No. 04-

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE INITIAL PUBLIC OFFERING SECURITIES LITIGATION

From an Order Granting Class Certification Entered on October 12, 2004, By the United States District Court for the Southern District of New York, Misc. 21-92, Civ. 02-242, Civ. 01-3857, Civ. 01-6001, Civ, 01-7048, Civ. 01-8404, Civ. 01-94171, Hon. Shira A. Scheindlin, United States District Judge

---

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR LEAVE TO APPEAL PURSUANT TO RULE 23(f) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Robin S. Conrad
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Gary A. Orseck
Roy T. Englert, Jr.
Brian M. Willen
ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP
1801 K Street, N.W., Suite 411
Washington, DC 20006
(202) 775-4500

Attorneys for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Miscellaneous:

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation. The Chamber regularly advocates the interests of its members in courts throughout the country. The class certification decision below raises issues of considerable importance to the Chamber's members, who are themselves frequently targets of class action litigation. Class certification can transform a routine lawsuit into a "bet-the-company" proposition. With the stakes so high, companies are often compelled to settle even meritless cases rather than risk potentially crippling jury verdicts. Such settlements are destructive to the Chamber's members, their customers, and the national economy.

The problem is particularly acute in securities fraud litigation. Indeed, it was the "significant evidence of abuse" of class actions in this context that led Congress to enact the Private Securities Litigation Reform Act in 1995. H.R. Conf. Rep. 104-369, at 31 (1995). All too often, such litigation amounts to a retrospective effort by disappointed investors to have issuers and financial services professionals insure them against the consequences of ordinary market risks. This imposes exorbitant costs on defendants and seriously disrupts the efficiency of the capital markets.

For these reasons, the Chamber has a special interest in ensuring that district courts certify class actions only after conducting the "rigorous analysis" called for by the Supreme Court. Here, far from doing so, the district court wrongly held that

plaintiffs need make only the flimsiest showing to obtain the benefits of certification, and that in close cases courts should err on the side of certifying. It did so in a massive securities fraud case in which the practices of an entire industry are under attack and in which the financial stakes could hardly be higher. It did so in the face of undisputed evidence that the alleged scheme was a matter of public knowledge, an arrangement that many investors knew about and willingly participated in. Rule 23(f) was adopted precisely to ensure that certification decisions as important and misguided as this do not escape appellate scrutiny. If not corrected by this Court, the district court's decision will lead to the further abuse of the class action form, with profoundly deleterious consequences for the Chamber's members.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[C]lass actions are without doubt the most controversial subject in the civil process today." B. Hay & D. Rosenberg, "*Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1377 (2000). As it has done here, certification can transform a set of individual claims into a gargantuan lawsuit that threatens an entire industry with ruinous financial liability. From the defendant's perspective, certification dramatically increases both the costs of litigation and the costs of an adverse verdict. It also increases the *likelihood* of an adverse verdict, as class actions put special procedural burdens on defendants that

make such cases more difficult to defend. Indeed, as the district court here recognized, one effect of certification is "effectively" to "transfer[] the burden of proving individual facts from plaintiffs to defendants." Op. 93 n.300.

For these reasons, class certification "places inordinate or hydraulic pressure on defendants to settle." *Newton* v. *Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001); see also R. Bone & D. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1292 (2002) ("[A]lmost all class actions settle, and the class obtains substantial settlement leverage from a favorable certification decision."). This is true regardless of whether plaintiffs' claims have merit. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("[C]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and abandon a meritorious defense.").

The pressures imposed by class certification have a distorting effect on the legal system. They encourage plaintiffs to file marginal claims, for even a claim with little chance of success if tried may extract a lucrative settlement once a class is certified. And, where certification engenders settlement, the certification decision itself will escape review on appeal, giving a single judge extraordinary power. See *Blair* v. *Equifax Check Services, Inc.*, 181 F.3d 832, 835 (7th Cir. 1999). The unique dangers and

massive costs associated with class litigation make it imperative that courts *get certification decisions right* – and do so "early" in a case. FED. R. CIV. P. 23(c)(1)(A).

