UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-1162 Caption [use short title]

Motion for: Leave to File Brief of Amicus Curiae Securities Industry and Financial Markets Association in Support of Defendants-Petitioners

Set forth below precise, complete statement of relief sought:

Leave to file an Amicus Curiae brief, pursuant to Fed. R. App. P. 29, in support of defendants-petitioners' petition, pursuant to Fed. R. Civ. P. 23(f), for permission to appeal from an order granting class certification.

In re: Chicago Bridge & Iron

MOVING PARTY: Securities Industry and Financial Markets Association **OPPOSING PARTY:** ALSAR Ltd. Partnership, et al.

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Richard Rosen **OPPOSING ATTORNEY:** Kim E. Miller

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Court- Judge/ Agency appealed from: The Honorable Lorna G. Schofield, U.S. District Court Southern District of New York.

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/ Richard A. Rosen **Date:** 4/13/2020 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

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20-1162

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHICAGO BRIDGE & IRON COMPANY N.V., PHILIP K. ASHERMAN,

(*caption continued on inside cover*)

ON PETITION FROM AN ORDER GRANTING CERTIFICATION OF CLASS ENTERED ON MARCH 23, 2020 APPEAL BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
NO. 17-CV-1580
THE HONORABLE LORNA G. SCHOFIELD

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-PETITIONERS

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Defendants-Petitioners,

V.

ALSAR LTD. PARTNERSHIP, IRONWORKERS LOCALS 40, 361 & 417 - UNION SECURITY FUNDS, IRON WORKERS LOCAL 580 - JOINT FUNDS,

Plaintiffs-Respondents.

Pursuant to Federal Rule of Appellate Procedure 29, the Securities Industry and Financial Markets Association ("SIFMA") respectfully requests leave to file the attached brief as *amicus curiae* in support of defendants-petitioners. SIFMA has received the consent of all parties to file this brief.

SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of the industry's nearly 1 million employees, SIFMA advocates on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. SIFMA also provides a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

This case involves important issues concerning the standards under which courts should adjudicate motions for class certification in private securities litigation. On several prior occasions, this Court has granted SIFMA's motions requesting leave to file amicus briefs in cases concerning the securities industry, including briefs filed in support of petitions for leave to appeal pursuant to Federal Rule of Civil Procedure 23(f). *See, e.g.*, Order, *Goldman Sachs Grp., Inc.* v. *Ark.*

Teachers Ret. Sys., No. 18-2557 (2d Cir. Dec. 11, 2018), ECF No. 74; *Barclays Bank PLC* v. *Waggoner*, No. 16-450 (2d Cir. June 15, 2016), ECF No. 56; Order, *In re Petrobras Sec.*, No. 16-463 (2d Cir. June 15, 2016), ECF No. 120.

The district court's opinion granting class certification deepens the uncertainty in this Circuit as to the standards defendants must meet to show a lack of price impact at the class certification stage. *See Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 283 (2014). Specifically, the attached brief addresses the following issues raised by the district court's decision: (i) whether economic evidence that an alleged corrective disclosure did not have a statistically significant impact on a stock's price at a 5% significance level suffices to establish lack of price impact; (ii) the role contextual evidence should play in price impact analysis; and (iii) whether, to be deemed "corrective," a disclosure may merely relate to the same subject matter as the alleged misrepresentation or whether it must actually reveal the falsity of that alleged misrepresentation.

There is a compelling need for guidance from this Court on these frequently recurring, often outcome-determinative issues so that district courts can discharge their essential gatekeeper function. Class certification is often one of the last opportunities for a meaningful judicial determination of whether a securities class action should be permitted to proceed because, as this Court has repeatedly recognized, securities suits almost always settle once a class has been certified.

The rate at which private securities actions are being filed is accelerating dramatically, which impacts not only litigants, but the market as a whole. SIFMA respectfully submits that its brief will assist the Court in determining whether to grant defendants' petition.

