No. 04-

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TEACHERS' RETIREMENT SYSTEM
OF LOUISIANA, ET AL.,

Plaintiffs-Respondents,

v.

ACLN LTD., ET AL.,

Defendants,

BDO SEIDMAN, LLP,

Defendant-Applicant.

SUPPLEMENT TO APPLICATION OF BDO SEIDMAN, LLP, FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f), OR, IN THE ALTERNATIVE, PETITION FOR A WRIT OF MANDAMUS

From Orders Entered May 18, 2004 and June 3, 2004
by the United States District Court for the Southern District of New York,
Case No. 01-CV-11814 (MP)

BDO SEIDMAN, LLP
Barbara Taylor
330 Madison Avenue
New York, NY 10017

ROBBINS, RUSSELL, ENGLERT,
ORSECK & UNTEREINER LLP
Gary A. Orseck
Lawrence S. Robbins
Roy T. Englert, Jr.
Kathryn S. Zecca
Brian M. Willen
1801 K Street, NW, Suite 411
Washington, D.C. 20006
(202) 775-4500

June 7, 2004

Attorneys for BDO Seidman, LLP

On June 2, 2004, defendant-applicant BDO Seidman ("Seidman") filed an application under Rule 23(f) of the Federal Rules of Civil Procedure seeking review of the district court's May 18, 2004 order, which had, for the first time, allowed plaintiffs' claims against Seidman to proceed as a class action. Seidman also sought a stay from both this Court and the district court. The very next day, the district court entered an order that did not merely deny a stay, but retrospectively recharacterized the May 18 order as having not decided the crucial class certification question *at all*. See *Teachers' Retirement Sys. of Louisiana*, v. *ACLN Ltd.*, No. 01-CV-11814 (MP), Order (June 3, 2004) (attached hereto as Exhibit A). Instead, Judge Pollack announced that he would not address class certification until "that decision becomes ripe by an adverse verdict" against Seidman. *Ibid*. Seidman now files this supplement to its Rule 23(f) application to bring the June 3, 2004 Order to this Court's attention.

That order, which plainly violates Rule 23(c) in its attempt to postpone decision on class certification until after trial – see *Philip Morris Inc.* v. *Nat'l Asbestos Workers Med. Fund*, 214 F.3d 132 (2d Cir. 2000) – should not deter this Court from ruling on the significant legal question presented by Seidman's application. A district court cannot shield the critical class certification determination from the possibility of appellate scrutiny under Rule 23(f) by violating the command that certification decisions be made "[a]s soon as practicable after the commencement of an action brought as a class action." FED. R. CIV. P. 23(c)(1). If, however, the Court finds that Judge Pollack's June 3, 2004 Order *does* complicate review under Rule 23(f), Seidman asks this Court to issue a writ of mandamus to compel an immediate ruling on the class certification issue – a ruling that should be guided by the legal principles described in our June 2 application. Either way, the district court's latest order only underscores the need for an immediate stay of proceedings pending appellate resolution of these important issues.

BACKGROUND

The district court certified a class on November 13, 2002 – but that was before Seidman had been named as a defendant in the case. See Appendix to Seidman's 23(f) Application A67. In a motion filed in the district court on April 9, 2004, we pointed out that applying that certification order to Seidman would be an obvious violation of due process. See *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1086 (6th Cir. 1996) (holding that a class certification order could not be applied to defendant named three days *before* the order was entered). Seidman further asked the district court to determine that class certification is inappropriate in any event because plaintiffs' theory of "implied attribution" is incompatible with a presumption of market reliance under the "fraud-on-the-market" doctrine. Because reliance must be proved by each individual plaintiff, individual issues predominate over common ones as a matter of law.

