No. 07-1463

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE VIVENDI UNIVERSAL, S.A. SECURITIES LITIGATION

On Petition To Appeal From An Order Granting Class Certification
Entered On March 26, 2007, By The United States District Court
For The Southern District of New York, 02-CIV-5571,
Hon. Richard J. Holwell United States District Judge

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and 29 of the Federal Rules of Appellate Procedure, *amicus* states that The Chamber of Commerce of the United States of America has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

This case presents a question of fundamental and ever-increasing importance to the law governing class actions: whether, and under what circumstances, a court may certify a class involving foreign claimants in the face of uncertainty about whether the resulting judgment would be given res judicata effect in the claimants' home countries. This Court has addressed this issue only once, with a glancing reference in a 32-year-old opinion by Judge Friendly. Since then, district courts in this Circuit have divided over how the possibility of foreign non-recognition should bear on class certification. As overseas investors are seeking to participate in American class actions with unprecedented frequency, the time has come for this Court to use its authority under Rule 23(f) to resolve this "unsettled question of law."[1] Prompt appellate review is particularly warranted because the overly lax standard adopted by the district court "would extend the potentially coercive effect of securities class actions"[2]—thereby depriving defendants of vital procedural protections and exacerbating friction between the United States and foreign nations. As the world's largest business federation, whose members are often the targets of class action litigation, the Chamber of Commerce of the United States of America has an acute interest in averting these baleful consequences. That interest occasions this *amicus* brief, which is filed pursuant to Fed. R. App. P. 29(b).

[1] Fed. R. Civ. P. 23(f) advisory committee's notes.

[2] *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004).

I. WHETHER FOREIGN PLAINTIFFS CAN BE INCLUDED IN A CLASS DESPITE UNCERTAINTY ABOUT RES JUDICATA IS AN ISSUE OF SURPASSING IMPORTANCE.

This is the era of global securities litigation. "More and more, overseas investors are seeking redress in United States courts in federal securities class actions."[3] In 2004 and 2005 alone, 48 foreign companies were sued in securities class actions in the United States; many of these cases, like the present one, involve foreign plaintiffs who purchased securities on foreign markets.[4] And foreign investors moved for lead-plaintiff status in at least 40 U.S. securities fraud class actions between 2002 and 2005.[5] The plaintiffs' bar is doing its utmost to encourage this trend, particularly in Europe, where American lawyers are actively working to recruit investors to participate in class actions in the United States.[6] In part this is because "American securities fraud laws are perhaps the most plaintiff-friendly in the world."[7] There are obvious procedural advantages as well: liberal discovery rules; lawyers working on contingency; the absence of a "loser-pays"

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[3] Stuart M. Grant & Diane Zilka, *The Role of Foreign Investors in Federal Securities Class Actions*, 1442 P.L.I. 91, 94 (2004).

[4] Andrew Longstreth, *Coming to America: When Can Foreign Investors Who Brought Shares of Foreign Companies on Foreign Exchanges Sue in the U.S.?* AMERICAN LAWYER, Vol. 28, No. 11 (Nov. 2006).

[5] Stephanie Schwartz-Driver, *What Do Funds Have to Lose?* INVESTMENT & PENSIONS EUROPE Jan. 2006.

[6] *See* Mary Jacoby, *For the Tort Bar, A New Client Base: European Investors*, WALL ST. J., Sept. 2, 2005, at A1; Longstreth, *supra*; Schwartz-Driver, *supra*.

[7] Joshua G. Urquhart, *Transnational Securities Fraud Regulation: Problems and Solutions*, 1 CHI. J. INT'L L. 471, 473 (2000).

cost-shifting regime; the right to a jury trial.[8] Most relevant here, however, is the availability of the class action, a device that simply does not exist—at least in its American form—in much of the rest of the world. Indeed, "most other countries view American class actions as a Pandora's box that they want to avoid opening."[9]

This distrust of American-style class actions is neither parochial nor ill-considered, but rather is a deliberate policy choice.[10] The prevailing view among European legal experts, for instance, is that "U.S.-style class action litigation" is wasteful, unfair, and fosters an undesirable "litigation-driven society"; accordingly, "Europe neither needs nor wishes to import" this model.[11] Representative adjudication—particularly the "opt-out" class actions permitted by Rule 23(b)(3)—is also at odds with the individualized litigation model that continues to prevail in much of Europe and elsewhere. These countries "believe that the opt-out procedure is a violation of the rights of absent class members."[12] European

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[8] *See* Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire*, 15 J. TRANSNAT'L L. & POL'Y 281, 285, 303 (2006).

[9] Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 403 (2002).

[10] *See* Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements*, 10 TUL. J. INT'L & COMP. L. 5, 9 (2002).

[11] Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP. & INT'L L. 321, 343, 347 (2001).

