeals is given unfettered discretion whether to permit the appeal [of a class certification order]"). Rule 23(f) contemplates that permission to appeal is "most likely to be granted when the certification decision turns on a novel or unsettled question of law." *Id.*

Appellate courts applying Rule 23(f) have thus granted permission to appeal when it "facilitates the development of the law on class certification." *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 377 (3d Cir. 2013). This is especially true in securities litigation, when "very few securities class actions are litigated to conclusion, so review of [a] novel and important legal issue may be possible only through the Rule 23(f) device." *West v. Prudential Sec. Inc.*, 282 F.3d 935, 937 (7th Cir. 2002).

This appeal concerns Rule 23(b)(3)'s predominance requirement. As the Supreme Court has explained, "[w]hether common questions of law or fact predominate in a securities fraud action often turns on the element of reliance." *Halliburton I*, 131 S. Ct. at 2184. Since *Basic Inc. v. Levinson*, securities fraud plaintiffs have been permitted to invoke a rebuttable presumption of reliance based on what is known as the "fraud-on-the-market" theory. 485 U.S. 224, 245–46 (1988). But *Basic* also held that "[a]ny showing that severs the link between the alleged misrepresentation and . . . the price received (or paid) by plaintiff . . . will be sufficient to rebut the presumption of reliance." *Id.* at 248.

While Plaintiff's class certification motion was pending in this case, the Supreme Court decided *Halliburton II*, upholding the *Basic* presumption, but holding for the first time that defendants are permitted to rebut this presumption at the class certification stage "through evidence that an alleged misrepresentation did not actually affect the market price of the stock." 134 S. Ct. at 2417. Absent a plaintiff's ability to sustain the presumption of reliance, a class cannot be certified because individualized issues of reliance will predominate. *Id.*; *Basic*, 485 U.S. at 242.

This case presents the Court with a timely vehicle to address the standards for rebutting the fraud-on-the-market presumption or the application of Rule 23(b)(3) in class securities litigation. *Halliburton II* places price impact at center stage in the class certification analysis. The application of *Halliburton II*, and particularly the standard for evaluating price impact evidence at the class certification stage, presents a question of general importance in all securities class actions.

II. There Is a Compelling and Immediate Need for This Court to Correct the District Court's Departure from Supreme Court Law and to Provide Guidance on the Evidentiary Showing by Which Defendants Can Rebut the Reliance Presumption at the Class Certification Stage.

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

In *Halliburton I*, the Supreme Court explained that in a securities fraud case, focusing on the stock price drop upon the corrective disclosure (*i.e.* the "back end" price movement) was inappropriate since it had "nothing to do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively through the fraud-on-the market theory" (*i.e.* the "front end" price impact). 131 S. Ct. at 2186. The Supreme Court emphasized that "[l]oss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory." *Id.*[5] The presumption of reliance must be predicated on price impact at the time investors made their decision to purchase:

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

[5] Plaintiff's counsel themselves have perfectly summarized the law in different litigation: "*[w]hether or not there was a statistically significant price decline as a result of a corrective disclosure has no bearing on class certification in a securities fraud case.*" Reply Mem. of Law in Supp. of Pls.' Mot. for Class Certification at 37, *Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.*, No. 10-2847 (N.D. Ala. Apr. 20, 2012) (emphasis added) (citing *Halliburton I*, 131 S. Ct. at 2186) (filed by Robbins Geller Rudman & Dowd LLP) (A771.)

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

131 S. Ct. at 2186 (emphasis added) (citations omitted).

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

- "[D]efendants should at least be allowed to defeat the [*Basic*] presumption at the class certification stage through evidence that the *misrepresentation* did not in fact affect the stock price." *Id.* at *37 (emphasis added).
- "While *Basic* allows plaintiffs to establish that precondition indirectly, it does not require courts to ignore a defendant's direct, more salient evidence showing that the *alleged misrepresentation* did not actually affect the stock market's price and, consequently, that the *Basic* presumption does not apply." *Id.* at *41 (emphasis added).

Here, Plaintiff offered no evidence—much less the required reliable economic evidence—that the September 14, 2010 statements about Best Buy being "on track" and "in line" to meet its previously stated 2011 annual earnings guidance artificially inflated Best Buy's stock price on that day.[6] To the contrary, Best Buy presented uncontradicted evidence, in the words of the Supreme Court, "showing that the alleged misrepresentation did not actually affect the stock's market price." *Halliburton II*, 134 S. Ct. at 2416.

