No. _____

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE: HEALTHSOUTH CORPORATION
SECURITIES LITIGATION

PETITION FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION, MASTER FILE NO. CV-03-BE-1500-S; CONSOL. CASE NO. CV-03-BE-1502-S
HON. KARON O. BOWDRE, PRESIDING

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONS PURSUANT TO RULE 23(f) FOR LEAVE TO APPEAL

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

John R. Oller
Counsel of Record
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000

Richard D. Bernstein
Of Counsel
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 2006
(202) 303-1000

Counsel for Amicus Curiae
The Chamber of Commerce of the United States of America

In re HealthSouth Corporation Securities Litigation

RULE 26.1-1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is not a publicly traded corporation. It has no parent corporation and no publicly traded corporation owns more than 10% of its stock.

Amicus curiae is unaware of any other persons with an interest, as set forth in Eleventh Circuit Rule 26.1-1, in the outcome of this case, other than the parties to this Petition, and those interested persons listed in their briefs.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

WILLKIE FARR & GALLAGHER LLP

By:
John R. Oller

787 Seventh Avenue
New York, NY 10019
Tel: (212) 728-8000
Fax: (212) 728-8111

Counsel for Amicus Curiae
The Chamber of Commerce of the United States of America

TABLE OF CONTENTS

RULE 26.1-1 CORPORATE DISCLOSURE STATEMENT C-1

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

ARGUMENT 2

I. THE DISTRICT COURT'S ORDER INCREASES SECURITIES LITIGATION RISKS AND HURTS U.S. COMPETITIVENESS................ 2

II. RULE 23(F)'S PURPOSES ARE ALSO IMPLICATED HERE. 5

III. THE DISTRICT COURT'S RULINGS ON RELIANCE IMPROPERLY EXPAND SECTION 10(B) IN CONFLICT WITH *STONERIDGE* AND OTHER SUPREME COURT DECISIONS. 6

   A. The "Fraud-Created-the-Market" Theory Violates *Stoneridge*............ 6

   B. The District Court's Alternative "Common Scheme" Theory of Reliance Also Conflicts With Supreme Court Precedent. 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Basic, Inc. v. Levinson, 485 U.S. 224 (1988) 9

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) 6, 7, 9

Chiarella v. United States, 445 U.S. 222 (1980) 9

Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336 (2005) 10

Eckstein v. Balcor Film Investors, 8 F.3d 1121 (7th Cir. 1993) 8

In re HealthSouth Corp. Sec. Litig., 257 F.R.D. 260 (N.D. Ala. 2009) 8

In re Refco Inc. Sec. Litigation, 609 F. Supp. 2d 304 (S.D.N.Y. 2009) 8

Lipton v. Documation, Inc., 734 F.2d 740 (11th Cir. 1984) 7

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154 (3d Cir. 2001) 5

Ockerman v. May Zima & Co., 27 F.3d 1151 (6th Cir. 1994) 8

Oscar Private Equity Investments v. Allegiance Telecom, Inc., 487 F.3d 261 (5th Cir. 2007) 10

Ross v. Bank South, N.A., 885 F.2d 723 (11th Cir. 1989) 7, 8

Shores v. Sklar, 647 F.2d 462 (5th Cir. 1981) 7

Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) .... *passim*

OTHER AUTHORITIES

Fed. R. App. P. 5 1

Fed. R. App. P. 29 1

Fed. R. Civ. P. 23(f) 1, 5, 6

H.R. Rep. No. 104-50 (1995) 4

Commission on the Regulation of U.S. Capital Markets in the 21st Century, Report and Recommendations (March 2007) 3, 4

Interim Report of the Committee on Capital Markets Regulation (Nov. 30, 2006) 3, 4

SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 1

SEC Rule 144A, 17 C.F.R. § 230.144A(c) .... *passim*

Securities Act Release No. 33-6806, 53 Fed. Reg. 44,016 (Nov. 1, 1988) 4

The Chamber of Commerce of the United States of America ("Chamber") submits this *amicus* brief in support of the Petitions of Defendants Ernst & Young LLP ("E&Y") and UBS AG; UBS Securities, LLC; Howard Capek; Benjamin Lorello; and William McGahan (collectively, "UBS") pursuant to Fed. R. App. P. 5 and Fed. R. Civ. P. 23(f) for permission to appeal from the class certification order entered on September 30, 2009 by the district court. Interlocutory appellate review is necessary so that the Court can provide much-needed guidance to district courts, litigants and businesses in this Circuit concerning the presumptions of class-wide reliance applicable in securities fraud cases under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, as well as the proper scope of 10b-5 liability of secondary actors arising out of their involvement in securities offerings under SEC Rule 144A and other capital raising transactions by public companies. This *amicus* brief is submitted pursuant to the motion by the Chamber filed contemporaneously pursuant to Fed. R. App. P. 29.

INTEREST OF AMICUS CURIAE

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million companies and professional organizations of every size, in every industry, and from every region in the country. An important function of the Chamber is to represent the interests of its members in

matters before the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community, such as cases involving the federal securities laws, including *Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc.*, 128 S.Ct. 761 (2008) ("*Stoneridge*"). Those interests are implicated here, as many of the Chamber's members participate in 144A offerings either as initial purchasers (such as UBS in this case) that buy the securities being privately offered by the issuer and then resell them to others, or as auditors (such as E&Y in this case) that provide an opinion on the financial statements of the issuer that are incorporated by reference in registration statements for the securities traded in the secondary market. These are issues of exceptional importance to the Chamber's members, the public and the markets generally.

ARGUMENT

I. THE DISTRICT COURT'S ORDER INCREASES SECURITIES LITIGATION RISKS AND HURTS U.S. COMPETITIVENESS

This case has broad implications for every business that is involved in the issuance of tradeable securities. The district court's class certification order dramatically expands the theories of presumptive class reliance that allow for certification of large securities class actions in a manner contrary to *Stoneridge* and other Supreme Court opinions. There is a growing consensus that overly expansive readings of the securities laws are adversely affecting the competitiveness of the U.S. capital markets, as reflected in a recent report of the

Committee on Capital Markets Regulation, an independent and bipartisan group comprised of 22 leaders from the investor community, business, finance, law, accounting and academia, formed to explore a range of issues related to maintaining and improving the competitiveness of the U.S. capital markets, and enhancing shareholder rights while reducing excessive and overly burdensome regulation and litigation.[1]

Many of the Chamber's members participate as "initial purchasers" in private offerings of securities by companies under Rule 144A, which allows for the immediate resale of private placement securities to qualified institutional buyers (institutions that manage at least $100M in securities) without requiring public registration. This provides efficient access to U.S. capital at a lower cost than traditional public U.S. offerings. Companies from all over the world have used Rule 144A to raise capital and increase their company's profile with U.S. institutional investors including banks, savings and loan institutions, insurance companies, investment companies or employee benefits plans.

---

1 *See* Interim Report of the Committee on Capital Markets Regulation (Nov. 30, 2006), available at http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf. ("Interim Report"); *see also* Commission on the Regulation of U.S. Capital Markets in the 21st Century, Report and Recommendations (March 2007) ("Commission Report"), available at http://www.capitalmarketscommission.com/portal/capmarkets/default.htm) (follow "Download Full Report" hyperlink)

Initial purchasers serve an important function in the Rule 144A capital raising process because they buy securities from the issuer and resell them to qualified institutional buyers in the offering. The district court's order, if left undisturbed, will expand vastly the potential liability of initial purchasers and other participants (such as auditors) in capital raising transactions. Affirmance of the district court's order would thus contribute to making access to U.S. capital markets more expensive as investors bear the higher transaction costs to compensate financial institutions for soaring expenses.