On May 18, the district court denied Seidman's motion. In so doing, the court suggested that, even if the market had *not* attributed the allegedly false statements to Seidman, class certification still would be proper because "Seidman's attribution to those reports was raised in the earlier motion by Seidman to dismiss the complaint and failed." 5/18/2004 Order 3 (A3). Moreover, according to Judge Pollack, whether the market attributed the alleged misstatements to (and thus relied upon) Seidman is irrelevant to the class certification question, because reliance is just a *damages* issue to be sorted out at trial:

> Whether *class* members may attribute the improprieties charged to BDO Seidman because of its alleged participation in those reports is a question of damages as to BDO Seidman to be determined on trial of the issues relating to BDO Seidman.

5/18/2004 Order 3 (A3) (emphasis added). Because this was the first judicial order purporting to subject Seidman to the burdens of class action litigation, Seidman invoked Rule 23(f) and applied

to this Court for permission to appeal the district court's decision. Seidman also requested that this Court stay proceedings in the district court pending resolution of that appeal. Appl. 20 n.16. We made the same request of Judge Pollack directly. See BDO Seidman, LLP's Motion for a Stay Pending Appeal Pursuant to Rule 23(f) of the Federal Rules of Civil Procedure (June 1, 2004) (attached hereto as Exhibit B).

In an order dated June 3, 2004, however, the district court not only denied the motion for a stay, but suggested that this Court lacks jurisdiction under Rule 23(f) because the May 18 order actually had *not* decided the class certification question after all. According to Judge Pollack, "no decision was reached by the Court on BDO Seidman's motion whether the earlier Class Certification made on November 12, 2002 also applied to BDO Seidman." June 3, 2004 Order. The court did not stop there, however, but proceeded to announce that *no* certification decision would be forthcoming. Indeed, Judge Pollack made clear that he would not resolve whether Seidman is covered by the original class certification until *after* a full trial on the merits:

> That question will be reached on the damages phase as to BDO Seidman when and if that becomes ripe by an adverse verdict. The earlier certification for purposes of BDO Seidman will be ripe "as soon as practicable" under the late circumstances of this case. The question whether BDO Seidman should be treated as a Class Member Defendant or only as a defendant accountable to the individually named plaintiffs in the case – a question of damages.

Id. Judge Pollack's latest order plainly violates Rule 23(c)(1) and – if given effect – would undermine Rule 23(f) as well.

ARGUMENT

1. The central premise of the district court's June 3, 2004 order – that a decision on class certification can be postponed until after an adverse judgment is rendered against Seidman – is so clearly contrary to law that it need be given no weight by this Court in evaluating Seidman's Rule

23(f) application. Rule 23(c)(1) unambiguously requires district courts to "determine by order" whether a class certification is appropriate "[a]s soon as practicable after commencement of an action brought as a class action." As this Court has observed, this language was added precisely "to prevent prejudice to defendants that can arise when a determination of class certification is postponed until after trial." *Philip Morris*, 214 F.3d at 133 (citing FED. R. CIV. P. 23(c)(3) advisory committee's note); see also *Jimenez* v. *Weinberger*, 523 F.2d 689, 697 (7th Cir. 1975) ("[T]he text [of Rule 23(c)] certainly implies, even if it does not state expressly, that [a class certification] decision should be made in advance of the ruling on the merits."). Accordingly, this Court in *Philip Morris* held that

> it is "difficult to imagine cases in which it is appropriate to defer class certification until after a decision on the merits." *Bieneman* v. *Chicago*, 838 F.2d 962, 963 (7th Cir. 1988) (per curiam). In this case, in the face of repeated requests by the petitioner and with trial imminent, Rule 23(c) imposes on the district court *an immediate obligation* to decide the issue of class certification and thereby to abate the multi-billion dollar specter of a risk-free intervention decision by thousands of putative plaintiffs.