Accordingly, SIFMA respectfully requests leave to file the attached brief as *amicus curiae* in support of defendants-petitioners.

Dated: April 13, 2020

Respectfully submitted,

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THE HONORABLE LORNA G. SCHOFIELD

BRIEF OF *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITION OF DEFENDANTS-PETITIONERS FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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ALSAR LTD. PARTNERSHIP, IRONWORKERS LOCALS 40, 361 & 417 - UNION SECURITY FUNDS, IRON WORKERS LOCAL 580 - JOINT FUNDS,

Plaintiffs-Respondents.

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.

Dated: April 13, 2020

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") represents the interests of broker-dealers, investment banks, and asset managers.[1] Its mission is to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. SIFMA regularly files *amicus curiae* briefs in cases raising issues vital to securities industry participants.

BACKGROUND AND SUMMARY OF ARGUMENT

The district court's class certification decision grapples with several issues that have engendered growing confusion and disagreement among district courts in this Circuit, on which this Court's guidance is sorely needed.

First, the district court joined a minority of courts by finding that defendants failed to carry their burden of rebutting the *Basic* presumption, although defendants showed (and plaintiffs agreed) that a disclosure did not cause a statistically significant price change at the 5% level. Further, although the court stated that contextual evidence is also necessary to evaluate price impact, it failed to address the contextual evidence on which both parties' experts opined and did not indicate what contextual evidence might be relevant. The Circuit should

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), 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 *amicus* or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

clarify (i) when, if ever, statistical significance measured from a less rigorous threshold can constitute sufficient evidence of price impact, and (ii) whether courts must examine additional contextual evidence in analyzing price impact.

Second, unlike several courts in this Circuit, the district court declined to analyze whether the alleged corrective disclosures actually revealed to the market the falsity of prior alleged misrepresentations. Instead, the court considered only whether the disclosures "related" to the same subject matter as earlier alleged misrepresentations. This Court should clarify the appropriate standard for evaluating "correctiveness" in this context.

This case provides the Court with an opportunity to clarify several frequently recurring legal questions regarding class certification standards that will otherwise escape effective review. *See Sumitomo Copper Litig.* v. *Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 140 (2d Cir. 2001). This Court has recently granted Rule 23(f) petitions in several matters raising distinct but equally impactful issues. *See, e.g.*, *Ark. Teachers Ret. Sys.* v. *Goldman Sachs Grp., Inc.*, 2020 WL 1682772 (2d. Cir. Apr. 7, 2020) ("*Goldman II*") (addressing standard for rebutting inflation-maintenance theory in response to motion for class certification); *Ark. Teachers Ret. Sys.* v. *Goldman Sachs Grp., Inc.*, 879 F.3d 474 (2d Cir. 2018) ("*Goldman I*") (addressing standard of proof required to rebut *Basic* presumption); *Waggoner* v.

Barclays PLC, 875 F.3d 79 (2d Cir. 2017) (clarifying evidence required to demonstrate market efficiency and price impact at class certification).

As this Court has recognized, "review of a novel and important legal issue concerning the scope of the *Basic* presumption may be possible only through the Rule 23(f) device." *Hevesi* v. *Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004) (quotation marks and alterations omitted). Because class certification is one of the last stages of meaningful judicial oversight in private securities suits, if a class is certified, "[w]ith vanishingly rare exception" the litigation proceeds to settlement.[2] Indeed, "Rule 23's *in terrorem* effect is the reason Congress authorized interlocutory appeals under Rule 23(f)." *Goldman II*, 2020 WL 1682772, at *11 ("[C]lass certification can pressure defendants into settling large claims, meritorious or not.").