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[6] While the parties' experts agreed that the alleged fraud did not increase the price of Best Buy's stock, the district court *sua sponte* suggested that gradual, "if not in a straight line" increases in Best Buy's stock price "throughout the [three-month] class period" could evidence price impact. (A13.) That conjecture is completely antithetical to the efficient-market premise of the *Basic* presumption, under which the stock price reacts *immediately* to new, material information. *See Basic*, 484 U.S. at 247.

Contrary to *Halliburton I* and *Halliburton II*, the district court focused on the wrong time period, collapsing the distinct concepts of transaction causation and loss causation. It held that "price impact can be shown by a decrease in price following a revelation of the fraud." (A13.) But the price movement upon the revelation of the fraud—*i.e.* the corrective disclosure—is the centerpiece of the loss causation analysis, which *Halliburton I* held is not at issue at the class certification stage. Instead, the proper price impact focus in a misrepresentation (as opposed to an alleged omission) case is on transaction causation—the front end price impact at the time the alleged misrepresentations were made.

Here, as the district court acknowledged and Plaintiff conceded, there was no price movement when the alleged misrepresentations were made. As permitted under *Halliburton II*, Best Buy made an evidentiary showing of the lack of a statistically significant price increase resulting from the alleged misrepresentations. Plaintiff's only response was to point to the December 2010 price drop. As a matter of law, that is not sufficient.

1. The District Court Disregarded Uncontroverted Evidence That the Challenged Statements Did Not Impact the Stock Price and Incorrectly Applied a "Mere Pleading Standard" to Sustain the Presumption of Reliance.

"A party seeking class certification must affirmatively demonstrate his compliance with the Rule . . . ." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). If a plaintiff establishes the predicates of the reliance element of a 10b-5 claim, *Basic* recognizes a rebuttable presumption of classwide reliance under

Fed. R. Evid. 301. 485 U.S. at 245 (citing Fed. R. Evid. 301). A presumption "does not shift the burden of persuasion, which remains on the party who had it originally." Fed. R. Evid. 301. Accordingly, when a plaintiff invokes the presumption of reliance, the defendant bears only "the burden of producing evidence to rebut the presumption."[7] *Id.* Rule 23 does not invoke a mere pleading standard. Because the plaintiff has the ultimate burden of demonstrating that Rule 23's requirements are met, *Dukes*, 131 S. Ct. at 2551, once the defendant produces evidence to rebut the presumption of reliance, class certification must be denied unless the plaintiff shows by a preponderance of the evidence price impact of the alleged misstatements.

Defendants produced evidence clearly showing the lack of a connection between the "on track" and "in line" statements and any purported distortion of Best Buy's stock price—an event study showing that those statements "had no discernable impact on Best Buy's stock price[.]"(A628.) Accordingly, Plaintiff bore the burden of persuasion to show, by a preponderance of the evidence, that the challenged statements had a price impact at the time each member of the proposed class purchased. But Plaintiff's expert conceded that he did not try to

[7] Under Federal Rule of Evidence 301, the presentation of rebuttal evidence "destroys that presumption, leaving only that evidence and its inferences to be judged against the competing evidence and its inferences to determine the ultimate question at issue." *Lupyan v. Corinthian Colls., Inc.*, No. 13-1843, 2014 U.S. App. LEXIS 15019, at *13-14 (3d Cir. Aug. 5, 2014) (quotations omitted). The "quantum of evidence" needed to rebut a presumption is "minimal"; it need only be sufficient "to withstand a motion for summary judgment or judgment as a matter of law on the issue." *Id.* at *14 (quotations omitted).

show any relationship between the "on track" and "in line" statements and the price of Best Buy's stock. (A701.)

Rather than holding Plaintiff to his burden of persuasion under Rule 23, the court compounded its misapplication of the *Halliburton* rulings by applying a "mere pleading standard," which Rule 23 forbids. *Dukes*, 131 S. Ct. at 2551. The court made no finding that the statements at issue had any effect on the price of Best Buy's stock—instead speculating, without any empirical basis, that they "*could have* further inflated the price, prolonged the inflation of the price, or slowed the rate of fall." (A13 (emphasis added).) Speculation about different theories of price impact is no substitute for the factual findings the Supreme Court has clearly required to be made at the class certification stage.

