No. 20-222

IN THE

Supreme Court of the United States

GOLDMAN SACHS GROUP, INC., *et al.*,

Petitioners,

v.

ARKANSAS TEACHER RETIREMENT SYSTEM, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF FORMER SEC OFFICIALS AND LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a defendant in a securities class action may rebut the presumption of classwide reliance recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), by pointing to the generic nature of the allenged misstatements in showing that the statements had no impact on the price of the security, even though that evidence is also relevant to the substantive element of materiality.

2. Whether a defendant seeking to rebut the *Basic* presumption has only a burden of production or also the ultimate burden of persuasion.

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INTRODUCTION AND STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The *amici curiae* are a group of individuals who have a strong interest in these issues: former officials of the United States Securities and Exchange Commission and law professors whose scholarship and teaching focuses on the federal securities laws. Although each individual amicus may not endorse every statement herein,[2] this brief reflects the consensus of the *amici* that this case presents exceptionally important questions on the *Basic* presumption and a defendant's right to rebut the same, the lower courts' resolution of these issues was incorrect and threatens to eviscerate that right, and therefore, this Court should reverse the order affirming the district court's certification of the class. In alphabetical order, the *amici curiae* are:

- Brian G. Cartwright – Former General Counsel of the U.S. Securities and Exchange Commission from 2006 to 2009;

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* or their counsel, contributed money to fund its preparation or submission. All parties have consented to the filing of this brief pursuant to this Court's Rule 37.3(a).

[2] In addition, the views expressed by the *amici* here do not necessarily reflect the views of the institutions with which they are or have been associated, whose names are included solely for purposes of identification.

- Ronald J. Colombo – Professor of Law and Dean for Distance Education at the Maurice A. Deane School of Law at Hofstra University;
- Elizabeth Cosenza – Associate Professor and Area Chair, Law and Ethics at Fordham University;
- Charles C. Cox – Former Commissioner of the U.S. Securities and Exchange Commission from 1983 to 1989;
- Richard A. Epstein – The Peter and Kirsten Bedford Senior Fellow at the Hoover Institution, and the Laurence A. Tisch Professor of Law at New York University School of Law;
- The Honorable Joseph A. Grundfest – William A. Franke Professor of Law and Business at Stanford Law School, and Commissioner of the U.S. Securities and Exchange Commission from 1985 to 1990;
- Simon Lorne – Former General Counsel of the U.S. Securities and Exchange Commission from 1993 to 1996;
- Paul G. Mahoney – David and Mary Harrison Distinguished Professor of Law at the University of Virginia School of Law, and Dean of the same from 2008 to 2016;
- Adam C. Pritchard – The Frances and George Skestos Professor of Law at the University of Michigan Law School;
- Amanda M. Rose – Professor of Law at Vanderbilt University Law School and

Professor of Management at Vanderbilt University Owen Graduate School of Management;

- Matthew Turk – Assistant Professor of Business Law and Ethics at Indiana University's Kelley School of Business;
- Andrew N. Vollmer – Senior Affiliated Scholar, Mercatus Center at George Mason University; former Professor of Law, General Faculty, University of Virginia School of Law; former Deputy General Counsel of the U.S. Securities and Exchange Commission; and
- Karen E. Woody – Associate Professor of Law at Washington & Lee University School of Law.

SUMMARY OF ARGUMENT

The questions presented in this appeal are extremely important to securities class actions. At stake here is whether defendants can rebut the fraud-on-the-market presumption created in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), in opposing class certification, as squarely required by this Court in *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) ("*Halliburton II*"). In his vigorous dissent from the court of appeals' panel decision affirming the district court's granting of class certification, Judge Sullivan explained that by precluding consideration of the generic nature of the challenged statements in assessing price impact, the court of appeals' decision has made *Basic* "truly irrebuttable," and class certification "all but a certainty in every case." (Pet.