This is exactly the goal of Rule 23(f). The Rule seeks to ensure that the outcomes of class actions are wedded more to the merits of the "parties' underlying legal positions," *Hevesi* v. *Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004), than to the degree of "blackmail" that plaintiffs are able to bring to bear as a result of the prospect of classwide liability. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). By allowing review of certification decisions on an interlocutory basis, the Rule is designed to protect parties aggrieved by adverse and dubious certifications, and thereby to facilitate the orderly and consistent development of the law of class actions. See *West* v. *Prudential Secs., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002).

The present case is just the sort for which Rule 23(f) was designed. The court certified classes of staggering proportions (involving numerous defendants, millions of plaintiffs, and billions of dollars) only by abandoning the "rigorous analysis" required by *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 161 (1982), and in its place adopting a standard under which a class can be certified on the basis of nothing more than "some showing" that it should be. The district court also announced an unprecedented and unwarranted presumption in favor of certification, one entirely at odds with the rule that *plaintiffs* bear the burden of demonstrating that a class should

be certified. That excessively deferential approach led the district court into a series of significant errors, which this Court will likely have no subsequent opportunity to correct. The Chamber addresses only three of these mistakes.

First, the court used its relaxed standards to give plaintiffs the benefit of a presumption of reliance under *Basic, Inc.* v. *Levinson*, 485 U.S. 224 (1988). That presumption, which derives from the so-called fraud-on-the-market doctrine, depends upon proof that the relevant market is efficient. Instead of making that finding, however, the district court held that it was enough for plaintiffs to make "some showing" of efficiency. Op. 105. Particularly where certification depends on an application of the *Basic* presumption, requiring merely "some showing" is inconsistent with any conceivable notion of rigorous analysis. It is also inconsistent with the requirements of the 2003 amendments to Rule 23 and with the basic procedural fairness that must attend decisions to subject defendants to the burdens of class litigation.

Second, the court's excessively deferential approach to Rule 23 caused it to certify a class without identifying a sufficient causal link between the allegedly fraudulent scheme and the price of the securities at issue. Instead of determining whether a classwide mechanism actually exists for determining that the prices of the securities were artificially inflated throughout these extremely lengthy class periods, the court rested *entirely* on its observation that the theory offered by plaintiffs' non-economist

expert was "not fatally flawed." Op. 124. That standard, which is really no standard at all, effectively transfers power over the class certification decision from courts to plaintiffs' lawyers and their partisan expert witnesses. Whether Rule 23 requires such extreme deference to plaintiffs' expert is a vitally important question for the law of class actions; this Court has recently suggested that the question is an open one that warrants prompt review under Rule 23(f). *Hevesi*, 366 F.3d at 78-79 & n.6.

Further bolstering the case for review is another serious flaw in the district court's application of the *Basic* presumption. *Basic* allows courts to presume that investors rely on a security's price as an accurate measure of its intrinsic value when the presumption is supported by "common sense and probability." 485 U.S. at 246. Here, however, the court gave plaintiffs the benefit of that presumption in the face of *undisputed* evidence that the allegedly fraudulent scheme was the subject of extensive media coverage and widely known in the financial world. Given that so many knew or were in a position to know of allegations that the price of the securities was manipulated, there was no basis for adopting a classwide presumption to the contrary.

ARGUMENT

Rule 23(f) gives "unfettered discretion" to appellate courts to allow litigants to appeal from "an order of a district court granting or denying class action certification." FED. R. CIV. P. 23(f), advisory committee's notes. This Court has held that a Rule

23(f) petition should be granted when the underlying "certification order implicates a legal question about which there is a compelling need for immediate resolution." *In re Sumitomo Copper Litigation*, 262 F.3d 134, 139 (2d Cir. 2001). That showing is made when a legal question "of fundamental importance to the development of the law of class actions * * * is likely to escape effective review after entry of final judgment." *Id*. at 140. Certification decisions applying the fraud-on-the-market doctrine in novel ways are particularly appropriate candidates for interlocutory review. See *Hevesi*, 366 F.3d at 77. *Hevesi* also pointed out that, in enormous class actions where class members could be entitled to a "staggering amount of money * * * after final judgment," certification decisions are especially likely to escape review except through Rule 23(f). *Id.* at 81. Those observations could have been made with the present case in mind.

