Appeal No. 14-3178

In the United States Court of Appeals for the Eighth Circuit

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

REPLY BRIEF OF DEFENDANTS-APPELLANTS BEST BUY CO., INC., BRIAN J. DUNN, JIM MUEHLBAUER, AND MIKE VITELLI

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Preliminary Statement

Earlier this year, this Court reaffirmed that district courts must conduct a "rigorous analysis" to determine whether class certification is appropriate. Here, that rigorous analysis required a careful assessment of price impact, under the framework established by *Basic*, *Halliburton II*, and Federal Rule of Evidence 301. The Supreme Court has described the *Basic* presumption as a "fairly modest premise," which a defendant rebuts at the class-certification stage by producing evidence showing a lack of price impact from the alleged misstatement. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2410 (2014). This is consistent with *Basic*'s "any showing" formulation of the rebuttal and its citation of Rule 301.

Defendant's burden is one of production, not persuasion, and the quantum of evidence required for this rebuttal is the same as that required of a party opposing summary judgment. Once Defendants satisfied this modest burden by showing that the misstatements did not lead to an increase in the price of Best Buy stock, the *Basic* presumption dropped from the analysis, and Plaintiff bore the ultimate burden of persuasion to adduce empirical data showing price impact from the challenged statements.

Plaintiff relied solely on a maintenance theory of price impact, which, even if valid, required that Plaintiff overcome Best Buy's rebuttal of the *Basic* presumption by proving either (i) a positive

price impact from the two challenged statements on September 14, 2010 or (ii) a negative price impact attributable to a "corrective disclosure" *i.e.* a revelation that Best Buy had on September 14 misstated information. Plaintiff concedes there was no price impact from the two challenged statements on September 14, so that theory is out. Plaintiff's fallback is to label a Company disclosure on December 14—when Best Buy released its actual third quarter results and year-end projection—as a "corrective disclosure." This label is demonstrably wrong; as Defendants and Amici Curiae demonstrated in the opening briefs, the December 14 statement was not and could not have been corrective because it only reported information that did not even exist on September 14.

Plaintiff's opposition does not meaningfully address this fatal disconnect. Instead, Plaintiff seeks to deflect scrutiny by saying that the District Court was not permitted at the class certification stage to determine whether the December 14 statement qualified as a "corrective disclosure." Plaintiff, in essence, asks the Court to turn away from the content of the December 14 statement, and accept without question his assertion that the disclosures were corrective. Plaintiff's narrow view of a district court's role on class certification is at odds with repeated insistence from the Supreme Court and this Court that district courts must engage in rigorous analysis of evidence before certifying any class. Indeed, *Halliburton II* emphasized that allowance of defendants' rebuttal right was

necessary "to maintain the consistency of the presumption with the class certification requirements of . . . Rule . . . 23." 134 S. Ct. at 2417.

Equally unavailing is Plaintiff's invented roadblock that the determination of whether a statement is a "corrective disclosure" cannot be made unless an expert witness offers this conclusion. This position is at odds with the substantial body of precedent in which courts routinely make such determinations as a matter of law.

Plaintiff's efforts to muddy the waters of the evidentiary standard are also misguided. He acknowledges that Federal Rule of Evidence 301 governs, but then distorts its application beyond recognition by inventing a rebuttal burden without basis in law or reason, and which would transform the rebuttable presumption into an irrebuttable one. A rigorous analysis of price impact under the proper Rule 301 framework leads to one conclusion here: following Defendants' rebuttal of the *Basic* presumption, Plaintiff did not (and cannot) meet his burden of showing price impact. Defendants satisfied their burden with the testimony of Professor Lehn, which was sufficient evidence to permit a factfinder to find no price impact, thus precluding Plaintiff from relying on the presumption to satisfy his burden of persuasion. The *only* purported evidence of price impact of the alleged September 14 misstatements Plaintiff advanced was the December 14 stock price decline. That back-end analysis at the class certification stage contravenes *Halliburton I* and *Halliburton II*'s instruction to focus on the front end. Even if relevant

to class certification, the December 14 statement did not reveal that the challenged "in line" and "on track" statements were false when made on September 14. It therefore provided no evidence that the September 14 statements had price impact.