App. 44a.) As detailed below, this result eliminates the careful balance first recognized in *Basic* and affirmed in *Halliburton II*. There, this Court did not reverse the judge-made *Basic* presumption. It held, however, that defendants must be afforded the opportunity to show at class certification that alleged misstatements did not have price impact—the premise of the efficient market theory underlying *Basic*. To remediate the significant consequences of the court of appeals' nullification of *Halliburton II* in the leading circuit for securities cases and the center of the nation's financial markets, this Court should reverse the court of appeals' decision.

Also at issue in this case is whether a defendant seeking to rebut the *Basic* presumption has only a burden of production—as it should under Federal Rule of Evidence 301—or also the ultimate burden of persuasion. This Court should make clear that Rule 301 applies, as it does to all presumptions for which no federal statute provides otherwise.

This case takes on heightened importance amid the emerging trend of securities class action plaintiffs relying on the novel "inflation maintenance" theory. That theory, never before sanctioned by this Court, posits that a class may be certified where an alleged misstatement does not itself introduce inflation into the stock price, but simply *maintains* inflation previously introduced through some other, even non-fraudulent, means. Coupling such an expansive view of price impact with such a restrictive view of the right to rebutting price impact recognized in *Halliburton II* ensures almost automatic class certification in inflation maintenance cases. That is, a class would be

certified any time a public company makes generic or aspirational disclosures about mitigating risk or engaging in best practices—as nearly all public companies do—and then suffers a stock price drop. That cannot be consistent with the aim and holding of *Halliburton II*. Simply put, if the court of appeals' decision stands, companies will be almost defenseless against plaintiffs' class certification arguments, which will become *de facto* irrebuttable.

ARGUMENT

I. FACTS AND PROCEDURAL HISTORY

In 2010, Respondents brought this securities action on behalf of a putative class of Goldman Sachs shareholders against Petitioners in the United States District Court for the Southern District of New York, alleging violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 (as well as Section 20(a), the provision for "control person" liability). Respondents alleged that Petitioners made material misrepresentations with respect to two categories of statements: (1) aspirational goals, including statements such as "[o]ur clients' interests always come first" and "[i]ntegrity and honesty are at the heart of our business"; and (2) warnings about the risks of conflicts of interest, including statements such as "[c]onflicts of interest are increasing and a failure to appropriately identify and deal with conflicts of interest could adversely affect our businesses." J.A. 31–33, 27–29; D. Ct. Dkt. 136, at 5–6. Respondents alleged that the challenged statements were

fraudulent because Goldman Sachs had undisclosed client conflicts with respect to some of their financial instruments, and subsequent news reports of government enforcement activity relating to alleged conflicts of interest demonstrated the falsity of the challenged statements to the market. Petitioners moved to dismiss, arguing that the alleged misstatements were immaterial as a matter of law. The court denied the motion in relevant part. (Pet. App. 7a.)

Thereafter, Respondents moved to certify the class, invoking the *Basic* presumption and relying on the inflation maintenance theory, which (as described above) purportedly makes certain statements actionable merely because they *maintained* an already inflated stock price. To rebut the *Basic* presumption, Petitioners presented evidence showing that the alleged misstatements had no price impact. First, Petitioners argued that the generic, aspirational nature of the alleged misstatements could not have affected the stock price. Second, Petitioners showed that Goldman Sachs' stock price had not declined in response to news reports on 36 separate dates before the purported "corrective disclosures" despite the fact that those reports included allegations about Goldman Sachs' conflicts of interest. In fact, Petitioners' experts showed that the stock price drops on the "corrective disclosure" dates were caused by investor concerns over the potential impact of government enforcement activity, not by the revelation of the falsity of the challenged statements, and that none of the challenged statements were mentioned in any of the analyst reports on Goldman

Sachs during the Class Period. The district court granted Respondents' motion for class certification. (Pet. App. 79a-94a.)