2. The District Court Erred in Finding Price Impact Based on a Decline in Stock Price on December 14 That Was Not Tied to Disclosure of New Information That Corrected or Revealed the Falsity of the Challenged September 14 Statements.

Even if it were theoretically permissible, the district court's attempt to derive price impact from a decrease in price following a "revelation of the fraud" is legally flawed because it overlooks the lack of the essential predicate to such a conclusion: a factual nexus between the "revelation" causing price decline at the end of the class period and the challenged statements. Without this nexus between alleged misstatement and "corrective disclosure," the support for the district court's conclusion that "the alleged misrepresentations could have further inflated the price, prolonged the inflation of the price, or slowed the rate of fall"

vanishes, along with its premise that "price impact can be shown by a decrease in price following a revelation of the fraud." (A13.)

A corrective disclosure "must at least relate back to the misrepresentation and not to some other negative information about the company." *Meyer v. Greene*, 710 F.3d 1189, 1197 (11th Cir. 2013). But there was no "corrective disclosure" on December 14, 2010. Plaintiff did not allege, nor did the district court identify, any "truth" revealed on December 14, 2010 that had been previously concealed in September. This is the crucial distinction between the present case and cases finding a price impact based on the so-called maintenance theory: in those cases the disclosure of the truth was directly tied to a prior confirmatory statement. *See, e.g.*, *Local 703*, 2014 U.S. App. LEXIS 15016, at *15–18 (holding courts must conduct "holistic, fact-sensitive inquiries into the efficiency of the market" in cases concerning alleged confirmatory misrepresentations).

To the contrary, and dispositively, none of the information that allegedly caused the December 2010 price drop—Best Buy's third quarter sales and financial results, and its updated assessment of the company's projected earnings based on those results (A4)—existed on September 14, 2010, and, thus, cannot be "the alleged truth concealed by the alleged misrepresentations." (A13.)

In a key error, the court incorrectly characterized the December 2010 disclosures as revealing "Best Buy's true financial condition and revenue and earnings prospects for FY11." (A5.) But that is demonstrably wrong. On December 14, 2010, Best Buy disclosed its financial condition and earnings prospects *as of that point in time*; that information in no way showed that the "on

track" and "in line" statements were false when they were made. As the Seventh Circuit has put it, "[f]raud depends on the state of events when a statement is made, not on what happens later." *Schleicher v. Wendt*, 618 F.3d 679, 684 (7th Cir. 2010) (citations omitted).

Plaintiff's fraud claims survived dismissal only to the extent they involved "statements of present condition" and the alleged "falsehoods relate to the *non-forward looking aspect* of the statement[s]." (A–202 (emphasis added).) None of the supposedly corrective information disclosed in December 2010 even discussed Best Buy's "present condition" as of September 2010, let alone corrected any non-forward looking aspect of the statements. Indeed, none of the December 2010 analyst and media accounts relied on by Plaintiff's expert refer at all to Best Buy's financial condition in September 2010. (A463–602.)

Certainly, Plaintiff highlighted Best Buy's acknowledgement that its "growth assumptions earlier in the year *turned out to be* too aggressive." (A4–5 (emphasis added).) But that merely reflects the revision of its non-actionable, forward-looking projections. Put simply, nothing in the record suggests that Best Buy revealed in December that in September the company was not "on track to deliver and exceed [its] annual EPS guidance" or that its earnings were not "essentially in line with [Best Buy's] original expectations for the year" *when those statements were made*.

This critical fact distinguishes this case from the authority the district court relied on to justify deriving price impact from a subsequent price decline. *See FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1316–17 (11th Cir. 2011)

(alleged concealment of use of "click fraud" practices, stock price declined when it was revealed that the defendant did rely on "click fraud"); *Schleicher*, 618 F.3d at 684 (alleged concealment of information about $900 million in guarantees, price decline when information was disclosed); *In re Pfizer Inc. Sec. Litig.*, 936 F. Supp. 2d 252, 260–61 (S.D.N.Y. 2013) (concealment of clinical studies showing risks associated with two pharmaceutical products, price decline when those concealed risks were disclosed). In none of these cases did the court hold that *any* price decline untethered to the revelation of the falsity of the allegedly fraudulent statements could establish price impact.