214 F.3d at 135 (emphasis added).[1]

In light of *Philip Morris*, Judge Pollack's newly announced non-decision is just as indefensible as was Judge Weinstein's in that case. Indeed, Judge Pollack provided absolutely no justification for putting off a decision on the class certification question. This is not surprising, for

[1] In so holding, the Court also relied on the Eighth Circuit's decision in *Paxton* v. *United Nat'l Bank*, 688 F.2d 552, 558 (1982), which concluded that it "is rarely appropriate for a court to delay the certification decision until after a trial on the merits." See also *ibid*. ("The subsequent decision to delay certification until after the trial was completed, notwithstanding the apparent acquiescence of the parties, is directly contrary to the command of [Rule 23(c)(1)] that the court determine whether a suit denominated a class action may be maintained as such '[a]s soon as practicable after the commencement of [the] action.'") (citation omitted).

there is simply no reason that the issue cannot be addressed now.[2] Indeed, the question whether the November 2002 Order can be applied to Seidman consistent with due process and with *Wright* v. *Ernst & Young LLP*, 152 F.3d 169 (2d Cir. 1998) – and it plainly cannot – will not become any more "ripe" (6/3/2004 Order) than it is now.

Nor can the district court avoid making a class certification decision in the prompt manner mandated by Rule 23(c) simply by labeling that question one "of damages" June 3, 2004 Order. Not only would that approach gut *Phillip Morris's* "timing requirement" (214 F.3d at135) in one fell swoop, but describing the certification issue as one of damages is particularly inappropriate in the circumstances of *this* case. For, as we showed in our application (at 17 & n.13), whether the claims against Seidman can properly proceed as a class action turns on an issue of *reliance*, which is of course an essential element of *liability* in a Section 10(b) action. See *Wright*, 152 F.3d at 175 (2d Cir. 1998) (citation omitted) ("Reliance only on representations made by others cannot itself form the basis of liability.").

Against this backdrop, we can only conclude – regretfully but inevitably – that the district court hopes to prevent this Court from accepting Seidman's application for permission to appeal and thereby to protect Judge Pollack's highly dubious certification ruling from appellate scrutiny. To accept such an approach would mean that a trial court could *always* insulate its class certification

---

[2] Indeed, not even *plaintiffs* dispute that it is improper to postpone deciding class certification until after trial. When Judge Pollack briefly floated this idea at the May 18, 2004 hearing, plaintiffs' counsel urged the court to "make clear that the class certification order does apply to the claims against BDO Seidman." 5/18/2004 Tr. 20-21 (A19); see also *id.* at 21-22 (A19) ("But we would urge the Court for that reason for limitations – to the extent there are other people out there relying on the class action, they might have to file individual cases if they wanted to do so. We wouldn't think that would be very efficient."). Fundamentally, plaintiffs' position is that Seidman's challenge to class certification came *too late*, whereas Judge Pollack deems it to be *too early*. This Court's intervention is plainly necessary.

rulings from appellate review until after final judgment – just the result that Rule 23(f) is designed to prevent. Indeed, a defendant in Seidman's present position, who understands that class certification will result as soon as an adverse judgment is entered, faces the very same settlement-inducing "risk of potentially ruinous liability" that ordinarily justifies interlocutory appellate review of certification decisions. Fed. R. Civ. P. 23(f) advisory committee's note; cf. *In re Visa Check/MaterMoney Antitrust Litig.*, 280 F.3d 124, 148 (2d Cir. 2001) (Jacobs, J., dissenting) (citation omitted) ("One sound basis for granting jurisdiction under Rule 23(f) is * * * the circumstance that the class certification places inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability.").

If a district court judge can deprive defendants of such review by the simple – albeit wrongful – device that Judge Pollack has now deployed, Rule 23(f) would be rendered a dead letter. And with the Rule would be jettisoned its important goal of ensuring 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 class-wide liability. *Rutstein* v. *Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1241 n.21 (11th Cir. 2000).[3] Accordingly, the district court's June 3 order actually provides *greater* reason for this Court to exercise its authority under Rule 23(f) and to decide the important class certification issue presented by Seidman's application. In so doing, this

[3] The first judge to use the term "blackmail" to describe such settlements was Judge Friendly. See HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973); see also *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, C.J.) ("Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'").

Court would make clear that a district court cannot block the appellate review contemplated by Rule 23(f) by taking action that Rule 23(c)(1) simply forbids.

