No. 25-135

IN THE

United States Court of Appeals for the Fourth Circuit

IN RE THE BOEING COMPANY SECURITIES LITIGATION

On Petition for Permission to Appeal from the United States District Court for the Eastern District of Virginia, Alexandria Division
Case No. 1:24-cv-00151 (Hon. Leonie M. Brinkema)

BRIEF OF *AMICUS CURIAE* THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF BOEING DEFENDANTS' PETITION FOR PERMISSION TO APPEAL

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March 28, 2025

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INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association that represents the interests of hundreds of securities firms, banks, and asset managers.* SIFMA is also the United States regional member of the Global Financial Markets Association. SIFMA's mission is to support a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. To further that mission, SIFMA regularly files *amicus curiae* briefs in cases such as this one that raise issues of vital concern to securities industry participants. This case involves important issues concerning standards for class certification in private securities actions, which are directly relevant to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry.

INTRODUCTION AND SUMMARY OF ARGUMENT

In modern class-action litigation, the decision to certify a class is "typically a game-changer, often the whole ballgame." *Allen v. Ollies Bargain Outlet, Inc.*, 37 F.4th 890, 908 (3d Cir. 2022) (Porter, J., concurring). A district court addressing a

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* Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus, 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.

class-certification motion therefore cannot leave central questions about the appropriateness of class-wide resolution to be resolved in later innings, because those innings are likely to never come.

Given that reality, the Supreme Court emphasized in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), that district courts have a "duty to take a close look" at such questions. *Id*. at 34 (citation and quotation marks omitted). In that case, like this one, the appropriateness of certification depended on the plaintiffs' ability to prove damages on a class-wide basis rather than through plaintiff-by-plaintiff proof. The Court explained that in that context, it is not enough for plaintiffs to provide assurances that they will eventually devise a model that allows the necessary class-wide resolution. Instead, before certifying the class, the district court must undertake "'a rigorous analysis'" to ensure "that there [is] *in fact*" a damages model "sufficiently" connected to plaintiffs' liability case to satisfy Rule 23(b). *Id.* at 33 (citations and quotation marks omitted).

Unfortunately, in the decade since *Comcast*, district courts have all too often shirked their "duty" to perform the close analysis that the Supreme Court required. *Id.* at 34. In case after case, courts have relied on plaintiffs' assurances that their experts could eventually devise models sufficient to prove class-wide damages, if necessary, rather than requiring that those models actually be presented for "rigorous analysis" at the certification stage. *Id.* at 33. And predictably, the *in terrorem* effect

of class certification generally means that those models never materialize for district court (let alone appellate) review, because defendants are forced to settle rather than putting plaintiffs to their proof.

Recognizing the need for appellate review of that growing trend, this Court granted a Rule 23(f) petition just last month in *International Brotherhood. of Electrical Workers Local 98 Pension Fund v. Deloitte & Touche LLP*, No. 25-1146, to address the application of *Comcast* to securities class actions. But before the opening brief in that appeal has even been filed, plaintiffs are already arguing that *Deloitte* involves idiosyncratic facts that will make any decision there inapplicable to other securities suits in this Circuit. Indeed, the district court here reasoned that there was no need to wait for this Court's decision in *Deloitte* before granting class certification because *Deloitte* involves "a unique factual situation." Pet. App. 3 n.1.

It is far from clear that the eventual decision in *Deloitte* will be distinguishable in the way that plaintiffs (and the district court) have maintained, but this Court should not run that risk. To ensure that the Court's much-needed guidance on *Comcast* cannot be distinguished away into nothingness, the Court should grant defendants' Rule 23(f) petition in this case as well and consolidate the two cases for argument. Doing so will allow the Court to address *Comcast*'s application in a broader range of circumstances. Moreover, the facts here vividly illustrate the problems that result when district courts fail to undertake the "rigorous analysis" that

Comcast requires. 569 U.S. at 33. As defendants explain, plaintiffs' expert offered no methodology at all by which to identify damages that map onto plaintiffs' theories of liability in this case—instead simply reciting legal boilerplate about the test for damages in securities suits and predicting that he will be able to come up with an appropriate model to apply that test at some later date. Defs' Rule 23(f) Pet. 8-9. Treating that sort of testimony as sufficient to support certification of a potentially multi-billion-dollar class would "reduce Rule 23(b)(3)'s predominance requirement"—and *Comcast* itself—"to a nullity." *Comcast*, 569 U.S. at 36. This Court should not countenance that result.

ARGUMENT

I. Enforcement of *Comcast*'s Limits on Class Certification Is Critical for U.S. Financial Markets

As a prerequisite for class certification under Rule 23(b)(3), *Comcast* requires that plaintiffs present a methodology for calculating damages on a classwide basis that is consistent with their liability theories. *See* 569 U.S. at 33. District courts must undertake a "rigorous analysis" to ensure that plaintiffs have satisfied that evidentiary burden by "affirmatively demonstrat[ing]" compliance with Rule 23(b). *Id.* at 33, 35 (citation and quotation marks omitted).

