16-1912

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH WAGGONER, MOHIT SAHNI, BARBARA STROUGO,
individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

– v. –

BARCLAYS PLC, ROBERT DIAMOND ANTONY JENKINS,
BARCLAYS CAPITAL INC., WILLIAM WHITE,
Defendants-Appellants,
CHRISTOPHER LUCAS, TUSHAR MORZARIA,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *amicus* states as follows:

The Chamber of Commerce of the United States of America has no parent company. No publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber thus regularly files *amicus curiae* briefs in cases raising issues of concern to the Nation's business community, including in securities cases.

The Chamber has a strong interest in this important case. Many of the Chamber's members are companies subject to U.S. securities laws who are adversely affected by the district court's decision relieving Plaintiffs of their burden to provide direct evidence of market efficiency before receiving the *Basic* presumption of reliance. Those members (and those who are exposed to other types of class action litigation) are likewise adversely affected by

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[1] Pursuant to Fed. R. App. P. 29(c), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief.

the district court's decision expanding the availability of the *Affiliated Ute* presumption of reliance. In addition, the Chamber has long been concerned about the costs that class-action lawsuits—including, in particular, securities class actions—impose on the American economy. To that end, the Chamber regularly files *amicus curiae* briefs in various class action appeals, including in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) ("*Halliburton II*").

SUMMARY OF ARGUMENT

Time and again, the Supreme Court and this Court have stressed that "Rule 23 does not set forth a mere pleading standard," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), and so a district court must perform "rigorous analysis" to ensure it "receive[s] enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met," *In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d 24, 37, 41 (2d Cir. 2006). The district court below failed to follow these instructions in at least two critical respects.

First, the district court applied a presumption of reliance under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), even though Plaintiffs failed to present direct evidence of a cause-and-effect relationship between unexpected news and the market price of Barclays ADS. Such a relationship is the essence of the "efficient market" required under *Basic*. By instead relying on "indirect evidence" of market efficiency, the district court eviscerated the foundation of the fraud-on-the-market theory underlying the *Basic* presumption. Moreover, the district court improperly relieved Plaintiffs of their burden of persuasion under *Halliburton II* once Defendants rebutted the presumption. *Halliburton II* is quite clear that Defendants must have a full opportunity to rebut evidence of price impact at the class-certification stage, but the district court gave short shrift to the Defendants' evidence on this point. Because the presumption relieves plaintiffs of the burden they otherwise carry to show reliance on allegedly misleading information, this Court should be particularly vigilant to prevent the kind of shortcut taken below.

Second, the district court improperly applied the presumption of reliance under *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972). The *Affiliated Ute* presumption is a narrow and highly circumscribed exception to the fundamental requirement that plaintiffs must plead reliance and causation in order to state a securities fraud claim. *Affiliated Ute* allows the trier of fact to presume reliance where the defendant fails to disclose material information only when (1) the lack of positive statements from the defendant would make reliance as a practical matter impossible to prove, and (2) the defendant owed an affirmative duty of disclosure to the plaintiff based on the relationship between the parties. Because neither element was present here, the district court improperly applied the *Affiliated Ute* presumption.

These errors are not foot faults. They are fundamental departures from precedent. If left uncorrected, these errors would effectively eliminate the reliance element of Rule 23 and make class certification a near certainty in every securities class action involving a large, listed issuer. The business community already faces enormous challenges from dubious class-action litigation, in the securities context and elsewhere. Upholding the district court's decision would embolden plaintiffs to bring even more questionable claims that are disconnected from real culpability and allow them to extort settlements using the threat of massive class-wide damages. The district court's decision should be reversed or vacated.

ARGUMENT

I. The District Court Improperly Applied the *Basic* Presumption of Reliance.

A. Plaintiffs Bear the Burden of Proving Every Element of the Rule 23 Analysis, Including Predominance.

As the Supreme Court has cautioned, the class action remains "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 133 S. Ct.

