No. 14-3178

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IBEW LOCAL 98 PENSION FUND; MARION HAYNES and RENE LeBLANC; Individually and on Behalf of All Others Similarly Situated,
Plaintiffs-Appellees,

vs.

BEST BUY CO., INC.; BRIAN J. DUNN; JIM MUEHLBAUER and MIKE VITELLI;
Defendants-Appellants.

Appeal from the United States District Court
for the District of Minnesota
No. 0:11-cv-00429-DWF-FLN
The Honorable Donovan W. Frank

PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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I. STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision is contrary to *Halliburton Co. v. Erica P. John Fund, Inc.*, __ U.S. __, 134 S. Ct. 2398 (2014), and *Gebhardt v. ConAgra Foods, Inc.*, 335 F.3d 824, 831-32 (8th Cir. 2003). The case also presents the following questions of exceptional importance, upon which the panel decision conflicts with the decisions of other circuits:

1. Is a price maintenance theory – *i.e.*, a claim that materially false statements or omissions maintained an already-inflated stock price – cognizable under §10(b) of the Securities Exchange Act of 1934?

2. If so, in a price maintenance case, does a defendant defeat the presumption of stockholder reliance under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), by demonstrating only that the material false statement did not cause an immediate increase in the stock price (*i.e.*, caused no "front-end" increase)?

DATED: May 10, 2016

s/Susan K. Alexander
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II. INTRODUCTION

In conflict with the Supreme Court's decision in *Halliburton Co. v. Erica P. John Fund, Inc.* ("*Halliburton II*"), __ U.S. __, 134 S. Ct. 2398 (2014), and the law of two other circuits, the panel in this case held that a defendant in a securities fraud case may defeat the presumption of reliance established by *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), simply

by showing the absence of any stock price *increase* following a false or misleading statement. In so doing, the panel necessarily rejected the holdings of the Seventh and Eleventh Circuits, both of which have recognized the viability of "price maintenance" theories under which false statements have a price impact by *maintaining* an already-inflated stock price until the truth is disclosed and the stock price falls. *See Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010); *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1315 (11th Cir. 2011). The panel's ruling on one of the most important questions in contemporary securities litigation is incorrect and warrants *en banc* review.

III. STATEMENT OF THE CASE

1. At 8 a.m. on the morning of September 14, 2010, Best Buy, Inc. issued a press release, reducing its revenue forecast but increasing the company's earning guidance for the year. The company's stock price surged. *IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*, No. 14-3178 (8th Cir. Apr. 12, 2016) ("Slip Op.") at 3. Two hours later, at 10 a.m., officials held a conference call to explain their guidance to analysts and investors. *Id.* Having established market expectations in their press release, defendants attempted during the conference call to sustain those expectations by assuring investors that the future projections had a basis in present performance. Specifically, defendants assured investors that, based on performance to date, "earnings are essentially in line with our original expectations for the year" and that Best Buy was then "on track to

deliver and exceed" the new, increased earnings guidance. *Id*. After the call, the company's stock price maintained its higher value, but did not increase further. *Id*.

Three months later, defendants were forced to acknowledge that their September 14 statements were false. They admitted that although they had represented that the company was "on track" to deliver higher earnings, in fact, Best Buy had not been on track at all; instead, the raised earning guidance had been premised on hopes of an "improvement in the TV industry in the third quarter" and other unprecedented reversals of declining trends. (A115-A116¶116) Those hopes never materialized. As a consequence, Best Buy dramatically cut earnings guidance for the year (Slip. Op. at 4) – even though it had spent $1.2 billion in stock buybacks in an attempt to shore up earnings. (A131-A132¶144) Overnight, Best Buy's stock price fell 14%. Slip Op. at 3.