I. THE DISTRICT COURT FAILED TO CONDUCT THE "RIGOROUS ANALYSIS" REQUIRED BY RULE 23

Class certification is appropriate only "if the trial court is satisfied, *after a rigorous analysis*," that the prerequisites of Rule 23 have been met. *Falcon*, 457 U.S. at 161 (emphasis added); see *id.* at 160 ("actual, not presumed, conformance with Rule 23" is "indispensable"). Under Rule 23(b)(3), a district court must make "findings" that common questions "predominate over any questions affecting only individual

members." Doing so requires that the court take a "close look" at all matters relevant to predominance. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 615 (1997).

The district court entirely disregarded these mandates. It held that plaintiffs could satisfy Rule 23 by doing nothing more than making "some showing." Op. 65. Equally pernicious was the court's announcement that its "*sole* job * * * in assessing expert evidence on a certification motion is to 'ensure that the basis of the plaintiff's expert opinion is not so flawed that it would be inadmissible as a matter of law.'" Op. 66 (quoting *In re Visa Check/Mastermoney Antitrust Litigation*, 280 F.3d 124, 135 (2d Cir. 2001)). Those empty standards are not compelled by this Court's cases, are inconsistent with the approach followed in other Circuits, represent an abdication of the court's responsibilities under Rule 23, and warrant immediate review.

A. The "Some Showing" Standard Is Not Compelled By This Court's Cases And Is Fundamentally Misguided

The district court's "some showing" standard is the functional equivalent of the deferential "some evidence" standard, which is met if there is "any evidence in the record that could support the conclusion." See *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633, 2645 (2004). Following that approach would make class certification virtually automatic, "frustrating the district court's responsibilities for taking a close look at relevant matters." *Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004). Setting such a low bar may be appropriate where overriding policy concerns

counsel against more serious scrutiny. *E.g.*, *Superintendent, Mass. Correctional Inst.* v. *Hill*, 472 U.S. 445, 455-56 (1985) (challenges to prison discipline). In light of the high costs to defendants and to society from erroneously certified class actions, however, this is not such a context. There is no justification for converting Rule 23, which requires analytic rigor, into little more than a rubber stamp.[1/]

Not surprisingly, use of the "some showing" standard contradicts the approach followed in other circuits. See *West*, 282 F.3d at 938 ("A district judge may not duck hard questions by observing that each side has some support * * *. Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and

---

[1/] The district court compounded theses problems by suggesting that, if a certification question is close, "the court should err in favor of allowing the class to go forward." Op. 57-58. There is no basis for putting such a thumb on the scale in the plaintiffs' favor. Doing so is inconsistent with the rule that it is the *plaintiffs'* burden to establish the prerequisites to class certification. See *Vizena* v. *Union Pacific R.R. Co.*, 360 F.3d 496, 503 (5th Cir. 2004). Nor is Judge Scheindlin's remarkable proposition supported by this Court's statement, which originally appeared in *Lundquist* v. *Security Pacific Automotive Fin. Servs. Corp*., 993 F.2d 11, 15 (2d Cir. 1993), that "we are notably less deferential to the district court when that court has denied class status than when it has certified a class." The only case that *Lundquist* cited was *Robidoux* v. *Celani*, 987 F.2d 931, 935 (2d Cir. 1993), which said something quite different: "abuse of discretion can be found more readily on appeals from the denial of class status *than in other areas*, for the courts have built a body of case law with respect to class action status." (Emphasis added). The point is not that abuse of discretion is more readily found in *denials* of certification as compared with *grants*, but rather in certification decisions generally. This is confirmed by *Abrams* v. *Interco, Inc.*, 719 F.2d 23 (2d Cir. 1983), the sole case cited in *Robidoux*: "Abuse of discretion can be found far more readily on appeals from the denial *or grant* of class action status than where the issue is, for example, the curtailment of cross-examination or the grant or denial of a continuance." *Id.* at 28. (Emphasis added).

