No. 09-90012-H

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

IN RE HEALTHSOUTH CORPORATION SECURITIES LITIGATION.
(NO. CV-03-BE-1500-S)

HON. KARON O. BOWDRE (JUDGE PRESIDING)

ON PETITION FOR LEAVE TO APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE CLEARING HOUSE ASSOCIATION L.L.C., AND THE FINANCIAL SERVICES ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITION OF UBS FOR PERMISSION TO APPEAL PURSUANT TO FED. R. CIV. P. 23(f)

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RULE 26.1-1 CORPORATE DISCLOSURE STATEMENT

The Securities Industry and Financial Markets Association and the Financial Services Roundtable are not subsidiaries of other corporations, and no publicly held corporation owns 10% or more of their stock.

The Clearing House Association L.L.C. (the "Clearing House") has no parent corporation. The Clearing House is a limited liability company and as such has no shareholders; therefore, no publicly held corporation owns 10% or more of its stock. Rather, each member holds a limited liability company interest in the Clearing House that is equal to each other member's interest. The ten members of the Clearing House are ABN AMRO Bank N.V.; Bank of America, National Association; The Bank of New York Mellon; Citibank, National Association; Deutsche Bank Trust Company Americas; HSBC Bank USA, National Association; JPMorgan Chase Bank, National Association; UBS AG; U.S. Bank National Association; and Wells Fargo Bank, National Association. Each member holds a 10% limited liability company interest in the Clearing House.

Amici are unaware of any other persons with an interest, as set forth in Eleventh Circuit Rule 26.1-1, in the outcome of this case, other than the parties to this Petition, and those interested persons listed in their briefs.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Pursuant to Fed. R. App. P. 5 and 29, The Securities Industry and Financial Markets Association ("SIFMA"), The Clearing House Association L.L.C. ("Clearing House"), and The Financial Services Roundtable ("Roundtable") (collectively, "*Amici*") respectfully submit this brief as *amici curiae* in support of Defendants-Petitioners UBS[1] (collectively, "UBS") to urge this Court to grant the Petition for Leave to Appeal so that the Court can provide much-needed guidance to district courts, litigants, and businesses in this Circuit by addressing the proper scope of primary liability of secondary actors under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder arising out of their involvement in securities offerings under Securities and Exchange Commission ("SEC") Rule 144A and other capital raising transactions by public companies.

INTEREST OF THE *AMICI CURIAE*

SIFMA brings together the shared interests of more than 600 securities firms, banks, and asset managers locally and globally through offices in New York, Washington, D.C., and London. Its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. SIFMA's mission is to champion policies and practices that benefit investors and issuers, expand and perfect global capital markets, and foster the development of new products and services. Fundamental to achieving this mission is earning, inspiring, and upholding the public's trust in the industry and the markets. The Clearing House was founded 150 years ago and is an association of leading commercial banks.

[1] "UBS" refers collectively to UBS AG and UBS Securities LLC, and Mssrs. Capek, Lorello, and McGahan.

Through an affiliate, the Clearing House provides payment, clearing, and settlement services to its member banks and to other financial institutions. The Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $85.5 trillion in managed assets, $965 billion in revenue, and 2.3 million jobs.

Each of the *Amici* commonly appears as *amicus curiae* in cases raising issues of importance to the securities markets and the commercial banking industry. Those interests are implicated here, as many of *Amici*'s members participate as "initial purchasers" in private offerings of securities by companies under Rule 144A. Initial purchasers – although technically not "underwriters" within the meaning of the federal securities laws – serve an important function in the Rule 144A capital raising process because they buy the securities from the issuer and resell them to "qualified institutional buyers" ("QIBs") in the offering. Historically, the potential legal exposure of initial purchasers in 144A offerings has been well-defined and limited to claims by the QIBs that bought 144A securities from the initial purchasers concerning the accuracy of statements made to them by the initial purchasers. *Amici* urge Rule 23(f) review because the district court decision presents an unprecedented theory of class certification that threatens to expand potential initial purchaser liability in four novel ways, including holding that: (1) initial purchasers in 144A offerings implicitly endorse the accuracy of the

issuer's financial statements, (2) initial purchasers in 144A offerings, which are ***private***, can be liable for inaccurate financial statements not only to the QIBs that bought the 144A securities in the offering, but also to participants in the vast ***public*** secondary markets, (3) liability attaches even where the 144A offering involves ***bonds***, but the class consists of secondary market purchasers of ***stock***, and (4) a "unified loss causation theory" may be applied, exposing an initial purchaser to liability that far exceeds any losses directly caused by its conduct.