2. Plaintiffs filed an action on behalf of a class of investors against Best Buy and certain of its chief officers and managers, alleging violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934. (Docket No. "Dkt." 1)

Defendants moved to dismiss the Complaint for failure to state a claim. In its Order, dated August 5, 2013, the district court granted the motion, in part, as to defendants' September 14, 2010, 8:00 a.m., press release providing full-year earnings per share guidance on the ground that the guidance was protected by the safe harbor provision of the Private

Securities Litigation Reform Act of 1995 ("PSLRA"). (A217-A239, relying on 15 U.S.C. §78u-5(c)) The court denied the motion, however, as to claims arising from two statements about current progress toward the goal by Chief Financial Officer Muehlbauer, made during a subsequent 10:00 a.m. investor conference call, finding that all elements of a claim – including materiality – were pled sufficiently to satisfy the PSLRA. (A234, A236)

Plaintiffs moved to certify a class of injured investors, invoking the *Basic's* fraud-on-the-market presumption to establish class-wide reliance. (Dkt. 126) As permitted by *Halliburton II*, the defendants attempted to rebut the presumption by showing that the 10 a.m. statements had no price impact. Defendants' expert purported to satisfy that burden by pointing out that while the company's stock price rose after the 8 a.m. press release, it did not rise *again* after officials assured investors in the 10 a.m. conference call that the rosy projections in the press release had a foundation in the company's present conditions. (A264)

In response, plaintiffs submitted a report from economic expert Steinholt, who explained that material false statements do not solely impact prices by causing them to rise, but may prevent or slow a decline in price that would otherwise occur. (A338¶7) He illustrated this "price maintenance theory" – recognized in at least two other circuits, *see supra* at 2 – with an example:

> [I]f investors expect a company to report earnings of $1 per share, and the company falsely reports earnings of $1 per share

> even though its actual earnings are only $0.60 cents per share, the stock price would not be expected to increase. However, this does not mean that the misrepresentation (overstatement of earnings per share by $0.40 cents) was immaterial. Instead, it means that the materiality of the misrepresentation (overstatement) cannot be assessed based on this price reaction because it only reflects the difference between investors' expectations ($1/share) and false earnings reported (also $1/share), not the difference between the truth ($0.60/share) and the false earnings reported ($1/share).

(*Id.*) Thus, the impact of such a misrepresentation is instead analyzed by examining the price decline, if any, following the disclosure of the relevant truth concealed by the misrepresentation. (*Id.*) *See also, e.g.*, *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 415 (7th Cir. 2015) ("The best way to determine the impact of a false statement is to observe what happens when the truth is finally disclosed and use that to work backward, on the assumption that the lie's positive effect on the share price is equal to the additive inverse of the truth's negative effect."); *Halliburton II*, 134 S. Ct. at 2414 (*Basic* presumption may be "'rebutted by appropriate evidence,' including evidence that the asserted misrepresentation (*or its correction*) did not affect the market price of the defendant's stock.").[1]

Turning to facts of this case, Steinholt opined that it is "not at all surprising" Best Buy's stock price did not increase further after the conference call statements because "the economic substance of the

[1] Citations omitted and emphasis added unless otherwise noted.

information disclosed on the 2Q11 conference call had largely been disclosed in the 2Q11 earnings release prior to the market opening," and by 10 a.m. "was largely reflected in Best Buy's stock price." (A340¶11) That is, the 8 a.m. press release created market expectations of increased earnings and the subsequent false statements in the later call, reiterating and reinforcing the economic substance of the press release, served to maintain the resulting higher prices, when prices would have fallen if defendants had told the truth in the call or simply refused to say whether there was a basis for their projections in current performance. (A348-A349) "Consequently," Steinholt explained, "reliance using the so-called 'price impact' methodology has been satisfied in this case." (A349)

After considering all of the evidence and argument, the district court concluded defendants "have not submitted evidence sufficient to rebut the presumption of reliance" with a showing of no price impact because defendants only addressed stock price movement at the time of the alleged false statements and did not address at all the stock price movement when their fraud was revealed. (A362-A363 & n.6) Relying on the price maintenance precedents from the Seventh and Eleventh Circuits, the court held that "price impact can be shown by a decrease in price following a revelation of the fraud," thereby rejecting defendants' assertion that a material misrepresentation must always cause the stock price to increase in order to have a price impact. (A362 (citing *Schleicher v. Wendt*, 618 F.3d 679, 683 (7th Cir. 2010))) On that basis, and in light of plaintiffs'