Despite the absence of evidence showing any price impact, the District Court rested its decision on speculation that the alleged misstatements "could have" affected the stock price. Such speculation cannot stand in the face of uncontroverted evidence that the stock did not move on the day the statements were made. The District Court's speculative approach to price maintenance is particularly troubling because it has no limiting principle and effectively renders the *Basic* presumption irrebuttable, contrary to *Halliburton II*.

Plaintiff's attempted defense of the District Court's speculative approach underscores this fundamental problem. Under Plaintiff's view, a price decline alone is sufficient to establish price impact, and any inquiry into the nexus between that decline and the alleged fraud "is specifically disallowed at the class certification stage." Plaintiff-Appellee's Brief ("Pl. Br.") at 59. But *Halliburton II* and Rule 301 establish that once the *Basic* presumption has been rebutted, the inquiry moves beyond academic theory to the facts on the ground. Those facts show there was no price impact from the alleged misstatements. Plaintiff's detour around the law, evidence and economics showing the absence of price impact from the two

challenged statements only underscores that the class certification order cannot stand.

Argument

I. Plaintiff's Misreading of Federal Rule of Evidence 301 Has No Support in Law

Plaintiff concedes that Federal Rule of Evidence 301 governs this case. Pl. Br. at 2, 35. Rule 301, invoked by the Supreme Court in *Halliburton II*, provides that "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. ***But this rule does not shift the burden of persuasion, which remains on the party who had it originally***." Fed. R. Evid. 301 (emphasis added). Plaintiff acknowledges he bore the ultimate burden of persuasion on class certification, then proceeds to manufacture a rebuttal burden for defendants which no court has endorsed, is contrary to *Halliburton II* and would shift the burden of persuasion to defendants.

Under Plaintiff's novel view, class certification must be granted unless Defendants affirmatively exclude all conceivable price impact theories, including that the challenged statements, as the District Court stated, "could have" caused the price to stay the same on any given day across a proposed three-month class period. (Add13.) The price impact rebuttal burden proposed by Plaintiff effectively would be impossible to meet.

This is particularly apparent on the facts of this case, as shown in Point II below, where it was undisputed there was no price impact from the challenged statements on the date one would expect to see any effect—the date they were made. There certainly was no evidence to support the District Court's conjecture that these statements somehow first affected Best Buy's stock price at some indeterminate point into a three month class period and thereafter through vague reference to "price maintenance." Simply put, once a defendant rebuts the presumption by showing that a challenged statement had no price impact, a plaintiff cannot meet his ultimate burden of persuasion by sitting back in response to that rebuttal showing and relying on the same facts that triggered the rebuttable presumption in the first place. If Plaintiff's approach were adopted, the burden would never shift back to Plaintiff. Defendants would either disprove price impact by a preponderance of the evidence, or they would fail to do so. Either way, Plaintiff's approach impermissibly would relieve him of the burden of persuasion, contrary to Rule 301 and *Halliburton II*.

Plaintiff's misreading of Rule 301 flows from his improvised reworking of the "burden of production." Plaintiff agrees that Defendants' burden was one of "production." Pl. Br. at 34.[1] As

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[1] Plaintiff quotes the same case as Defendants to this effect: "Only if and when a defendant 'has succeeded in carrying its burden of production' does the burden shift back to the plaintiffs to

Plaintiff correctly states, Defendants bear the "burden of producing evidence that, if believed by the trier of fact, would support a finding that the presumed fact does not exist." *Id.* (citing Defendants'-Appellants' Opening Brief ("Def. Br.") at 28 n.5, citing *St. Mary's* (internal quotation marks omitted)). Plaintiff goes awry, however, by conflating the burden of production with Plaintiff's ultimate burden of persuasion. Contrary to law, he contends that the burden of production requires Defendants to disprove price impact by a preponderance of the evidence.[2]

The Supreme Court made clear in *St. Mary's*, however, the burden of "produc[tion]" requires only evidence to "*support* a finding" that the presumed fact does not exist. *St. Mary's*, 509 U.S. at

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establish price impact with direct evidence." *Id.* (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506–07 (1993)).