The court of appeals granted Petitioners' petition for an interlocutory appeal and vacated the district court's order, holding that the district court failed to apply the preponderance of the evidence standard for determining whether Petitioners rebutted the *Basic* presumption, while rejecting Petitioners' argument that Rule 301 applies. (Pet. App. 60a-78a.) The court of appeals also held that the district court erred by refusing to consider Petitioners' evidence that Goldman Sachs' generic statements had no price impact because the stock price had not reacted to the news reports of client conflicts on 36 dates, reasoning that "[a]lthough price impact touches on materiality, which is not an appropriate consideration at the class certification stage, it 'differs from materiality in a crucial respect'" because it "refers to the effect of a misrepresentation on a stock price." (Pet. App. 76a-77a (quoting *Halliburton II*, 573 U.S. at 282.))

On remand, Petitioners detailed the generic nature of the statements, and presented economic and empirical evidence showing that the challenged statements had no price impact and that the decreases in stock price following the "corrective disclosures" were not attributable to the alleged misstatements. Despite that evidence, the district court again granted Respondents' motion for class certification. (Pet. App. 47a-59a.)

The court of appeals then granted Petitioners' petition for an interlocutory appeal and affirmed the decision below to certify the class, finding that

Petitioners failed to rebut the *Basic* presumption. (Pet. App. 1a-46a.) The court rejected Petitioners' argument, based on *Halliburton II*, that the district court erred in refusing to consider the generic nature of the statements as evidence that such statements had no impact on the stock price. (Pet. App. 19a-27a.) Viewing Petitioners' argument as an attempt to impermissibly "smuggl[e] materiality into Rule 23," the court stated that "[w]hether alleged misstatements are too general to demonstrate price impact has nothing to do with the issue of whether common questions predominate over individual ones." (Pet. App. 22a, 23a.) Characterizing Petitioners' burden as a "heavy" one, the court of appeals explained that the *Basic* presumption could be rebutted only by showing that the "entire price decline on the corrective-disclosure dates was due to something other than its alleged misstatements." (Pet. App. 28a & n.18.) The petition for a writ of certiorari was filed after Petitioners' petition for rehearing was denied on June 15, 2020. (Pet. App. 95a-96a.)

II. THE COURT OF APPEALS' PRICE IMPACT ANALYSIS VIOLATES *HALLIBURTON II*.

A. Consideration of the Nature of the Alleged Misstatements Falls Squarely Within the Compromise Reached in *Halliburton II*.

In affirming the district court's legally and factually flawed class certification order, the court of

appeals rendered this Court's decision in *Halliburton II* a *de facto* nullity. *Halliburton II* reflected a compromise between the two diametrically opposed arguments represented in that case: securities class action defendants urged that *Basic*'s fraud-on-the-market presumption be overruled, while securities class action plaintiffs urged that defendants not have any opportunity to rebut the fraud-on-the-market presumption at class certification.[3]

Since this Court's creation of the fraud-on-the-market presumption in *Basic*, courts have struggled with the presumption's practical application. In *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011) ("*Halliburton I*"), this Court addressed some of the ambiguity surrounding *Basic* by rejecting the argument that plaintiffs must affirmatively show loss causation to invoke the fraud-on-the-market presumption. The Court reasoned that loss causation did not relate to whether an investor had *relied* on a misrepresentation "either directly or presumptively through the fraud-on-the-market theory." *Id.* at 813. Two years later, in *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013), this Court seemingly leaned further in the direction of securities fraud class action plaintiffs, holding that plaintiffs need not establish materiality and defendants may not rebut materiality prior to class certification.

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[3] *See* Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market: Reflections on Amgen and the Second Coming of Halliburton*, 57 ARIZ. L. REV. 37, 46-47 (2015).