expert evidence, the court held that defendants' failure to address the stock price impact of the revelation of defendants' false statements was fatal to their attempt to rebut the *Basic* presumption. (A362) "Even though the stock price may have been inflated prior to the earnings phone conference, the alleged misrepresentations could have further inflated the price, prolonged the inflation of the price, or slowed the rate of fall. This impact on the stock price can support a securities fraud claim . . . [and] can be shown by a decrease in price following a revelation of the fraud." (*Id.*) Because defendants' expert did not even attempt to address the possibility that the 10 a.m. statements affected the market by maintaining Best Buy's inflated stock price, the court concluded that defendants "have not submitted evidence sufficient to rebut the presumption of reliance." (A362-A363)

3. This Court granted defendants permission to appeal the interlocutory ruling and reversed in a 2-1 decision. Slip Op. at 2. As relevant here, the panel held that defendants established a lack of price impact – and thereby rebutted the *Basic* presumption – by presenting "overwhelming evidence of no 'front-end' price impact." *Id.* at 12. That is, the Court held that price impact can only be shown through proof that a material false statement caused an immediate *increase* in stock price, thereby precluding any price maintenance theory that asserts the false statement instead *maintained* an inflated price until a corrective disclosure resulted in a price decrease at the "back end." *Id.* at 11-12.

In reaching this conclusion, the panel majority agreed that the 8 a.m. press release established market expectations. *Id.* at 11(citing plaintiffs' expert's observation that investors gave the press release "great weight"). And it did not doubt that, as a practical matter, the price increase resulting from that change in expectation would have dissipated if the defendants had failed to reinforce the market expectations (or had told the truth) during the conference call. Nonetheless, the panel concluded that the "absence of further price impact" – meaning, the lack of any further price *increase* – "following the conference call" was "direct evidence that investors did not rely on the executives' confirming statements" in the conference call. *Id.*

The majority acknowledged plaintiffs' price maintenance theory turned not on the existence of a front-end stock price increase, but rather on the claim that the false statements "maintain[ed] an inflated stock price." *Id.* at 12. And the panel provided a "*cf.*" cite to the Seventh and Eleventh Circuit decisions accepting the price maintenance theory. *Id.* "But that theory," the panel held, "provided no evidence that refuted defendants' overwhelming evidence of no price impact." *Id.*

Judge Murphy dissented, expressing concern about the panel's split with "the circuit courts that have recognized price maintenance theories to be cognizable under the Securities Exchange Act." Slip Op., dissent at 15.

IV. REASONS FOR REHEARING *EN BANC*

Rehearing is required because the panel decision creates a conflict with the law of other circuits, this Court, and the Supreme Court, on a question of recurring importance to securities fraud litigation.

A. The Panel Decision Conflicts with the Law of Other Circuits

As already noted by a number of observers, the Panel decision created a circuit conflict by holding that a price *increase* is required to show a price *impact* under *Halliburton II*. *See* Fed. R. App. P. 35(b)(B).[2]

The Seventh and Eleventh Circuits have held that proof (even "overwhelming proof") of no front-end price impact is insufficient to prove that a false statement had no price impact, was immaterial, or caused no loss. The Seventh Circuit, for example, has acknowledged that it is "tempting to think that inflation can be measured by observing what happens to the stock immediately after a false statement is made. But

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[2] *See also, e.g.*, Antonelli, et al., *Post-Halliburton II Update: Eighth Circuit Denies Class Certification Based on Lack of Price Impact*, http://www.paulhastings.com/publications-items/details/?id=b335e969-2334-6428-811c-ff00004cbded; Sherman & Sterling, *Eighth Circuit Holds Presumption Of Reliance Rebutted Under Halliburton II and Reverses Class Certification in Securities Action*, at 4, http://www.shearman.com/~/media/Files/NewsInsights/Publications/2016/04/Eighth-Circuit-Holds-Presumption-of-Reliance-Rebutted-Under-Halliburton-II-and-Reverses-Class-Certification-in-Securities-Action-LIT-041416.pdf; *cf.* Reply Br. of Appellants, *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 15-11096, at 13 (5th Cir. 2016) ("The Eighth Circuit recently held that such a showing [of no front-end impact] can *alone* be enough to rebut the presumption of reliance, even in a price-maintenance case where the plaintiff asserts that a later corrective disclosure caused a price decline.") (emphasis in original).