The district court erred in considering the December 14, 2010 price decline as evidence of price impact. That error was fundamental to the court's decision to certify the class in this case, and warrants immediate review by this Court.

B. Plaintiff's Concession That the Challenged "in line" and "on track" Statements Were Substantially the Same as the Non-actionable Earnings Projections Precludes Reliance

In addition to the undisputed record evidence rebutting the presumption of reliance, applying the presumption based on Best Buy's statements that it was "in line" with and "on track" to meet its projections—acknowledged by Plaintiff to be inseparable from the non-actionable projections announced two hours earlier—would circumvent the PSLRA safe harbor and defy common sense. Indeed, most courts hold that statements that the company is "on track" to meet its forward-looking projections are not even actionable because they are merely reaffirmations of the projection. *See, e.g.*, *Institutional Investors Grp. v. Avaya, Inc.*, 564 F.3d 242,

256 (3d Cir. 2009) ("The 'on track' . . . language here . . . expresses only defendants' continuing comfort with the earlier, October annual projection, which they were then reiterating; that is, it amounts in essence to a reaffirmation of that projection. It does not transform the statements, or any part of them, into non-forward-looking assertions outside of the Safe Harbor."). Indeed, confirmatory statements "cannot be the basis for a fraud-on-the-market claim." *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 666 (5th Cir. 2004).

III. The Size of the Securities Class and Risk of Inordinate Settlement Pressure Provide a Compelling Reason for Immediate Review.

Rule 23(f) was adopted in recognition of the reality that an order granting class certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f) advisory committee's note (1998); *Elizabeth M. v. Montenez*, 458 F.3d 779, 784 (8th Cir. 2006) (quoting advisory committee's notes to Rule 23(f)). As the Supreme Court has emphasized, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); *accord Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1200 (2013) (noting that "[a]n order granting class certification . . . can exert substantial pressure on a defendant 'to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.'").

Thus, "the effect of a class certification in inducing settlement to curtail the risk of large awards provides a powerful reason to take an interlocutory appeal." *West*, 282 F.3d at 937. This is especially true in securities class actions, which tend to proceed "along a relatively predictable path of expensive litigation, significant potential loss allegations, and most often, an eventual settlement"—making class certification the "crucial inflection point" in the case. *George v. China Auto. Sys., Inc.*, No. 11–7533, 2013 U.S. Dist. LEXIS 93698, at *2 (S.D.N.Y. July 3, 2013).

This appeal presents exactly the kind of certification order that courts have singled out for special scrutiny in order to ensure that faultless defendants are not forced into settlement. The size of the class, magnified by Plaintiff's damage theory, gives rise to potential liability that has no relationship to the merits of Plaintiff's claims. Although Plaintiff has not offered any classwide damage calculations, its expert has suggested that Best Buy's $6/share stock price decline on December 14, 2010 should be used as a starting point for calculating damages (A707), and well over 300 million Best Buy shares were traded during the class period. (A19, 217.) Thus, it is no stretch to foresee that Plaintiff's counsel and retained experts may claim class entitlement to damages exceeding $1 billion—an amount that eclipses the company's annual operating income[8] (not to mention the individual defendants' resources) and certainly creates the kind of settlement pressure that supports interlocutory review.

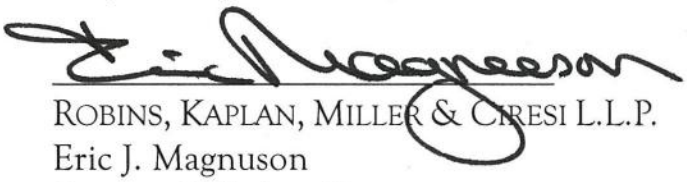
[8] *See* Best Buy Fiscal 2014 Annual Report at 23, *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=83192&p=irol-reportsannual (last visited Aug. 12, 2014).

CONCLUSION

Rule 23(f) was written for the very purpose of authorizing appellate review of decisions such as this. The decision below involves a matter of first impression in this Circuit on an issue that is fundamental to the future litigation of class certification in securities cases. And, without a 23(f) appeal, the district court's misapplication of the Supreme Court's *Halliburton I* and *II* may well evade appellate review. These are precisely the considerations that led to the enactment of Rule 23(f) and justify the grant of Defendants' petition.

August 19, 2014

Respectfully submitted,



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