There is therefore a compelling need for this Court's guidance on the potentially outcome-determinative issues here. *See Hevesi*, 366 F.3d at 77 (review of decisions concerning reliance presumption particularly appropriate because that doctrine "is often essential to class certification in securities suits"). Allowing lingering uncertainty regarding the economic evidence required to rebut the *Basic* presumption and the test for "correctiveness" would be especially ill-advised,

[2] Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009).

given the rapidly accelerating pace at which securities class actions are being filed. Such filings have more than doubled over the past decade; from 2018-2019, this Circuit saw a 40% increase in filings.[3]

ARGUMENT

I. The Second Circuit Should Clarify the Economic Evidence Required to Demonstrate a Lack of Price Impact.

In *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) ("*Halliburton II*"), the Supreme Court reaffirmed that defendants must have an opportunity at class certification to rebut the *Basic* reliance presumption by demonstrating a lack of price impact. *Id.* at 283-84. To prove or disprove price impact, parties submit economic expert evidence regarding statistical "event studies," which analyze whether a stock price change following an event or disclosure was statistically significant.

Specifically, event studies test whether a stock price change was large enough to rule out the default "null hypothesis"—i.e., that the price change merely reflects random "noise" in the market. Event studies determine the probability ("*p*-value") that one would observe a price change as large as the one that took place *if*

[3] Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2019 Full Year Review*, NERA Economic Consulting, 2-3 (Feb. 12, 2020).

the price change resulted from noise.[4] That probability is then compared to a preset "significance level" to determine whether the change is statistically significant.[5] If the probability is less than the significance level, then the price change is statistically significant, and the null hypothesis can be rejected.[6] "In practice, statistical analysts typically use [significance] levels of 5% and 1%."[7]

A. The 5% Significance Level Is Widely Accepted in Scientific Literature and Case Law.

> "The 5% level is the most common in social science . . . ."[8]

Accordingly, most courts analyzing price impact have recognized that "[i]n most scientific work, the level needed to obtain a statistically significant result is set at a five percent level." *Carpenters Pension Tr. Fund of St. Louis* v. *Barclays PLC*, 310 F.R.D. 69, 81 (S.D.N.Y. 2015); *see, e.g.*, *Strougo* v. *Barclays PLC*, 312 F.R.D. 307, 317 (S.D.N.Y. 2016) (same), *aff'd sub nom. Waggoner* v. *Barclays PLC*, 875 F.3d 79 (2d Cir. 2017); *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 309 F.R.D. 251, 262 (N.D. Tex. 2015) ("*Halliburton III*"); *In re Xerox Corp. Sec. Litig.*, 746 F. Supp. 2d 402, 409 n.2 (D. Conn. 2010).

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[4] David A. Freedman & David H. Kaye, Fed. Judicial Ctr., *Reference Guide on Statistics*, in *Reference Manual on Scientific Evidence* 211, 250 (3d ed. 2011).
[5] *Id.* at 251.
[6] *Id.*
[7] *Id.*
[8] *Id.*

Many courts have rejected price impact evidence where it was not significant at the 5% level. For example, in *In re Moody's Corp. Securities Litigation*, 274 F.R.D. 480 (S.D.N.Y. 2011), the court concluded that there was "[in]sufficient evidence of a link between [a] corrective disclosure and the price" where an expert was able to show a statistically significant negative return at the 10% level, but not the 5% level. *Id.* at 493 & n.11. Similarly, in *In re American International Group, Inc. Securities Litigation*, 265 F.R.D. 157 (S.D.N.Y. 2010), *vacated on other grounds*, 689 F.3d 229 (2d Cir. 2012), the court held that defendants rebutted the *Basic* presumption where they showed that plaintiffs' expert, Dr. Finnerty—plaintiffs' expert here—did not find a statistically significant return for two disclosures at the 5% level, although the return was significant at the 10% level. *Id.* at 186-87; *see also In re Intuitive Surgical Sec. Litig.*, 2016 WL 7425926, at *15 (N.D. Cal. Dec. 22, 2016) (finding "no reason to deviate" from the 5% threshold); *Halliburton III*, 309 F.R.D. at 270 (similar).

