No. 04-

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TEACHERS' RETIREMENT SYSTEM
OF LOUISIANA, ET AL.,

Plaintiffs-Respondents,

v.

ACLN LTD., ET AL.,

Defendants,

BDO SEIDMAN, LLP,

Defendant-Applicant.

REPLY BRIEF OF DEFENDANT-APPLICANT BDO SEIDMAN, LLP, IN SUPPORT OF APPLICATION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f), OR, IN THE ALTERNATIVE, PETITION FOR A WRIT OF MANDAMUS

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

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June 23, 2004

This past March, with fact discovery drawing to a close, we asked plaintiffs' counsel when they would move for class certification as to their claims against BDO Seidman, LLP ("Seidman"). Counsel responded that they would not do so, because Seidman is "bound by the [November 2002] class certification order," entered before Seidman was named as a defendant. A-36. Seidman therefore asked the district court to clarify that the November 2002 order does *not* apply to Seidman, or, in the alternative, to decertify the class on the ground that individual issues of reliance predominate over common ones. In response, plaintiffs told the district court that, in light of the November 2002 order, there was no need to address the merits of the certification question.

Following plaintiffs' lead, and without considering any evidence or making any findings, on May 18, 2004, the district court denied both of Seidman's motions. A1-A4. As we have candidly told this Court (6/1/04 Appl. 11 n.6), it is difficult to tell *what* Judge Pollack's May 18 Order purported to decide, but as best we could tell at the time that order effectively certified a class against Seidman – by (i) holding that the November 2002 order was binding on Seidman and (ii) refusing to decertify the class.

Then on June 3, 2004, the day after Seidman sought review of that order under Rule 23(f), Judge Pollack announced – *sua sponte* – that "no decision" had been reached on May 18 regarding class certification after all. Seidman's June 7, 2004, Supplemental Filing ("Supp."), Exh. A. Equally important, Judge Pollack emphatically stated that he *would not* decide the appropriateness of class certification until the matter "becomes ripe by an adverse verdict" against Seidman. *Ibid*.

Plaintiffs try to turn to their advantage the fact that the district court has created such a moving target. They make no pretense of defending either the May 18 or June 3 district court order *on the merits*. Instead, plaintiffs – who just three months ago castigated Seidman's insistence that a class certification motion be filed as "a thinly veiled litigation ploy" because Seidman was so

clearly "bound by the class certification order in this action" (A-36) – now argue that Seidman's Rule 23(f) application "is not properly before" this Court because "the District Court has not yet entered an order granting or denying class certification." Opp. 1. Plaintiffs also assert that Seidman's mandamus petition is "moot" (Opp. 7) because plaintiffs – just last week – filed their own motion for class certification which, they assert, "is scheduled to be heard by the District Court on July 13, 2004" (Opp. 6).

The Court should reject both of those arguments and accept Seidman's Rule 23(f) application. First, the district court's May 18 order *is* a class certification order, which is subject to interlocutory appeal under Rule 23(f). The district court's June 3 "no decision" does not impair the appealability of the prior order. District courts obviously are not free to insulate important class certification issues from appellate review by refusing to heed the requirement that class certification decisions be made "[a]s soon as practicable after the commencement of an action brought as a class action." Fed. R. Civ. P. 23(c)(1). Second, Seidman's mandamus petition is not rendered moot by plaintiffs' belated motion for class certification. That motion is "scheduled" to be heard only in the sense that plaintiffs have unilaterally proposed a hearing date of their own choosing. But *Judge Pollack* has not "scheduled" anything; nor, given his June 3 order, is there the slightest reason to suppose (Opp. 7-8) that Judge Pollack will issue a "ruling as to whether this action can be maintained as a class action against Seidman" simply because plaintiffs have finally (and well after the close of discovery) asked him to do so. To the contrary, Judge Pollack has explicitly ordered that he will *not* issue such a ruling until after an "adverse verdict" is rendered against Seidman.

