No. 14-90022

In the

United States Court of Appeals for the Eleventh Circuit

LOCAL 703, I.B. OF T. GROCERYAND FOOD EMPLOYEES WELFARE FUND, ET AL.,
Plaintiffs-Respondents,
v.
REGIONS FINANCIAL CORPORATION, C. DOWD RITTER, IRENE M. ESTEVES, AND ALTON E. YOTHER,
Defendants-Petitioners.

On Appeal from the United States District Court
for the Northern District of Alabama
Case No. 2:10-CV-02847-IPJ
The Honorable Inge Prytz Johnson

MOTION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO APPEAR AS *AMICUS CURIAE* SUPPORTING DEFENDANTS-PETITIONERS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 29(c), *Amicus Curiae* states that it is a non-profit membership organization with no parent company and no publicly-traded stock.

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(b), the Chamber of Commerce of the United States of America ("the Chamber") respectfully moves for leave to file the accompanying *amicus curiae* brief in support of the Brief filed by Defendants-Petitioners Regions Financial Corporation, et al. ("Defendants"), requesting that this Court rehear their Rule 23(f) Petition and reverse the District Court's Order.

1. The Chamber is the Nation's largest federation of businesses and associations. It directly represents 300,000 members and indirectly represents the interests of over three million businesses and professional organizations of every size, in every sector, and from every region of the United States.

2. Many of the Chamber's members are companies subject to U.S. securities laws, and the Chamber regularly files *amicus curiae* briefs in class action appeals, including *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) ("*Halliburton II*"). The Chamber's interest in this litigation stems from the consequences for its members and affiliates that could result from allowing the District Court's order to stand.

3. The Chamber's members and represented affiliates are concerned about the increasing costs of securities class actions. Increasing securities class action litigation imposes significant litigation, settlement, insurance, and business-

disruption costs on American businesses, capital markets, and the economy generally. *See generally Stoneridge Inv. Partners, LLC v Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740–43 (1975) (all recognizing the cost pressures of securities class actions on American businesses and the economy).

4. As explained in the accompanying brief, *Halliburton II* requires that defendants in securities class actions be permitted to rebut the fraud-on-the-market presumption at the certification stage of the action by providing evidence that the alleged misrepresentation(s) did not, in fact, affect the stock price. The District Court here did not heed that instruction, instead certifying a class even though Defendants rebutted the presumption and Plaintiffs presented no contrary evidence. That approach is directly at odds with the Supreme Court's decision in *Halliburton II*, and, if allowed to stand, will facilitate further securities class action litigation, further increasing the costs to the Chamber's members.

5. The Chamber's motion for leave to file an *amicus* brief should be granted because the Chamber's historic position as the largest federation of business companies and associations gives it unique insight and expertise in explaining the adverse effects of the District Court's order in this case. The

accompanying brief explains those ill effects at length, providing additional analysis and support for why the Order should be reversed. This insight expands on the information and arguments offered in the principal brief of the Defendants.

6. Plaintiffs' counsel was consulted about the Chamber's motion. They do not consent.

For these reasons, the Chamber of Commerce of the United States of America respectfully moves for leave to file the accompanying brief as *amicus curiae*.

DATED: February 2, 2015 Respectfully submitted,

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The undersigned counsel certifies that on February 2, 2015, the foregoing motion was served on the following parties via electronic filing with Eleventh Circuit CM/ECF:

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the Chamber of Commerce of the United States of America (the "Chamber"), submits this brief pursuant to FEDERAL RULE OF APPELLATE PROCEDURE 29(a).

The Chamber is the Nation's largest federation of businesses and associations. It directly represents 300,000 members and indirectly represents the interests of over three million businesses and professional organizations of every size, in every sector, and from every region of the United States. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. Many of the Chamber's members are companies subject to U.S. securities laws. To that end, the Chamber regularly files *amicus curiae* briefs in various class action appeals, including in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) ("*Halliburton II*").

