CASE NO. 17-3871

In the United States Court of Appeals for the Sixth Circuit

ALAN WILLIS; CITY OF PONTIAC GENERAL EMPLOYEES' RETIREMENT SYSTEM; TEAMSTERS LOCAL 237 ADDITIONAL SECURITY BENEFIT FUND,

Plaintiffs-Appellees,

v.

BIG LOTS, INC.; STEVEN S. FISHMAN; JOE R. COOPER; CHARLES HAUBIEL, II; TIMOTHY A. JOHNSON,

Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF OF *AMICI CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLANTS

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INTEREST OF *AMICI CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association that represents the interests of hundreds of securities firms, banks, and asset managers. SIFMA is also the United States regional member of the Global Financial Markets Association. SIFMA's mission is to support a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. To further that mission, SIFMA regularly files *amicus curiae* briefs in cases such as this one that raise issues of vital concern to securities industry participants. *See, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) ("*Halliburton II*"); *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013); *Meoli v. Huntington Nat'l Bank*, 848 F.3d 716 (6th Cir. 2017); *Daley v. Mostoller*, 717 F.3d 506 (6th Cir. 2013). This case involves important issues concerning class certification in private securities actions, which are directly relevant to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry.

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[1] All parties have consented to the filing of this brief. Under Federal Rule of Appellate Procedure 29(a)(4)(E), the undersigned counsel certify that no party's counsel authored this brief in whole or in part, and that no person or entity other than the *amici*, their members, or their counsel contributed money to fund its preparation or submission.

The Chamber of Commerce of the United States of America ("Chamber") is the largest business federation in the world. It represents 300,000 members directly, and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases raising issues concerning the business community. This appeal concerns interests central to the Chamber's mission. Many of the Chamber's members are public companies with exposure to securities class actions. Given the implications of class certification decisions, the Chamber's members are keenly interested in ensuring that the courts faithfully apply Rule 23's strictures in securities cases.

SUMMARY OF ARGUMENT

The Supreme Court has placed careful limits on class certification, reflecting a clear mandate that plaintiffs must actually prove—not simply plead—that their proposed class satisfies Rule 23's requirements. The consequences of failing to enforce these limits are particularly acute in the context of class action securities litigation, where it is widely recognized that the actual merits of securities fraud claims may have little bearing on their resolution. Class certification places enormous settlement pressure on defendants—even those with meritorious defenses—and research shows that the costs of overbroad, unmeritorious litigation ultimately get passed along to participants in the U.S. financial markets.

In this case, the district court disregarded important limits on class certification, upsetting the careful balance the Supreme Court has struck in affording securities plaintiffs a path to class recovery without providing them with a free pass. The Supreme Court has recognized that "in securities class action cases, the crucial requirement for class certification will usually be the predominance requirement of Rule 23(b)(3)." *Halliburton II*, 134 S. Ct. at 2412. The district court's decision certifying Plaintiffs' proposed class in this case disregarded two important aspects of Rule 23(b)'s "predominance" requirement.

First, the district court's decision failed to heed the Supreme Court's holding in *Halliburton II* that a defendant must be afforded the opportunity at the class

certification stage to rebut the presumption of reliance set forth in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), with evidence that the alleged misrepresentation had no price impact. Defendants made that showing here with undisputed evidence (provided by Plaintiffs' own expert) that there was no statistically significant stock price increase in response to the alleged misrepresentations. Yet the district court nevertheless certified the class on the ground that Plaintiffs argued—*without proving or even pleading*—that the alleged misrepresentations theoretically could have maintained a stock price that otherwise would have dropped. This holding deprives the rebuttal opportunity at the heart of *Halliburton II* of meaning and contradicts the approach of other courts that have adhered to the Supreme Court's mandate.

Second, contrary to the Supreme Court's decision in *Comcast*, the district court deemed Plaintiffs' rote invocation of an "event study" sufficient to establish classwide proof of damages. The Supreme Court has held that a plaintiff at the class certification stage must prove that its damages model is consistent with its liability case, requiring that the court conduct a "rigorous analysis," but there was no such showing here. Instead, Plaintiffs relied on a damages model that made no attempt to disaggregate price impact attributable to actionable statements from price impact attributable to statements the district court found to be non-actionable. Nonetheless, the district court certified the class after Plaintiffs' expert simply

predicted, without more, that he could someday prepare an "event study" to disaggregate that price impact. The district court's approach fell short of the rigorous analysis *Comcast* requires, inappropriately precluding Defendants from demonstrating that Plaintiffs failed to satisfy their burden of establishing that damages are susceptible to classwide measurement.