[2] The Advisory Committee Notes cited by Plaintiff are unavailing; they relate to the version of Rule 301 proposed by the Advisory Committee and rejected by Congress. Pl Br. at 35 (quoting Advisory Committee Notes to Rejected Rule 301). *See In re Yoder Co.*, 758 F.2d 1114, 1119 (6th Cir. 1985) ("The Advisory Committee notes, on which the Bankruptcy Court relied, that reject the 'bursting bubble' theory pertain to the proposed rule, which was not enacted, and are thus of little help in interpreting the final rule."); *see also* Weinstein's Federal Evidence § 301 App. 01[4] ("Thus, a lawyer operating with a presumption in her favor should not rely on the Advisory Committee Note; if she did, she would have a misplaced confidence in the ability of the presumption to withstand contrary evidence.") (quotation omitted). Unlike current Rule 301, the rejected rule would have *shifted* the burden of persuasion to the opposing party.

507. This is the same burden placed on a party opposing a summary judgment motion, and this Court has held that the opposing party need only come forward with "some evidence," not "substantial evidence." *Clay v. Traders Bank of Kansas City*, 708 F.2d 1347, 1351 (8th Cir. 1983) (holding that to rebut a presumption of insolvency, under Rule 301 the party was required "to show only some evidence of solvency," not "substantial evidence"). As the Third Circuit recently explained in discussing Rule 301: "The presumption's only effect is to require the party [contesting it] to produce enough evidence substantiating [the presumed fact's absence] to withstand a motion for summary judgment or judgment as a matter of law on the issue." *Lupyan v. Corinthian Colls. Inc.*, 761 F.3d 314, 320 (3d Cir. 2014) (alterations in original, citation omitted). In fact, the "quantum of evidence" needed to rebut a presumption "in a civil case is 'minimal.'" *Id.; see also ITC Ltd. v. Punchgini Inc.*, 482 F.3d 135, 149 (2d Cir. 2007) (rebuttal under Rule 301 is sufficient where the proffered evidence "when viewed in the light most favorable to [rebutting party], would permit a reasonable jury to infer" nonexistence of the presumed fact).[3]

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[3] In support of his novel preponderance of the evidence standard at the rebuttal stage, Plaintiff cites two district court cases from other circuits, *Aranaz v. Catalyst Pharm. Partners Inc.*, 302 F.R.D. 657 (S.D. Fla. 2014), and *Pa. Ave. Funds v. Inyx Inc.* No. 08 Civ. 6857 (PKC), 2011 WL 2732544 (S.D.N.Y. July 5, 2011). Neither applies or even cites Rule 301, which Plaintiff concedes governs here. And the basis of the *Aranaz* ruling-- a "clear and drastic spike following the

If Plaintiff were correct that Defendants' rebuttal burden is to establish the ultimate fact in dispute by a preponderance of the evidence, then there would be no need for the third step in the established burden-shifting analysis. In the frequently litigated employment discrimination context, for example, the plaintiff would never bear the burden of proving discriminatory reasons for their termination. So long as the plaintiff came forth with factual allegations sufficient to create the presumption of discrimination, it would become the employer's burden not just to produce evidence of nondiscriminatory reasons for termination, but to actually disprove discrimination. That is not the law. In fact, the *St. Mary's* case relied on by both Plaintiff and Defendants shows this: "By producing *evidence* (***whether ultimately persuasive or not***) of nondiscriminatory reasons, petitioners sustained their burden of production . . . ." *St. Mary's*, 509 U.S. at 509 (bolded emphasis added). Plaintiff's interpretation replaces the pivotal phrase "whether ultimately persuasive or not" with the diametrically opposite clause "only if ultimately persuasive."

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alleged misrepresentation and an equally dramatic decline following the revelation of the truth" (302 F.R.D. at 673) is absent here. *Id*. (noting that, unlike here, "all agree that the publications containing the misrepresentation and its revelation respectively caused those price swings"). In *Pennsylvania Avenue Funds*, the defendants offered *no evidence* to rebut the presumption (because they failed to meet discovery deadlines), so the question of what burden defendants bore was entirely academic. 2011 WL 2732544, at *10.