B. The Second Circuit Should Clarify the Applicable Significance Level for Price Impact Analysis.

Despite wide acceptance of the 5% significance standard by most scientists and courts, the court below joined a minority of courts by finding that a lower threshold of statistical significance was sufficient evidence of price impact. *See* A-8-9; *Pirnik* v. *Fiat Chrysler Autos., N.V.*, 327 F.R.D. 38, 46-47 (S.D.N.Y. 2018). The district court noted that a 5% brightline cutoff could result in a *p*-value

of 4.99% being accepted and a *p*-value of 5.01% being rejected. A-8-9. But that theoretical possibility is an insufficient basis for allowing plaintiffs to proffer expert opinions predicated on a wide range of confidence levels (such as the 8.44% level proffered by plaintiffs here). Moreover, failure to adopt a broadly applicable objective standard will require district judges to make difficult ad hoc decisions, making the very complex class certification process even more difficult, unpredictable, and time consuming.

Plaintiffs' expert asserts that many articles published in top finance journals from 2005-2010 reported findings at a 10% significance level. A-822. But reporting *findings* at a 10% level is not the same as drawing *conclusions* at this level, let alone conclusions sufficiently reliable to permit private litigants to pursue claims often involving hundreds of millions of dollars. *Am. Int'l Grp.*, 265 F.R.D. at 187 ("The Court finds the distinction between reporting results and drawing conclusions about hypotheses based on those results to be crucial to the question before it."). Also, for purposes of determining whether to grant 23(f) review, the very fact that some articles might report findings at a standard less rigorous than that accepted by most scientists and courts only underscores the need for this Court's guidance. Absent clarification, litigants will face substantial uncertainty regarding the proof sufficient to bring and defend securities fraud claims, and

district courts may struggle to exercise their gatekeeping function to exclude expert evidence that does not adhere to accepted methodologies.

C. The Second Circuit Should Clarify How Other Contextual Evidence Affects Price Impact Analysis.

The Court should likewise clarify the role that contextual evidence other than price movements should play in the analysis. The district court stated that such an analysis "should not be based only on whether a *p*-value passes a specific threshold, as researchers must consider multiple contextual factors when performing data analysis." A-9. Indeed, both parties' experts opined on non-statistical, contextual evidence concerning price impact, including contemporaneous statements by analysts. A-414-46, 482-557. Without explanation, the district court did not consider this evidence and did not discuss what contextual evidence may be adduced as part of a price impact analysis. Both litigants and lower courts would benefit from further guidance on this issue.

II. The Second Circuit Should Clarify the Standard for Analyzing Correctiveness.

The district court correctly noted that it was required, as part of its price impact analysis, to determine the "correctiveness" of the alleged corrective disclosures. A-11. We respectfully submit, however, that the district court's analysis—which considered only whether the disclosures "related" to the same subject matter as prior misstatements, but not whether they *corrected* those

misstatements—is inconsistent with *Halliburton II*, and deepens growing confusion among district courts.

This Court recently emphasized that "[i]f a defendant shows that an alleged misrepresentation did not, for whatever reason, actually affect the market price of a defendant's stock," then the reliance presumption is rebutted and the class cannot be certified. *Goldman I*, 879 F.3d at 486. It appears to be common ground that a disclosure precipitating a share price decline must actually *correct* a prior misstatement, "otherwise there would be no inference raised that the original, allegedly false statement caused an inflation in the price to begin with." *Archdiocese of Milwaukee Supporting Fund, Inc.* v. *Halliburton Co.*, 597 F.3d 330, 336 (5th Cir. 2010), *vacated on other grounds*, *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U.S. 804 (2011); *see also Goldman II*, 2020 WL 1682772, at *2 n.1 ("A 'corrective disclosure' is an announcement or series of announcements that reveals to the market the falsity of a prior statement.").