For these reasons, as discussed more fully herein, affirmance of the district court's ruling would permit a plaintiff to bypass the Supreme Court's careful limitations in *Halliburton II* and *Comcast* by simply invoking the words "price maintenance" and "event study." Such a ruling would create a virtually unchallenged path to class certification in this Circuit, eviscerating an important check on unmeritorious litigation and enabling strong-arm settlements that impose costs on defendants, on their shareholders, and on the U.S. capital markets. This Court should therefore reverse.

ARGUMENT

I. ENFORCEMENT OF THE LIMITS ON CLASS CERTIFICATION IS CRITICAL TO U.S. FINANCIAL MARKETS

Recognizing that Congress never intended Rule 23 to afford plaintiffs an unchallenged path to class recovery, the Supreme Court in *Halliburton II* and *Comcast* placed important limits on class certification. While *Basic* affords class plaintiffs an indirect means of establishing reliance and, in turn, Rule 23(b)'s predominance element, *Halliburton II* reaffirmed that "the presumption [i]s

rebuttable rather than conclusive," *Halliburton II*, 134 S. Ct. at 2408, and it held that defendants must be afforded an opportunity to rebut the presumption at the class certification stage "to maintain [] consistency . . . with the class certification requirements of Federal Rule of Civil Procedure 23," *id*. at 2417. In *Comcast*, the Supreme Court emphasized that district courts must conduct a "rigorous analysis" to ensure that a party seeking to maintain a class action has "affirmatively demonstrate[d]" compliance with Rule 23. *Comcast*, 569 U.S. at 33. These holdings make clear that the class certification requirements of Rule 23 must be enforced with rigor and cannot simply be rubber-stamped.

The consequences of lax class certification requirements are particularly acute in the context of private securities litigation. "Federal class action securities fraud filings hit a record pace in the first half of 2017." Cornerstone Research, *Securities Class Action Filings—2017 Midyear Assessment* 1 (2017). If filing activity continues at the same pace through the end of the year, nearly 10% of all exchange-listed companies will be the subject of federal class action securities claims in 2017. *Id.* This would be the highest annual rate in 20 years. *Id*.

As a practical matter, a defendant's ability to rebut the *Basic* presumption of reliance or to challenge a plaintiff's damages model will often be critical to the outcome of securities litigation. Between 2000 and 2013, courts granted 77% of the class certification motions decided in securities cases. *See* Renzo Comilli &

Svetlana Starykh, NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2013 Full-Year Review* 19 (2013). After class certification, it is well-established that defendants face enormous settlement pressure, even when they have meritorious defenses. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("[W]hen 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."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification 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."); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 259 F.3d 154, 165 (3d Cir. 2001) ("[C]ertifying the class may place unwarranted or hydraulic pressure to settle on defendants."). In an ideal world, a plaintiff's prospect for recovery would rise and fall with the strength of its case, but research shows that the merits of securities fraud claims may matter little, and even weak cases will often result in "blackmail settlements" that defendants reluctantly pay to avoid the risk of a debilitating judgment.[2] *Cf.* Henry J. Friendly, *Federal Jurisdiction: A General*

[2] *See* Geoffrey Rapp, *Rewiring the DNA of Securities Fraud Litigation: Amgen's Missed Opportunity*, 44 Loy. U. Chi. L.J. 1475, 1478 (2013) ("[B]ecause securities

View 120 (1973) (noting that class actions risk "recoveries that would ruin innocent shareholders").