Each of these four findings is both novel and necessary to the district court's justification for certifying a shareholder class here. The consequence is that UBS theoretically faces liability for billions of dollars of losses allegedly sustained by shareholders with whom UBS was not in privity and who did not purchase the bonds that UBS sold based on "implied" statements and a remote and tenuous causal link. Such unprecedented judicial expansion of the law – and corresponding potential extensions of liability, to remote investor classes, for underwriters and financial institutions playing other roles in the capital raising process – would discourage participation in 144A and other capital markets at a time when access to capital is critical to the global economy. The district court's "novel" theories of class certification are therefore of tremendous importance to *Amici*, the parties, and the markets generally. *See* Rule 23(f) advisory committee's note (1998 Amendments). For these reasons, *Amici* urge this Court to grant UBS's Petition.

ARGUMENT

Review under Rule 23(f) here is critical because the magnitude of the potential liability under the district court's unique theories threatens to impose

"hydraulic pressure . . . to settle," *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192 (3d Cir. 2001), and effectively deny UBS the opportunity to litigate this case on the merits. Congress sought to mitigate the impact of such situations by enacting reforms in the PSLRA, which "were intended to prevent plaintiffs from bringing 'strike suits' in securities matters. Congress found that the high costs of defending strike suits often forced defendants to settle meritless class actions." *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1090-91 (11th Cir. 2002) (citation omitted); *see also* H.R. Conf. Rep. 104-369, at 31 (1995) (PSLRA intended to deter "the targeting of deep pocket defendants, including . . . underwriters . . . without regard to their actual culpability").

Similarly, and most relevant here, Congress adopted Rule 23(f) because it was mindful of the fact that, particularly in § 10(b) and other cases where billions of dollars are frequently at stake, important legal issues often will escape appellate review because few defendants will bear the risk of such a high-stakes trial in order to gain eventual appellate review. Rule 23(f) advisory committee's note (1998 Amendments) ("[S]everal concerns justify expansion of present opportunities to appeal. . . . An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."). Rule 23(f) was intended by Congress to afford interlocutory review in the precise circumstance presented here where, as shown below, the lower court's certification raises substantial and troubling issues concerning the construction of § 10(b) and application of Rule 23.

A. Well-Settled Law Rejects the Notion that Initial Purchasers "Impliedly Endorse" a 144A Issuer's Financial Statements

The first novel ruling upon which class certification is predicated is that initial purchasers in a 144A offering are deemed to "impliedly endorse" the financial statements of the issuer. That has not been the case to date. Rule 144A was adopted in 1990 to facilitate "a more liquid and efficient institutional resale market for unregistered securities" and to attract foreign issuers to the U.S. capital markets. Securities Act Release No. 33-6862, 55 Fed. Reg. 17,933, 17,934 (Apr. 30, 1990) (the "1990 Release"). A 144A offering involves "initial purchasers" (such as UBS and other members of *Amici*) that buy the securities being privately offered by the issuer and then resell to others.

Rule 144A limits the immediate resale of unregistered securities to QIBs. *Id.* at 17,935-36. Because QIBs are sophisticated investors who, according to the SEC, "can fend for themselves," the Rule 144A offering process is streamlined. Securities Act Release No. 33-6806, 53 Fed. Reg. 44,016, 44,026 n.144 (Nov. 1, 1988) (the "1988 Release"). Through 144A, many corporations have been able to raise substantial amounts of money in the U.S. capital markets. Indeed, in the past few years, proceeds raised by issuers through private Rule 144A offerings have exceeded the proceeds raised through IPOs. Steven M. Davidoff, *Do Retail Investors Matter Anymore*, N.Y. Times DealBook, Jan. 17, 2008, http://dealbook.blogs.nytimes.com/2008/01/17/do-retail-investors-matter-anymore/?scp=10&sq=Rule%20144A&st=cse).