In addition, the district court's order threatens to undermine an important purpose of Rule 144A, that is, to attract "[f]oreign issuers who previously may have foregone raising capital in the United States due to the compliance costs and liability exposure." Securities Act Release No. 33-6806, 53 Fed. Reg. 44,016, 44,022 n.93 (Nov. 1, 1988). Foreign markets – which limit or prohibit private class actions – are becoming more attractive to both U.S. and foreign companies, depriving American investors of *bona fide* investment opportunities. *See* H.R. Rep. No. 104-50, at 20 (1995) ("Fear of [securities] litigation keeps companies out of the capital markets."); *see also* Commission Report, supra n.1, at 30 ("[I]nternational observers increasingly cite the U.S. legal and regulatory environment as a critical factor discouraging companies and other market participants from accessing the U.S. markets."); Interim Report, *supra* n.1, at 11

("Foreign companies commonly cite the U.S. class action enforcement system as the most important reason why they do not want to list in the U.S. market."). *See also Stoneridge,* 128 S. Ct at 772 (citing "practical consequences" of increased risks from securities claims as "raising the costs of doing business," and noting that "[o]verseas firms with no other exposure to our securities laws could be deterred from doing business here . . . [t]his, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets"). Ever-expanding securities class action liability, a key deterrent to foreign issuers considering entry into U.S. markets, would continue to sabotage the competitive footing of U.S. capital markets.

Thus, both practical and policy reasons warrant appellate review of the district court's order.

II. RULE 23(F)'S PURPOSES ARE ALSO IMPLICATED HERE.

Of direct relevance here, Congress enacted Rule 23(f) to allow interlocutory review of class action rulings in multi-billion dollar cases that create "hydraulic pressure . . . to settle," *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192 (3d Cir. 2001), and effectively deny defendants the opportunity to litigate the case on the merits. *See* Rule 23(f) advisory committee's note (1998 Amendments) ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially

ruinous liability."). Rule 23(f)'s purpose is implicated in the precise circumstance presented here where, as shown below, the lower court's problematic certification order raises substantial and troubling issues concerning the construction of section 10(b) and application of Rule 23.

III. THE DISTRICT COURT'S RULINGS ON RELIANCE IMPROPERLY EXPAND SECTION 10(B) IN CONFLICT WITH *STONERIDGE* AND OTHER SUPREME COURT DECISIONS.

A. The "Fraud-Created-the-Market" Theory Violates *Stoneridge.*

In *Stoneridge*, the Supreme Court rejected so-called "scheme liability," that is, the theory that, where a defendant engages in conduct with the "purpose and effect of creating a false appearance of material fact to further a scheme to misrepresent" a company's financial condition, an investor can be presumed to have relied on the deceptive acts notwithstanding that they were not communicated to the public and the defendant otherwise owed no duty of public disclosure. 128 S.Ct. at 767-74. As the Court explained, "the § 10(b) private right should not be extended beyond its present boundaries," particularly in view of the fact that when Congress enacted the PSLRA in 1995, it "accepted the § 10(b) private cause of action as then defined but chose to extend it no further." *Id.* at 773. Moreover, the Court reasoned that because *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) had held that § 10(b) liability did not extend to secondary actors accused of aiding and abetting, and Congress in the PSLRA

expressly declined to impose aiding and abetting liability in private civil actions, a theory of scheme liability would "make[] any aider and abettor liable under § 10(b) if he or she committed a deceptive act in the process of providing assistance," thereby putting "an unsupportable interpretation on Congress' specific response to *Central Bank*" in the PSLRA. 128 S.Ct. at 771. In so holding, the Supreme Court rejected a "but for" theory of reliance, premised on the notion that the false financial statements the issuer released were "a natural and expected consequence" of the defendants' deceptive (but non-publicly communicated) acts. *Id.* at 770. Were such a concept of reliance to be adopted, the Court explained, "the implied cause of action would reach the whole marketplace in which the issuing company does business; and there is no authority for this rule." *Id.* at 771.