The Chamber has long been concerned about the costs that class action lawsuits — and particularly securities class actions — impose on the American economy. The Supreme Court has recognized that the increase of securities class action litigation puts a significant economic drain on U.S. public companies and their investors, both through the direct costs of litigation and settlements and indirectly through higher insurance costs. *See Merrill Lynch, Pierce, Fenner &*

Smith, Inc. v. Dabit, 547 U.S. 71, 81 (2006) (discussing the use of securities class action lawsuits "to injure 'the entire U.S. economy'"); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994) (remarking that the "uncertainty and excessive litigation can have ripple effects" and "increased costs . . . of the litigation and settlement costs under 10b-5 may be . . . incurred by the company's investors"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740–43 (1975) (noting that extensive discovery and the potential for uncertainty and disruption in a lawsuit allows plaintiffs with inadequate claims to extort settlements from innocent companies); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (stating that the "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense"); *see also* FED. R. CIV. P. 23(f) Advisory Committee Notes to 1998 Amendments (stating that "[a]n order granting 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").

According to Stanford Law School's Securities Class Action Clearinghouse, total settlement dollars from securities class actions rose by 46 percent in 2013 and

totaled $4.8 billion.[1] These costs impose a burden on capital markets and increase the costs of capital and insurance for businesses of all sizes and for the U.S. economy generally. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (stating that class action securities lawsuits can "raise the cost of being a publicly traded company . . . and shift securities offerings away from domestic capital markets"). In addition, the U.S. Senate has noted that many securities class actions have "had an *in terrorem* effect on Corporate America . . . . These lawsuits have added significantly to the cost of raising capital and represent a 'litigation tax' on business . . . . Many of these companies are high-technology companies which, by their very nature, have unpredictable business prospects and, consequently, volatile stock prices." S. REP. NO. 104–98, at 9 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 687–88 (footnotes omitted).

The District Court's decision undermines those principles by certifying a class based on the fact of a raw stock drop, even though Defendants made a showing of absence of price impact. Put differently, the District Court certified the class even though the rebuttable presumption had been rebutted, and Plaintiffs had produced no evidence to the contrary. In essence, under the District Court's reasoning, a class action lawsuit can survive on a mere showing of market

[1] Stanford Clearinghouse & Cornerstone Research, *Securities Class Action Settlements: 2013 Review and Analysis*, at 3 (2014), *available at* http://securities.stanford.edu/research-reports/1996-2013/Settlements-Through-12-2013.pdf.

efficiency even if the *only evidence* in the record rebuts price impact. This is diametrically opposed to the Supreme Court's decision in *Halliburton II*.

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(c)(5)

Pursuant to FEDERAL RULE OF APPELLATE PROCEDURE 29(c)(5), counsel for the Chamber states that no counsel for a party authored this brief in whole or in part, and that no person — other than the Chamber, its members, or its counsel — made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Halliburton II provides a simple, clear instruction: although securities fraud plaintiffs may satisfy the reliance element of a Rule 10b-5 action by invoking a presumption of reliance, defendants may rebut that presumption at the certification stage of the action by providing evidence that the alleged misrepresentation did not, in fact, affect the stock price. The District Court here failed to heed that instruction. In this case, the District Court certified a class based on the rebuttable fraud-on-the-market presumption — despite the fact that Defendants rebutted the presumption with an event study proving no price impact. The District Court's error is compounded by the force of Defendants' study, which established no price impact on *both* the alleged misrepresentation dates *and* the alleged corrective disclosure dates. In the presence of that study, and following *Halliburton II*, it was error to certify the class. Indeed, with the presumption of reliance rebutted, the Plaintiffs could not satisfy Rule 23(b)(3)'s requirement of predominance because individualized proof of reliance was necessary to establish liability for each class member. Accordingly, this Court should grant the motion to rehear the Rule 23(f) petition and reverse the District Court's order.

ARGUMENT

I. A CARDINAL PRINCIPLE OF CLASS ACTION LAW AND RULE 23 IS THAT THE PLAINTIFF BEARS THE BURDEN WITH RESPECT TO EVERY ELEMENT OF THE RULE 23 ANALYSIS, INCLUDING PREDOMINANCE.