While defendants bear the immediate brunt of this settlement pressure, the costs of overbroad, unmeritorious litigation ultimately "get[] passed along to the public." *SEC v. Tambone*, 597 F.3d 436, 452 (1st Cir. 2010) (Boudin, J., concurring). Companies may suffer undue decreases in equity value,[3] and current shareholders are effectively required to insure former shareholders for their investment losses.[4] The competitiveness of American capital markets declines due to the perception that any benefits these markets afford may be negated by the

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litigation is so high risk for defendants, these cases—should they survive motions to dismiss and obtain class certification—will almost always settle."); Tom Baker & Sean J. Griffith, *How the Merits Matter: Directors' and Officers' Insurance and Securities Settlements*, 157 U. Pa. L. Rev. 755, 757-58 (2009) (observing that the merits of securities fraud claims may matter little when it comes to the settlement of securities class actions); Denise N. Martin *et al.*, *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions*, 5 Stan. J.L. Bus. & Fin. 121, 156 (1999) ("Generally, we find that the merits do not have much, if any, explanatory power on settlement size."); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 523 (1991) (study of securities class action settlements concluding that "the merits did not affect the settlement amounts").

[3] *See* Anjan V. Thakor, U.S. Chamber Inst. for Legal Reform, *The Unintended Consequences of Securities Litigation* 14 (2005) (noting that the average securities class action reduces the value of a defendant company's equity by 3.5 percent).

[4] *See, e.g.*, Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 Stan. L. Rev. 1487, 1503 (1996) (noting that securities class action settlements are, "in large part, a transfer of wealth from current shareholders to former shareholders").

greater comparative costs that our legal system imposes on businesses.[5] And as the Supreme Court has observed, the true costs of class actions are "payable in the last analysis . . . for the benefit of speculators and their lawyers." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975) (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring)).

In *Halliburton II* and *Comcast*, the Supreme Court placed reasonable and important restrictions on plaintiffs' ability to obtain class certification, requiring them to provide evidentiary proof of compliance with Rule 23. As explained in the sections that follow, the district court's ruling, if affirmed, would permit plaintiffs to bypass these restrictions and obtain class certification in private securities litigation without the requisite proof. By simply reciting the phrase "price maintenance," plaintiffs would avoid the rebuttal opportunity afforded to

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[5] *See, e.g.*, Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* ii, 101 (2007) ("foreign companies [are] staying away from US capital markets for fear that the potential costs of litigation will more than outweigh any incremental benefits of cheaper capital"); Fin. Servs. Forum, *2007 Global Capital Markets Survey* 8 (2007) (noting that nine of ten foreign companies that delisted from the U.S. between 2003 and 2007 cited litigation risk as a factor); Comm. on Capital Mkts. Regulation, *Interim Report of the Committee on Capital Markets Regulation* 5 (2006) (noting the importance of litigation burden in choosing a market); *cf. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) ("Overseas firms with no other exposure to our securities laws could be deterred from doing business here. This, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets.") (citation omitted).

defendants in *Hallibuton II*, even where "price maintenance" is inconsistent with the pleadings and unsupported by evidence. Plaintiffs would circumvent *Comcast* by simply promising to conduct a damages "event study" at some point in the future, without making the requisite showing that their damages model comports with their theory of liability. In these ways, the district court's decision undermines the safeguards imposed on class certification by the Supreme Court and should be reversed.

II. THE DISTRICT COURT DEPRIVED DEFENDANTS OF THE OPPORTUNITY UNDER *HALLIBURTON II* TO REBUT *BASIC*'S PRESUMPTION OF RELIANCE

A. The District Court Misapplied *Basic*'s and *Halliburton*'s Burden-Shifting Framework for the Presumption of Reliance

In *Halliburton II*, the Supreme Court held that a defendant can rebut the *Basic* presumption of reliance at the class certification stage with evidence that the "asserted misrepresentation . . . did not affect the market price of the defendant's stock." *Halliburton II*, 134 S. Ct. at 2414; *see also id.* ("*Basic* emphasized that the presumption of reliance was rebuttable rather than conclusive"). The Supreme Court also made clear that a defendant's burden in rebutting the *Basic* presumption is not a high one: "[a]ny showing that severs the link between the alleged misrepresentation and the price received (or paid) by the plaintiff" is sufficient to rebut the presumption at the class certification stage. *Id.* (quoting *Basic*, 485 U.S. at 248).