that assumption is *often wrong*." *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 415 (7th Cir. 2015). Indeed, the court observed, "the movement of a stock price immediately after a false statement often tells us very little about how much inflation the false statement caused." *Id.; see also FindWhat*, 658 F.3d at 1315 (same). For example, Judge Easterbook has explained:

> If a firm says that it lost $100 million, when it actually lost $200 million – and analysts had expected it to announce that it lost only $50 million – then the announcement will cause the stock's price to fall. But the fall won't be as much as the truth would have produced. People who buy the stock after the announcement, and before the truth comes out, pay too much; they will lose money when the rest of the bad news emerges. This is no different in principle from a firm's announcement of a $200 million profit, when the truth is $100 million; only the signs on the numbers differ.

Schleicher, 618 F.3d at 684. The Seventh Circuit thus has held that the *Basic* presumption is not defeated simply by proving that the stock price failed to rise in response to the allegedly false statements. *See id*. at 683-84. Instead, the presumption fully applies when "false statements cause[] the full amount of inflation to remain in the stock price, even if the price didn't change at all, because had the truth become known, the price would have fallen then." *Glickenhaus*, 787 F.3d at 418.

The Eleventh Circuit has likewise held that "[d]efendants whose fraud prevents preexisting inflation in a stock price from dissipating are just as liable as defendants whose fraud introduces inflation into the stock

price in the first instance." *FindWhat,* 658 F.3d at 1317. The lack of a front-end impact, the court explained, does not disprove loss causation "because the market has already digested [the prior] information and incorporated it into the price." *Id.* at 1310. For that reason, the Eleventh Circuit has held that a defendant may not defeat the *Basic* presumption simply by showing that "confirmatory information" did "not cause a change in the stock price." *Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248, 1259 (11th Cir. 2014) (quoting *FindWhat*, 658 F.3d at 1310).

The panel majority here noted that the inflation maintained by the 10 a.m. misstatements was "established by *the non-fraudulent* press release." Slip Op. at 12. But the Seventh and Eleventh Circuits have directly rejected that reasoning, holding that "[h]ow the stock became inflated in the first place is irrelevant because each subsequent false statement prevented the price from falling to its true value and therefore caused the price to remain elevated." *Glickenhaus*, 787 F.3d at 418; *see also Regions Financial*, 762 F.3d at 1259 (same). Even if the stock was inflated for perfectly innocent reasons (say, due to a mistaken but good faith projection), a knowingly false statement that prevents the stock from falling to a more accurate level has an obvious impact on the stock price and causes investors who purchased at that inflated price a recoverable loss. *See id.*

B. The Panel Decision Conflicts with Prior Circuit Precedent

En banc review is also warranted because the panel decision departs from prior circuit precedent. In *Gebhardt v. ConAgra Foods, Inc.*, 335 F.3d 824, 831-32 (8th Cir. 2003), this Court recognized that securities fraud can have a price *impact* even without a correlated price movement. There, this Court reversed dismissal, in part on loss causation grounds. The Court acknowledged defendants' argument that since the company's "stock's value increased in the weeks after the May [revelation of the fraud,] the plaintiffs can show no connection between the misrepresentations and any loss." *Id.* at 831. Rejecting that argument, however, this Court held that stock price *impact* can occur even when the stock price does not move in the expected direction: "stockholders can be damaged in ways other than seeing their stocks decline. If a stock does not appreciate as it would have absent the fraudulent conduct, investors have suffered a harm." *Id.* at 831-32.

Thus, this Court has previously acknowledged precisely what plaintiffs alleged – and expert Steinholt's analysis confirmed – happened here: there was stock price *impact* even though the stock price did not move in the expected direction.