QIBs are sophisticated and understand that statements made in the issuer's 144A offering materials are not attributed – expressly or impliedly – to initial

purchasers merely because their names appear on the cover of the materials. Indeed, UBS's Petition notes, courts routinely reject the notion of primary liability under § 10(b) for "implied" statements. *See* UBS Pet. 13-14.

More troubling still is the district court's second novel proposition – that initial purchasers can be liable for their "implied" statements not only to those QIBs to whom they "make" those statements, but also to purchasers of publicly traded securities in a completely different secondary market (sometimes years later) with whom the initial purchasers had no contact.

By regulation, Rule 144A offerings are "deemed ***not to have been offered to the public***." 17 C.F.R. § 230.144A(c) (emphasis added). Under industry practice, Rule 144A offering materials typically are labeled "strictly confidential" and bear a legend indicating that distribution to non-QIBs is forbidden. For these reasons, any potential liability historically has been limited to actions by the QIBs that purchased the 144A securities from the initial purchaser being sued. *Cf. In re Parmalat Sec. Litig.*, 570 F. Supp. 2d 521, 524-25 (S.D.N.Y. 2008) ("the duty of disclosure that BoA allegedly breached was a duty owed only to purchasers from BoA in private placements"). Indeed, courts have held that it would be nonsensical to find that an "offering that is ***private*** by its terms, and by federal regulation for purposes of one provision of the [securities laws], should be considered ***public*** for purposes of another provision" of the securities laws. *In re Refco., Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 626 n.9 (S.D.N.Y. 2007) (emphasis added).

B. The District Court's Expansion of Liability to Claims by Public Shareholders and Its Application of a "Unified Loss Causation" Theory Imposes Hydraulic Settlement Pressure

The district court here also adopted an erroneous "unified loss causation" theory, by which initial purchasers in the 144A markets (and other secondary actors who help companies raise capital) can be held liable not just for the harm causally linked to their imputed statements, but for ***all*** economic losses suffered by ***all*** of an issuer's public and private security holders. The nearly unbridled exposure under this theory conflicts with the provisions of § 10(b) and the PSLRA that require plaintiffs to demonstrate that "the act or omission of the defendant . . . caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. § 78u-4(b)(4). Few if any secondary actors facing the prospect of a certified class that wields the threat of unified loss causation could withstand the settlement pressures that result, regardless of the merits of the case. This fact militates heavily in favor of review of the district court's opinion under Rule 23(f).

C. The District Court's Opinion Injects Uncertainty into the Regulatory Regime Governing 144A Offerings

The district court's ruling violates another fundamental precept recognized by the Supreme Court: the securities laws should be interpreted to promote certainty and predictability because these characteristics are critical to the fair and efficient functioning of the U.S. securities markets. As the Court stated:

> [T]he rules for determining aiding and abetting liability are unclear, in an area that demands certainty and predictability. That leads to the undesirable result of decisions made on an ad hoc basis, offering little predictive value to those who provide services to participants in the securities business. Such a shifting and highly fact-oriented disposition

> of the issue of who may be liable for a damages claim for violation of Rule 10b-5 is not a satisfactory basis for a rule of liability imposed on the conduct of business transactions.

Central Bank, N.A. v. First Interstate Bank, N.A., 511 U.S. 164, 188 (1994) (internal quotations and citations omitted).

Prior to the district court's decision in this case, initial purchasers in 144A offerings had the benefit of clear guidance on the scope and nature of their legal liability – initial purchasers would be accountable to those to whom they sold 144A securities for the accuracy of the statements that the initial purchasers themselves made. Under the district court's ruling here, however, liability to the broader public market turns on the "shifting and highly fact-oriented disposition" of issues such as whether an initial purchaser's private statements affected public markets, the extent and nature of an initial purchaser's role in private investor meetings and road shows, what other securities might be held by the QIBs, and which QIBs were solicited. Moreover, the district court's ruling gives no guidance as to how this tangle of factors should be weighed. The resulting *ad hoc* decisions, based on almost imperceptible distinctions, will offer little predictive value to other companies wishing to engage in 144A and other capital market transactions.