Here, Defendants cited undisputed evidence that the alleged misstatements, when made, did *not* affect Big Lots' stock price. Indeed, the district court agreed that Plaintiffs' expert's "regression analysis does not show a statistically significant price increase associated with any of the nine alleged misrepresentation dates." *See* Class Cert. Op., RE 88-1, Page ID # 5118-19. This conclusion should have been sufficient to rebut the *Basic* presumption. *See Halliburton II*, 134 S. Ct. at 2416 (an event study can constitute "direct [and] salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price").

Nonetheless, the district court embraced Plaintiffs' unsubstantiated theory that the alleged misrepresentations could have "maintained" the stock price, even though Plaintiffs neither alleged nor introduced evidence to support this so-called "price maintenance" theory.[6] The district court's holding that a defendant must disprove such a speculative possibility cannot be squared with the Supreme Court's holdings in *Basic* or *Halliburton II*. Under those cases, as well as under Federal Rule of Evidence 301, which governs evidentiary presumptions in civil cases, a defendant succeeds in rebutting the *Basic* presumption with any evidence that could lead a reasonable jury to conclude that the alleged misstatements did not affect the stock price. *See Halliburton II*, 134 S. Ct. at 2414 (presumption is

[6] The complaint expressly alleges that all of the purported misrepresentations prior to the first corrective disclosure resulted in a price *increase*—not price maintenance. *See* Am. Compl., RE 18 ¶¶ 78, 94, 100, Page ID # 239, 245, 248.

rebutted by "*any* showing" of a lack of price impact) (quoting *Basic*, 485 U.S. at 248 (emphasis added)); *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 149 (2d Cir. 2007) (burden of production to overcome a presumption is not a "heavy" one and requires only evidence from which a reasonable jury could infer the non-existence of the presumed fact).[7]

Under *Halliburton II*, once a defendant rebuts the presumption, a plaintiff must proffer *evidence*—not speculation—that refutes the defendant's evidence and demonstrates that the alleged misrepresentation "actually affect[ed] the market price of the stock." *Halliburton II*, 134 S. Ct. at 2417; *see also IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 783 (8th Cir. 2016) (where a defendant submits "evidence of no 'front-end' price impact" and the plaintiff presents no contrary evidence, the presumption has been overcome).[8]

Instead of requiring Plaintiffs to come forward with actual evidence, however, the district court relied upon the speculative *possibility* that the price

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[7] *See also ITC*, 482 F.3d at 148 (a presumption is merely an assumption of fact that ceases to operate upon the proffer of contrary evidence).

[8] *See also Halliburton II*, 134 S. Ct. at 2408 ("if a defendant could show that the alleged misrepresentation did not, for whatever reason, actually affect the market price . . . a plaintiff would have to prove that he directly relied on the defendant's misrepresentation in buying or selling the stock"); Fed. R. Evid. 301 (a presumption "does not shift the burden of persuasion, which remains on the party who had it originally").

maintenance theory—a theory Plaintiffs did not even plead—*might* apply.[9] *See In re Credit Suisse First Boston Corp. (Lantronix, Inc.) Analyst Sec. Litig.*, 250 F.R.D. 137, 145 (S.D.N.Y. 2008) (decertifying class on reconsideration and holding that price maintenance theory is "patently deficient" where it "is based not on facts but on speculation"). In doing so, the district court accepted unsubstantiated conjecture where evidentiary proof was necessary. *See* 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 5:25 (12th ed. 2015) ("[s]peculation that . . . statements maintained or slowed the rate of decline should give way to an evidentiary showing of no price impact of the challenged statement when made"). The Supreme Court has repeatedly held that to "prevail on a motion for class certification, a party must demonstrate through 'evidentiary proof' that 'questions of law or fact common to class members predominate over any questions affecting only individual members.'" *Halliburton II*, 134 S. Ct. at 2423 (quoting *Comcast*, 133 S. Ct. at 1426). Mere speculation of "price maintenance" is insufficient to overcome evidence of the lack of price impact.