1426, 1432 (2013). Certification of a class is appropriate only when "questions of law or fact common to class members predominate over any questions affecting only individual members" and when class litigation "is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Importantly, "Rule 23 does not set forth a mere pleading standard," and a party seeking class certification "must affirmatively demonstrate [its] compliance with the Rule—that is, [it] must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 564 U.S. at 350 (emphasis in original). The plaintiffs carry the burden of proof with respect to every Rule 23 requirement, and a district court abuses its discretion when it fails to conduct the "rigorous analysis" that Rule 23 requires. *Comcast Corp.*, 133 S. Ct. at 1432.

This burden of proof is no different for the "predominance" requirement under Rule 23(b)(3). The predominance inquiry is not satisfied unless "a proposed class is 'sufficiently cohesive to warrant adjudication by representation.'" *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1196 (2013) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). Class-wide issues predominate only when legal or factual questions can be resolved "through generalized proof" and are "more substantial than the issues subject only to individualized proof." *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 118 (2d Cir. 2013). "The requirement's purpose is to ensure that the class will be certified only when it would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010) (citation and alteration omitted).

B. To Receive the *Basic* Presumption of Reliance, Plaintiffs Must Present Direct Evidence of Market Efficiency at the Class Certification Stage.

Before certifying a class, plaintiffs must prove that "questions of law or fact common to class members predominate" in their underlying cause of action—in this case, under Section 10(b) of the Exchange Act and Rule 10b-5. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011) ("*Halliburton I*"). Section 10(b) and Rule 10b-5 "prohibit making any material misstatement or omission in connection with the purchase or sale of any security." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) ("*Halliburton II*"). To recover damages for violations of these provisions, plaintiffs must prove "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Id*.

The reliance element is a critical component of this cause of action because it "ensures that there is a proper connection between a defendant's misrepresentation and a plaintiff's injury." *Amgen*, 133 S. Ct. at 1192 (citation omitted). "The traditional (and most direct) way for a plaintiff to demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction—*e.g.*, purchasing common stock—based on that specific misrepresentation." *Halliburton I*, 563 U.S. at 809.

In *Basic Inc. v. Levinson*, however, the Supreme Court held that "securities fraud plaintiffs can in certain circumstances satisfy the reliance element of a Rule 10b-5 action by invoking a rebuttable presumption of reliance, rather than proving direct reliance on a misrepresentation." *Halliburton II*, 134 S. Ct. at 2408 (citing *Basic*, 485 U.S. at 246-47). The Court based that presumption on what is known as the "fraud-on-the-market" theory, which holds that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Basic*, 485 U.S. at 246.

The *Basic* presumption is premised on "price impact"—*i.e.*, "whether the alleged misrepresentations affected the market price in the first place." *Halliburton I*, 563 U.S. at 814. "In the absence of price impact, *Basic*'s fraud-on-the-market theory and presumption of reliance collapse." *Halliburton II*, 134 S. Ct. at 2414. "The fundamental premise underlying the presumption is that an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction." *Id*. (citation omitted). "If it was not, then there is no grounding for any contention that the investor indirectly relied on that misrepresentation through his reliance on the integrity of the market price." *Id*. (citation omitted).

For the *Basic* presumption to apply, plaintiffs must show: "(1) that the alleged misrepresentations were publicly known, (2) that they were material, (3) that the stock traded in an efficient market, and (4) that the plaintiff traded the stock between the time the misrepresentations were made and when the truth was revealed." *Halliburton II*, 134 S. Ct. at 2408. To prove market efficiency, "the most important" factor to consider is *direct* evidence of cause and effect—*i.e.*, a causal relationship between unexpected news and the market price. *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 207 (2d Cir. 2008). "[I]n an efficient market, all publicly available information is rapidly incorporated into, and thus transmitted to investors through, the market price." *Amgen*, 133 S. Ct. at 1195. As a result, "[e]vidence that unexpected corporate events or financial releases cause an immediate response in the price of a security" is "the essence of an efficient market and the foundation for the fraud on the market theory." *Teamsters Local 445 Freight Div. Pension Fund*, 546 F.3d at 207. "Without the demonstration of such a causal relationship, it is difficult to presume that the market will integrate the release of material information about a security into its price." *Id*.

