16-0250-cv

United States Court of Appeals
for the
Second Circuit

PENSION FUNDS,

Plaintiff,

ARKANSAS TEACHERS RETIREMENT SYSTEM, WEST VIRGINIA INVESTMENT MANAGEMENT BOARD, PLUMBERS AND PIPEFITTERS PENSION GROUP, ILENE RICHMAN, Individually and on behalf of all others similarly situated, PABLO ELIZONDO, HOWARD SORKIN, individually and on behalf of all others similarly situated, TIKVA BOCHNER, EHSAN AFSHANI, LOUIS GOLD, THOMAS DRAFT, Individually & on behalf of all others similarly situated,

Plaintiffs-Appellees,

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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– v. –

GOLDMAN SACHS GROUP, INC., LLOYD C. BLANKFEIN, DAVID A. VINIAR, GARY D. COHN,

Defendants-Appellants,

SARAH E. SMITH,

Defendant.

DISCLOSURE STATEMENT

The National Association of Shareholder and Consumer Attorneys is not a nongovernmental corporate party within the meaning of Federal Rule of Appellate Procedure 26.1.

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INTEREST OF AMICUS CURIAE

The National Association of Shareholder and Consumer Attorneys ("NASCAT") is a nonprofit membership organization, founded in 1988, consisting of attorneys committed to representing investors and consumers in cases with the potential to advance the state of the law, educate the public, ensure corporate accountability, and improve access to justice for those who have been harmed by financial wrongdoing. Among other things, NASCAT advocates for the principled interpretation and application of the federal securities laws—including the Securities Exchange Act of 1934 ("Exchange Act")—to protect investors from manipulative, deceptive and fraudulent practices, and to ensure this nation's capital markets operate fairly and efficiently.[1] Since its founding, NASCAT has submitted numerous *amicus* briefs on issues of concern for investors and consumers before the United States Supreme Court and numerous appellate courts, including this Court.

NASCAT is substantially interested in the issues presented by this case, which have potentially far-reaching implications for the ability of shareholders to certify securities fraud class actions in the future. NASCAT agrees with the

[1] The parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(c)(5), the undersigned represents that (i) no counsel for a party authored this brief, in whole or in part, and (ii) no one other than NASCAT, its counsel, or individual members who are not counsel for any parties in this action contributed money that was intended to fund the preparation or submission of this brief.

decision of the District Court below granting Plaintiffs' motion for class certification, and writes separately for the specific purpose of explaining how authority from this Court and others, including the Supreme Court in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), squarely supports the District Court's rejection of Defendants'[2] argument that Plaintiffs' proffered damages methodology does not sufficiently demonstrate that common classwide legal or factual questions "predominate" so as to satisfy Fed. R. Civ. P. 23(b)(3). As discussed further below, Defendants' argument improperly seeks, in effect, to make proof of loss causation and/or materiality a prerequisite to satisfying the predominance element of Rule 23(b)(3) and certifying a class under the Exchange Act, in direct conflict with the Supreme Court's recent rulings in *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011) ("*Halliburton I*") and *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013).

SUMMARY OF ARGUMENT

As Defendants acknowledge, this Court already has held that "plaintiffs are not required to 'rely upon a classwide damages model to demonstrate predominance'" under Rule 23(b)(3).[3] Instead, under *Comcast*, when plaintiffs do

[2] "Defendants," for purposes of this appeal, include Goldman Sachs Group, Inc. ("Goldman"), Lloyd C. Blankfein, David A. Viniar, and Gary D. Cohn.

[3] *See* Br. and Special App'x for Defendants-Appellants Seeking Reversal of Class Certification Pursuant to Federal Rule of Civil Procedure 23(f) ("Def. Br.") at 55 (citing *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407 (2d Cir. 2015)).

put forth a proposed methodology for measuring damages as evidence that common questions of law or fact predominate over individual questions, they must show that that methodology is capable of measuring damages attributable to plaintiffs' classwide "theory of injury."[4] Nonetheless, plaintiffs seeking to certify a class under Section 10(b) of the Exchange Act are not required to perform actual damage calculations,[5] nor are they required to "prove" the elements of loss causation or materiality.[6] Those questions are instead reserved for summary judgment or trial, or (in the case of damages) afterwards if liability and damage determinations are bifurcated. This is because questions under the Exchange Act as to whether defendants' alleged misrepresentations were material or proximately caused investors' losses are, by definition, "common" to class members and/or go to ultimate liability.[7] Further, courts have routinely held that the potentially individualized nature of damages does not outweigh the utility of determining liability (or other questions) on a class basis.[8]