As the Supreme Court has cautioned, the class action remains "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). To fall within this exception, "a party seeking to maintain a class action 'must affirmatively demonstrate his compliance'" with Rule 23 of the FEDERAL RULES OF CIVIL PROCEDURE. *Id.* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)). "'[T]he trial court [must be] satisfied, after a rigorous analysis,'" that a plaintiff has met the prerequisites of Rule 23. *Id.* (quoting *Wal-Mart*, 131 S. Ct. at 2551).

A party seeking to certify a class action bears the burden of proof with respect to every applicable Rule 23 requirement. *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009). Rule 23 "does not set forth a mere pleading standard." *Comcast*, 133 S. Ct. at 1432. Rather, recent decisions of the Supreme Court "have made clear that plaintiffs wishing to proceed through a class action must actually *prove* — not simply plead — that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3)." *Halliburton II*, 134 S. Ct. at 2412. Thus, proof of the Rule 23

requirements is indispensable to the class certification inquiry. *See Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1187–88 (11th Cir. 2003) (holding that burden of proof to establish propriety of class certification rests with advocate of class, and district court has independent obligation to evaluate whether requirements of Rule 23 have been met).

As the Court recognized in *Halliburton II*, this burden is no different for the "predominance" requirement under Rule 23(b)(3). 134 S. Ct. at 2412. *See also* FED. R. CIV. P. 23(b)(3) (requiring court to find "that the questions of law or fact common to class members predominate over any questions affecting only individual members"); *Comcast*, 133 S. Ct. at 1432 ("If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)."). Because the District Court's order runs afoul of these principles, it should be reversed.

II. THE CHALLENGED ORDER RAN AFOUL OF THESE CARDINAL PRINCIPLES AND DEPRIVED DEFENDANTS OF THE BENEFIT OF THEIR RIGHT UNDER *HALLIBURTON II* TO REBUT PRICE IMPACT AT THE CERTIFICATION STAGE.

A. *Halliburton II* Bestows on Defendants a Right to Rebut the Fraud-on-the-Market Presumption of Reliance at Class Certification.

In concluding that Plaintiffs had satisfied the predominance element under Rule 23(b)(3), the District Court deprived Defendants of their right under *Halliburton II* to rebut the fraud-on-the-market presumption of reliance at class certification. This presumption stems from *Basic Inc. v. Levinson*, 485 U.S. 224

(1988), where the Court held that plaintiffs providing evidence of certain elements could invoke a rebuttable presumption of classwide reliance known as the fraud-on-the-market presumption. This presumption is based on the idea that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.* at 246. To invoke it, "a plaintiff must prove that: (1) the alleged misrepresentations were publicly known, (2) they were material, (3) the stock traded in an efficient market, and (4) the plaintiff traded the stock between when the misrepresentations were made and when the truth was revealed." *Halliburton II*, 134 S. Ct. at 2413.

In *Halliburton II*, the Supreme Court preserved the *Basic* presumption, but clarified that defendants have a right at the class certification stage to rebut it "through evidence that the misrepresentation did not in fact affect the stock price." *Id.* at 2414. In so holding, the Court recognized that a successful Section 10(b) claim requires proof of reliance, and that in the absence of common issues of reliance, individualized issues would predominate and defeat class certification. *See id.* at 2412 (noting that, "[i]n securities class action cases, the crucial requirement for class certification will usually be the predominance requirement of Rule 23(b)(3)," and "[t]he *Basic* presumption does not relieve plaintiffs of the burden of proving — before class certification — that [the predominance] requirement is met").

Thus, under *Halliburton II*, defendants can "rebut the presumption of reliance with evidence of a *lack* of price impact, not only at the merits stage — which all agree defendants may already do — but also before class certification." *Id.* at 2413. The Court recognized that "[p]rice impact is . . . an essential precondition for any Rule 10b-5 class action" (*id.* at 2416); that "[i]n the absence of price impact, *Basic*'s fraud-on-the-market theory and presumption of reliance collapse" (*id.* at 2414); and that, "without the presumption of reliance, a Rule 10b–5 suit cannot proceed as a class action: Each plaintiff would have to prove reliance individually, so common issues would not 'predominate' over individual ones" (*id.* at 2416). The import of this logic is clear and powerful. If defendants rebut the *Basic* presumption in securities litigation under Section 10(b), class certification must fail absent independent proof of price impact.