But this "but for" reliance theory is exactly what the district court here adopted. Relying on cases from two decades ago, decided long before *Central Bank* or *Stoneridge*, the district court stated that it was "reasonable to allow recovery on the fraud on the market theory where the securities could not have been marketed *but for* the fraud," a theory since dubbed the "fraud-created-the-market" theory. *See* Op. at 49 (emphasis added) (citing *Lipton v. Documation, Inc.*, 734 F.2d 740 (11th Cir. 1984); *Ross v. Bank South, N.A.*, 885 F.2d 723 (11th Cir. 1989); *Shores v. Sklar*, 647 F.2d 462 (5th Cir. 1981). Whatever else may be said about this controversial theory, which was adopted by a closely divided panel of

this Court in *Ross* and has been heavily criticized by other circuits[2], there is no doubt that it expands the § 10(b) private right "beyond its present boundaries," in contravention of *Stoneridge*, 128 S.Ct. at 773. *See also In re Refco Inc. Sec. Litig.*, 609 F.Supp.2d 304, 318 (S.D.N.Y. 2009) (the "fraud-created-the-market" theory "appear[s] to be in grave doubt after *Stoneridge*"). At a minimum this Court should take this occasion to revisit its twenty-year-old holding in *Ross* adopting the "fraud-created-the-market" theory.

The district court compounded its error by applying its new reliance presumption to *non-public* conduct as to which there was no evidence of reliance by multiple classes of bondholders. Acknowledging that *Stoneridge* precludes § 10(b) liability for "behind-the-scenes scheming," the district court held that UBS's non-public conduct "took on a public face when UBS endorsed the bond offerings and actively marketed them," such that "*but for* the active public participation by UBS, the Rule 144A transactions could not have occurred." 257 F.R.D. at 278 (emphasis added); *see* Op. at 4 n.6. This is just another variation on the "but for" theory of § 10(b) reliance rejected in *Stoneridge*. What the district court called an implied "endorsement" by UBS is really one of three things, all of which fall outside § 10(b): It is either an omission by a defendant without the necessary duty

---

2 *See, e.g., Ockerman v. May Zima & Co.*, 27 F.3d 1151, 1159-60 (6th Cir. 1994); *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1131 (7th Cir. 1993).

to disclose (*see Chiarella v. United States*, 445 U.S. 222, 230 (1980)), or it is aiding and abetting, and proscribed by *Central Bank*, or it is an improper new category and disallowed by *Stoneridge*.

If allowed to stand, the district court's ruling that allegedly fraudulent, implied endorsements of an issuer's financial statements "create" a market on which the entire marketplace is presumed to rely, would breed a new wave of private § 10(b) class actions, encourage a host of class actions against secondary actors, encourage costly litigation in this Circuit's courts as securities class action lawyers would prefer this Circuit to others, and impede the capital markets.

B. The District Court's Alternative "Common Scheme" Theory of Reliance Also Conflicts With Supreme Court Precedent.

The district court alternatively held that it could certify a class even *without* a presumption of reliance, based on what it termed the "uniform misrepresentation common fraudulent scheme theory"– a theory by which it need not apply any reliance presumption because it could certify a class despite individualized reliance issues. As support for this conclusion, the court cited decisions that pre-date *Basic, Inc. v. Levinson,* 485 U.S. 224 (1988), which held that a presumption of reliance is necessary precisely because individualized questions of reliance would otherwise defeat class certification. But that presumption is not available in situations such as the one here, a Rule 144A offering where the price for a newly-issued security is set by the issuer and the security is privately sold in the primary market. By

suggesting that no such presumption is needed, the district court dramatically lowered the standard for class certification and rendered superfluous decades of decisions carefully limiting the circumstances in which certification may be granted absent a showing of actual reliance.

The district court's "common scheme" theory of reliance is also directly at odds with *Stoneridge* by effectively reading the reliance requirement out of the statute at the class certification stage.[3] Again, if the district court opinion is allowed to stand, it will enable "plaintiffs with weak claims to extort settlements from innocent companies," *Stoneridge*, 128 S. Ct. at 772, and the capital markets and U.S. competitiveness will be thereby harmed.

CONCLUSION

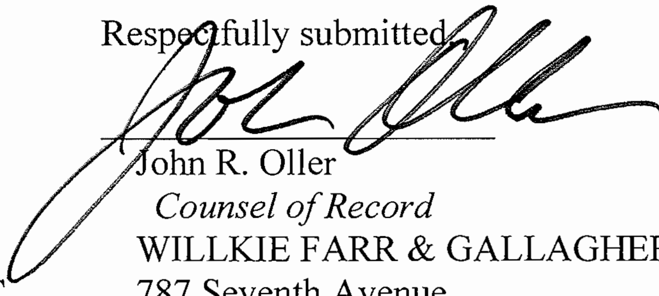
The Court should grant the petitions.