choosing between competing perspectives."); *Johnston* v. *HBO Film Mgmt*, 265 F.3d 178, 186-190 (3d Cir. 2001) (carefully evaluating record evidence to reject plaintiffs' class certification allegations). These courts have recognized that Rule 23's requirement of *findings* and the importance of class certification make it vital that robust procedural safeguards attend such decisions. See *Szabo* v. *Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001). This means that at the certification stage courts must engage in careful scrutiny to ensure – based on the facts as they actually are, not merely as plaintiffs want them to be – that the requirements of Rule 23 are satisfied. The "some showing" standard fails to do so.[2/]

Although Judge Scheindlin purported to derive that standard from *Caridad* v. *Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), she seriously misread that decision. In *Caridad*, the defendant argued that certification was inappropriate because the alleged employment discrimination had been caused by subjective employment practices. Although the Court rejected the argument that subjective practices cannot be challenged in a class action, that did not mean that certification was necessarily appropriate: "Of course, class certification would not be warranted

---

[2/] In light of the liberal venue provisions of the securities laws, the disparity between the district court's approach and that followed elsewhere invites forum shopping, bolstering the case for interlocutory review. See *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 340-41 (1980).

absent *some showing* that the challenged practice is causally related to a pattern of disparate treatment * * *." *Id*. at 292 (emphasis added).

As context makes clear, *Caridad* certainly did *not* hold that a plaintiff "is only required to make 'some showing.'" Op. 65. To the contrary, the Court held that a plaintiff *must* make some showing, *i.e.* must put forward actual evidence rather than bare allegations, that the prerequisites to class certification exist. *Caridad* thus stands only for the proposition that a plaintiff cannot satisfy the requirements of Rule 23 merely by *alleging* that they have been met. A ruling that "some" showing is *necessary* for class certification does not mean that *any* showing is therefore *sufficient*.[3/] The "some showing" standard was the district court's own invention, and a wrongheaded one at that. This Court should correct that error promptly.

B. It Is Particularly Inappropriate To Use The "Some Showing" Standard To Erect A Presumption Of Reliance Under *Basic*

Applying the "some showing" test, the district court held that plaintiffs were entitled to a presumption of reliance under *Basic* v. *Levinson*. Op. 105.[4/] "[B]ecause the presumption of reliance created by the doctrine is often essential to class

---

[3/] The district court's suggestion that this Court "reiterated" the "some showing" test in *Visa Check* is simply wrong. Op. 65. *Visa Check* does not so much as allude to *Caridad*'s "some showing" language.

[4/] The fraud-on-the-market doctrine, when applicable, holds that efficient securities markets incorporate all material information into the share price and that investors rely on the integrity of that price in deciding to invest. *Basic*, 485 U.S. at 241.

certification in securities suits," this Court has recognized that questionable applications of *Basic* are compelling candidates for review under 23(f). *Hevesi*, 366 F.3d at 77; see also *West*, 282 F.3d at 938. The fraud-on-the-market doctrine depends on the existence of an efficient market, for only such markets can be expected to reflect "all publicly available information, and, hence, any material misrepresentations." *Basic*, 485 U.S. at 246. The question of what showing of efficiency must be made at the certification stage is a recurring and important one, worthy of attention under Rule 23(f). The "some showing" test used in this case directly contradicts *Gariety* v. *Grant Thornton*.

There, the Fourth Circuit reversed a class certification decision that, like the decision here, relied on the plaintiffs' allegations and on very limited evidence that suggested the presence of an efficient market. 368 F.3d at 364 & n.*. The Fourth Circuit concluded that, in doing so, "the district court failed to comply adequately with the procedural requirements of Rule 23." *Id.* at 365. And, although the district court had pointed to the fact that the stock price had dropped in response to the revelation of the alleged fraud, "that single piece of information, standing alone, does not represent adequate evidence that the plaintiffs in this case purchased their shares * * * in an efficient market." *Id.* at 368. Instead, the court of appeals directed the

district court, after considering all evidence in the record and conducting a rigorous analysis, to make an actual *finding* of market efficiency. *Ibid.*