[12] Ilana T. Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563, 1580 (2005). *See also*

scholars have also criticized opt-out class actions on the ground that they provide plaintiffs' lawyers with "too much leverage that may encourage large corporate defendants to settle 'speculative claims' in the form of 'legal blackmail.'"[13] This unease is both reflected and expressed in the reluctance of many foreign courts to give res judicata effect to American class action judgments.[14] In particular, the "idea that courts can bind a claimant to a legal judgment based upon inaction, particularly when the claimant received notice of the action only through constructive means, is difficult for foreign courts to accept."[15]

It is thus unsurprising that the question whether foreign claimants may be included in a class action even if they may not be bound by an adverse decision has arisen with increased frequency and importance. The growing globalization of securities litigation makes it necessary to have a clear rule for determining when a class may be certified in the face of uncertainty about whether the resulting judgment would be recognized abroad. The only guidance this Court has provided,

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Dreyfuss, *supra*, 10 TUL. J. INT'L & COMP. L. at 9 (European view is that American class actions "elude the fundamental concepts that characterize the formally defined structure of traditional civil litigation," *i.e.*, "individualized litigation").

[13] Grace, *supra*, 15 J. TRANSNAT'L L. & POL'Y at 289.

[14] Because the United States is not party to any relevant treaty requiring foreign states to enforce American judgments, foreign courts often refuse to do so on "public policy" grounds. *See* Buschkin, *supra*, 90 CORNELL L. REV. at 1577-79. *See generally* Russell J. Weintraub, *How Substantial is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?* 24 BROOK. J. INT'L L. 167, 168 (1998).

[15] Buschkin, *supra*, 90 CORNELL L. REV. at 1580.

in the *Bersch* case three decades ago, did not purport to establish a precise or comprehensive standard.[16] The absence of a clear rule has spawned confusion and divergent rulings in the district courts. Given this Circuit's location at the center of the international securities markets and its position as the preeminent forum for large-scale securities litigation, this is undoubtedly a "legal question about which there is a compelling need for immediate resolution" under Rule 23(f).[17]

II. A CLASS INVOLVING FOREIGN PLAINTIFFS MAY NOT BE CERTIFIED IF THERE IS ANY REALISTIC POSSIBILITY THAT THE JUDGMENT WOULD NOT BIND ALL CLASS MEMBERS.

The district court here held that certification is permissible so long as "plaintiffs are able to establish a *probability* that a foreign court will recognize the res judicata effect of a U.S. class action judgment."[18] That standard is inadequate to safeguard the vitally important interests at stake when classes involving foreign claimants are certified. Instead, the appropriate standard should preclude certification under Rule 23(b)(3) when the court finds that there is ***any significant possibility*** that a judgment involving foreign class members would not be treated

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[16] *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975). Because the affidavits submitted in *Bersch* clearly established that the judgment would not bind the foreign plaintiffs, the Court was able to dispose of the issue merely by observing that "while an American court need not abstain from entering judgment simply because of a possibility that a foreign court may not recognize or enforce it, the case stands differently when this is a near certainty." *Id*. at 996.

[17] *Hevesi*, 366 F.3d at 76.

[18] *In re Vivendi Universal, S.A. Securities Litig.*, 2007 WL861147, at *18 (S.D.N.Y. Mar. 22, 2007) (Order at 37) (emphasis added).

as binding in those members' home countries. In other words, certification may be granted *only* where there is no realistic chance that the class judgments would fail to bind the entire class. This rigorous standard is required for a number of reasons, but here we focus on two: (1) the foundational importance to class action litigation of res judicata, a principle that ultimately implicates the requirements of due process; and (2) the need for U.S. courts to respect their foreign counterparts and avoid unnecessary international disharmony.

First, although class certification presents defendants with a number of serious risks,[19] it carries with it one crucial benefit: "class certification 'provides a single proceeding in which to determine the merits of the plaintiffs' claims, and therefore protects *the defendant* from inconsistent adjudications.'"[20] The "consistency," "finality," and "repose" that class certification promises defendants "derives from the fact that the class action is binding on all class members."[21] Indeed, Rule 23 was crafted precisely to ensure that this was so. Recognizing that "it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one," the

[19] These risks are well documented. *See, e.g., Hevesi*, 366 F.3d at 80-81; *In re Rhone-Poulenc Rorer Inc*., 51 F.3d 1293, 1298 (7th Cir. 1995).

[20] *Gunnells v. Healthplan Servs., Inc*., 348 F.3d 417, 427 (4th Cir. 2003) (quoting 5 MOORE'S FEDERAL PRACTICE § 23.02 (3d ed. 1999)).