But there remains significant confusion about how to apply that abstract principle. Here, for example, the district court limited its analysis to whether the alleged corrective disclosures revealed "new" information that "relate[d]" to the same subject matter as an alleged misrepresentation. A-10-13. But a disclosure can *relate* to the same subject as an alleged misstatement without *correcting* it—in which case the disclosure would provide no evidence of the

misstatement's price impact.[9] For example, the court in *In re Moody's* analyzed whether a senator's comments disclosing congressional scrutiny of a ratings agency's independence "corrected" the agency's alleged misrepresentations about its independence. 274 F.R.D. at 487-88. The court determined that, even though the disclosure caused a stock drop and related to the same subject matter as the misrepresentation, "[t]he fact that Congress was going to examine the rating agencies' conflicts does not amount to a revelation of the alleged fraud." *Id.* Because this disclosure was not "corrective," the court concluded that it "cannot serve as a basis for certifying the class," and price impact was rebutted. *Id.* at 492-93. Had the court analyzed only whether the corrective disclosure *related* to the same subject as the misstatement, a class would have been certified, and defendants would have faced enormous settlement pressure. *See supra* at 3.

Similarly, this Court upheld an analysis that focused on whether a disclosure *corrected* a prior misstatement in *Goldman II*. In its Rule 23(f) review, this Court credited the district court's finding that "[t]he inflation was demonstrated on [the corrective-disclosure] dates, when the falsity of the misstatements was revealed." 2020 WL 1682772, at *8; *see id.* at *15 ("The [district] court reviewed the evidence, traced the price declines back to Goldman's

[9] *See* Defendants' Pet., ECF No. 1, at 12-13 (identifying three instances where the district court failed to determine whether an alleged corrective disclosure revealed the falsity of prior statements).

alleged misstatements, and credited [plaintiffs' expert's] report.").[10] This Court also employed a thorough correctiveness analysis in *In re Flag Telecom Holdings, Ltd. Securities Litigation*, 574 F.3d 29, 40-41 (2d Cir. 2009), in which the Court determined that an alleged corrective disclosure did not actually "reveal[] the truth about the subject of any of Defendants' alleged misstatements," and that investors who sold their shares before the subsequent corrective disclosure were in-and-out traders and therefore atypical and inadequate class representatives.

Other courts in this Circuit, however, have employed analyses that, like the district court's here, did not analyze whether the alleged disclosures actually corrected prior misstatements. *E.g.*, *Pirnik*, 327 F.R.D. at 46-47 (analyzing whether alleged corrective disclosures were "wholly irrelevant" and rejecting argument that the disclosures did not demonstrate price impact even though they corrected alleged misstatements the court had previously ruled were "inactionable or irrelevant"). Still other courts have declined to engage in *any* correctiveness analysis at the class certification stage, finding that such analyses improperly delve into loss causation. *See, e.g.*, *Carpenters Pension*, 310 F.R.D. at 95-96.

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[10] *See also In re Signet Jewelers Ltd. Sec. Litig.*, 2019 WL 3001084, at *13-15 (S.D.N.Y. July 10, 2019) (rejecting argument at class certification that nine alleged corrective disclosures "were not actually *corrective*" because contemporaneous analyst reports showed that the market understood the disclosures to reveal the alleged fraud).

Although this Court has instructed district courts to consider "any showing" rebutting price impact at class certification, it has not directly addressed the issue of what a correctiveness analysis should entail. The decision below—and decisions in cases like *Moody's* and *Pirnik*—demonstrate that the rigor of a district court's correctiveness analysis will often determine whether a class is certified, which often determines whether a private securities suit is dismissed or settled for a substantial sum.

CONCLUSION

The Court should grant defendants' Rule 23(f) petition.

Dated: April 13, 2020

Respectfully submitted,

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Certificate of Compliance

I, Richard A. Rosen, attorney for amicus curiae, hereby certify that this brief conforms to the requirements of Fed. R. App. P. 32(a)(7) because this brief contains 2,556 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(f). 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 in Times New Roman 14-point font.

Dated: April 13, 2020

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