In this regard, the district court's ruling directly conflicts with the Eighth Circuit's decision in *Best Buy*, where the court held—consistent with *Basic*, *Halliburton II*, and Federal Rule of Evidence 301—that unsubstantiated claims of

[9] *See* Class Cert. Op., RE 88-1, Page ID # 5119 (noting that "a misrepresentation *can* have a price impact not only by raising a stock's price but also by maintaining a stock's already artificially inflated price") (emphasis added).

price maintenance are insufficient to overcome actual evidence of a lack of price impact. In *Best Buy*, as here, the plaintiffs' expert acknowledged in event study evidence that the alleged misstatements did not cause defendant's stock price to move. *Best Buy*, 818 F.3d at 782. Nonetheless, the plaintiffs argued that, coupled with the possibility of price maintenance, a drop in Best Buy's stock price after the corrective disclosure alone was evidence of the requisite price impact. *Id*. at 782-83. The Eighth Circuit disagreed, holding that the opinions of the parties' experts constituted "overwhelming evidence of no 'front-end' price impact" rebutting the *Basic* presumption, and that plaintiffs' price maintenance theory was supported by "no contrary evidence." *Id*.

Here, the district court declined to follow *Best Buy*, asserting that the Eighth Circuit's decision inappropriately "flips the burden on the plaintiffs to prove price impact under their advanced theory when the burden should rest on a defendant to prove lack of price impact in order to rebut *Basic*'s presumption at this stage." Class Cert. Op., RE 88-1, Page ID # 5121. The district court was mistaken. The *Best Buy* court simply held that a defendant's "evidence of no 'front-end' price impact" satisfies the defendant's burden, and that if the plaintiff introduces no contrary evidence, then the presumption of reliance has been rebutted.[10] *See Best*

[10] *See also In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480, 490 n.6 (S.D.N.Y. 2011) ("Defendants bear the burden of rebutting the presumption and *Plaintiffs have the opportunity to rebut the rebuttal*." (emphasis added)).

Buy, 818 F.3d at 782-83. Contrary to the district court's view, a defendant does not have to "prove" lack of price impact to rebut the *Basic* presumption, but rather—as set forth in *Halliburton II*—must simply introduce *any* evidence that severs the link between the alleged misrepresentation and stock price. This is what Defendants did here. *See Halliburton II*, 134 S. Ct. at 2408 ("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") (quoting *Basic*, 485 U.S. at 248).[11]

By crediting Plaintiffs' speculative and unsubstantiated price maintenance theory without requiring them to proffer any evidence in support of that theory, the district court allowed Plaintiffs to retain the *Basic* presumption in the face of direct and uncontradicted rebuttal evidence.[12] This is contrary to *Halliburton II*. *See*

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[11] Just yesterday, the Second Circuit issued a decision in *Waggoner v. Barclays Bank PLC*, No. 16-1912-cv (2d Cir. Nov. 6, 2017), which addresses similar *Halliburton II* issues. The parties in this case will have an opportunity to address the implications of that decision more fully, but for now *amici* note that regardless of whether the burden of production or persuasion applies to defendants' rebuttal of the *Basic* presumption (an issue the Second Circuit discusses at length), that burden is met in a case, like this one, where plaintiffs' own evidence establishes a lack of front-end price impact and there is no contrary evidence. In contrast, in *Waggoner*, the plaintiffs' expert offered such contrary evidence, as the court noted that he "opined that inflation would have entered the stock when Barclays marketed" its product in an allegedly misleading way. Slip op. at 71 n.37.

[12] Notably, the district court credited Plaintiffs' price maintenance argument despite the fact that the theory is inconsistent with the allegations in their complaint. Specifically, Plaintiffs allege that each of the purported

Halliburton II, 134 S. Ct. at 2412 ("[P]laintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including . . . the predominance requirement of Rule 23(b)(3)."). Because the district court's ruling permits Plaintiffs to circumvent *Halliburton II*, it should be reversed.

B. The District Court's Holding Also Renders *Basic*'s Rebuttable Presumption Virtually Irrebuttable

Despite undisputed evidence that the alleged misrepresentations, when made, did not cause Big Lots' stock price to move, the district court held that because "Defendants failed to show that there was no statistically significant price impact following the *corrective disclosures* in this case," they failed to rebut the presumption of reliance. Class Cert. Op., RE 88-1, Page ID # 5123 (emphasis added). Thus, while *Halliburton II* expressly provides that the *Basic* presumption is rebutted by evidence that either "the asserted misrepresentation (or its correction) did not affect the market price of the defendant's stock[,]" the district