In short, plaintiffs offer no serious opposition to Seidman's application. They have sensibly – but belatedly – abandoned their position that Seidman is bound by the November 2002 class

certification order; they do not dispute that Judge Pollack's May 18 order fails to make any of the findings required by Rule 23(b)(3); they do not dispute the error of Judge Pollack's June 3 order purporting to postpone a decision on class certification until after trial; and they do not dispute that Seidman's application meets this Court's standards for granting an application for permission to appeal under Rule 23(f). What plaintiffs *do* argue – that none of these issues is properly before the Court – is incorrect.[1]

1. Plaintiffs' only response to Seidman's Rule 23(f) application is their assertion that the Court should decline to hear Seidman's appeal because the district court has not yet issued an appealable order granting or denying class certification. Opp. 1. According to plaintiffs, Seidman should "follow the rules and wait for the District Court's decision" before seeking review under Rule 23(f). Opp. 8.[2]

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[1] Plaintiffs are themselves unwilling to defend any of Judge Pollack's rulings, but they find it useful to characterize Seidman's challenges to the rulings below as "*ad hominem* attacks against the District Court." Opp. 6 n.6. The charge is baseless and warrants no further rebuttal.

[2] Plaintiffs also suggest (Opp. 4-5) that Seidman committed a procedural error by filing a motion to dismiss the case "without first challenging class certification." But it was not *Seidman's* burden to seek *de*certification of a class that did not cover Seidman in the first place; it was *plaintiffs'* burden to move to include Seidman as a class defendant. Nor is there any basis for the suggestion that Seidman somehow forfeited its right to challenge class certification simply by filing a motion to dismiss after being added to the case. Seidman had every right – indeed, it was *required* under Rule 12 – promptly to file any motion to dismiss it may have had in its response to the complaint. There is no intimation in Rule 12 that a party files such a motion at its peril, giving up the right to challenge class certification unless it includes a challenge to the class at the same time. Nor, contrary to plaintiffs' intimation, did Seidman *ever* concede that the case against Seidman had been certified as a class action or in any way suggest that it would take advantage of any favorable ruling by claiming that it bound a class. To the contrary, Seidman's March 19, 2003, motion to dismiss plainly referred to "a purported class." See 6/1/04 Appl. 6-7 (citing Mem. in Support of BDO Seidman's Mot. to Dismiss at 3 (Mar. 19, 2003)).

As explained in our application, however, the district court's May 18 Order effectively decided the class certification issue for purposes of Rule 23(f). First, the district court denied Seidman's motion for a ruling that the November 2002 order does not bind Seidman: "In certifying the class, the claim was accepted that the market relied on the two audit reports. Whether class members may attribute the improprieties charged *to BDO Seidman*," the court ruled, is merely "a question of damages as to BDO Seidman to be determined on trial of the issues relating to BDO Seidman." A-3 (emphasis added). Second, Judge Pollack denied Seidman's motion to decertify the class, because Seidman's arguments had been "raised in the earlier motion by Seidman to dismiss the complaint and failed." *Ibid.* To be sure, the district court stopped short of stating, in so many words, "this case shall proceed as a class action against Seidman." But the court's reasoning and conclusion are clear enough.[3] The only plausible way to construe the May 18 order is as a ruling that the case would proceed as a class action against Seidman. The order therefore is reviewable under Rule 23(f).

The district court's June 3 order – stating that "no decision was reached" on May 18, and that none *will* be reached until after "an adverse verdict" – cannot defeat Seidman's right to appeal the previous ruling. As explained in our supplemental submission (at 3-5), the June 3 order is plainly impermissible under Rule 23(c)(1), as construed by this Court in *Phillip Morris Inc.* v. *Nat'l Asbestos Workers Med. Fund*, 214 F.3d 132, 135 (2d Cir. 2000) ("it is difficult to imagine cases in which it is appropriate to defer class certification until after a decision on the merits."). Nonetheless,

[3] At the hearing on Seidman's motions, the court clearly expressed its view that Seidman is bound by the November 2002 class certification order. See A-14 at 3 ("Isn't that all mooted? Because I ordered that [the November 2002 order] be applicable right now; isn't that right?"); see *ibid*. ("I believe the class, that you should be part of the class consideration.").

according to plaintiffs, the district court's erroneous deferral of a ruling on class certification until after trial insulates *both* of the district court's orders from interlocutory review.