With *Halliburton I* and *Amgen* handed down only two years apart, this Court appeared to be steadily lowering the bar for securities fraud class action plaintiffs to advance their cases. That seemingly changed in *Halliburton II*. There, Chief Justice Roberts (joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor and Kagan), while reaffirming the viability of the fraud-on-the-market presumption, provided much-needed clarity on ***how*** to apply the fraud-on-the-market presumption in practice. The middle ground established by the Supreme Court in *Halliburton II* provides that defendants in securities fraud class actions ***must*** be afforded an opportunity to rebut the fraud-on-the-market presumption of reliance "with evidence of a lack of price impact . . . before class certification." 573 U.S. at 277. Although the majority opinion failed to overturn *Basic* and held that plaintiffs need not prove price impact to first *invoke* the fraud-on-the-market presumption, the Court also made clear that defendants are entitled to an opportunity to rebut the *Basic* presumption at class certification by presenting evidence that severs the link between the alleged misrepresentations and the stock price. *Id.* at 279–80. Significantly, in so holding, the *Halliburton II* Court cited *Basic*'s own expansive articulation of the standard for securities fraud class action defendants to break that link: "[*a*]*ny* showing that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff" for the shares in question. *Id.* at 281 (citing *Basic*, 485 U.S. at 248) (emphasis added). No qualification was placed on the defendants' rebuttal right. In particular, the Court did not preclude

consideration of price-impact evidence that could also implicate the other elements of a Rule 10b-5 claim that had been addressed in its recent decisions, such as loss causation (*Halliburton I*) or materiality (*Amgen*).

This Court's decision in *Halliburton II* thus reflects a carefully constructed compromise between the apparently plaintiff-friendly trend in *Halliburton I* and *Amgen*, and the defendants' contention in *Halliburton II* that *Basic* be overruled entirely. In many ways, this compromise represents a recognition of what was implicit in *Basic*: (i) the presumption of fraud-on-the-market is exactly that, only a presumption, and as such, is rebuttable; and (ii) evidence introduced by defendants demonstrating the absence of price impact before class certification will break the link between the challenged statements and the stock price, thereby defeating that presumption. *See* 573 U.S. at 268–69.

By refusing to consider evidence that should have served to rebut the *Basic* presumption under *Halliburton II*, the court of appeals' decision here is at odds with this compromise. The court of appeals erroneously barred Petitioners from relying on the generic and aspirational nature of the alleged misstatements to show a lack of price impact, reasoning that such inquiry is merely a "means for smuggling materiality into Rule 23." (Pet. App. 21a, n.11 & 22a.) Nevertheless, as Judge Sullivan astutely noted in his dissent, "[t]he mere fact that such an inquiry 'resembles' an assessment of materiality does not make it improper." (Pet. App. 45a.) As mandated by *Halliburton II*, a defendant is entitled to rebut the

Basic presumption at the class certification stage with *any* evidence showing that an alleged misrepresentation did not actually affect the stock's price, regardless of whether it is also "highly relevant at the merits stage." 573 U.S. at 283. Moreover, this Court made it abundantly clear in *Halliburton II* that "[there] is no reason to artificially limit the inquiry at [that] stage." *Id*. at 262. Therefore, the nature of the alleged misstatements should have been considered by the court of appeals in determining whether Petitioners rebutted the *Basic* presumption, as such rebuttal evidence indisputably falls squarely within the compromise reached in *Halliburton II*.

B. This Court Has Previously Rejected the Restricted View on Price Impact Evidence Adopted by the Court of Appeals.

The court of appeals incorrectly viewed evidence about the generic nature of challenged statements as "a means for smuggling materiality into Rule 23" in violation of *Amgen*. (Pet. App. 21a, n.11 & 22a.) But nothing in *Amgen* prohibits a court from considering at the class certification stage the generality or specificity of the alleged misstatements, which directly bears on price impact. (Pet. App. 45a.) In fact, the generality of an alleged misstatement is powerful evidence of a lack of price impact. As explained by Petitioners' expert, Dr. Laura Starks, generic statements like those at issue here are pervasive in company communications. J.A. 599-605, 626. Accordingly, analysts and institutional investors are unlikely to consider a company's generic and