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[4] *Comcast*, 133 S. Ct. at 1433; *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407-08 (2d Cir. 2015).
[5] *Roach*, 778 F.3d at 405, 408-09 (individualized damages alone do not preclude class treatment).
[6] *Halliburton I*, 131 S. Ct. at 2186 (proof of loss causation not required to certify class); *Amgen*, 133 S. Ct. at 1199 (proof of materiality of alleged misrepresentations not a prerequisite to class certification).
[7] *Halliburton I*, 131 S. Ct. at 2186; *Amgen*, 133 S. Ct. at 1191.
[8] *Roach*, 778 F.3d at 408 (citing cases).

By arguing that Plaintiffs must disaggregate allegedly non-actionable price events from their damages computations in order to satisfy *Comcast* and certify a class under the Exchange Act, Defendants employ an overly narrow reading of "theory of injury" and "actual…measure[ment]" of damages under both *Comcast* and *Roach*, and impermissibly seek to move materiality and loss causation determinations up to the class certification stage of proceedings, in direct conflict with *Halliburton I* and *Amgen*.

In the case below, the District Court correctly found that Plaintiffs' proffered damages methodology satisfied Rule 23(b)(3) and *Comcast* because it was capable of measuring damages attributable to the Plaintiffs' "theory of injury" under the Exchange Act. (SA13). Unlike in *Comcast*, where the plaintiffs' proffered damages model was capable only of measuring cumulative, non-disaggregated damages accruing from four distinct theories or "kinds" of antitrust injury (only one of which was deemed sufficient to proceed on a class basis), Plaintiffs here have alleged one—and only one—theory of injury, *i.e.*, that purchasers of Goldman securities paid inflated prices for those securities as a result of Defendants' alleged material misstatements or omissions during the asserted class period, and were damaged thereby.

Naturally, as the District Court recognized, the *quantum* of damages stemming from this theory of injury ultimately will vary depending on which

misrepresentations (and their concomitant stock price effects) are deemed sufficiently material to include as contributors to Plaintiffs' and the class's injury, or which price movements are deemed to have been caused, in whole or in part, by Defendants' misrepresentations (as opposed to non-actionable or ordinary market events). But none of that is ripe for determination at this stage, under directly applicable Supreme Court precedent. Further, while variations to the "inputs" in Plaintiffs' methodology may affect the *quantum* of damages, there has been no serious argument that Plaintiffs' methodology will be unable to accept those inputs and measure actual classwide damages at the appropriate time, as is routine in Exchange Act cases.[9] As the District Court correctly recognized, the above factors fundamentally distinguish this case from the case presented in *Comcast*, thus suiting it for class treatment.

ARGUMENT

I. Plaintiffs' Proposed Damages Methodology Concerns One Uniform Classwide Theory of Injury, and Thus Does Not Suffer from the Same Flaws as the Methodology Presented in *Comcast*.

Unlike the plaintiffs in *Comcast*, Plaintiffs here have not proposed multiple distinct theories of injury, but rather just one—*i.e.*, that Goldman's investors were injured by Defendants' material misrepresentations about Goldman's conflicts of

[9] *See Ludlow v. B.P., p.l.c.*, 800 F.3d 674, 689 (5th Cir. 2015) (holding that "the *ability*" to remove corrective events later found not to "correct" the misrepresentations, "not the actual execution of that correction," is what *Comcast* requires at the class certification stage) (emphasis in original).

interest policies and business practices, which were subsequently revealed to be false. (SA1). Plaintiffs seek, under the Exchange Act, to recover damages incurred by a class of investors who purchased or otherwise acquired Goldman securities at prices that were inflated as a result of Defendants' material misrepresentations or omissions. (SA1-2). The District Court correctly recognized that this alleged stock price inflation theory constitutes Plaintiffs' "theory of injury"—similar to that which is alleged in virtually all cases arising under the Exchange Act. (SA13). Plaintiffs' uniform theory of injury has survived a motion to dismiss, and was deemed capable of class treatment by the Court below. (SA13-14). These facts differentiate this case, in a fundamental sense, from *Comcast*.