C. The District Court Improperly Granted the *Basic* Presumption of Reliance Without Any Direct Evidence of Market Efficiency.

The district court erred in granting class certification without any direct evidence that Barclays' securities were traded in an efficient market. The court mistakenly concluded that Plaintiffs were entitled to the *Basic* presumption of reliance even though they never "demonstrat[ed] efficiency through a direct test, such as an event study." *Strougo v. Barclays PLC*, 312 F.R.D. 307, 322-23 (S.D.N.Y. 2016). Instead, the court concluded that "indirect evidence of market efficiency—including that a stock trades in high volumes on a large national market and is followed by a large number of analysts" was "sufficient to satisfy the *Basic* presumption on class certification." *Id*. at 322. Finding that Plaintiffs had "established market efficiency indirectly," the court declined to "consider whether they have also satisfied *Cammer* 5 by proof of an event study." *Id*. at 323.

The court's exclusive reliance on indirect evidence was error. Direct evidence of causality is necessary to determine whether a security is traded in an efficient market. This determination about market efficiency does not turn on a simple tally of the *Cammer* factors. *See Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989). Rather, as this Court has explained, whether "unexpected corporate events or financial releases cause an immediate response in the price of a security" is "the *most important*" factor and "the essence of an efficient market and the foundation for the fraud on the market theory." *Teamsters Local 445 Freight Div. Pension Fund*, 546 F.3d at 207 (emphasis added and citations omitted).

"Without the demonstration of such a causal relationship, it is difficult to presume that the market will integrate the release of material information about a security into its price." *Teamsters Local 445 Freight Div. Pension Fund*, 546 F.3d at 207; *see also In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 512 (1st Cir. 2005) (Without "a historical cause-and-effect relationship between company disclosures and an immediate response in stock price … there is little assurance that information is being absorbed into the market and reflected in its price."). An empirical study is essential for evaluating market efficiency. *See* Defendants-Appellants Br. 42-45 ("Barclays Br."). The court's "indirect" factors were mere "indicators" of efficiency and insufficient standing alone to prove market efficiency. *See id.*; *see, e.g.*, *In re HealthSouth Corp. Sec. Litig.*, 261 F.R.D. 616, 633 (N.D. Ala. 2009).

Adopting the district court's reasoning would eviscerate the reliance element in class action lawsuits. If "indirect evidence" were sufficient to find market efficiency, which then established reliance, then most, if not all, large companies would be potentially liable for any statement regardless whether investors actually relied on it. This would have the effect of making the securities laws into an insurance policy. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347-48 (2005) ("Such a rule would tend to transform a private securities action into a partial downside insurance policy."). Indeed, almost all large companies satisfy these "indirect" factors, which include commonplace features such as heavy trading volume, analyst coverage, and market capitalization. Conversely, investors in smaller issuers or bond offerings would rarely benefit from the presumption. But the Supreme Court has never indicated that size can serve as a proxy for the existence of an efficient market. Indeed, such a presumption would conflict with the empirical evidence, which shows that securities of large companies trading on major exchanges often do trade inefficiently. *See* Barclays Br. 44.

D. The District Court Improperly Relieved Plaintiffs of Their Burden of Persuasion Once the Presumption Was Rebutted.

Even if Plaintiffs had met their burden under *Basic*, however, the district court again erred by relieving Plaintiffs of their burden of persuasion once Defendants rebutted the presumption. In *Halliburton II*, the Supreme Court made clear that market efficiency—even if shown—does not establish an irrebuttable presumption of price impact, and that, at the class certification stage, the defendant must be afforded an opportunity to rebut the plaintiffs' "indirect way of showing price impact" (*i.e.*, via the fraud-on-the-market presumption) by providing "direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price." 134 S. Ct. at 2415-16. The burden then shifts back to plaintiffs to prove price impact, which is "an essential precondition for any Rule 10b-5 class action." *Id*. at 2416.