Judge Scheindlin expressly rejected the Fourth Circuit's analysis. Op. 63-65. Although she did so in supposed reliance on *Caridad*, as shown above, the question of what evidentiary standard a plaintiff must meet to establish the elements of Rule 23 (especially by means of the fraud-on-the-market presumption) remains an open one in this Circuit. See *Hevesi*, 366 F.3d at 79.[5/] That question is of profound importance to the law of class actions. It appears in nearly every securities fraud case. It is no exaggeration to say that literally billions of dollars may turn on its resolution. And here – in a massive case where the normal coercive effects of class certification are magnified – the district court answered the question in direct and admitted conflict with several other circuits. Rule 23(f) was made for cases like this.

C. The "Not Fatally Flawed" Test Led The District Court To Improperly Extend The Fraud-On-The-Market Doctrine

The district court further departed from any notion of rigorous analysis by refusing to give meaningful scrutiny to plaintiffs' expert's theory of a connection be-

---

[5/] Neither *Caridad* nor *Visa Check*, on which the district court relied, were securities fraud cases; in neither did certification turn on the use of a presumption of reliance. Thus, in granting the 23(f) petition in *Hevesi*, this Court cited neither case and observed that defendants had "offered a substantial legal argument in support of their position" that plaintiffs' allegations that the *Basic* presumption applies "must be thoroughly tested at the certification stage." 366 F.3d at 79.

tween the alleged fraud and the price of the securities. To prevail on their market manipulation claims, plaintiffs must show that the tie-in scheme, by which underwriters allegedly required IPO allocants to purchase shares in the aftermarket, artificially affected the prices of the securities and that plaintiffs relied on those prices. *In re IPO Litig.*, 241 F. Supp. 2d 281, 285 (S.D.N.Y. 2003). The fraud-on-the-market theory assists plaintiffs in making those showings. See *Basic*, 485 U.S. at 241-242.[6/] Application of that doctrine, however, depends on the existence of a causal connection between the allegedly fraudulent scheme and the price of the securities. See *West*, 282 F.3d at 938. Here, this requires evidence both that orchestrated purchases of the target stocks immediately after an IPO had an inflationary effect on share prices *and* that this effect persisted throughout the extremely long class periods. And, as the district court recognized, class certification is inappropriate unless plaintiffs provide a mechanism that explains that inflation – as well as its extremely slow dissipation – *on a classwide basis*. Op. 116-117.

In trying to do so, plaintiffs relied entirely on the report of one non-economist expert, Daniel Fischel. Rather than subjecting Fischel's novel and speculative theory

---

[6/] "Absent the fraud on the market theory, the parties injured by [market] manipulati[ion] schemes could not plead the necessary element of reliance." *Scone Investments, L.P.* v. *American Third Market Corp.*, 1998 WL 205338, at *5 (S.D.N.Y. April 28, 1998).

to any sort of serious analysis, however, the district court invoked its all-but-empty test that required plaintiffs merely to put forward a theory that was not "fatally flawed." Op. 124; see also Op. 66. On that basis, Judge Scheindlin refused even to consider the welter of evidence that Fischel's approach is incapable of providing a common mechanism for connecting the tie-in scheme with movements in the price of the securities that persisted across the class period. Op. 124-125.

This extreme deference misconceives the purposes of Rule 23, with serious consequences for defendants, for courts, and for the national economy. Indeed, it is flatly inconsistent with *Falcon* to certify a class without subjecting the claims made by plaintiffs' expert, which bear directly on the predominance finding required by Rule 23, to any sort of rigorous analysis. As the Seventh Circuit has recognized, such skittishness about scrutinizing expert evidence at the certification stage "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert." *West*, 282 F.3d at 938.

Such abdication has far-reaching effects. It encourages plaintiffs' lawyers to file weak class action claims, confident that the problems in their claims will not be exposed until a trial that is likely never to come. Giving plaintiffs a free pass at the certification stage while reserving the hard questions for trial simply ignores the reality that in modern class action litigation, certification is often the most important

event. See Bone & Evans, *supra*, 51 DUKE L.J. at1291-92 (studies show that only 9% of certified class actions went to trial). It is thus cold comfort to suggest, as the district court did here, that defendants will be able to attack the expert's analysis at trial (Op. 125), for the certification decision itself renders the chance of a trial remote.