Courts of Appeals have applied Rule 301's framework to a variety of presumptions and in doing so, have enforced this burden-shifting analysis. *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1037–38 (Fed. Cir. 1992) (explaining that evidence to rebut presumption of laches is sufficient "even if such evidence may ultimately be rejected as not persuasive" and holding that "[i]f the patentee presents a sufficiency of evidence which, if believed, would preclude a directed finding in favor of the infringer, the presumption evaporates and the accused infringer is left to its proof"); *Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc.*, 304 F.3d 1167, 1176–77 (11th Cir. 2002) (agreeing with "[e]very federal court that has considered the question" of the application of Rule 301 to the presumption of abandonment of a trademark that, "[o]nce the presumption is triggered, the legal owner of the mark has the burden of producing evidence of either actual use during the relevant period or intent to resume use. *The ultimate burden of proof (by a preponderance of the evidence) remains always on the challenger*." (emphasis in original) (quoting *Emergency One, Inc. v. Am. FireEagle, Ltd.*, 228 F.3d 531, 536 (4th Cir. 2000)). This squarely confirms that under Rule 301 once a defendant rebuts a presumption, the inquiry focuses on the underlying issue, not whether or not the presumption applies, because the presumption has no effect. *See St. Mary's*, 509 U.S. at 510 (once defendant satisfies its burden of production, the presumption is "no longer relevant"); *Nunley v. City of Los Angeles*,

52 F.3d 792, 796 (9th Cir. 1995) ("Under the so-called 'bursting bubble' approach to presumptions, a presumption disappears where rebuttal evidence is presented. *See, generally*, *In re Yoder*, 758 F.2d 1114, 1119 (6th Cir. 1985) ('Most commentators have concluded that Rule 301 as enacted embodies the Thayer or "bursting bubble" approach.' At least two other circuit courts have expressly agreed." (citations omitted)); *Tenneco Chems., Inc. v. William T. Burnett & Co., Inc.*, 691 F.2d 658, 663 (4th Cir. 1982) ("It is axiomatic that a presumption is not evidence and disappears in the face of evidence sufficient to rebut it.").

Plaintiff's attempt to continue to rely on the *Basic* presumption after it has been rebutted also makes no sense. No factor relevant to triggering the presumption addresses the issue of price impact by the two challenged statements.[4] Rather, the fraud-on-the-market economic theory underpinning *Basic*—that the market price of a stock trading in an efficient market *should* be affected by alleged

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[4] A plaintiff invokes the presumption by showing only that the stock traded in an efficient market and the named plaintiff purchased at a time the alleged misrepresentation was publicly known. *Halliburton II*, 134 S.Ct. at 2416 ("Price impact is different. The fact that a misrepresentation 'was reflected in the market price at the time of [the] transaction'—that it had price impact—is '*Basic* 's fundamental premise.' It thus has everything to do with the issue of predominance at the class certification stage. That is why, if reliance is to be shown through the *Basic* presumption, the publicity and market efficiency prerequisites must be proved before class certification.").

misstatements—provides at best an "indirect proxy for price impact." *Halliburton II*, 134 S.Ct. at 2415. *Halliburton II* recognized that this proxy is displaced by direct evidence of the actual effect of the alleged misstatements on the stock price. *Id.* at 2416 (*Basic* "does not require courts to ignore a defendant's direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply."). Once Defendants presented evidence of lack of price impact, Plaintiff bore the burden of persuasion that the challenged statements were "transmitted through market price." *Id.* at 2416. Plaintiff failed to do so.

II. Defendants Satisfied Their Burden of Production by Producing Direct Evidence of No Price Impact

Defendants satisfied their burden of production on lack of price impact through the uncontradicted expert testimony of Professor Lehn, which showed that there was no statistically significant movement of Best Buy's stock resulting from the September 14 misstatements at issue. (A266–67.) In fact, Plaintiff's expert agreed that the challenged statements caused no movement in the stock price. (A340 ¶ 11.) It is undisputed that Best Buy's stock trades in an efficient market, so that publicly available information is incorporated into the stock price near-instantaneously. Thus, if the challenged statements were to affect the stock price, the impact would have occurred on the date the statements entered the market.