That requirement plays a particularly important role in private securities litigation. As a practical matter, the class-certification stage is often the *only* opportunity for a court in a securities class action to assess the validity of the

plaintiffs' damages model. Following class certification, defendants face enormous pressure to settle even when they have meritorious defenses. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (observing that when facing "damages allegedly owed to tens of thousands of potential claimants" and "even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."). Accordingly, if the flaws in a damages model are not addressed at the class-certification stage, there will generally be no opportunity for a district court (or court of appeals) to remedy the error later because "these cases—should they . . . obtain class certification—will almost always settle." Geoffrey Rapp, *Rewiring the DNA of Securities Fraud Litigation: Amgen's Missed Opportunity*, 44 Loy. U. Chi. L.J. 1475, 1478 (2013).

That reality has wide-ranging negative effects for the Nation's financial system. Although the named defendants in a securities action may bear the immediate consequences of any settlement, the costs of overbroad, unmeritorious litigation ultimately "ge[t] passed along to the public." *SEC v. Tambone*, 597 F.3d 436, 452-53 (1st Cir. 2010) (Boudin, J., and Lynch, CJ., concurring). Companies may lose equity value, requiring current shareholders effectively to insure former shareholders for their investment losses. *See* Anjan V. Thakor, U.S. Chamber Inst. for Legal Reform, *The Unintended Consequences of Securities Litigation* 14 (2005) (noting that the average securities class action reduces the value of a defendant

company's equity by 3.5 percent). Moreover, "the prevalence of meritless securities lawsuits and settlements in the U.S. has driven up the apparent and actual cost of business," causing "foreign companies [to] sta[y] away from US capital markets for fear that the potential costs of litigation will more than outweigh any incremental benefits of cheaper capital." Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* ii, 101 (2007). In a very real way, therefore, the promiscuous certification of securities class actions threatens to undermine the overall competitiveness of American capital markets.

II. The Court Should Grant Defendants' Rule 23(f) Petition to Provide Much-Needed Clarity About *Comcast*'s Application

Given that outsized significance of class-action litigation for the U.S. securities industry, the Court should grant defendants' Rule 23(f) petition to provide needed clarity and correction about how *Comcast* applies to securities class actions.

This Court has explained that review under Rule 23(f) is warranted "where a grant of class certification creates irresistible pressure on the defendant to settle." *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 143 (4th Cir. 2001) (citation omitted). Likewise, the Court has recognized that granting a Rule 23(f) petition may be necessary to "'permit the resolution of an unsettled legal issue" because "one of the purposes of Rule 23(f) was to promote the development of case law regarding certain fundamental class action issues which tend to be under-litigated because so many

class actions are settled or otherwise resolved in ways that preclude eventual appellate consideration of procedural issues." *Id.* at 143-44 (citation omitted).

As the Court's recent grant of the Rule 23(f) petition in *Deloitte* reflects, the *Comcast* issue that defendants raise here clearly warrants review under those standards. Even before the decisions in *Deloitte* and this case, district courts in this Circuit had already evinced a troubling disregard for *Comcast*—repeatedly endorsing an assembly-line approach to satisfying Rule 23(b) based on boilerplate promises that an adequate method for calculating damages would be available. In *In re NII Holdings, Inc. Securities Litigation*, for example, the court offered a cursory analysis remarkably similar to the one here, ultimately basing its certification decision on the fact that the "out-of-pocket" damages method "is widely accepted as the traditional measure of damages for Rule 10b-5 actions." 311 F.R.D. 401, 413-14 (E.D. Va. 2015). District courts granted class certification on comparably thin grounds in *In re Under Armour Sec. Litig.*, 631 F. Supp. 3d 285, 312 (D. Md. 2022); *City of Cape Coral Mun. Firefighters' Ret. Plan v. Emergent Biosolutions, Inc., HQ*, 322 F. Supp. 3d 676, 691 (D. Md. 2018); and *KBC Asset Management NV v. 3D Sys. Corp.*, 2017 WL 4297450, at *7 (D.S.C. Sept. 28, 2017). And each of those cases settled following class certification, reinforcing the conclusion that review under Rule 23(f) is the only plausible way to restore *Comcast*'s vitality in this Circuit.

In other circumstances, this Court's grant of review in *Deloitte* might make it appropriate to simply hold defendants' petition pending a decision in that case. In the weeks since the Rule 23(f) grant in *Deloitte*, however, plaintiffs have already begun arguing that *Deloitte* presents extenuating facts that will prevent any generalization from the Court's eventual decision to class-certification orders in other securities actions pending in this Circuit. Indeed, the district court here accepted that argument, opining that there was no need to delay consideration of plaintiffs' class-certification motion until after a decision in *Deloitte* because *Deloitte* "presents a unique factual situation complicating the connection between plaintiff's damages model and its theory of liability." Pet. App. 3 n.1. Rather than risk issuing a decision in *Deloitte* that some courts might treat as inapplicable to the mine run of securities cases in this Circuit, therefore, this Court should grant defendants' Rule 23(f) petition here and consolidate both cases for argument. Doing so will ensure that the Court can address *Comcast*'s application to a broad range of circumstances, providing much-needed clarity on a critically important issue.