B. The Challenged Order Disregarded the Import and Effect of Defendants' Rebuttal Evidence under *Halliburton II*.

The District Court erroneously held that that "plaintiffs' claims survive the scrutiny now required by *Halliburton II*," based *purely on the fact that Regions' stock lost value*:

> Regardless of other events occurring the day in question, defendants concede its stock tumbled 24% on January 24, 2009. Whether this tumble was due to defendants' corrective disclosures, namely that good will was significantly more impaired than previously asserted and that the loan loss reserves where drastically understated, or due to the overall market conditions on that day, is an ultimate question in this action, and properly reserved for a jury to

> decide. Similarly, whether this tumble was the continuation of the steady decline in stock price from February 2008 through the end of the class period, due to external market factors, or whether it was directly attributable to the January 20, 2009, corrective disclosure is a question of fact, so tied to the merits of this case that it is reserved for the trier of fact.

Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp., 2014 WL 6661918, at *8−*9, *10 (N.D. Ala. Nov. 19, 2014). This holding runs afoul of *Halliburton II* for multiple reasons.

First, this holding ignores the import that *Halliburton II* gives to the fact that Defendants rebutted the *Basic* presumption with evidence of a lack of price impact. Defendants presented evidence when opposing class certification that neither the alleged misrepresentations at the heart of Plaintiffs' lawsuit nor any alleged corrective disclosures affected the market price of Regions' stock. Specifically, Defendants presented an event study showing that the alleged misrepresentations did not cause a statistically significant price increase on any of the thirteen misrepresentation days alleged by Plaintiffs. (R-102-1, James Rep., Ex. A ¶¶ 67−73 & Ex. 10).[2] To rebut Plaintiffs' "confirmatory information" theory,

[2] This Court has already recognized this submission as "evidence that [Regions'] 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.*, 762 F.3d 1248, 1258 (11th Cir. 2014). More generally, this Court has also recognized the relevance of event studies. *See*, *e.g.*, *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1313 (11th Cir. 2011) (noting that "event studies are a common method of establishing loss causation, used routinely in the academic literature to determine whether the release of particular information has a significant effect on a company's stock price") (quotation marks omitted).

Defendants' event study also showed that any alleged corrective disclosures did not have a statistically significant impact on Regions' stock price. (R-102-1, James Rep., Ex. A ¶¶ 48−61 & Exs. 8, 9, and 11).

Plaintiffs offered nothing to rebut this evidence. Under *Halliburton II*, that should have been the end of the story: "While *Basic* allows plaintiffs to establish [the] precondition [of price impact] 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." 134 S. Ct. at 2416; *see also id.* at 2414 ("In the absence of price impact, *Basic*'s fraud-on-the-market theory and presumption of reliance collapse.").

Second, the District Court's holding that raw drop in stock price alone demonstrates price impact by a preponderance of the evidence (*i.e.*, satisfies plaintiffs' burden of proof at class certification) also runs afoul of *Halliburton II*. The sheer fact that Regions' stock declined in value cannot substitute for evidence sufficient to establish the *cause* of the decline — that is, to satisfy the preponderance standard for price impact. Under *Halliburton II*, it is "clear that plaintiffs wishing to proceed through a class action must actually *prove* — not simply plead — that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3)." 134 S.

Ct. at 2412; *see also Comcast*, 133 S. Ct. at 1432 ("The party [seeking certification] must . . . satisfy through evidentiary proof at least one of the provisions of Rule 23(b) . . . [including] that the questions of law or fact common to class members predominate over any questions affecting only individual members.") (internal quotation marks omitted); *Levitt v. J.P. Morgan Sec., Inc.*, 710 F.3d 454, 465 (2d Cir. 2013) ("The Rule 23 requirements must be established by at least a preponderance of the evidence."). Indeed, under *Halliburton II*, predominance in a securities fraud class action as it pertains to reliance comes from evidence of *price impact*, not just a decline in stock price. *See* 134 S. Ct. at 2416 ("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.") (internal quotation marks and citations omitted). Moreover, under *Wal-Mart* and its progeny, 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. *See* 131 S. Ct. at 2551. Ultimately, when the fraud-on-the-market presumption is rebutted — as it was here — Plaintiffs cannot satisfy the predominance requirement because individualized reliance inquiries become essential.