Here, Defendants came forward with undisputed evidence that the only alleged misstatements remaining in the case did not cause any statistically significant price increase. *See* Barclays Br. 36-41. The district court brushed this evidence aside and instead relied on Plaintiffs' mere allegations that the supposed misrepresentations "maintained" inflation in the stock price because the court believed Defendants bore the ultimate burden to prove lack of price impact. 312 F.R.D. at 325-26. But, under Federal Rule of Evidence ("FRE") 301—which governs the effects of the fraud-on-the-market presumption, *see Basic*, 485 U.S. at 245 (citing FRE 301)—when a defendant produces evidence which, "when viewed in the light most favorable to [defendant], would permit a reasonable jury to infer" that the presumption is incorrect, the presumption is rebutted and "ceases to operate." *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 148-49 (2d Cir. 2007). The burden then shifts back to the plaintiff to prove the fact without benefit of the presumption. *Id*.

By ruling that Defendants' evidence was insufficient to rebut the *Basic* presumption and shift the burden to Plaintiffs, the district court adopted a test that would permit plaintiffs in every case to satisfy the predominance requirement simply by pleading market efficiency and without sustaining their burden to prove price impact. This test effectively creates an irrebuttable presumption contrary to *Halliburton II* and FRE 301.

* * *

In the end, both of these errors are fatal. The district court relieved Plaintiffs of their obligation "to *prove*" a cause-and-effect relationship between a company's material disclosures and its stock price. *Dukes*, 564

U.S. at 350. The district court needed to employ "rigorous analysis" in its review of the evidence, *Comcast Corp*., 133 S. Ct. at 1432, but the court's emphasis on "indirect evidence" fell far short of this requirement, setting a dangerous precedent for class action litigation. *See infra* at 18-21.

II. The District Court Improperly Applied the *Affiliated Ute* Presumption of Reliance.

"The traditional (and most direct) way for a plaintiff to demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction based on that specific misrepresentation." *Amgen*, 133 S. Ct. at 1192. In *Affiliated Ute*, however, the Supreme Court recognized a narrow exception to this requirement. Under this exception, "an omission of a material fact by a defendant with a duty to disclose establishes a rebuttable presumption of reliance upon the omission by investors to whom the duty was owed." *Levitt v. J.P. Morgan Secs., Inc.*, 710 F.3d 454, 465 (2d Cir. 2013) (citing *Affiliated Ute*, 406 U.S. at 153-54). The logic of *Affiliated Ute* is that plaintiffs alleging material omissions by a defendant would face "an unrealistic evidentiary burden" if they were required "to show a speculative state of facts, *i.e.*, how [they] would have behaved if omitted material information had been disclosed." *Joseph v. Wiles*, 223 F.3d 1155, 1162 (2d Cir. 2000); *see also Titan Grp., Inc. v. Faggen*, 513 F.2d 234, 238 (2d Cir. 1975) (same). Consequently, the *Affiliated Ute* presumption allows a trier of fact to "presume reliance where the defendant fails to disclose material information." *Joseph*, 223 F.3d at 1162.