III. Plaintiffs Have Failed to Present a *Comcast*-Compliant Damages Model

If the Court grants Rule 23(f) review here, it should reverse the district court's class-certification order. *Comcast* requires plaintiffs to present a "model . . . establishing that damages are capable of measurement on a classwide basis" in a manner "consistent with [their] liability case." 569 U.S. at 34-35. But plaintiffs

have not done so in this case; instead, they averred that a general formula for such damages is available and promised to provide a concrete model in the future. That falls far short of the evidentiary showing *Comcast* demands.

Plaintiffs' expert, Mr. Chad Coffman, acknowledged that plaintiffs did not create an actual damages methodology capable of measuring damages specific to this case, despite asserting that out-of-pocket measure of damages "is a standard and well-accepted [damages] method." Dkt. 105-1 ¶ 96. He also admitted that "the artificial inflation per share that is an input to the [out-of-pocket] damages" measure requires "an inherently case-specific" analysis that "depends on specific facts and circumstances" of each case. *Id.* at ¶¶ 98-99. But Mr. Coffman provided no case-specific damages analysis here. Indeed, he acknowledged that the description of his damages approach came nearly verbatim from a "template" he has used for *all* of his class-certification reports since at least 2020, recycling the same "virtually identical" language "dozens of times." Dkt. 115-2, 82:19-87:20; *see* Pet. 8-9. The template simply lists various *potential* "technique[s] and valuation approach[es]" for measuring stock-price inflation as a general matter, reserves the right to use other unspecified approaches, and leaves for another day the task of determining how to come up with an actual methodology that measures out-of-pocket damages on a class-wide basis under the facts of this case. *Id.* at ¶¶ 98-100; *see* Pet. 8-9.

That is not a *Comcast*-compliant methodology, just a promise of one to come. And the promise, moreover, is highly questionable. Plaintiffs' liability theory depends on their argument that while defendants' individual statements may have been "mere puffery," they "bec[a]me material to investors" when they "[we]re made repeatedly." Dkt. 53, at 8. But plaintiffs failed to identify any sound methodology for determining how much of that gradual inflation had taken hold on any given trading day during the class period—a determination essential for calculating damages for individual class members. *See* Pet. 8-9, 16-17. Making matters worse, plaintiffs also offered no methodology reliably to account for changing investor information about Boeing's safety plans throughout the class period, or to disaggregate the effects on share price that the January 5, 2024, Alaska Airlines accident would have caused regardless of any earlier statements concerning Boeing's commitment to safety. *See id.* at 16, 18-19.

Those case-specific considerations highlight the need for a damages model that a court can actually subject to "a rigorous analysis" that "probe[s] behind the pleadings" before certifying a class. *Comcast*, 569 at 33-34 (citations and quotation marks omitted). Without such a model, plaintiffs cannot carry their burden of putting forward "evidentiary *proof*" that damages can be established on a class-wide basis in a manner consistent with their theory of liability. *Id.* at 33 (citation omitted; emphasis added). To be sure, "[c]alculations need not be exact" at the class-

certification stage. *Id.* at 35. But without *some* details applying the general damages formula to the case at hand, a district court cannot possibly analyze whether the plaintiffs have identified a damages model that is "consistent with [plaintiff's] liability case." *Id.* (citation omitted).

In this regard, the class-certification decision in *In re BP p.l.c. Securities Litigation* is instructive. *See* 2013 WL 6388408, at *16-17 (S.D. Tex. Dec. 6, 2013). There, too, Mr. Coffman opined that he would ultimately be able to calculate damages using a model that "has not yet been created." *Id.* After identifying the case-specific problems that such a model might encounter, the court denied certification, explaining that "[s]imply invoking the event study methodology" does not demonstrate "how Plaintiffs propose to use an event study to calculate class members' damages, and how that event study will incorporate—and, if necessary, respond to—the various theories of liability." *Id.* at 17. Accordingly, the court found that "Plaintiffs have failed to meet *their burden* of showing that damages can be measured on a class-wide basis consistent with their theories of liability." *Id.* Had the district court actually undertaken the *Comcast*-required analysis of Mr. Coffman's assurances here, it would have reached the same conclusion.

CONCLUSION

For the foregoing reasons, this Court should grant defendants' Rule 23(f) petition.

Dated: March 28, 2025

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limitations of Federal Rule of Appellate Procedure 29(a)(5) because this brief, excluding the portions excepted by the rules, contains 2,597 words, according to the word-count feature of the software used to generate this brief.

I certify that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6).

/s/ Benjamin W. Snyder
Benjamin W. Snyder

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2025, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the Court's CM/ECF system, and counsel for all parties will be served by the CM/ECF system.

/s/ Benjamin W. Snyder
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