2. Should the Court conclude otherwise, however, Seidman alternatively seeks a writ of mandamus to compel the district court to decide immediately whether a class is to be certified as to Seidman. Mandamus is appropriate in order to "forc[e] an inferior court to take an obligatory action" when "no other remedy adequately protects the petitioner's interest." *In re FCC*, 217 F.3d 125, 133 (2d Cir. 2000); see also *Richardson Greenshields Secs., Inc.* v. *Lau*, 825 F.2d 647, 652 (2d Cir. 1987) (mandamus available to compel a district court "to exercise its authority when it is its duty to do so"). The party seeking the writ must show that "its right to such relief is 'clear and indisputable.'" *In re IBM Corp.*, 45 F.3d 641, 643 (2d Cir. 1995) (quoting *Moses H. Cone Mem. Hosp.* v. *Mercury Construction Corp.*, 460 U.S. 1, 18 (1983)). By its terms, Judge Pollack's most recent order is a paradigm case of lawless inaction by an inferior court that can be corrected only through mandamus.

In light of this Court's decision in *Philip Morris*, the district court's stated refusal to rule on class certification until after an adverse jury verdict is clearly and indisputably contrary to law. As explained above, that case imposes an unambiguous "obligation" on the district court – in the absence of some kind of exceptional circumstance not present here (nor even hinted at by Judge Pollack) – to decide class certification well in advance of trial. 214 F.3d at 135. And, although the Court in *Philip Morris* ultimately denied defendant-petitioner's request for mandamus, it did so *only* because (1) the Second Circuit had "never before announced our understanding of the timing requirement in Rule 23(c)" and (2) there was no "record of a definitive ruling by the district court that it would under no circumstances decide class certification before trial." *Ibid*.

In this case, by contrast, Judge Pollack has issued a "definitive ruling" stating his intention not to decide class certification – and has done so in the face the *Philip Morris* decision itself. The only factors stopping the Court from granting mandamus in *Phillip Morris* thus plainly cut the opposite way here.[4] Accordingly, and because Seidman has no other way to protect its undisputed and important right under Rule 23(c)(1) to obtain a *pre-trial* class certification decision, mandamus is warranted to compel the district court to act. See *In re King World Productions*, 898 F.2d 56, 59 (6th Cir. 1990) (listing, as one factor making mandamus proper, that "the district court's order * * * manifests a persistent disregard of the federal rules").

That said, it would be needlessly inefficient for the Court simply to send this matter back to Judge Pollack for a prompt class certification decision whose result, according to Judge Pollack's approach to date, seems a foregone conclusion. Such a procedure would almost certainly result in a more explicit certification as to Seidman along the lines outlined in the district court's May 18, 2004 order, followed by a second Rule 23(f) application identical to the one Seidman has already filed. To avoid such a waste of time and resources, the Court (if it does grant mandamus) should simultaneously address plaintiffs' dubious arguments as to why class certification against Seidman is appropriate. That is, the Court should provide guidance to the district court as to "whether the 'fraud-on-the-market' doctrine of *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), entitles a plaintiff

---

[4] Moreover, having denied formal mandamus relief, the court of appeals in *Philip Morris* nevertheless went on both to express confidence that "the district court will promptly discharge its *obligation* to decide the issue of class certification" *and* to retain jurisdiction over any "appeals arising from class certification." 214 F.3d at 135-36 (emphasis added). Thus, although mandamus may not have issued, the Court made abundantly clear that it would not allow that case to proceed to trial with the class certification issue unresolved – and thus with the chance for interlocutory appeal under Rule 23(f) negated. Here, given that this Court has now clearly expressed its views on Rule 23(c)'s "timing requirement," that same result can and should be obtained through mandamus.

to class certification based upon a presumption of reliance on audit opinions that do not name the defendant and that could have been attributed to the defendant only through a convoluted series of inferences based on various pieces of inconclusive circumstantial information." Appl. 1. And, for the reasons set out in our original application (at 13-20), this Court should answer that question in the negative.