[21] *Id*. *See also* NEWBERG ON CLASS ACTIONS § 5:38 (4th ed. 2006) (the "objective" of "a unitary adjudication" is achieved because "the final judgment, whether favorable or adverse to the class, will be binding on the entire class"); *In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 310 (3d Cir. 2005).

advisory committee amended the rule in 1966 "to assure that members of the class * * * would be bound by all subsequent orders and judgments."[22]

As the Supreme Court has recognized, therefore, a defendant "would be obviously and immediately injured if [a] class-action judgment against it became final without binding the plaintiff class."[23] Such injury results not only where the court lacks personal jurisdiction over the class members (as alleged in *Shutts*), but also where the jurisdictions in which certain class members reside may refuse to recognize the judgment. In both scenarios, the defendant "could be subject to numerous later individual suits by these class members," and thus faces all of the considerable burdens of class litigation, without any of the corresponding benefits.[24] A rule that allows a class to be certified despite significant uncertainty about whether the resulting judgment will bind the entire class simply fails to respect the basic bargain that justifies class actions in the first place.

Such a lax standard also gives an undeserved windfall to foreign claimants. Freed from the effects of res judicata, foreign class members would enjoy the fruits of victory, but would not feel the sting of defeat. This "heads I win, tails you lose" approach turns the class certification process on its head. As this Court has recognized, "if defendants prevail against a class they are *entitled* to a victory no

[22] *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974).
[23] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985).
[24] *Id*.

less broad than a defeat would have been."[25] The objective of a class action is to *resolve* large number of claims in a single proceeding; it is not to give foreign claimants a free and non-binding shot at extracting money from a defendant.

Indeed, so deeply rooted is res judicata that jettisoning this basic protection for class action defendants would raise serious due process problems.[26] At common law, res judicata was "a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts."[27] Over a century ago, the Court described the "maxim" in civil cases that "no man shall be twice vexed for one and the same cause,"[28] observing that there are "no maxims of the law more firmly established, or of more value in the administration of justice."[29] Thus it is that an owner of property "is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment."[30] Due process similarly protects

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[25] *Bersch*, 519 F.2d at 996 (emphasis added).

[26] *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("[A]brogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause.").

[27] *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (quoting *Hart Steel Co. v. R.R. Supply Co*., 244 U.S. 294, 299 (1917)). *See also Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931).

[28] *Ex parte Lange*, 85 U.S. 163, 168 (1873).

[29] *United States v. Throckmorton*, 98 U.S. 61, 65 (1878).

[30] *W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961).

defendants from being "vexed" by a suit that fails to provide sufficient guarantees that victory will provide finality and repose.[31] To subject a defendant to class litigation without clear assurances that any judgment rendered will be a "good bar to an action"[32] impermissibly abandons these established principles and is inconsistent with both Rule 23 and the Due Process Clause.

Second, allowing U.S. courts to certify classes involving claimants whose home countries may decline to enforce the judgment exacerbates the tensions that already exist as a result of the broad extraterritorial application of American law.[33] In refusing to give preclusive effect to U.S. class action judgments, foreign courts see themselves as protecting the interests of their own citizens, who may not even have known that they were party to the litigation. At the same time, those courts are resisting American efforts to export this controversial procedural device to a legal system that has consistently and studiously eschewed it.[34]

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[31] S*ee* Janet Walker, *Crossborder Class Actions: A View From Across the Border*, 2004 MICH. ST. L. REV. 755, 763.

[32] *Lange*, 85 U.S. at 168-69.

[33] *E.g.*, Russell Du Puy, *International Cooperation in Securities Enforcement*, 46 WASH. & LEE L. REV. 713, 720 (1989) ("Many foreign states view any effort to apply United States laws beyond United States borders as a violation of the foreign state's sovereignty and as an improper effort to export American economic, social, and judicial values."); Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 NW. U.L. REV. 523, 523-24 (1993) (applying U.S. securities laws abroad "has offended the sovereignty of other countries which have reacted by passing retaliatory legislation of their own").

[34] *See* Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41, 74 (2003).

When an American court fails to heed these concerns, therefore, it puts its foreign counterparts in an awkward dilemma. If the foreign court recognizes a judgment against the class, it would undermine principles fundamental to its own legal system and jeopardize the rights of its citizens to their day in court. If the foreign court refuses to recognize the judgment, however, its decision would unfairly expose the prevailing defendant to repeated litigation and strip away the benefits that are supposed to result from class adjudication. Foreign courts thus would be forced to choose between *taking offense* at being asked to sacrifice established procedural protections for their nationals and *giving offense* by rejecting the validity of a judgment duly entered by an American court. Either way, certifying a class in the face of significant uncertainty about whether the judgment will be given preclusive effect abroad ensures unfairness and contributes to international discord. Principles of comity—the "spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states"[35]—demand greater consideration and respect. The surest way to prevent these problems is to make clear that Rule 23 forbids a class with foreign claimants from being certified when there is any significant possibility that the judgment would not be fully recognized abroad.

[35] *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987).

Dated: April 17, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2007, 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:

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