A test for liability that hinges on such distinctions is unacceptable. The Supreme Court has recognized that the contours of § 10(b) (and Rule 10b-5) must be carefully drawn, as private rights of action under this section are implied, rather than express, and "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Central Bank*, 511 U.S. at 189 (citation omitted). Thus, the Supreme Court's

major opinions in the area of implied rights under § 10(b) all require clear rules and well-defined contours in order to avoid litigation abuses. *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975) (limiting private § 10(b) actions to actual "purchasers or sellers" lest persons be encouraged to bring lawsuits with "settlement value to the plaintiff out of any proportion to its prospect of success").

Just last year, the Supreme Court expressed concern about expanding potential liability under § 10(b) in a manner that would cause market participants to "protect against [such] threats" by withdrawing from the U.S. capital markets or, alternatively, by duplicating the role already served by auditors and accountants. *Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 772 (2008). Were the members of *Amici* to respond in this way, the 144A markets would become substantially less liquid and more expensive. The district court's ruling also may chill activity in other corners of the capital markets, where participants will be concerned that fundraising, lending, or other activities for a company (outside the 144A context) may constitute an "implied endorsement" of the company upon which public shareholders will be deemed to have relied. It is critical that this Court review the district court's decision pursuant to Rule 23(f) before imposing such burdens and costs on the U.S. capital markets.

D. The District Court's Opinion Will Deter Foreign Companies From Participating in the U.S. Capital Markets

Although the district court's decision will have a material impact on the willingness of domestic companies to participate in the U.S. capital markets,

foreign companies may become particularly reluctant. Several highly publicized reports have warned of a precipitous decline in the competitiveness of U.S. capital markets. One of the critical causes of this decline is foreign companies' fears of being drawn into shareholder lawsuits. *See, e.g., Interim Report of the Committee on Capital Markets Regulations* ix-x (Nov. 30, 2006), *available at* http://www.capmktsreg.org/pdfs/11.30Committee_Interim ReportREV2.pdf (United States losing competitive position because of several factors, including "the growth of . . . liability risks compared to other developed and respected market centers"); *see also* H.R. Rep. No. 104-50I, at *20 (1995) ("Fear of [securities] litigation keeps companies out of the capital markets.").

The district court's opinion, if left undisturbed, will fuel these concerns and foreign initial purchasers and issuers "with no other exposure to our securities laws" other than through 144A offerings may choose not to participate in this area of the U.S. capital markets. *Stoneridge*, 128 S. Ct. at 772. This result would be directly contrary to the purposes of Rule 144A, which was enacted to attract "[f]oreign issuers who previously may have foregone raising capital in the United States due to the compliance costs and liability exposure." 1988 Release, 53 Fed. Reg. at 44,022 n.93.

CONCLUSION

For the foregoing reasons, this Court should grant UBS's petition for permission to appeal.

Dated: New York, New York
April 24, 2009

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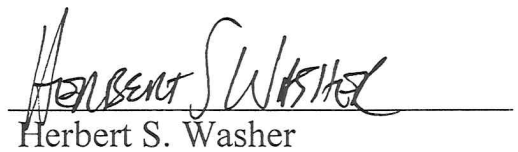
By: 
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the length limitations set forth in Fed. R. App. P. 29(d) because it is no more than one-half the maximum length authorized by the Federal Rules of Appellate Procedure for a party's principal brief.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) in that it has been prepared in proportionally spaced 14 point font (Times New Roman) produced by Microsoft Word.

Dated: April 24, 2009

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of the Brief of The Securities Industry and Financial Markets Association, The Clearing House Association L.L.C., and The Financial Services Roundtable as *Amici Curiae* in Support of Petition of UBS for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f) to be served via Federal Express upon the following:

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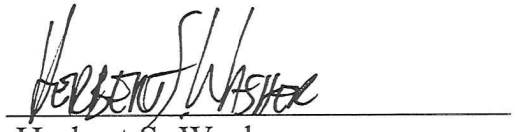
By: 
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