C. The Panel Decision Conflicts with *Halliburton II*

The panel decision is also in direct conflict with the Supreme Court's decision in *Halliburton II*.

As discussed, the panel held that price impact can be rebutted with a showing that a false statement did not cause any front-end price *increase*. But the relevant question under *Halliburton II* is whether the statement had an "impact" on prices, not whether it caused an "increase." *See* 134 S. Ct. at 2413. The word "impact" conveys the broader meaning of any effect on the price at all, including the effect of preventing a price decrease that would otherwise occur. *See, e.g.*, *id.* at 2416 (disproving price impact entails "showing that the alleged misrepresentation did not actually *affect* the stock's market price"); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 814 (2011) ("'Price impact' simply refers to the *effect* of a misrepresentation on a stock price."). After all, the purpose of the price impact inquiry is to determine whether the alleged misrepresentation "was reflected in the market price at the time of the transaction," such that the investor could have relied on it indirectly through reliance on the market price. *Id.* at 813. And as explained by expert Steinholt (A338¶7) and confirmed by other circuits (*see supra* at 2), a misrepresentation can affect markets, and thereby be reflected in the market price, by preventing a decline in price just as readily as by causing the price to rise.

Accordingly, it is unsurprising that in *Halliburton II* the Court held that the *Basic* presumption may be "'rebutted by appropriate evidence,' including evidence that the asserted misrepresentation (*or its correction*) did not affect the market price of the defendant's stock." 134 S. Ct. at 2414. In other words, the Court recognized that the defendant's rebuttal

will depend on the specific facts of each case. To demonstrate the absence of price impact, defendants must address the stock price at the time the false statements were made *and* the time the falsity was revealed, showing "that the asserted misrepresentation (*or its correction*) did not affect the market price of the defendant's stock." *Id.*

D. *En Banc* Review Is Needed to Restore Uniformity in This Increasingly Important Area of Securities Law

The question presented by this petition also warrants review because the availability and scope of a price impact theory is an important and increasingly recurring question in securities litigation. *See, e.g.*, Jonathan C. Dickey, *2015 Year-End Securities Litigation Update*, Harv. L. Sch. Forum on Corp. Gov. & Fin. Reg. (noting that "what evidence is sufficient to show lack of price impact" is one of the "key questions" left open by *Halliburton II*).

Numerous observers have already noted that the panel's decision effectively eliminating price maintenance theory in this circuit is of great precedential and practical consequence. *See, e.g.*, Antonelli, *supra* (The *Best Buy* decision "will be an important authority, both within the Eighth Circuit and in other jurisdictions, as issues of reliance continue to be a battleground at the class certification stage."); *supra* n.1.[3] Indeed, the

[3] To the extent the panel opinion is ambiguous about whether price maintenance theories may ever be maintained in other circumstances, that ambiguity itself is harmful and should be resolved by this Court sitting *en banc*.

question presented by this petition affects not only the availability of class certification under *Basic*, but also the standards for proving loss causation on the merits. *See, e.g.*, *Gebhardt*, 335 F.3d at 831-32; *FindWhat,* 658 F.3d at 1315; *Glickenhaus*, 787 F.3d at 418. The application of such an important doctrine should not vary from circuit to circuit, or depart from the Supreme Court's clear guidance in *Halliburton II*.

V. CONCLUSION

For the reasons set forth above, plaintiffs request that this Court grant panel rehearing and/or rehearing of the Panel decision *en banc*.

DATED: May 10, 2016

Respectfully submitted,

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CERTIFICATE OF VIRUS FREE

The undersigned counsel certifies under Eighth Circuit Rule 28A(h)(2) that the Petition for Panel Rehearing and Rehearing *En Banc* has been scanned for computer viruses and that the document is virus free.

DATED: May 10, 2016

s/Susan K. Alexander
SUSAN K. ALEXANDER

DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is Post Montgomery Center, One Montgomery Street, Suite 1800, San Francisco, California 94104.

2. I hereby certify that on May 10, 2016, I electronically filed the foregoing document: **PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*** with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

3. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

4. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on May 10, 2016, at San Francisco, California.

s/Tamara J. Love
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