aspirational statements in valuing a company's stock, which is exactly what happened here. As Judge Sullivan recognized, the challenged statements are so generic that "no reasonable investor would have attached any significance" to them. (Pet. App. 44a-45a.) Moreover, Dr. Starks found that "analysts did not view [the challenged] statements as containing information pertinent to an investment decision-making process." J.A. 599-605, 626. In imposing a blanket prohibition against such evidence, the court of appeals misconstrued *Amgen* in much the same manner as the Fifth Circuit in *Halliburton II*, which prompted this Court's reversal in that case.

In *Amgen*, this Court held that proof of materiality is not a prerequisite to certification of a securities fraud class action. *See* 568 U.S. at 459. Even though materiality is a precondition to *Basic*'s fraud-on-the-market presumption, the Court reasoned that, "[a]s to materiality . . ., the class is entirely cohesive. It will prevail or fail in unison." *Id.* at 460. In so ruling, the *Amgen* majority also affirmed the district court's refusal to consider Amgen's "truth-on-the-market" rebuttal evidence at the class certification stage. *Id.* at 481.

On this basis, between *Halliburton I* and *Halliburton II*, the Fifth Circuit concluded that defendants could not offer evidence of a lack of price impact at class certification. *Erica P. John Fund, Inc. v. Halliburton Co.*, 718 F.3d 423 (5th Cir. 2013), *vacated and remanded by* 573 U.S. 258 (2014). Specifically, the Fifth Circuit refused to consider defendants' expert report conclusively showing that there was no statistically significant impact on the

stock's price on 20 of the 22 misrepresentation dates, and that the price increases on the two remaining misrepresentation dates were not caused by any of the alleged misrepresentations. Applying *Amgen*, the Fifth Circuit reasoned that price impact evidence may ***not*** be considered because, like materiality, price impact does not bear on common question predominance under Federal Rule of Civil Procedure 23. *Id.* at 432.

The Fifth Circuit made the same error as the court of appeals did here: because "[t]he price impact evidence considered here is both similar to and offered for much the same reason as the materiality evidence" that this Court in *Amgen* held should not be considered at class certification, the Fifth Circuit refused to credit Halliburton's contention that it was challenging reliance, not materiality, through its truth-on-the-market defense. *Id.* at 434 n.10. This Court rejected the Fifth Circuit's analysis in *Halliburton II*.

There, this Court explained that, even though the same issues counseling against considering materiality evidence could also apply to weighing price impact evidence at class certification, "[p]rice 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." *Halliburton II*, 573 U.S. 258, 281, 283 (internal citation omitted).

Even though the same evidence often bears on price impact and materiality, *Halliburton II* holds

that, notwithstanding *Amgen*, price impact evidence may be considered at class certification, not for the purpose of rebutting materiality or rearguing a court's decision on the sufficiency of the complaint's pleading of materiality, but to demonstrate a lack of price impact and thereby to rebut the *Basic* presumption.

Indeed, the Seventh Circuit recently held in *In re Allstate Corp. Securities Litigation*, 966 F.3d 595 (7th Cir. 2020), that the district court there failed to adhere to *Halliburton II*'s holding when it failed to consider permissible price impact evidence at class certification. Noting the "challenge" courts face in reconciling *Halliburton I*, *Amgen*, and *Halliburton II*, the Seventh Circuit properly permitted defendants to introduce price impact rebuttal evidence at the class certification stage, including an expert report showing that there was "no statistically significant increase in Allstate's stock price following any of the alleged misrepresentations." *Id.* at 611. The Seventh Circuit held that such evidence—similar to the evidence profferred by Petitioners here—should have been considered by the district court as price-impact rebuttal evidence, even though it undoubtedly implicated the separate element of materiality. *Id.*