The district court suggested (Op. 65-66) that the "not fatally flawed" standard is compelled by *Visa Check* and *Caridad*. This Court's more recent opinion in *Hevesi*, however, suggests otherwise. There, Judge Cote certified a class by extending the fraud-on-the-market doctrine to opinions by research analysts. Just as the court did here, Judge Cote "declined to wade into the battle of experts" as to whether a connection existed between the alleged fraud and the price of the securities. *Hevesi*, 366 F.3d at 78. She thus found it appropriate, for purposes of class certification, to apply the fraud-on-the-market doctrine based only on the theory advanced by plaintiffs' expert, without subjecting that theory to any serious testing. *Id*. at 79 n.5.

In granting review under Rule 23(f), this Court held that Judge Cote's approach raised serious questions worthy of immediate appellate attention. Without mentioning *Visa Check* or *Caridad*, the Court approvingly cited the Seventh Circuit's observation in *West*, 292 F.3d at 938, that "a district judge may not duck hard questions [at the certification stage] by observing that each side has some support." *Hevesi*, 366 F.3d

at 78.[7/] The Court then faulted the district court for applying "the fraud-on-the-market doctrine in a novel context without identifying a causal link between the statements at issue and the price of securities." *Id.* at 78-79. This is exactly what Judge Scheindlin has done. The mere fact that plaintiffs had an expert willing to attest to such a link was not enough in *Hevesi* and should not be enough here.

II. THERE IS NO BASIS FOR A CLASSWIDE PRESUMPTION OF RELIANCE WHERE THE ALLEGEDLY FRAUDULENT SCHEME WAS PUBLICLY REPORTED AND WIDELY KNOWN

The district court's problematic application of *Basic* was not limited to its deference to plaintiffs' minimal showing. The Court in *Basic* emphasized that the presumption that investors buy or sell stock "in reliance on the integrity of the market price" generally is "supported by common sense and probability." 485 U.S. at 246-

---

[7/] *Caridad* and *Visa Check* were both decided before the 2003 Amendments to Rule 23, which deleted the provision allowing for "conditional certification," a concept on which *Visa Check* relied. 280 F.3d at 150 (Jacobs, J., dissenting). Now, a "court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." FED. R. CIV. P. 23, advisory committee notes. This change reinforces the importance of *resolving* the issues necessary under Rule 23 at the certification stage, rather than deferring them until later. The same point is made by the Committee's recognition that "it is appropriate to conduct controlled discovery into the 'merits' limited to those aspects relevant to making the certification decision on an *informed basis*." *Ibid.* (emphasis added). The agnosticism suggested by the "not fatally flawed" standard is at odds with that mandate. Thus, even if *Caridad* and *Visa Check* required the standard followed by the district court here, those decisions should be reconsidered in light of the subsequent changes made to Rule 23. Cf. *Gariety*, 368 F.3d at 365 (under the 2003 Amendments, courts must look beyond plaintiffs' allegations in applying Rule 23).

247. "Application of the reliance presumption is not, however, automatic in all federal securities-fraud actions." *Gariety*, 368 F.3d at 364. Instead, it is appropriate only if the factual circumstances are such that it makes sense to believe that what is being presumed is likely true. This the plaintiff must prove. *Ibid*. An investor who knows about a scheme to inflate the price of a particular stock artificially, yet nonetheless buys that stock, cannot have relied on the integrity of the market price in making his investment and is entitled to no presumption of reliance. See *Basic*, 485 U.S. at 249.

In this case, as the district court recognized, the tie-in arrangements at the heart of plaintiffs' allegations of fraud were extensively reported in the media and were widely known throughout the financial community. Op. 42-45. They were the subject of an explicit SEC bulletin issued during the class period. See *In re IPO Secs. Litig.*, 241 F. Supp. 2d at 307. Indeed, plaintiffs themselves acknowledge that "it was common knowledge" that those who agreed to make purchases in the aftermarket were the ones who received allocations in IPOs. Op. 88. Against that backdrop, there is every reason to believe that many would-be plaintiffs were aware of the alleged tie-in schemes. Any such plaintiffs would be unable to prove reliance.