To allow the fact that a stock's value declined on a given day to rebut event studies affirmatively disproving price impact would eviscerate *Halliburton II*.

Raw stock drop is all securities lawyers would need to file suit. To equate stock drop with sufficient evidence of price impact (and, indeed, to allow it to *rebut* affirmative evidence of no price impact shown through event studies) would enable virtually every securities case filed to circumvent *Halliburton II*, to obtain certification, and to get to a jury on no evidence other than the raw drop in price that triggered the filing. Such a holding effectively guts *Halliburton II*.

C. The Challenged Order Disregards the Burden-Shifting Approach Established in *Basic* and Affirmed in *Halliburton II*.

The *Basic* presumption is just that — a presumption. The Supreme Court described it as a "useful device[ ] for allocating the burdens of proof between parties." *Basic*, 485 U.S. at 245. But "market efficiency" — the metric for invoking the presumption — is not the ultimate fact attempted to be proven by the presumption. "Price impact" is; and the Supreme Court emphasized in *Halliburton II* that the "prerequisites for invoking the presumption constitute an indirect way of showing price impact," and that *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." 134 S. Ct. at 2415−16.

It follows that once a defendant rebuts the presumption of reliance with evidence establishing a lack of price impact, the burden shifts to plaintiffs to show price impact to satisfy their burden on the predominance element. Federal Rule of

Evidence ("Rule") 301, the very rule invoked by *Basic* to describe the type of presumption the Court was recognizing, *see Basic*, 485 U.S. at 245–46 (citing FED. R. EVID. 301), provides that "unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption." FED. R. EVID. 301. The Rule, however, also explains that it "does not shift the burden of persuasion, which remains on the party who had it originally." *Id. See also Am. Fed'n of State, Cnty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 881 (11th Cir. 2013) (holding that Rule 301 "does not shift the burden of persuasion, which remains on the party who had it originally"), *cert. denied*, 134 S. Ct. 1877 (2014).

Under the prevailing view of Rule 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.*, 761 F.3d 314, 320 (3d Cir. 2014) (internal quotations omitted). This view is supported by *Halliburton II*: "Specifically, '[a]ny 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.'" 134 S. Ct. at 2408 (quoting *Basic*, 485 U.S. at 248).

Accordingly, because Plaintiffs ultimately bore the burden on the Rule 23

requirements, once Defendants "sever[ed] the link" between Plaintiffs' allegations and price impact, the burden reverted to Plaintiffs to counter Defendants' evidence by demonstrating that there was price impact. Plaintiffs could carry that burden either by showing a statistically significant stock price impact at the time of the statements or by showing a statistically significant stock price movement caused by the disclosures to the market of the information alleged to have been misrepresented.

This requirement thus imposes on Plaintiffs the burden to demonstrate a causal connection between the drop in stock price and the alleged misrepresentations. *See Phillips v. Scientific-Atlanta, Inc.*, 489 F.App'x 339, 343 (11th Cir. 2012) (affirming summary judgment in favor of defendants when plaintiffs "failed to eliminate sufficiently other possible explanations for the identified price drop" because, as a result, "no genuine issue of material fact exist[ed] on 'loss causation' — a required element of Plaintiffs' claim"); *see also In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 510 n.3 (2d Cir. 2010) (noting that "summary judgment [for defendants would be] appropriate if [plaintiffs] cannot show that at least some of the price drop was due to the fraud"); *Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse First Bos.*, 853 F. Supp. 2d 181, 193 (D. Mass. 2012), *aff'd sub nom.*, *Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse Sec. (USA) LLC*, 752 F.3d 82 (1st Cir. 2014) ("[T]o

survive summary judgment, plaintiffs must isolate the extent to which the decrease in stock price was caused by the disclosure and not, as the Supreme Court has warned, 'the tangle of [other] factors affecting [stock] price,' such as changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price").