The Seventh Circuit's approach is more consistent with *Halliburton II*. Any other reading of these cases creates a conflict between this Court's *Amgen* and *Halliburton II* rulings, requiring district courts to undertake the impossible task of parsing permissible price impact evidence from impermissible materiality evidence. As Judge Sullivan persuasively observed, "I don't believe that such rigid compartmentalization is possible[.]" (Pet. App. 45a.) Without an affirmation

from this Court that, under *Halliburton II*, price impact evidence may be presented at the class certification stage to rebut the *Basic* presumption, even if the evidence also implicates materiality, lower courts will continue to violate *Halliburton II* and deny defendants the opportunity to rebut the *Basic* presumption with permissible evidence. That is, although price impact resembles materiality, this Court's precedent directs courts "to consider the nature of the alleged misstatements in assessing whether and why" there was no price impact. (*Id.* at 44a.)

C. If Left Uncorrected, the Court of Appeals' Decision Will Adversely Impact Public Companies.

The court of appeals' decision impermissibly limits the price impact evidence that district courts can consider at class certification. Here, the court of appeals barred consideration of the generic nature of the alleged misstatements, reasoning that the issue should be dealt with at the pleading stage. (Pet. App. 20a n.10.) But that is often not what happens in practice. At the pleading stage, plaintiffs regularly argue that materiality is a mixed question of law and fact, and accordingly, cases dealing with generic statements oftentimes are not resolved on materiality grounds at the pleading stage. This Court should make clear that district courts must consider all relevant price impact evidence (even if it overlaps with materiality) at the Rule 23 stage.

The court of appeals' decision here risks draconian practical consequences because publicly traded companies *routinely* include generic statements of corporate principle similar to those at issue here in their public filings. The publication of these anodyne statements combined with a later stock price drop should not give rise to automatic class certification, even if shareholders happen to lose money.

These risks are particularly heightened during the ongoing COVID-19 crisis, where aspirational statements about best practices amid a fast-moving global pandemic have already been weaponized by plaintiffs and turned into a predicate for securities fraud class actions, as securities markets around the world are extremely volatile. Most significantly, a pharmaceutical company at the forefront of COVID-19 research is facing a shareholder class action lawsuit following the disclosure of adverse news from a highly-consequential, yet highly-expedited clinical trial. Just last week, a putative securities class action lawsuit was filed in the U.S. District Court for the Southern District of New York against U.K. pharmaceutical company AstraZeneca PLC and its executives based upon the disclosure of setbacks in its effort to develop a COVID-19 vaccine. *See* Compl., *Monroe Cty. Emps. Ret. Sys. v. AstraZeneca PLC, et al.*, No. 21-cv-722-JPO (S.D.N.Y Jan. 26, 2021) (ECF No. 1). The complaint predicates allegations of securities fraud on, *inter alia*, statements by the AstraZeneca CEO pledging to "uphold the integrity of the scientific process" and noting that "[w]e continue to lead across multiple fronts in the global response to the COVID-19 pandemic." *Id.* at 12, 15.

Further, companies in the travel industry that have made generic disclosures about business principles during the COVID-19 outbreak now face *investor* securities class action lawsuits after a stock price drop. *See, e.g.*, Compl. at 14, *City of Riviera Beach Gen. Emps. Ret. Sys. v. Royal Caribbean Cruises Ltd.*, *et al.*, No. 20-cv-24111-KMW (S.D. Fla. Oct. 7, 2020) (ECF No. 1) (challenged disclosures by cruise company defendant include statement that it "initiated strong safeguards to help contain the spread of the disease and protect [its] guests and crew"); Consol. Am. Compl. at 23, 34, *Douglas v. Norwegian Cruise Lines, et al.,* No. 20-21107-Civ-SCOLA (S.D. Fla. Jul. 31, 2020) (ECF No. 56) (challenged statements by cruise company defendant include that it was "working tirelessly to do what is right for [its] guests, crew and shareholders while protecting the equity of [its] brands" and "plac[es] the utmost importance on the safety of our guests and crew").