In the face of this evidence of knowledge, the district court nonetheless concluded that it was appropriate to *presume* that each and every class member had *no* knowledge – and thus relied on the integrity of the market price. On that basis, the

court shifted the burden to the defendants to rebut the presumption, thus relieving individual plaintiffs of any obligation to show that they somehow escaped learning what was so widely known. Op. 93 & n.300. That conclusion makes a hash of *Basic*; indeed, it misconceives the very concept of an evidentiary presumption. Precisely because presumptions shift the otherwise-applicable burden of proof, they must be deployed with careful consideration as to whether they are justified. Cf. *Tot* v. *United States*, 319 U.S. 463, 467-468 (1943) ("[A] statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.").

In the typical securities fraud case, there is no reason to suspect that the plaintiffs were aware that fraud was afoot. Common sense and probability thus support an assumption of classwide ignorance that puts the onus on defendants to identify, on an individual basis, the few investors who might have known the truth. Here, in contrast, the existence of prominent and widespread information *in the public domain* describing the alleged fraud is incompatible with a broad presumption of ignorance.

Moreover, the district court was wrong to suggest that the issue of knowledge is itself one that is common to the class. Op. 112-13. Contrary to Judge Scheindlin's unsupported assumption, the question is not what the class as a whole *should have*

known, but instead what and when each *individual* plaintiff *actually* knew about the alleged scheme. Without a classwide presumption, actual knowledge can be proven only on an investor-by-investor basis. And such a presumption can be erected only if common sense and probability suggest that its premises are accurate. That is not the case here.

Finally, the court's assertion that "differences among class members in terms of access to publicly available information (*e.g.*, whether certain investors actually saw all publicized materials, or whether they had access to sophisticated investment advice in interpreting the releases) are insufficient to defeat certification or rebut plaintiffs' presumed reliance" (Op. 114) is inexplicable. Indeed, this is precisely the kind of showing that the Court in *Basic* said *would* be sufficient to rebut a presumption of investor reliance. See 485 U.S. at 248-249.[8/]

CONCLUSION

Defendants' petitions for leave to appeal should be granted.

[8/] Indeed, even if the court was correct to afford plaintiffs a presumption of reliance, defendants are still entitled to rebut that presumption by proving knowledge on an investor-by-investor basis. Op. 93. Although the court recognized this, it failed to grapple with the consequences: a plethora of mini-trials, in which each plaintiff's knowledge is litigated individually. This will cause individual questions to predominate over common ones just as surely as they would if no presumption were erected in the first place, rending class adjudication unwieldy and improper. See *Zimmerman* v. *Bell*, 800 F.2d 386, 390 (4th Cir. 1986).

Respectfully submitted,

_____

Robin S. Conrad
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Gary A. Orseck
Roy T. Englert, Jr.
Brian M. Willen
ROBBINS, RUSSELL, ENGLERT,
ORSECK & UNTEREINER LLP
1801 K Street, N.W., Suite 411
Washington, DC 20006
(202) 775-4500

Attorneys for *Amicus Curiae*

October 26, 2004

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2004 I caused copies of the foregoing Brief of the Chamber of Commerce of the United States As *Amicus Curiae* in Support of the Petition for Leave to Appeal Pursuant to Federal Rule of Civil Procedure 23(f) to be served by First Class United States Mail, postage prepaid, on the following:

Ariana Tadler
Milberg, Weiss, Bershad & Schluman LLP
One Pennsylvania Plaza
New York, NY 10119

Stanley Bernstein
Bernstein, Liebhard & Lifshitz LLP
10 East 40th Street
New York, NY 10116

Gandolfo V. DiBlazi
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004

Jack C. Auspitz
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104

Timothy S. Bishop
Mayer, Brown, Rowe & Maw LLP
190 S. LaSalle Street
Chicago, IL 60603

_____

Gary A. Orseck