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misrepresentations leading up to the first corrective disclosure caused Big Lots' stock price to *increase*. *See* Am. Compl., RE 18 ¶¶ 78, 94, 100, Page ID # 239, 245, 248. Yet Plaintiffs' expert concluded that there was no statistically significant stock price increase associated with any of the alleged misrepresentations. *See* Class Cert. Op., RE 88-1, Page ID # 5118. In fact, Plaintiffs' expert's report indicates that, following the alleged misstatements on March 2, Big Lots' stock price actually *decreased* by 4% (as opposed to the 3% increase that Plaintiffs allege). *See* Steinholt Rpt., RE 60-3, Page ID # 1995. The district court's decision to apply the *Basic* presumption, even when a plaintiff alleges a *price increase* and the undisputed evidence shows a *price decrease*, cannot be reconciled with the Supreme Court's approach. *See Basic*, 485 U.S. at 248.

court misapplied *Halliburton II* by requiring Defendants to proffer evidence of *both*. *Halliburton II*, 134 S. Ct. at 2414.

The district court's ruling places a virtually insurmountable burden on defendants to rebut the *Basic* presumption. If a plaintiff can neutralize the defendant's evidence of no front-end price impact by simply saying the words "price maintenance," then the defendant is effectively precluded from ever showing a lack of front-end price impact. Thus, under the district court's ruling, if a defendant must proffer evidence of no price impact after both the alleged misstatement *and* the alleged corrective disclosure to rebut the *Basic* presumption, the defendant's opportunity to rebut the presumption would be all but meaningless.[13]

The Supreme Court in *Halliburton II* placed explicit limitations on plaintiffs' ability to satisfy Rule 23(b)'s predominance requirement through the *Basic* presumption, and the district court's ruling, if allowed to stand, would permit plaintiffs to circumvent *Halliburton II* and render Rule 23's predominance requirement a mere formality.

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[13] There is an open question as to whether defendants can rebut the presumption with evidence of no back-end price impact by showing that a disclosure preceding a stock price decline did not correct any alleged misrepresentation, but that issue is not presented in this case. *See, e.g.*, *In re Cobalt Int'l Energy, Inc. Sec. Litig.*, No. CV H-14-3428, 2017 WL 2608243 (S.D. Tex. June 15, 2017), *appeal docketed sub nom. St. Lucie Cty. Fire Dist. Firefighters' Pension Tr. Fund v. Bryant*, No. 17-20503 (5th Cir. Aug. 4, 2017).

III. PLAINTIFFS' DAMAGES MODEL FAILS TO SATISFY *COMCAST*'S REQUIREMENTS

A. *Comcast* Is Not Satisfied by a Damages Model That Does Not Disaggregate Actionable Damages

If Plaintiffs prevail on their claims, they will be entitled only to damages resulting from actionable misstatements that survived Defendants' motion to dismiss. *See Comcast*, 569 U.S. at 35. Yet the only damages model Plaintiffs presented to the district court failed to disaggregate the price impact of actionable statements from the price impact of statements the district court held were not actionable. The district court's acceptance of that damages model cannot be squared with the Supreme Court's decision in *Comcast*.

In *Comcast*, plaintiffs alleged four different antitrust injuries, and the district court accepted only one of plaintiffs' four proposed theories. *See Comcast*, 569 U.S. at 37. At the class certification stage, plaintiffs' expert submitted a proposed damages model that aggregated injuries flowing from all four alleged theories and did not account for the court's dismissal of three of plaintiffs' theories of liability. *Id*. at 36-37. The Supreme Court held that such a damages model violates Rule 23's predominance requirement because, if the model "does not even attempt" to disaggregate damages, "it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id*. at 35. Rather, "a model purporting to serve as evidence of damages in [a] class action

must measure only those damages attributable" to plaintiffs' liability theory. *Id.*; *see also Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 343-54 (2005) (in securities fraud cases, it is critical to evaluate "the tangle of factors affecting [stock] price," because the securities laws protect investors "only against those economic losses that misrepresentations actually cause" and do not provide "broad insurance against market losses"); *In re Rail Freight Fuel Surcharge Antitrust Litig. No. 1869*, 725 F.3d 244, 253 (D.C. Cir. 2013) (noting that, in the wake of *Comcast*, "[i]t is now indisputably the role of the district court to scrutinize [plaintiffs' damages model] before granting certification" to ensure it is not susceptible to "false positives").