In *Comcast*, plaintiffs proposed four distinct theories of antitrust impact or "injury," each of which potentially relied on or implicated different facts and class members: (i) allegedly improper market "clustering" by defendant, resulting in decreased market penetration by competitors; (ii) the deterrence of entry by "overbuilders" into the same market space; (iii) the reduction of "benchmark" competition on which cable customers relied to compare prices; and (iv) defendants' use of "clustering" to increase bargaining power relative to content providers. *Comcast*, 133 S. Ct. at 1430-31. Only one of these theories of injury—the "overbuilder" theory (item (ii) above)—was accepted by the district court as "capable of classwide proof." *Id.* at 1431. Yet to establish that such injury was

capable of classwide proof, plaintiffs relied on expert testimony setting forth what prices would have prevailed but for all four kinds of anticompetitive impacts as "a whole," without specifying how damages uniquely attributable to the "overbuilder" theory could be measured. *Id*. at 1431, 1435. The Court held that this was insufficient to show that plaintiffs' "overbuilder" theory of injury was, by itself, capable of classwide proof sufficient to satisfy Rule 23(b)(3). *Id.*[10]

In sum, plaintiffs' proposed damages methodology in *Comcast* was over-inclusive not just with respect to the likely *quantum* of classwide damages captured, but also—more importantly—the kind of damages captured (which in turn implicated the size and identity of the proposed affected class). As the record in *Comcast* reflects, the "overbuilder" theory raised certain classwide fact questions that were not necessarily relevant to the other three distinct (non-approved) theories of classwide injury. For instance, the parties specifically disputed whether, and to what extent, Comcast's allegedly anticompetitive clustering deterred "overbuilding" in the relevant market, with Comcast pointing out that "[o]nly 1.3% of cable customers nationwide [were] served by an overbuilder," and that there was "no evidence of actual or potential overbuilding" in most of the counties within the allegedly affected market. *See* Brief for

[10] Even so, consistent with authority that is "well nigh universal," the Court did not mandate that damages needed to be computed in order for a class to be certified. *Comcast*, 133 S. Ct. at 1437 (Ginsburg, J. and Breyer, J., dissenting).

Petitioners at *5-*6, *Comcast Corporation v. Behrend*, 2012 WL 3613365 (2012) (No. 11-864). Yet the possibly limited impact of "overbuilders" in the affected market area would have been of little relevance to determining the separate anticompetitive effects of "clustering" or "bundling" by Comcast in that market area, and could have implicated a different, or smaller, class.[11] By proposing to measure cumulative damages stemming from all four distinct antitrust theories of injury, therefore, plaintiffs in *Comcast* failed to sufficiently demonstrate that the unique "overbuilder" theory was capable of common, classwide proof. Indeed, the Court held that the identities of the class members specifically injured by the deterrence of entry by "overbuilders" into the relevant market may have been obscured by plaintiffs' over-inclusive damages methodology.[12]

No such issue is presented by the case below. Defendants do not dispute that Plaintiffs have alleged only one theory of injury, and that Plaintiffs' proposed

[11] *See Comcast*, 133 S. Ct. at 1434-35 ("For all we know, cable subscribers in Gloucester County may have been overcharged because of petitioners' alleged elimination of satellite competition (a theory of liability that is not capable of classwide proof); while subscribers in Camden County may have paid elevated prices because of petitioners' increased bargaining power vis-à-vis content providers (another theory that is not capable of classwide proof); while yet other subscribers in Montgomery County may have paid rates produced by the combined effects of multiple forms of alleged antitrust harm; and so on. The permutations involving four theories of liability and 2 million subscribers located in 16 counties are nearly endless.").

[12] *Id.* at 1435 ("In light of [plaintiffs'] model's inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class.").

damages methodology (including a regression analysis and event study—standard in virtually all Exchange Act class actions) will measure the alleged stock price inflation caused by Defendants' misrepresentations and omissions in a manner common to all class members, leaving no doubt as to the identities of the affected class members. All class members will be subject to the same damages model, as they all are alleged to have been harmed by the same alleged conduct and have remedies pursuant to the same theory of liability.[13] And while the total *quantum* of classwide damages may change by virtue of adding or eliminating (from consideration by the model) stock reactions tied to certain events (including but not limited to the SEC's lawsuit and related investigations), any such changes will uniformly affect the class—factors making this case eminently certifiable under Rule 23(b)(3) and distinguishable from *Comcast*.[14]

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[13] In this manner, this case is similar to *Butler v. Sears, Roebuck and Co.*, 727 F.3d 796, 800 (7th Cir. 2013), in which Judge Posner reinstated the Seventh Circuit's judgment that a proposed class satisfied Rule 23(b)(3) where "[u]nlike the situation in *Comcast*, there is no possibility. . . that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis."