Granting class certification based on generic statements of corporate principle would be contrary to this Court's precedent and congressional intent as reflected in the Private Securities Litigation Reform Act. *See Halliburton II*, 573 U.S. at 277 (explaining that the PSLRA was enacted "to combat perceived abuses in securities litigation with heightened pleading requirements, limits on damages and attorney's fees, a 'safe harbor' for certain kinds of statements, restrictions on the selection of lead plaintiffs in securities class actions, sanctions for frivolous litigation, and stays of discovery pending motions to dismiss"); *see also Dura Pharms., Inc. v.*

Broudo, 544 U.S. 336, 345 (2005) ("The securities statutes seek to maintain public confidence in the marketplace . . . by deterring fraud, in part, through the availability of private securities fraud actions. . . . But the statutes make these latter actions available, not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause."). The private right of action under the securities law is not intended to function as a guarantee against stock price declines, especially in times of crisis.

D. The Court of Appeals' Decision Will Render Class Certification Merely a Formality in Virtually Any Securities Action Premised on the Inflation Maintenance Theory.

The importance of the fact that Respondents' claims are premised on the inflation maintenance theory cannot be understated. The inflation maintenance theory permits plaintiffs to argue that certain statements can be actionable if they merely *maintained* an already inflated stock price. *See In re Pfizer Inc. Sec. Litig.*, 819 F.3d 642, 659 (2d Cir. 2016). Here, the court of appeals permitted the application of the inflation maintenance theory to generalized statements of corporate principle, an unprecedented expansion of an already expansive theory. Accordingly, the court of appeals rendered class certification a mere formality in virtually any

securities class action premised on the inflation maintence theory.

The only two circumstances in which any court had previously applied the inflation maintenance theory involved alleged misstatements that (1) were unduly optimistic statements about specific, material financial or operational information made to stop a stock price from declining;[4] or (2) falsely conveyed that the company had met market expectations about a specific, material financial metric, product, or event.[5] In any event, whatever the merits or flaws of this theory, general statements that companies routinely make in corporate disclosures, like the ones at issue in this case, cannot "maintain" an inflated stock price.

Plaintiffs' reliance on the theory comes as no surprise given the recent surge in inflation maintenance cases filed by securities class action plaintiffs across the country, and defendants' extraordinarily low success rates in rebutting the *Basic* presumption in such cases. (Pet. App. 19a n.9.) This trend makes the inflation maintenance theory susceptible to abuse at class certification, especially if it is transformed into a catch-all path for securities fraud plaintiffs to certify investor classes based simply on a stock drop, even when the challenged

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[4] *See, e.g.*, *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223 (2d Cir. 2016); *Schleicher v. Wendt,* 618 F.3d 679 (7th Cir. 2010).

[5] *See, e.g.*, *FindWhat Inv. Grp. v. FindWhat.com*, 658 F.3d 1282 (11th Cir. 2011); *Alaska Elec. Pension Fund v. Pharmacia Corp.,* 554 F.3d 342 (3d Cir. 2009).

statements were too general to cause any price impact. If allowed to become a catch-all in this way, it would be in direct contradiction to this Court's precedent, *see Halliburton II*, 573 U.S. 258, and would result in effectively eliminating the price impact requirement altogether.

Given the risk of abuse of the inflation maintenance theory at class certification, this Court should reverse the court of appeals' decision and hold that courts must consider *any* relevant evidence offered to show that an alleged misrepresentation had no price impact. Otherwise, plaintiffs nationwide will continue to benefit from the *Basic* presumption, which depends on price impact, even in cases like this where, despite Respondents' invocation of the inflation maintenance theory, there is no evidence of price impact.

III. A DEFENDANT SEEKING TO REBUT THE *BASIC* PRESUMPTION BEARS ONLY THE BURDEN OF PRODUCTION, NOT THE BURDEN OF PERSUASION.