That cannot be the law. Rule 23(f) recognizes that a class certification order – particularly in a large securities fraud suit like this one – carries with it the "risk of potentially ruinous liability" (Fed. R. Civ. P. 23(f) Advisory Comm. Notes), which often results in a settlement that bears no relation whatever to the "parties' underlying legal positions." *Hevesi* v. *Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004). The "hydraulic pressure" to settle that such an order imposes (*In re Visa Check/MaterMoney Antitrust Litig.*, 280 F.3d 124, 128 (2d Cir. 2001) (Jacobs, J., dissenting)) is only amplified here by Judge Pollack's insistence that this case is nearly "ready for trial" (Supp. at 9). The coercive effect of class certification is no less pronounced simply because Judge Pollack intends to make it official only after an "adverse verdict."[4] Plaintiffs' suggestion that there is no reviewable order does more than elevate form over substance – it seeks to defeat a *defendant's* appellate rights because of unclarity *plaintiffs* have created in the procedural posture of the case.

2. In the event the Court concludes that interlocutory review under Rule 23(f) is unavailable, Seidman is entitled to a writ of mandamus to compel the district court to decide whether a class is to be certified as to Seidman. As explained in our supplemental filing (at 7-9), mandamus is warranted here to vindicate Seidman's "clear and indisputable" right to a prompt certification decision. *In re IBM Corp.*, 45 F.3d 641, 643 (2d Cir. 1995).

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[4] There is a fundamental problem with the district court's ruling that it will decide class certification only in the event of a verdict "adverse" to Seidman. In the event Seidman *prevails* at trial – and thus there is no "adverse verdict" – the court might elect *not* to decide the certification question, thus leaving unanswered the question whether Seidman's victory is binding on just the named plaintiffs or the putative class as a whole. A legal system in which named plaintiffs get to extend a *favorable* verdict to an entire class, but the class members are not likely to be bound by an *unfavorable* verdict, makes no sense.

Plaintiffs argue (Opp. 7) that the mandamus petition should be denied as moot. On June 15 – just after Seidman filed its mandamus petition – plaintiffs suddenly abandoned their long-held view that the November 2002 order "applies to the class' claims against Seidman,"[5] and filed a motion for class certification. Plaintiffs apparently counted off the requisite number of days allotted for Seidman's opposition and plaintiffs' reply, and noticed a hearing for the very next day, July 13, 2004. See Plaintiffs' Appendix 1-6. Plaintiffs announce that their new motion obviates the need for mandamus because "on July 13, 2004, the District Court is scheduled to hear argument on Lead Plaintiff's motion for [class] certification" (Opp. 2), and plaintiffs' motion thus "affords Seidman the very relief Seidman is seeking" (Opp. 7).

That is nonsense. First, the district court "is scheduled" to hear plaintiffs' motion on July 13 only in the sense that plaintiffs – without consulting either the district court or Seidman – picked that date and put it in their Notice of Motion. But Judge Pollack certainly has given no indication that he wishes to hear plaintiffs' motion. Indeed, his June 3 order makes clear that Judge Pollack will *not* decide the class certification question until after trial. As Judge Pollack explicitly stated, "[t]hat question will be reached on the damages phase as to BDO Seidman" – and not before. Supp. Exh. A.[6]

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[5] Plaintiffs' Memorandum of Law in Opposition to BDO Seidman, LLP's Motion for Clarification or, in the Alternative, Class Decertification (May 10, 2004) (filed under seal).

[6] Even if the district court were to hear plaintiffs' motion, that hearing is unlikely to occur on the date it has been "scheduled." To begin with, plaintiffs' counsel advised undersigned counsel for Seidman this past Friday, June 18, that Judge Pollack had just called him to advise that he was scheduled to enter the hospital on June 20 for one or two weeks. In addition – as plaintiffs point out in their papers – "the record on Lead Plaintiff's motion for class certification is not yet complete." Opp. 7. If class certification proceedings go forward in the district court, Seidman intends to take discovery to determine whether (as plaintiffs assert) the market believed that Seidman was ACLN's auditor.

If the Court decides not to grant Seidman permission to appeal under Rule 23(f), it should issue a writ of mandamus and order the district court to rule on whether Seidman is subject to class certification based on the legal principles – including a proper reading of *Wright* v. *Ernst & Young LLP*, 152 F.3d 169 (2d Cir. 1998) – described in Seidman's application.

CONCLUSION

For these reasons, this Court should grant Seidman's application for leave to appeal under Rule 23(f). In the alternative, the Court should grant a writ of mandamus. In either event, the Court should enter a stay of proceedings in the district court pending resolution of these issues in this Court. See 6/1/04 Appl. 20 n.16.

Respectfully submitted,

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June 23, 2004

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I hereby certify that on June 23, 2004, I caused true and correct copies of the foregoing to be served on the following:

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