[14] *See Sykes v. Mel S. Harris & Assocs., Inc.*, 780 F.3d 70, 82 (2d Cir. 2015) (at class certification, "plaintiffs must. . . show that they can prove, through common evidence, that all class members were . . . injured by the alleged [conduct]. . . That is not to say the plaintiffs must be prepared at the certification stage to demonstrate through common evidence the precise amount of damages incurred by each class member. But we do expect the common evidence to show all class members suffered *some* injury.") (citing *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) (emphasis in original)).

Defendants' only argument against Plaintiffs' methodology is that it does not, at present, "actually measure" the damages alleged to have been suffered by the class. Def. Br. at 55 (citing *Roach*, 778 F.3d at 407). However, even *Comcast* does not require that classwide damages "actually" be measured prior to class certification. *Comcast*, 133 S. Ct. at 1433 (noting that proposed classwide damage measurements "need not be exact" but rather simply be "consistent with [plaintiff's] liability case"); *see also* FN 10, *supra*. And as discussed below, this Court's opinion in *Roach* should not be read to suggest otherwise.

II. By Arguing That Plaintiffs Must Disaggregate Stock Price Declines Not Caused By Defendants' Alleged Wrongful Conduct, Defendants Impermissibly Seek to Make Loss Causation and Materiality Determinations Prerequisites to Class Certification.

Defendants argue that Plaintiffs have not satisfied Rule 23(b)(3)'s predominance element because Plaintiffs' damages methodology does not "*actually measure*" the damages resulting from Plaintiffs' theory of injury. Def. Br. at 55 (emphasis in original). Defendants argue that the District Court erred by certifying a class without requiring that Plaintiffs do this computation first. *Id.* at 56.

Defendants' argument misconstrues *Comcast* and its progeny, including this Court's opinion in *Roach*, and overlooks additional recent Supreme Court precedent that is directly applicable to Plaintiffs' Exchange Act claims. For starters, neither *Comcast* nor this Court's opinion in *Roach* requires that Plaintiffs

compute classwide damages in order to satisfy Rule 23(b)(3). To the contrary, this Court expressly held that *Comcast*'s "narrow[]" holding does not require proponents of class certification to "rely upon a classwide damages model to demonstrate predominance." *Roach*, 778 F.3d at 407. Instead, for a proposed classwide damages model to be relied upon (among other factors) to certify a class under Rule 23(b)(3), it "must actually measure damages that result from the class's asserted theory of injury." *Id.*

Defendants seize on the words "actually measure" to mean, in the present context, that Plaintiffs must perform a damages event study and regression analysis in a manner sufficient to disaggregate what Defendants assert to be non-actionable stock price events from actionable ones in order to certify a class under the Exchange Act. Def. Br. at 56. However, Defendants' over-literal reading of *Roach* misses the mark. The words "actually measure," taken in their proper context, serve only to emphasize the point that any proposed classwide damages methodology that purports to demonstrate that common legal and factual issues predominate under Rule 23(b)(3) must actually be tied to the "class's asserted theory of injury," and not to some other theory or theories that (as in *Comcast*) have not been found amenable to classwide proof. *Roach*, 778 F.3d at 407.

It makes no sense to argue, as Defendants do, that the words "actually measure" as employed in *Roach* (a case that did not involve claims asserted under

the Exchange Act) implicitly overrule the Supreme Court's express holdings in *Halliburton I* and *Amgen*—*i.e.*, that neither proof of loss causation nor proof of materiality of Defendants' misrepresentations or omissions are prerequisites to class certification in Exchange Act cases.[15] Precisely which stock price events will give rise, in whole or in part, to recoverable damages (and by how much) under Plaintiffs' theory of injury has yet to be determined and is unripe for consideration at this stage.[16] That is the plain, unambiguous lesson of *Halliburton I* and *Amgen*, which were decided by the same justices that decided *Comcast* (which, like *Roach* and unlike *Halliburton I* and *Amgen*, also was not an Exchange Act case).

Defendants' argument thus effectively seeks to circumvent *Halliburton I* and *Amgen* as directly controlling precedent, and impermissibly make loss causation

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[15] *Halliburton I*, 131 S. Ct. at 2186; *Amgen*, 133 S. Ct. at 1199.