It was clearly erroneous for the District Court, without any evidentiary support, to attribute subsequent price movements to statements that had no price impact when made. (Add13.) (speculating that price impact "could" exist because "Plaintiffs allege that the stock price rose generally (if not in a straight line) throughout the class period".) The District Court's generalized reference to varied stock price behavior across three months as "price impact" evidence is irreconcilable with the Supreme Court's insistence that class certification evidentiary findings serve as protection against Rule 10b-5 serving as investment insurance. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) ("[T]he statutes make these . . . actions available, not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause."); *Basic Inc. v. Levinson*, 485 U.S. 224, 252 (1988) (White, J., joined by O'Connor, J., concurring in part and dissenting in part) ("[A]llowing recovery in the face of affirmative evidence of nonreliance—would effectively convert Rule 10b-5 into a scheme of investor's insurance." (internal quotation marks and citation omitted)).

Rather than attempt to defend the District Court's unsupported conclusion, Plaintiff responds that Defendants in the rebuttal failed to disprove all possible "conjecture" that "price impact 'could' exist." Pl. Br. at 49–50. But Defendants did not have the burden under Rule 301 of conjuring and then disproving every speculative

price impact possibility. That would not only incorrectly shift the burden of persuasion to Defendants, it would expand that burden far beyond even a preponderance of the evidence standard.

The District Court abused its discretion in resorting to conjecture and hypothesis about what effect the misstatements "could have" had on the price of Best Buy stock to certify a class. It effectively applied a minimal pleading stage-style scrutiny that has been roundly rejected. *Compare* Pl. Br. at 28 ("Any of those price impacts could 'support a securities fraud claim.'" (quoting District Court at A362)), *with Comcast Corp. v. Behrend,* 133 S. Ct. 1426, 1432 (2013) (Rule 23 "does not set forth a mere pleading standard") (quoting *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2551–52 (2011)); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 298 (1st Cir. 2000) ("[A]rguments woven entirely out of gossamer strands of speculation and surmise [may not] tip the decisional scales in a class certification ruling."). Indeed, this conjectural approach has no limiting principle: if endorsed, it would make the *Basic* presumption essentially irrebuttable, which is precisely what the Supreme Court held in *Halliburton II* was not the law. 134 S. Ct. at 2408 ("*Basic* emphasized that the presumption of reliance was rebuttable rather than conclusive.").

III. Plaintiff Is Unable to Reconcile His Back-End Analysis with the Supreme Court's Decisions in *Halliburton I* and *Halliburton II*

Plaintiff anchors his back-end price drop argument on the following sentence in the Supreme Court's *Halliburton II* decision: "*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." Pl. Br. at i (quoting 134 S. Ct. at 2414) (emphasis and alteration added by Plaintiff). By its plain language, this sentence says that Defendants can rebut the presumption with evidence that the misrepresentation ***or*** its correction did not affect the market price of the defendant's stock. Here, it is undisputed that Defendants presented evidence that the misrepresentation did not affect the stock price.

In the face of such uncontroverted evidence, Plaintiff turns the disjunctive into the conjunctive. He baldly says that Defendants must adduce evidence that ***both*** the misrepresentation ***and*** its correction did not affect the stock price. Pl. Br. at 45. But the Supreme Court never said that. It said the opposite. It said a defendant could rebut by showing one or the other. It did not require both. When the Supreme Court held that proof of loss causation is not properly before the court in determining whether a plaintiff has invoked the fraud on the market theory, the Supreme Court in no way suggested that proof of the absence of loss

causation should become an element of a defendant's rebuttal of the theory.

Plaintiff asserts that Defendants' reading "is not supported by the grammatical construction of the sentence" but makes no effort to support this bald assertion.[5] The disjunctive word "or" would need to be replaced with the word "and" to reach the meaning that Plaintiff ascribes to the sentence. That is not what the Supreme Court wrote.

The *Halliburton II* decision as a whole reinforces the conclusion that the Supreme Court's use of the disjunctive was not a typographical error. Elsewhere throughout the opinion the Supreme Court repeatedly stated that defendants may rebut the presumption with evidence of no price impact ***from 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

[5] Plaintiff never explains how Defendants' position "would mean absence of price impact could be shown in virtually every case." Pl. Br. at 43. The converse is true. If a stock-drop alone were sufficient to satisfy a plaintiff's burden, then the burden is illusory. Stock drops are what generate securities fraud cases in the first place, so if the mere existence of a price drop is sufficient to certify a class, that fact renders *Halliburton II* academic and sidelines the required rigorous analysis. Plaintiff, of course, argues that a defendant cannot even challenge the linkage between the drop and misstatement at the class certification stage, so any drop would be sufficient. Pl. Br. at 59–60.

fact affect the stock price." *Halliburton II*, 134 S.Ct. at 2414.

