16-0450

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

BARCLAYS BANK PLC, BARCLAYS CAPITAL INC.,
ROBERT DIAMOND, ANTONY JENKINS, AND WILLIAM WHITE
Defendants-Petitioners
v.
JOSEPH WAGGONER, MOHIT SAHNI,
(Caption Continued on the Reverse)

ON PETITION FROM AN ORDER GRANTING CERTIFICATION OF CLASS
ENTERED ON FEBRUARY 2, 2016
BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
NO. 14-CV-5797(SAS) THE HONORABLE SHIRA A. SCHEINDLIN

BRIEF OF *AMICUS CURIAE*
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
IN SUPPORT OF PETITION OF DEFENDANTS-PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel for the Securities Industry and Financial Markets Association hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% of its stock.

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INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers.[1] Its mission is to support a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA is the United States regional member of the Global Financial Markets Association. It regularly files *amicus curiae* briefs in cases raising issues of vital concern to securities industry participants. This case involves important issues concerning standards for class certification in private securities actions, which are directly relevant to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry.

BACKGROUND AND SUMMARY OF ARGUMENT

The District Court's opinion granting class certification improperly disregarded the careful limitations the Supreme Court has established to guide courts in determining whether to certify a class—limitations that are critical in light of the overwhelming settlement pressure the class action device exerts

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[1] Pursuant to Fed. R. App. P. 29(c)(5), the undersigned counsel certify that no party's counsel authored this brief in whole or in part; no party or party's counsel, or any other person, other than *amici* or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

regardless of the merits of the underlying dispute. Moreover, the District Court's opinion is part of a developing, erroneous trend in the Southern District of New York, which should serve as a national leader in securities class actions. If it is not corrected, and its rationale is applied in other cases, the ruling will greatly lower class certification standards, destroying the framework created by the Supreme Court, to the detriment of securities markets and investors. There is a compelling need for immediate resolution of this issue[2] because settlement pressure renders it unlikely that this Court will have an opportunity to address this issue other than through a Fed. R. Civ. P. 23(f) appeal.

In particular, the District Court misapplied the law governing two essential elements of the class certification inquiry: (i) the presumptions of reliance established by *Affiliated Ute Citizens of Utah* v. *U.S.*, 406 U.S. 128, 153–54 (1972), and *Basic Inc.* v. *Levinson*, 485 U.S. 224, 241–50 (1988); and (ii) the requirements with respect to classwide damages established by *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432–33 (2013). In each of these areas, the District Court afforded securities plaintiffs a virtually unchallengeable path to class certification. It rendered largely nugatory the defenses explicitly

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[2] *See Hevesi* v. *Citigroup Inc.*, 366 F.3d 70, 75–76 (2d Cir. 2004).

recognized by the Supreme Court, tipping the balance set by that Court in a manner that will burden the financial markets and drive up the costs of litigation.

First, the District Court expanded the definition of "omission" under *Affiliated Ute* in a way that would transform every misrepresentation into an omission entitled to the presumption of reliance. If any cases remained in which a plaintiff needed to show market efficiency under *Basic*, the District Court for good measure freed plaintiffs of the obligation to demonstrate that the market is in fact efficient. Its approach would deprive defendants of the rebuttal opportunity expressly preserved by the Supreme Court in *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2415–16 (2014) ("*Halliburton II*").

Second, the District Court relieved plaintiffs of the burden of showing that their damages case is consistent with their liability case, contrary to *Comcast.* It ignored governing law by shifting to defendants the duty of plaintiffs to disaggregate damages not flowing from the alleged misstatements. Moreover, it declared any defect in plaintiffs' damages analysis to be a classwide issue that would not stand in the way of class certification. In doing so, it overlooked the Supreme Court's rejection of class certification in *Comcast* under exactly that circumstance.

The class certification opinion in this case is one of several decisions from the Southern District that misapplied *Halliburton* and *Comcast* in

a manner that undermines the limitations established by the Supreme Court.[3] The district courts' misapplication of Supreme Court precedent underscores the importance of setting clear class certification standards in this Circuit. Indeed, this Court granted a Rule 23(f) petition in *In re Goldman Sachs Grp.*, No. 15-3179, and the opinion here follows that case in several respects.

ARGUMENT

I. THE 23(f) PETITION SHOULD BE GRANTED BECAUSE THE DISTRICT COURT IMPROPERLY GAVE PLAINTIFFS THE BENEFIT OF THE *AFFILIATED UTE* PRESUMPTION IN A CASE BASED ON MISSTATEMENTS

The District Court's class certification order is premised on a mischaracterization of Plaintiffs' alleged misrepresentations as omissions. As a result of that mistake, the District Court broadened the *Affiliated Ute* presumption of reliance to cover virtually all misrepresentation cases.

