

Securities Regulation Daily Wrap Up, TOP STORY—D. Minn.: Best Buy wins stay on Halliburton issue, (Sep. 12, 2014)

By Matthew Garza, J.D.

Best Buy prevailed on a motion to stay proceedings in a fraud case alleging that the company misled investors about its future earnings. The company previously lost an attempt to certify a question about the PSLRA safe harbor for interlocutory appeal, but in [*Halliburton v. Erica P. John Fund*](#), Best Buy found a winning argument to stay the litigation by asserting that the Eighth Circuit may allow it to appeal the class certification order ([*IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*](#), September 11, 2014, Frank, D.).

Allegations. The suit was brought by stock purchasers who claimed the company misled investors when it gave the impression that it was on track to meet its 2011 financial targets. On March 25, 2010, Best Buy reported positive financial results for the quarter and the year, and also issued 2011 guidance with revenues expected between \$52 and \$53 billion and earnings per share (EPS) of \$3.45 to \$3.60. The company had a poor first quarter in 2011 but stuck by its forecast for the full year in a press release and an investor call, noting that the first quarter was “just 10 percent of our year.” The company in fact increased its EPS guidance on September 14, 2010 in the face of lower sales and attributed the increase to \$700 million of share repurchases, despite saying earlier that repurchases would not impact its forecasts. The company also said it expected strong sales in the coming holiday season to support the EPS guidance increase.

The class, which consisted of purchasers of Best Buy common stock between September 14, 2010 and December 13, 2010, alleged that the company knew by the time it made its September 14, 2010 forecast that it was not on track to achieve the 2011 targets. The company knew that manipulation of “levers” like the share repurchases were solely responsible for the increase in EPS guidance, not substantive

growth, according to the allegations. Plaintiffs said the company knew comparable store sales were not meeting expectations, store traffic was “choppy,” and television sales were declining. Despite these known facts, Best Buy continued to reassure investors that earnings were “on track,” in violation of Exchange Act Section 10(b) and 20(a), according to the complaint.

The court examined the statements and in an August 13, 2013 opinion, [found](#) that Best Buy’s September 14, 2010 predicted increase in EPS was accompanied by meaningful cautionary language sufficient to bring the statement into the PSLRA safe harbor. Statements that the company was “on track” and results “essentially in line” with expectations, however, survived dismissal. These statements were not forward looking and not subject to the protection of the PSLRA safe harbor, held the court.

Interlocutory appeal. In December 2013, Best Buy sought a stay and to certify a question for interlocutory appeal regarding the PSLRA’s safe harbor; specifically, that Best Buy’s statements that it was “on track” and earnings were “in line” with its expectations reaffirmed an underlying forward-looking projection under the safe harbor. The court [found](#) that certification of the question was not warranted and would delay the litigation.

On June 23, 2014 in *Halliburton*, the Supreme Court held that defendants are allowed to rebut the fraud-on-the-market presumption of reliance at the class certification stage. On August 19, 2014, Best Buy filed a petition under Federal Rule of Civil Procedure 23(f) with the Eighth Circuit Court of Appeals, seeking permission to appeal the district court’s class certification order, and seeking guidance on applying the evidentiary showing by which one can rebut the reliance presumption at the class certification stage.

The court agreed that the question about class certification was valid, and there was a good chance that the Eighth Circuit would grant Best Buy’s petition. The court said 23(f) appeals are permitted in cases involving a ruling that grants class certification, if the ruling “raises the stakes of the litigation so substantially that the defendant likely will feel

irresistible pressure to settle,” or the appeal would clarify an important, unsettled question of law. Both conditions were present, said the court.

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Companies: BEW Local 98 Pension Fund; Best Buy Co., Inc.

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