Because the rationale for the presumption is "the difficulty of proving a speculative negative—that the plaintiff relied on what was not said," *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999), the presumption is applied only where "no positive statements exist" and "reliance as a practical matter is impossible to prove," *Wilson v. Comtech Telecomm. Corp.*, 648 F.2d 88, 93 (2d Cir. 1981). Moreover, courts vigilantly guard against any attempts to use "an artfully-pleaded complaint [to] recharacterize as an omission conduct which more closely resembles a misrepresentation." *Joseph*, 223 F.3d at 1162. Indeed, "[a]ny fraudulent scheme requires some degree of concealment, both of the truth and of the scheme itself," *id.* at 1163, and so "an affirmative misstatement can be cast as an omission and vice versa," *Goodman v. Genworth Fin. Wealth Mgmt., Inc.*, 300 F.R.D. 90, 104 (E.D.N.Y. 2014). To blur the line between misrepresentations and omissions would "permit the *Affiliated Ute* presumption to swallow the reliance requirement almost completely," *Joseph*, 223 F.3d at 1163, as every "misrepresentation claim could be reframed as an omission claim merely by alleging that a defendant 'did nothing to dispel' its own misrepresentation," *In re Barclays Liquidity Cross & High Frequency Trading Litig.*, 126 F. Supp. 3d 342, 366 (S.D.N.Y. 2015).

That is precisely what the district court did here. As Defendants extensively document, Plaintiffs' claims have always been premised upon affirmative misstatements—not omissions. *See* Barclays Br. 45-51. Indeed, Plaintiffs do not allege any independent omissions—*i.e.*, omissions that are not simply the failure to "disclose that their affirmative misrepresentations were false." *In re Interbank Funding Corp. Sec. Litig.*, 629 F.3d 213, 220 (D.C. Cir. 2010); *see* Barclays Br. 45-51.

Nor did Plaintiffs prove that Defendants had any "duty to disclose" the allegedly omitted information. "[F]or an omission to be considered actionable under § 10(b), the defendant must be subject to an underlying duty to disclose." *Levitt*, 710 F.3d at 465. Plaintiffs argue that Defendants failed to disclose that their allegedly unethical, illegal behavior was harming their clients. *See* Barclays Br. 49. Even assuming the truth of these allegations, they cannot support the *Affiliated Ute* presumption because "companies do not have a duty to disclose uncharged, unadjudicated wrongdoing." *City of Pontia Policemen's and Firemen's Retirement Sys. v. UBS AG*, 752 F.3d 173, 184 (2d Cir. 2014).

The district court recognized as much, *see* 312 F.R.D. at 319, but nevertheless found the *Affiliated Ute* presumption appropriate because "'a duty to disclose uncharged criminal conduct does arise if it is necessary to ensure that a corporation's statements are not misleading,'" *id*. (quoting *In re Sanofi Sec. Litig.*, 2016 WL 93866, at *10 (S.D.N.Y. Jan. 6, 2016)). But even if Defendants had such a duty, Plaintiffs still are not entitled to the *Affiliated Ute* presumption because it "should not be applied to cases that allege both misstatements and omissions unless the case can be characterized as one that *primarily* alleges omissions." *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999) (emphasis added). That is not the case here. Nor did the district court provide any cases to support the proposition that such a duty could justify the *Affiliated Ute* presumption. Indeed, neither *Sanofi*—nor any of the three cases it relies on—involved the *Affiliated Ute* presumption. *See Sanofi*, 2016 WL 93866, at *10 (listing cases).

By attempting to recast Plaintiffs' misstatement allegations as omission allegations, the district court disregarded the essential elements of securities fraud claims. If upheld, the court's decision would create a loophole that would allow plaintiffs to evade the critical requirement of pleading and proving reliance in securities fraud claims—an essential foundation for establishing a causal link between the defendant's actions and the plaintiff's loss. *See Dura Pharm*, 544 U.S. at 339. The district court's conclusions were flawed and should be reversed or vacated.

III. The District Court's Decision Will Embolden Securities Plaintiffs To Pursue Marginal Claims on Behalf of Questionable Classes.

Left uncorrected, the district court's errors not only harm class action law generally. They would cause particular damage in securities class actions, making class certification a near certainty in the vast majority of those actions, while simultaneously depriving defendants of their rights to a defense. This outcome would embolden plaintiffs to bring insubstantial securities fraud claims that bear little relation to any real culpability and serve only to extract settlements by wielding the threat of overbroad class-wide damages.