Large portions of the complaint are devoted to describing Defendants' alleged false statements, and it is those statements that are at the core of Plaintiffs' claims.[4] The District Court acknowledged that the complaint points to "specific misstatements," but opined that the case was primarily based

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[3] *See, e.g.*, *In re Goldman Sachs Grp., Inc. Sec. Litig.*, 2015 WL 5613150, at *7–8 (S.D.N.Y. Sept. 24, 2015); *In re Petrobras Sec. Litig.*, 2016 WL 413122 (S.D.N.Y. Feb 2, 2016); *Carpenters Pension Trust Fund of St. Louis* v. *Barclays PLC*, 310 F.R.D. 69 (S.D.N.Y. 2015).

[4] (*See, e.g.*, A-133, A-151–62, A-172–201.)

on alleged omissions, and therefore applied the *Affiliated Ute* presumption. (A-23–24.) The undisclosed information on which the District Court relied was merely that Defendants had engaged in conduct that purportedly made their affirmative statements misleading. (*See* A-24 n.77.) The District Court thus applied the *Affiliated Ute* presumption based on its characterization of alleged misstatements as omissions of the truth. This approach has been rejected by this Court and district courts in this Circuit. *See, e.g.*, *Starr ex rel. Estate of Sampson* v. *Georgeson S'holder, Inc.*, 412 F.3d 103, 109 n.5 (2d Cir. 2005) (*Affiliated Ute* presumption does not apply if omission merely "exacerbate[s] the misleading nature of the affirmative statements").[5]

Such a dramatic expansion of the *Affiliated Ute* presumption ignores the rationale for that presumption. It exists because "in instances of total non-disclosure . . . it is of course impossible to demonstrate reliance."[6] Where, as here, alleged misstatements are part of the plaintiffs' claims, the plaintiffs do

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[5] *See also Wilson* v. *Comtech Telecomms. Corp.*, 648 F.2d 88, 93 (2d Cir. 1981) (presumption applies only in "instances of total non-disclosure"); *Carpenters Pension Trust Fund of St. Louis*, 310 F.R.D. at 98 (declining to apply presumption because "[t]he 'omissions' in this case are simply the truth"); *Goodman* v. *Genworth Financial Wealth Mgmt., Inc.*, 300 F.R.D. 90, 105 (E.D.N.Y. 2014) (no presumption when "alleged omissions . . . are merely the inverse of defendants' alleged misrepresentation"); *In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480, 494 (S.D.N.Y. 2011).

[6] *Wilson*, 648 F.2d at 93 (quoting *Titan Group, Inc.* v. *Faggen*, 513 F.2d 234, 239 (2d Cir. 1975)).

not face "the evidentiary problems inherent in proving reliance on an omission": they can show whether they read and relied on the statements at issue.[7] There is no need for a presumption.

More importantly, the District Court's holding means that the *Affiliated Ute* presumption would *always* apply in securities fraud cases, because every misstatement necessarily "omits the truth."[8] The reliance element—which the Supreme Court has described as "essential," *Stoneridge Inc. Ptrs., LLC* v. *Scientific Atlanta*, 552 U.S. 148, 159 (2008)—would be effectively eliminated.

II. THE 23(f) PETITION SHOULD BE GRANTED BECAUSE THE DISTRICT COURT USED AN INCORRECT TEST OF MARKET EFFICIENCY TO DETERMINE THAT PLAINTIFFS WERE ENTITLED TO THE *BASIC* PRESUMPTION

In granting the motion for class certification, the District Court relied on an incorrect test of market efficiency to conclude that Plaintiffs were entitled to the *Basic* presumption of reliance. The District Court held that Plaintiffs could demonstrate that the stock at issue traded in an efficient market

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[7] *Goodman*, 300 F.R.D. at 104 (citation omitted); *see also In re Lehman Bros. Sec. & ERISA Litig.*, 2013 WL 5730020, at *3 (S.D.N.Y. Oct. 22, 2013).

[8] *Goodman*, 300 F.R.D. at 104; *see also In re Barclays Liquidity Cross & High Frequency Trading Litig.*, 2015 WL 5052538, at *18 (S.D.N.Y. Aug. 26, 2015) ("If a misrepresentation claim could be reframed as an omission claim merely by alleging that a defendant 'did nothing to dispel' its own misrepresentation, then the limitation of the *Affiliated Ute* presumption to omissions alone would be meaningless indeed.").

without submitting an event study showing a causal relationship between unexpected news and market price. (A-32.) Such a causal relationship is required to establish the fifth factor in the test of market efficiency set forth in *Cammer* v. *Bloom*, 711 F. Supp. 1264, 1286–87 (D.N.J. 1989)—the factor focused on most heavily by courts because it is the *only* factor analyzing whether the market actually functioned efficiently.[9]

The District Court held that the indirect evidence envisioned by the first four *Cammer* factors—including high volume trading on a national market with heavy analyst coverage—is sufficient to prove market efficiency. (A-32–34.) It held that a plaintiff need not submit evidence of a causal relationship between unexpected news and price because event studies can, on occasion, have an inadequate sample size. (A-12–13, A-30–32.) But the District Court did not even consider whether such a problem existed in the case before it.