- "While *Basic* allows plaintiffs to establish that precondition indirectly, it does not require courts to ignore a defendant's direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply." *Id*. at 2416.
- "Suppose a defendant at the certification stage submits an event study. . . . Suppose one of the six events is the specific misrepresentation asserted by the plaintiffs. . . . Now suppose the district court determines that, despite the defendant's study, the plaintiff has carried its burden to prove market efficiency, but that the evidence shows no price impact with respect to the specific misrepresentation challenged in the suit. The evidence at the certification stage thus shows an efficient market, on which the alleged misrepresentation had no price impact." *Id.* at 2415.
- "Specifically, ***any*** showing that severs the link between the alleged misrepresentation and ***either*** the price received (***or paid***) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." *Id*. at 2408 (quoting *Basic*, 485 U.S. at 248) (emphasis added).

As these passages make clear, Defendants can rebut by producing evidence of no price impact when the alleged misrepresentations were made. Or, as the *Halliburton II* sentence Plaintiff relies on observed, assuming there was front-end price impact, Defendants alternatively can rebut by producing evidence of no price impact from the correction of the misrepresentations.

Any doubt is erased by the express instruction in *Halliburton I* that loss causation—*i.e.*, a stock drop upon corrective disclosure—"is not price impact." *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2187 (2011); *see also id.* at 2186 ("We have referred to the element of reliance in a private Rule 10b–5 action as 'transaction causation,' not loss causation.").

IV. Plaintiff Makes No Effort to Contest Defendants' Showing That the December 14 Disclosure Was Not Corrective of the Alleged Misrepresentations at Issue

Even if a price maintenance theory of price impact was, in the abstract, viable in the face of no evidence of actual price impact, the District's Court's certification ruling cannot be sustained in this case because there was no corrective disclosure in this case. Plaintiff makes no meaningful response to Defendants' argument that the December 14 disclosure was not and could not have been corrective because it only reported information that did not even exist on September 14. Plaintiff ducks and dodges. He argues that the question of whether a disclosure was corrective or not cannot be challenged at the class certification stage. This argument is unsupportable in light of clear Supreme Court and Eighth Circuit precedent emphasizing the need for "rigorous analysis" before certifying a class. *See Powers v. Credit Mgmt. Servs., Inc.*, No. 13–2831, 2015 WL 160285, at *1 (8th Cir. Jan. 13, 2015); *Comcast,* 133 S. Ct. at 1432; *Wal-Mart,* 131 S. Ct. at 2551.

Plaintiff seeks to deflect scrutiny of his asserted "corrective disclosure" at the class certification stage by noting that whether a disclosure is corrective of the alleged fraud also is relevant to the loss-causation analysis. Pl. Br. at 44, 58–59. Indeed true; that is the reason looking to the back-end stock drop is impermissible on class certification. *See* Point III, *supra*. Proof of loss causation is not a requirement at the class certification stage. *See Halliburton I*, 131 S. Ct. at 2187. But if Plaintiff is going to ground price impact in stock price behavior upon the making of a purported corrective disclosure, Plaintiff cannot adopt a "take my word for it" approach and bar the Court from assessing whether the disclosure Plaintiff points to is really corrective of a prior alleged misrepresentation. Plaintiff cannot have it both ways. He cannot rely on purported linkages between the December 14 and September 14 statements while at the same time arguing that Defendants cannot dispute such linkages. Plaintiff's argument would result in an irrebuttable presumption of reliance, which is exactly what *Halliburton II* rejected. *See Parhat v. Gates*, 532 F.3d 834, 847 (D.C. Cir. 2008) ("If a Tribunal cannot assess the reliability of the government's evidence, then the 'rebuttable' presumption becomes effectively irrebuttable."); *see also Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) ("[I]n ruling on class certification, a court may be required to resolve disputes concerning the factual setting of the case."). After all, without a corresponding disclosure purportedly showing that

the "on track" and "in line" statements were false when made, the December 14 price decline could not possibly show that those statements distorted the stock prices when they were made.