At issue in this case is also the question of *how* a defendant in a securities class action must empirically rebut the *Basic* presumption. Neither *Basic* nor *Halliburton II* spelled out the precise burden of proof that each must party bear. Nor is that surprising: presumptions are specifically controlled by Rule 301, which the Court in *Basic* expressly cited, indicating that it is the proper procedural device "for allocating the burdens of proof between parties." 485 U.S. at 245.

Indeed, the Federal Rules of Evidence, by their terms, apply to all "civil cases and proceedings" in United States courts. FED. R. EVID. 1101(b). Rule 301 plainly applies to presumptions in *all* civil cases "unless a federal statute . . . provide[s] otherwise." FED. R. EVID. 301; *see St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993) (recognizing that Rule 301 governs "all presumptions"). In this case, there is no such federal statute. Therefore, Rule 301 applies.

Rule 301 makes clear that the party against whom a presumption is directed only bears "the burden of *producing* evidence to rebut the presumption," with the "burden of *persuasion* . . . remaining on the party who had it originally." FED. R. EVID. 301 (emphasis added). Therefore, when the plaintiff makes a prima facie showing of market efficiency, the burden of production shifts to the defendant to present evidence showing a lack of price impact, but the burden of persuasion *always* rests with the plaintiff. *See IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 782 (8th Cir. 2016). It was thus not incumbent upon Petitioners here to *prove* the absence of price impact.

Given the evident applicability of Rule 301, the court of appeals erred when it applied the following burden-shifting standard: while the plaintiff "bears the initial burden of demonstrating that the prerequisites for the *Basic* presumption are met," once this showing is made, the burden of persuasion "shifts to the defendant to rebut the presumption" by a preponderance of the evidence. (Pet. App. 27a-28a.). *See also Waggoner v. Barclays PLC*, 875 F.3d 79, 102 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 1702 (2018). The Seventh Circuit has similarly erred in holding

that the burden of persuasion to rebut the *Basic* presumption shifts to the defendant once a plaintiff has met its burden. *See In re Allstate Corp. Securities Litigation*, 966 F.3d 595 (7th Cir. 2020).

In contrast, the Eighth Circuit properly applied Rule 301 in *Best Buy*, requiring only that the defendant "come forward with evidence showing a lack of price impact" once plaintiffs presented a prima facie case that the *Basic* presumption applied. 818 F.3d at 782. District courts in other circuits have also applied Rule 301. *See, e.g.*, *Bing Li v. Aeterna Zentaris, Inc.*, 324 F.R.D. 331, 344 (D.N.J. 2018) (applying Rule 301 and requiring only that defendant *produce* evidence to rebut presumption); *KBC Asset Mgmt. NV v. 3D Sys. Corp.*, 2017 WL 4297450, at *8 (D.S.C. Sept. 28, 2017) (applying Rule 301 and requiring only that defendants "come forward" with evidence showing a lack of price impact); *but see Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, 260 (N.D. Tex. 2015) (shifting burden of persuasion to defendants); *Aranaz v. Catalyst Pharm. Partners Inc.*, 302 F.R.D. 657, 673 (S.D. Fla. 2014) (same).

The decision below incorrectly disregarded the burdens prescribed in Rule 301, which is clearly applicable to the *Basic* presumption. And, in effect, the Second Circuit's burden-shifting standard further entrenches the *Basic* presumption's irrebutability problem. Placing the burden of persuasion on defendants while disallowing certain evidence bearing directly on price impact puts defendants in a catch-22: they must persuade, but are barred from presenting evidence they need to do so. Simply put, defendants in the Second Circuit are burdened with a standard

they virtually cannot meet, and should not have to meet in the first place. As such, this Court should clarify that Rule 301 applies to the *Basic* presumption, and that the burden of persuasion never shifts to the defendants in such cases.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed. In the alternative, the judgment should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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