3. Finally, whichever path the Court chooses, it should certainly stay proceedings in the district court until the class certification issue is resolved. Judge Pollack's June 3 order makes clearer than ever that Seidman's situation is becoming more precarious by the day. Indeed, that order repeatedly emphasizes the proximity of a trial in this case, noting both "the advanced stage of the litigation" and – twice in the same paragraph – that the case is almost "ready for trial." June 3, 2004 Order. Accordingly, if a stay is not granted, the very right that Seidman is now seeking to vindicate – a right to a decision about class certification *in advance of trial* – could well be lost.[5] What's more, the district court's apparent effort to preclude appellate review of its certification decision, while simultaneously putting this case on a fast track to trial, seems calculated to amplify the pressure on Seidman to capitulate at the negotiating table. Preventing that kind of coercion is exactly why Rule 23(f) gives this Court the authority to stay proceedings in the district court pending resolution of an interlocutory appeal.

CONCLUSION

For these reasons, this Court should grant Seidman's application for leave to appeal under Rule 23(f). In the alternative, the Court should grant a writ of mandamus and order the district court

[5] It may be added that Judge Pollack's characterization of the case as "ready for trial" gives rather short shrift Seidman's right to seek summary judgment under Fed. R. Civ. P. 56.

to rule on whether Seidman is subject to class certification based on the legal principles described in Seidman's application.

Respectfully submitted,

_____

BDO SEIDMAN, LLP
Barbara Taylor
330 Madison Avenue
New York, NY 10017

ROBBINS, RUSSELL, ENGLERT,
ORSECK & UNTEREINER LLP
Gary A. Orseck
Lawrence S. Robbins
Roy T. Englert, Jr.
Kathryn S. Zecca
Brian M. Willen
1801 K Street, NW, Suite 411
Washington, D.C. 20006
(202) 775-4500

Attorneys for BDO Seidman, LLP

June 7, 2004

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2004, I caused true and correct copies of the foregoing to be served on the following:

By Federal Express:

Daniel L. Berger
Rochelle Feder Hansen
BERNSTEIN LITOWITZ BERGER & GROSSMAN LLP
1285 Avenue of the Americas
New York, New York 10019
Tel: (212) 554-1400
Fax: (212) 554-1444

Attorneys for Lead Plaintiff and Lead Counsel for the Class

Kevin W. Goering
Damion K.L. Stodola
COUDERT BROTHERS LLP
1114 Avenue of the Americas
New York, New York 10036

Attorneys for Defendant BDO International B.V.

The Honorable Milton Pollack
United States Courthouse
40 Centre Street, Room 2102
New York, NY 10007-1581

By First Class U.S. Mail:

Arthur N. Abbey
Joshua N. Rubin
ABBEY GARDY, LLP
212 East 39th Street
New York, New York 10016

Plaintiffs' Counsel, Executive Committee

Steven Schulman
Samuel H. Rudman
Pater Safirstein
MILBERG WEISS BERSHAD HYNES & LERACH LLP
One Pennsylvania Plaza, 49th Floor
New York, New York 10119-0165

Thomas A. Holman, Esq.
STARR & HOLMAN LLP
10 East 40th Street, 29th Floor
New York, New York 10016
Plaintiffs' Counsel, Executive Committee

Joseph Weiss
Jack Zwick
WEISS & YOURMAN
551 Fifth Avenue, Suite 1600
New York, New York 10176
Wendell Y. Tong

Kevin I. Yourman
WEISS & YOURMAN
10940 Wilshire Boulevard, 24th Floor
Los Angeles, CA 90024

Plaintiffs' Counsel, Executive Committee

John Cambria
SALANS
Rockefeller Center
620 Fifth Avenue
New York, New York 10020

Attorneys for Defendant BDO Minas Ioannou, Minas Ioannou, and Christakis Ioannou

Dated: Washington, DC
June 7, 2004

_____
GARY A. ORSECK