As a fallback, Plaintiff argues that the absence of linkage between challenged statement and asserted corrective disclosure can only be shown through expert evidence. Pl. Br. at 60. This is demonstrably wrong. Courts routinely dismiss complaints at the motion to dismiss stage where the court's review of a challenged statement and an asserted corrective disclosure reveals the absence of the required linkage.[6]

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[6] *See, e.g.*, *Cent. States, Se. & Sw. Areas Pension Fund v. Fed. Home Loan Mortgage Corp.*, 543 Fed. App'x 72, 77 (2d Cir. 2013) (affirming dismissal where "[t]he alleged corrective stock price decline related to disclosures regarding the federal government's takeover of [defendant], and [plaintiff] does not connect this takeover to [defendant's] subprime holdings, let alone to any misrepresentations about that subject."); *Brown v. Ambow Educ. Holding Ltd.*, No. CV 12–5062 PSG (AJWx), 2014 WL 523166, at *9 (C.D. Cal. Feb. 6, 2014) (dismissing case where none of the alleged corrective disclosures were in fact such, noting "[w]ithout a revelation of some wrongdoing to the market, an ensuing decline in stock price cannot be attributed to the alleged fraud."); *In re Initial Pub. Offering Secs. Litig.*, 399 F. Supp. 2d 261, 266 (S.D.N.Y. 2005) ("[A] failure to meet earnings forecasts has a *negative* effect on stock prices, but not a *corrective* effect."); *Boca Raton Firefighters' & Police Pension Fund v. DeVry Inc.*, No. 10 C 7031, 2012 WL 1030474, at *13–18 (N.D. Ill. Mar. 27, 2012) (dismissing claim after determining six different disclosures were not "corrective").

The reason Plaintiff wants to shield the asserted corrective disclosure from scrutiny at the class-certification stage is plain. The December 14 disclosure did not reveal the September 14 "on track" and "in line" statements were false when made. Plaintiff makes no serious effort to show that the December 14 disclosure was corrective. Plaintiff's sole argument, made in passing, is to refer to a December 14 disclosure that Best Buy's earlier "forecast and the forecasts of the vendor community were looking for an improvement in the TV industry in the third quarter . . ." (A115.); *see* Pl. Br. at 44. But that statement does not reveal any falsity in the actionable September 14 statements. It only underscores that Plaintiff is trying to hold Defendants liable for forward-looking statements in contravention of the District Court's decision on the motion to dismiss and well-settled law enforcing the PSLRA.[7] Tellingly, Plaintiff runs from what the District Court says was the substance of the December 14 statements: revelation of "Best Buy's true financial condition and revenue and earnings prospects for FY11." He runs from this portion of the opinion below because it shows the December 14 disclosure was not corrective of the alleged September 14 misrepresentations.

[7] The District Court limited Plaintiff's case to the extent that "in line" and "on track" were "a statement of present condition."

As Plaintiff does not dispute, what was revealed on December 14 was Best Buy's third fiscal quarter (September to November) sales and financial results, which by definition did not exist on September 14. *See* Def. Br. at 34; SIFMA Br. at 14–15; Chamber of Commerce Br. at 22. It is undisputed that none of the information disclosed in December 2010 made any reference to what Best Buy's financial condition had been three months earlier. *See* Def. Br. at 35. It is further undisputed that, when Best Buy reduced its earnings guidance on December 14, it did so explicitly "based on" events occurring post-September 14. (A343 ("lower than expected sales and earnings in the fiscal third quarter, and given our current visibility to potential outcomes in the fiscal fourth quarter").) Finally, Plaintiff does not dispute that none of the December 2010 analyst and media coverage of Best Buy's announcement referred to Best Buy's financial condition as of September 14. Def. Br. at 35.

