

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CASE NO. 23-3940

In re: FIRSTENERGY CORPORATION SECURITIES LITIGATION

DIANE OWENS, et al

Plaintiffs – Appellees

v.

FIRSTENERGY CORPORATION, et al

Defendants – Appellants

On Appeal from the United States District Court
for the Southern District of Ohio
Civil Action No. 2:20-cv-03785 and 2:20-cv-04287

**MOTION OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL FOR LEAVE TO
FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANT FIRSTENERGY
CORPORATION AND IN SUPPORT OF REVERSAL**

Pursuant to Federal Rules of Appellate Procedure 29(a)(2) and (3), the International Association of Defense Counsel (“IADC”) moves for leave to file a brief as amicus curiae in support of the defendants-appellants and in support of reversal of the district court’s opinion and order granting plaintiffs’ motion for class certification. IADC seeks leave to file the attached amicus curiae brief because of its interest in the important issues presented in this case.

IADC is an invitation-only, peer-reviewed membership organization of about 2,500 in-house and outside defense attorneys and insurance executives. It is dedicated to the just and efficient administration of civil justice and improvement of the civil justice system. IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. IADC regularly appears as amicus curiae before the United States Supreme Court, federal courts of appeals, and state supreme courts in cases involving issues of importance to its members. *See, e.g., Johnson & Johnson v. Ingham*, No. 20-1223 (U.S. Apr. 1, 2021) (brief in support of certiorari petition); *Janssen Pharms. v. A.Y.*, No. 20-1069 (U.S. Mar. 8, 2021) (brief in support of certiorari petition); *TransUnion LLC, v. Ramirez*, 594 U.S. 413 (2021) (brief in support of reversal); *Harris v. Fedex Corporate Services, Inc.*, ____ F.4th ____, 2024 WL 378285 (5th Cir. Feb. 1, 2024) (brief in support of reversal).

IADC members have considerable experience defending class action lawsuits and securities fraud cases. The rules and procedures applied in those cases are of the utmost importance to IADC members and the clients they represent.

As evidenced by IADC submitting an amicus curiae brief in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013),¹ the application of the factors set forth in Federal Rule of Civil Procedure 23 at the class certification stage is of paramount interest to IADC and its members. A court's ruling on a motion for class certification often is the most important step in a class action lawsuit. A court's proper application of the law at that stage is crucial to the effective and appropriate handling of class action lawsuits. IADC seeks leave to file the attached amicus curiae brief to address whether the district court's certification of the claimant class in this case is consistent with Rule 23 and the protections provided to defendants in class action lawsuits.

Similarly, whether the presumption of reliance recognized in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), should be applied to claims involving affirmative representations alleged to be incomplete is an issue of interest to IADC and its members. Almost every affirmative misrepresentation can be alleged to be an incomplete misrepresentation, since any misrepresentation can be made an accurate representation if enough additional information is provided. See *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 2 F.4th 1199, 1208 (9th Cir. 2021). Expanding *Affiliated Ute* to such situations will

¹ IADC also filed amicus briefs in *Sears, Roebuck and Co. v. Butler*, 569 U.S.1015 (2013), and *Whirlpool Corp. v. Glazer*, 569 U.S. 901 (2013), which addressed how *Comcast* should be applied.

render an otherwise applicable portion of Rule 23 meaningless in securities fraud cases. That will particularly have a significant impact in class actions, since reliance is otherwise dealt with as a factual issue that often scuttles class certification. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 461-63 (2013).

Because the resolution of these significant issues will significantly impact IADC members and the clients they represent, IADC seeks leave to file the attached amicus curiae brief.

Respectfully submitted,

/s/ Michael D. Risley

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CERTIFICATE OF SERVICE

This is to certify that this Motion for Leave has been filed on this 16th day of February, 2024, through the court's efilings system, which includes service on all registered users of that system.

Michael D. Risley
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