The Supreme Court and this Court have repeatedly warned against the threat of abuse and unfair settlement pressures that often attend the class treatment of securities fraud claims. *See, e.g.*, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008) (noting that the "potential for uncertainty and disruption in a [securities fraud] lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975) (noting that securities class action litigation poses "a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general"); *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004) (noting that "settlements in large class actions can be divorced from the parties' underlying legal positions" given the settlement pressure on defendants).

Given the costs of defending against such litigation and the potential for massive liability, settlement is a virtual certainty in cases that survive a motion to dismiss, regardless of merit, according to research by the Stanford Law School Securities Class Action Clearinghouse. *See* Stanford Clearinghouse, *Securities Class Action Filings: 2015 Year In Review* 12 (2016), http://goo.gl/Db3nSq (less than 1 percent of securities class action filings from 1997 to 2014 have reached a trial verdict).

The targeting of defendants for securities lawsuits likewise often has little to do with the merits. Although the implied private right of action under Section 10(b) and Rule 10b-5 is intended to provide a remedy for investors who suffer genuine injury from securities fraud, securities class actions are routinely filed in the wake of almost any negative announcement by a company that corresponds to a stock price decline. Statistics from the Stanford Clearinghouse demonstrate that securities fraud suits often target particular industry sectors, in many cases ensnaring a large portion of the publicly traded companies in a given industry. Stanford Clearinghouse, *Securities Class Action Filings: 2015 Year In Review*, *supra*, 18-19. For example, in 2015, new securities fraud class actions were filed against 2.6 percent of S&P 500 companies, but the figures were 10.3 percent for utilities companies and 7.5 percent for consumer staples companies. *Id*. Because securities fraud cases can take multiple years to resolve, the filing of a significant number of cases against an industry in one year can mire that industry in litigation for years to come.

Companies already face enormous pressure to settle securities class actions. Securities fraud class actions led to over $3 billion in settlements in 2015, with an average settlement of $38 million per case. *See* Stanford Clearinghouse, *Securities Class Action Settlements: 2015 Review and Analysis* 3 (2016), http://goo.gl/KPIl5y. Defense costs in these cases have been estimated to range from 25 to 35 percent of the settlement value. *See* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1546 (2006). The district court's approach, if permitted to stand, would increase these burdens.

Such costs are not isolated to companies against which suits have been brought. They are spread to *all* U.S. public companies, which must pay more for insurance, pay more to access capital, and be placed in a worse competitive position than their overseas counterparts. Indeed, these cases threaten the health of the U.S. economy—imposing huge costs on American businesses, investors, and employees while hurting the global competiveness of U.S. securities markets.

In addition to these costs, the district court's decision could have even greater economic consequences by spurring foreign issuers to turn to securities markets in other jurisdictions. The decision below, if affirmed, could discourage foreign global issuances involving the United States due to concerns about the risk of facing large U.S. class action lawsuits, even if most of the transactions occurred outside the United States.

These costs of excessive securities class actions are not offset by corresponding benefits in the form of effective fraud deterrence. *See* William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. Pa. L. Rev. 69, 72-73 (2011). In fact, most often the main result of settlements is a wealth transfer from one group of innocent shareholders to another—of course, with a healthy cut for the plaintiffs' lawyers. *See* Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 Ariz. L. Rev. 639, 648 n.43 (1996) ("[I]n the average settlement, 68.2% comes from the insurer and 31.4% from the issuer, with only 0.4% coming from individual defendants.") (citation omitted).

At bottom, this Court should be mindful of the legal and economic burdens that flow from the district court's decision. Many in the business community are already deeply vulnerable to massive liability from insubstantial securities class actions. The Court should not increase this exposure by approving of the casual approach to class certification taken by the district court in this case.

CONCLUSION

For the foregoing reasons, this Court should reverse or vacate the decision of the district court.

Respectfully submitted,

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Dated: August 1, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 4,642 words, including footnotes; and

(ii) 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 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 2016, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Second Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

<u>/s/ Michael H. Park</u>

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