[16] *Amicus curiae* Securities Industry and Financial Markets Association ("SIFMA") writes that District Court's rejection of Defendants' *Comcast*-related arguments "allow[s] plaintiffs to require companies to compensate them for losses due to events that did not violate the securities laws simply because those events happened to coincide with alleged securities law violations." *See* Brief of *Amicus Curiae* SIFMA in Support of Defendants-Appellants at 21. This argument ignores not just recent and directly applicable Supreme Court precedent, but also basic rules of civil procedure. As mandated under *Amgen*, *Halliburton I*, and the federal rules, common questions of loss causation and materiality will continue to be contested long after class certification, to be proven and adjudicated at a later date. *See, e.g.*, *Glickenhaus & Co. v. Household Intern., Inc.*, 787 F.3d 408, 421-24 (7th Cir. 2015) (discussing proof of loss causation on classwide basis at trial). The mere certification under Fed. R. Civ. P. 23 of a class of investors asserting Exchange Act claims against a public company does not require that company to compensate those investors for every decline in its stock price during the class period. Plaintiffs have not contended otherwise.

and materiality prerequisites to class certification. Outside of *Comcast* and *Roach*, Defendants cite just two opinions in apparent support of their view, each of which are either inapposite or unhelpful to Defendants. *Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP*, 806 F.3d 71 (2d Cir. 2015)[17] is inapposite because it did not concern Exchange Act claims and therefore was not controlled by *Halliburton I* and *Amgen*. Additionally, the Court did not even reach defendants' "alternative" *Comcast*-based argument that plaintiffs' proffered damages model was insufficient to "demonstrate damages on a class-wide basis," because it had already concluded that plaintiffs had failed to demonstrate class-wide causation (leading to summary judgment against plaintiffs). *Id.* at 95 n.9.

In re BP p.l.c. Sec. Litig., MDL No. 10-md-2185, 2014 WL 2112823 (S.D. Tex. May 20, 2014),[18] which was an Exchange Act case, is inapposite for other reasons, while also being unhelpful to Defendants. In that case, the district court agreed that "[t]he focus of the [Rule] 23(b)(3) class certification inquiry—predominance—is not whether the plaintiffs will fail or succeed, but whether they will fail or succeed *together*,"[19] and thus held that loss causation determinations (leading to possible "alterations in inputs" in plaintiffs' damages methodology)

[17] *See* Def. Br. at 55.
[18] *See* Def. Br. at 57.
[19] *See also In re Whirlpool Corp. Front-Loading Washer Products Liability Litig.*, 722 F.3d 838, 858-59 (6th Cir. 2013) (holding that proposed class satisfied Rule 23(b)(3) where it would "prevail or fail in unison").

were not prerequisites to class certification. *Id.* at *7.[20] In this respect, *In re BP* actually supports Plaintiffs' position, not Defendants'. Further, in that case, the court refused to certify an investor subclass only where plaintiffs expressly eschewed a stock price "inflation" theory and instead embraced a "compensatory damages" model for classwide damages that—atypical in Exchange Act cases—had nothing to do with "market price distortion," due to the unique factual circumstances of that case (*i.e.*, investors alleged they had suffered losses from having purchased BP securities prior to the Deepwater Horizon explosion). *Id.* at *10-11. The court declined to certify this so-called "pre-explosion" investor subclass because plaintiffs' "articulation of the causal link between the alleged misstatements and the claimed losses"—*i.e.*, whether investors would have purchased BP securities had they known the true state of BP's process safety programs—"inject[ed] individualized inquiries into what [was] supposed to be a classwide model of recovery." *Id.*

At the same time, the court in *In re BP* readily certified a "post-explosion" subclass of investors who relied (as Plaintiffs do here) on a far more traditional stock price "inflation" theory of injury, instructively holding that "failure to prove loss causation is not, at present, an impediment to class certification" and that

[20] Citing *Erica P. John Fund, Inc. v. Halliburton Co.*, 718 F.3d 423, 431 (5th Cir. 2013), *cert. granted, Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 636 (2013) (emphasis in original).

plaintiffs' only task under *Comcast* was to "present a legally viable, internally consistent, and truly classwide *approach* to calculating damages. Whether [p]laintiffs have properly executed under the approach is a question for a different day." *Id.* at *12-14 (emphasis in original).

CONCLUSION

For the foregoing reasons, NASCAT respectfully submits that the District Court correctly rejected Defendants' *Comcast*-based arguments and certified the plaintiff class, and that its decision accordingly should be affirmed.

Dated: August 25, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 4,572 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-Point Times New Roman font.

Dated: New York, New York
August 25, 2016

/s/ Daniel P. Chiplock
Attorney for Amicus Curiae National Association of Shareholder and Consumer Attorneys