This Court's decisions — beginning with its decision in the *FindWhat* litigation — shed further light on Plaintiffs' burden. *See Meyer v. Greene*, 710 F.3d 1189, 1196–97 (11th Cir. 2013) (noting that, to prove loss causation, plaintiffs often (1) identify a corrective disclosure; (2) show that the stock price dropped soon after the corrective disclosure; and (3) "'eliminat[e] other possible explanations for this price drop, so that the factfinder can infer that it is more probable than not that it was the corrective disclosure — as opposed to other possible depressive factors — that caused at least a 'substantial' amount of the price drop'") (quoting *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1311–12 (11th Cir. 2011) (emphasis added) (footnote omitted); *see also FindWhat*, 658 F.3d at 1312 (quoting *In re Williams Sec. Litig. – WCG Subclass*, 558 F.3d 1130, 1137 (10th Cir. 2009)), for proposition that "[l]oss causation is easiest to show when a corrective disclosure reveals the fraud to the public and the price subsequently drops — assuming, of course, that the plaintiff could isolate the

effects from any other intervening causes that could have contributed to the decline”).

Simply put, once defendants have rebutted the presumption of reliance with evidence of price impact at class certification, the litigation proceeds with Plaintiffs — as the parties seeking relief — bearing their ordinary burden of persuasion to establish the Rule 23 requirements.

III. RECOGNIZING THE IMPORTANCE OF THIS ISSUE, THE EIGHTH CIRCUIT HAS GRANTED RULE 23(f) REVIEW IN A SIMILAR CASE.

The subject of this appeal is of prime importance to businesses facing class-action lawsuits. This issue has already arisen in the U.S. Court of Appeals for the Eighth Circuit, which is currently considering it. That court recently granted Rule 23(f) review of the District Court of Minnesota’s decision on class certification in *IBEW Local 98 Pension Fund v. Best Buy Co.*, No. CIV. 11-429, 2014 WL 4746195 (D. Minn. Aug. 6, 2014). *See IBEW Local 98 Pension Fund v. Best Buy Co.*, No. 14-3178 (8th Cir. Sept. 24, 2014).

The plaintiffs in *Best Buy* are represented by the same lawyers representing the Plaintiffs here. The *Best Buy* plaintiffs base their Section 10(b) claims on allegedly fraudulent statements that Best Buy representatives made about the company’s 2011 fiscal year projections. There, like here, the primary issue at the class certification stage was reliance. There, like here, the district court granted the

plaintiffs' motion for class certification. And there, like here, the district court certified the class while failing to adhere to *Halliburton II*'s basic instructions that defendants may rebut price impact at the class certification stage.

The same errors that caught the Eighth Circuit's attention exist here and likewise merit review of Regions' case. Like the defendant's event study in *Best Buy*, Regions' event study establishes the lack of statistical price impact — on *either* the alleged misrepresentation dates *or* the alleged corrective disclosure dates. Specifically on the latter point, Defendants' event study here demonstrates that any alleged corrective disclosures did not have a statistically significant impact on Regions' stock price. (R-102-1, James Rep., Ex. A ¶¶ 48−61 & Exs. 8, 9, and 11).

Additionally, whereas the plaintiffs in *Best Buy* at least submitted an event study to try to prove a link between the alleged misrepresentations at issue and Best Buy's stock price, the Plaintiffs here entirely failed to present any such affirmative evidence to try to counteract Regions' event study.

In short, the errors interpreting and applying *Halliburton II* that warranted the Eighth Circuit's grant of Rule 23(f) review in *Best Buy* appear in the District Court's certification order below. This case is equally worthy of this Court's plenary review.

CONCLUSION

For the foregoing reasons, the Court should grant the Defendants' motion to rehear its Rule 23(f) petition and reverse the decision of the District Court.

DATED: February 2, 2015 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this motion complies with the typeface requirements set forth in *Federal Rule of Appellate Procedure* 32(a)(5) and the type-style requirements set forth in *Federal Rule of Appellate Procedure* 32(a)(6). The motion was prepared in Microsoft Word 14-point Times New Roman type. The undersigned counsel also certifies that this brief complies with the type-volume limitations of *Federal Rule of Appellate Procedure* 29(d) because it contains 4,182 words, excluding the parts of the brief exempted by *Federal Rule of Appellate Procedure* 32(a)(7)(B)(iii).

Dated: February 2, 2015

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