Rather than reference the actual content of the statements—which the Court itself may do—Plaintiff falls back on his expert's clear mischaracterization of the content of the statements. An expert's inaccurate recasting of a statement's content cannot convert the December 14 statement into a corrective disclosure. *See* Def. Br. at 37; *see also Wal-Mart*, 131 S. Ct. at 2554 (2011) (disregarding expert's class certification testimony because it "does nothing to advance [plaintiff's] case"). Steinholt said only that the "3Q11 earnings release effectively revealed to investors that Best Buy was

not 'on track,' but 'far off pace,'[8] to make the 2011 EPS guidance provided at the start of the Class Period." (A343.) Steinholt said only that Best Buy revealed in December that it would miss its September earnings forecast. That is very far from saying that the challenged "on track" and "in line" statements were false when made. Predictions that turn out to be wrong are not *false* when made. That is the reason Congress in the PSLRA enacted a safe harbor for forward-looking statements. Steinholt's report did not change the fact that the December 14 disclosures were not corrective of the alleged misrepresentations in this case.

V. Plaintiff Contradicts His Own Expert by Asserting the "On Track" and "In Line" Statements Had Separate Economic Substance from Best Buy's Non-Actionable Forward-Looking Statements

Plaintiff concedes that his expert opined that "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." Pl. Br. at 19 (quoting A340). Plaintiff also concedes that, "[a]ctionability considerations aside, the 'economic substance of the information in the 2Q11 earnings release and the 2Q11 conference call is virtually the same.'" *Id.* at 19 (quoting A341–42). As a result of concessions like these, the District Court limited this

[8] The words "far off pace" are Steinholt's own, despite his use of quotation marks to suggest otherwise.

case to the "non-forward looking aspects" of the "on track" and "in line" statements made on the conference call.

In an attempt to find some "non-forward looking aspect[]" of these statements, Plaintiff must contradict its own expert. Plaintiff for the first time claims that there *was* something of independent economic significance included in the conference call statements: "the later statements reassured investors about then-current progress toward the stated economic goal." Pl. Br. at 56. It defies common sense and economics (as evidenced by Mr. Steinholt's opinion to the contrary) to suggest that a conference call at 10:00 a.m. conveyed any substantial information about "progress" toward meeting the forecast released at 8:00 a.m. As Mr. Steinholt conceded, it was "hardly surprising" that the conference call statements had no price impact. *See also* Chamber of Commerce Br. at 24–25.

Conclusion

The class certification requirements of Rule 23 are not mere conveniences for streamlining litigation, but crucial safeguards grounded in fundamental notions of due process. In a putative securities fraud class action, where a plaintiff relies on the rebuttable *Basic* presumption to satisfy the Rule 23 criteria, the district court must carefully scrutinize the evidence. In the face of legally sufficient rebuttal evidence submitted by a defendant showing that the alleged misstatements did not affect the stock price, the district court must determine whether plaintiff has met its burden of persuasion by evaluating the parties' direct evidence of price impact without the benefit of the now-rebutted *Basic* presumption. Where, as here, a plaintiff's sole evidence is the effect on the price of a purported corrective disclosure, class certification cannot stand where it is manifest that the asserted "corrective disclosure" was not in fact corrective of the challenged statements. The District Court's failure to conduct a rigorous analysis of the evidence, and its failure to make factual determinations about the nature of the December 14 statements, resulted in clear error. Instead of holding Plaintiff to his burden of persuasion, the District Court improperly speculated about what "could have" happened and merely deferred to Plaintiff's allegations. *Halliburton II* holds that when absence of price impact is shown, the presumption of reliance is unavailable and the predominance requirement cannot be established.

For the reasons set forth above and in Defendants' opening brief, this Court should reverse the District Court's decision and remand with instructions to deny class certification.

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Certificate of Brief Length

The undersigned counsel for Appellants Best Buy Co., Inc., Brian J. Dunn, Jim Muehlbauer, and Mike Vitelli, certifies that this brief complies with the requirements of Fed. R. App. P. 32(a)(7)(B) in that it is printed in 14 point, proportionately spaced typeface utilizing Microsoft Word 2010 and contains 6,041 words, including headings, footnotes, and quotations.

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Certificate of Virus Free

The undersigned counsel for Appellants Best Buy Co., Inc., Brian J. Dunn, Jim Muehlbauer, and Mike Vitelli, certifies under 8th Cir. R. 28A(h)(2) that the brief and addendum have been scanned for computer viruses and that the brief is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system, and I will serve a copy of the foregoing on all participants in the case who are not registered CM/ECF users by mailing a copy of the same, first class, postage paid, to the address listed on the Court's CM/ECF system.

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