Plaintiffs "can and do introduce evidence of the *existence* of price impact in connection with 'event studies.'" *Halliburton II*, 134 S. Ct. at 2415. But they will not do so in future litigation against companies whose stock is traded on a national exchange if the District Court's approach is good law. Why

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[9] *Teamsters Local 445 Freight Div. Pension Fund* v. *Bombardier Inc.*, 546 F.3d 196, 207 (2d Cir. 2008) (the fifth factor is "'the most important[] *Cammer* factor,'" because it is "'the essence of an efficient market'").

run the risk of actually addressing the critical evidence of market efficiency, which can be controverted, when one has a get-out-of-jail-free card?

III. THE 23(f) PETITION SHOULD BE GRANTED BECAUSE DEFENDANTS REBUTTED THE *BASIC* PRESUMPTION

Plaintiffs' own expert performed a regression analysis showing that the allegedly misleading disclosures, when made, had no impact on stock price. (A-39.)[10] Defendants properly argued that this showing rebutted the presumption of reliance.[11] The District Court discarded Defendants' argument, which was based on undisputed record evidence, instead accepting Plaintiffs' unsupported contention that the misstatements maintained the stock price at an artificially inflated level: because "[P]laintiffs allege that Defendants' misstatements . . . maintained the price of Barclays' common stock," Plaintiffs "asserted a tenable theory of price maintenance, and [D]efendants' attempt at rebuttal . . . fails." (A-39–40, 42 (internal quotation mark omitted).) Rejecting rebuttal evidence in favor of *ipse dixit*—which is always available—would render futile efforts under *Halliburton II* to rebut the presumption of reliance.

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[10] Defendants also showed that the stock price drops at issue were caused by factors other than the alleged corrective disclosures. (A-42–44.)

[11] *See In re Moody's Corp. Sec. Litig.*, 2013 WL 4516788, at *9 (S.D.N.Y. Aug. 23, 2013) (presumption rebutted if statements caused no price increase).

IV. THE 23(f) PETITION SHOULD BE GRANTED BECAUSE PLAINTIFFS' DAMAGES MODEL IS ARBITRARY

The District Court's class certification order is inconsistent with the Supreme Court's decision in *Comcast.* Like the plaintiffs in *Comcast,* Plaintiffs here advanced a damages theory that is disconnected from their theory of liability: they failed to separate damages resulting from the allegedly misleading statements from those attributable to other causes. (A-45.) Under *Comcast*, class certification was therefore unavailable.[12]

The District Court disregarded the flaws in Plaintiffs' model on the grounds that (1) Plaintiffs need not proffer a methodology that isolates the price decline caused by Defendants' alleged misstatements; and (2) the issue would affect all class members in the same way. (A-45–46.) Both are mistaken.

First, in *Comcast*, the Supreme Court ruled that it is the plaintiff's burden of showing that the "plaintiff's damages case [is] consistent with its liability case" in order to satisfy the predominance requirement for 23(b)(3) class certification, and that a model that fails to separate recoverable damages from other losses is insufficient. 133 S. Ct. at 1433 (citation omitted). Indeed, the rule that plaintiffs must disaggregate recoverable damages from other losses

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[12] *See also Ludlow* v. *BP, PLC,* 800 F.3d 674, 688 (5th Cir. 2015), *petition for cert. filed* (U.S. Jan. 28, 2016) (No. 15-952) (failure to disaggregate non-recoverable losses would send plaintiffs "to a place forbidden by *Comcast*").

was well-established before *Comcast*.[13] *Comcast* added that, for purposes of class certification, plaintiffs must show not only that they can meet this burden but that they can do so on a classwide basis. The District Court improperly excused Plaintiffs from providing a damages model that "actually measure[s] damages that result from the class's asserted theory of injury."[14]

Second, the Supreme Court held that such a failure precludes certification, even if the flaw in the model might be a classwide issue, as the defect in *Comcast* was. 133 S. Ct. at 1433. The Supreme Court stated that certifying a class despite an "arbitrary" model of class damages, based on assurances that the disputed issues can be resolved on a classwide basis, "would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.*

CONCLUSION

The District Court's opinion, if not corrected and if followed by other courts, will lead to improperly certified securities class actions, the costs of which are "payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers."[15] This Court should grant Defendants' petition.

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[13] *See Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 342–43 (2005); *Lattanzio* v. *Deloitte & Touche LLP*, 476 F.3d 147, 157–58 (2d Cir. 2007).

[14] *Roach* v. *T.L. Cannon Mgmt. Corp.*, 778 F.3d 401, 407 (2d Cir. 2015).

[15] *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring).

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,327 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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