Plaintiffs' proposed damages model does not meet this standard. The district court previously dismissed many of the alleged misstatements in the complaint, either because they fell within the Private Securities Litigation Reform Act's safe harbor for forward-looking statements or because Plaintiffs failed to plead adequately that the statements were false or misleading. *See* Motion to Dismiss Op., RE 49, Page ID # 1509, 1512-41. Yet Plaintiffs' proposed event study assumes that the stock price decline following the two alleged corrective disclosures equals the amount by which the alleged false or misleading statements inflated the stock price—*i.e.*, Plaintiffs assume that nothing else could have caused the alleged economic impact following the corrective disclosures except the

alleged false or misleading statements the district court held to be actionable. *See* Steinholt Dep., RE 75-8 (41:9-42:14, 123:19-124:5), Page ID # 3391-92, 3473-74.

Rather than holding Plaintiffs to *Comcast*'s requirements, the district court simply held that Plaintiffs satisfied *Comcast* because their expert promised that someday he could develop an "event study." *See* Class Cert. Op., RE 88-1, Page ID # 5109 ("Plaintiffs have satisfied *Comcast*. Specifically, [Plaintiffs' expert] proposes to use an event study to measure damages on a classwide basis."). The court then rested on its denial of Defendants' *Daubert* motion, where it accepted Plaintiffs' expert's assertion that "the proposed damages methodology only includes damages from the remaining actionable statements, so there is no reason to reduce any damages for non-actionable statements." *See Daubert* Op., RE 87, Page ID # 5038 (quoting Steinholt Rebuttal, RE 78-3 ¶ 21, Page ID # 4668-69). For the reasons discussed in the next section, this summary prediction of what an event study would show is insufficient to satisfy *Comcast*.

B. The District Court Failed to Conduct a "Rigorous Analysis" of Plaintiffs' Damages Model

Comcast held that, under Rule 23, courts must conduct a "rigorous analysis" to determine whether plaintiffs' damages model measures only those damages attributable to their theory of liability. *Comcast*, 569 U.S. at 35. Here, rather than conduct the required analysis, the district court simply took Plaintiffs' expert at his word that the damages model "could be tweaked to account for information that

becomes available throughout the litigation of the case." *Daubert* Op., RE 87, Page ID # 5038.

The district court should have engaged in a similar exercise to the one the court undertook in *In re BP p.l.c. Securities Litigation*, No. 10-MD-2185, 2013 WL 6388408 (S.D. Tex. Dec. 6, 2013). In that case, defendants' expert identified multiple ways in which plaintiffs' proposed damages model was inconsistent with their theory of liability, including that plaintiffs' event study "assume[d] a 'constant dollar' methodology of damages, and [did] not disaggregate inflation from multiple alleged disclosures." *BP*, 2013 WL 6388408, at *16. Much like Plaintiffs here, the *BP* plaintiffs argued that, while they had not yet done so, they would be able to construct a damages model capable of disaggregating damages. *Id*. at *17. In denying class certification, the *BP* court held that "[s]imply invoking the event study . . . does not [establish] that the class-wide damages methodology proposed will track Plaintiffs' theories of liability, as the Supreme Court expressly required in *Comcast* before a class may be certified." *Id*.; *see also In re BP p.l.c. Sec. Litig.*, No. 10-MD-2185, 2014 WL 2112823, at *12 (S.D. Tex. May 20, 2014) (noting that plaintiffs' burden under Rule 23 "is not met by asking the Court simply to trust them").

Defendants' expert in this case, Dr. Paul Gompers, identified concerns with Plaintiffs' proposed damages model that are nearly identical to those raised by

defendants' expert in *BP*. Specifically, Dr. Gompers explained that Plaintiffs' event study purports to use a constant dollar methodology of damages without addressing how that methodology will account for multiple alleged corrective disclosures, or how it will disaggregate inflation attributable to alleged misstatements from the price impact of statements the district court found to be non-actionable. *See* Gompers Rpt., RE 75-9, Page ID # 3533-50. As noted above, the district court summarily rejected these concerns and took Plaintiffs' expert at his word that Plaintiffs' proposed damages model could be "tweaked" if and when appropriate. *Daubert* Op., RE 87, Page ID # 5038. But *Comcast* makes clear that the district court had a "duty to take a '*close look*'" at whether Plaintiffs' damages model can be applied classwide in a manner consistent with their theory of liability. *Comcast*, 569 U.S. at 34 (emphasis added). "Plaintiffs cannot avoid this hard look by refusing to provide the specifics of their proposed methodology." *BP*, 2013 WL 6388408, at *17.