Dated: October 23, 2009

---

[3] Moreover, insofar as "reliance is tied to causation," *see Stoneridge*, 128 S.Ct. at 770, the district court's "common course of conduct" theory also fails to establish a class-wide theory of loss causation, another essential element of a § 10(b) claim. *See generally Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). *See also Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 269-71 (5th Cir. 2007) (requiring showing of loss causation at class certification stage).

Respectfully submitted,



John R. Oller
Counsel of Record
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000

Richard D. Bernstein
Of Counsel
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 2006
(202) 303-1000

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

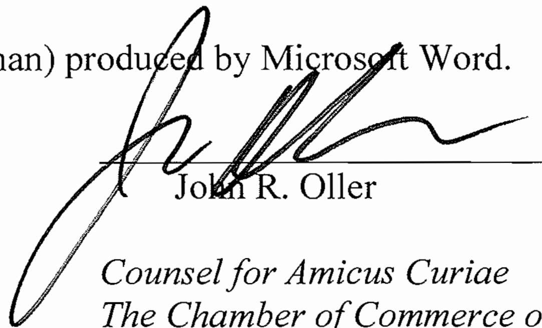
Counsel for Amicus Curiae
The Chamber of Commerce
of the United States of America

CERTIFICATE OF COMPLIANCE

I, John R. Oller, hereby certify that this brief complies with the length limitations set forth in Fed. R. App. P. 29(d) because it is no more than one-half the maximum length authorized by the Federal Rules of Appellate Procedure for a party's principal brief.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) in that it has been prepared in proportionally spaced 14 point font (Times New Roman) produced by Microsoft Word.

Dated: October 23, 2009



John R. Oller

Counsel for Amicus Curiae
The Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

I, John R. Oller, hereby certify that on this 23rd day of October, 2009, I caused copies of the foregoing brief to be served on counsel for the parties at the addresses listed below by FedEx Next Business Day and delivered the requisite copies of the brief to the Clerk of Court by FedEx Next Business Day.

Robert J. Giuffra, Jr., Esq.
Brian T. Frawley, Esq.
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004-2498

W. Michael Atchison, Esq.
STARNES & ATCHISON LLP
100 Brookwood Place
Seventh Floor
Birmingham, Alabama 35209

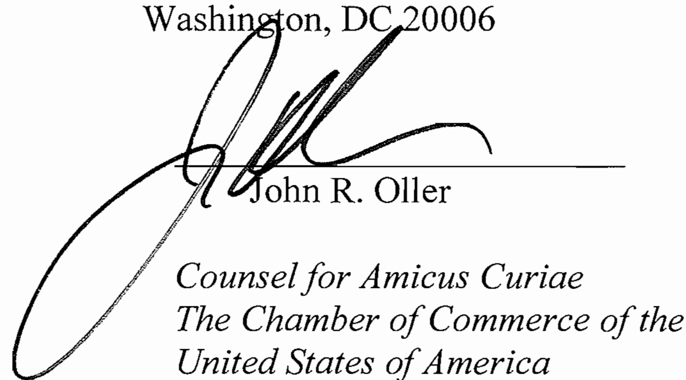
Samuel H. Franklin, Esq.
LIGHTFOOT FRANKLIN
& WHITE LLC
400 20th Street North
Birmingham, Alabama 35203

Patrick Coughlin, Esq.
COUGHLIN STOIA GELLAR
RUDMAN & ROBBINS LLP
655 W. Broadway, Suite 1900
San Diego, California 92101

Joseph A. Fonti, Esq.
LABATON SUCHAROW LLP
140 Broadway
New York, New York 10005

Steffen N. Johnson
Winston & Strawn LLP
1700 K Street N.W.
Washington, DC 20006

Dated: October 23, 2009



John R. Oller

Counsel for Amicus Curiae
The Chamber of Commerce of the United States of America