The district court also appears to have ignored evidence that belied Plaintiffs' expert's assurance that "the proposed damages methodology only includes damages from the remaining actionable statements." *See Daubert* Op., RE 87, Page ID # 5038 (quoting Steinholt Rebuttal, RE 78-3 ¶ 21, Page ID # 4668-69). For example, according to Mr. Steinholt's analysis, Big Lots' stock price experienced a statistically significant (8.09%) increase on February 2, 2012, the

day on which a number of the alleged misstatements were made, *see* Steinholt Rpt., RE 60-3, Page ID # 1995, but the district court had found those statements to be non-actionable, *see* Motion to Dismiss Op., RE 49, Page ID # 1509. As in *Comcast*, Plaintiffs' damages model does not attempt to disaggregate price impact associated with such lawful statements from the impact of any alleged misstatements that survived Defendants' motion to dismiss.[14]

The district court's decision to certify the proposed class without such scrutiny "travel[ed] to a place forbidden by *Comcast*." *Ludlow v. BP, p.l.c.*, 800 F.3d 674, 688 (5th Cir. 2015); *see also In re VHS of Mich., Inc.*, 601 F. App'x 342, 344 (6th Cir. 2015) ("[A]fter *Comcast* [a] class must be able to show that their damages stemmed from the defendant's actions that created the legal liability.") (second alteration in original and citation omitted). If plaintiffs can meet their burden under Rule 23(b)(3)'s predominance element by simply hypothesizing that their proposed damages model can be tweaked at some later date to account for their liability theory, then the limitation on class certification set forth in *Comcast* would be no limitation at all. *See Comcast*, 569 U.S. at 35-36 ("Under that logic,

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[14] *See In re Processed Egg Prod. Antitrust Litig.*, No. 08-md-2002, 2016 WL 410279, at *8 (E.D. Pa. Feb. 3, 2016) (damages model that improperly "intermingles lawful and unlawful behavior" does not satisfy *Comcast*); *In re POM Wonderful LLC*, No. ML 10–02199 DDP (RZx), 2014 WL 1225184, at *5 (C.D. Cal. Mar. 25, 2014) (Plaintiffs' damages expert improperly "assumed that 100% of [the] price difference was attributable to [defendant's] alleged misrepresentations").

at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity.").[15]

* * *

Halliburton II and *Comcast* reflect a clear Supreme Court mandate that plaintiffs must prove—not simply plead or theorize—Rule 23's predominance element. As explained above, the district court's ruling, if affirmed, would effectively permit plaintiffs in this Circuit to bypass the Supreme Court's evidentiary requirements and obtain class certification based upon little more than theories and promises. As a practical matter, the ultimate effect of such a ruling would be to place unwarranted and insurmountable settlement pressure on defendants—even in unmeritorious cases—and to transform securities laws inappropriately into a "scheme of investor's insurance" for which the U.S. financial markets pay the premiums. *See Basic*, 485 U.S. at 252 (White, J.

[15] Yesterday's *Waggoner* decision also considers similar *Comcast* arguments. *See Waggoner*, slip op. at 73-78. In *Waggoner*, the Second Circuit found that the plaintiffs' "damages model directly measured" the harm alleged. *Id.* at 76. The Second Circuit did not address the issue presented here, whether Plaintiffs' damages model must account for alleged misstatements that the district court deemed non-actionable.

dissenting) (internal quotation marks omitted). The district court's certification decision should therefore be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's class certification order.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because it contains 5,972 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Sixth Circuit Rule 32(b)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2017, I electronically filed the foregoing Brief of *Amici Curiae* Securities Industry and Financial Markets Association and Chamber of Commerce of the United States of America in Support of Defendants-Appellants with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system, which will send notice to all registered CM/ECF users. Participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

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