16-1914

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNIVERSITIES SUPERANNUATION SCHEME LIMITED, EMPLOYEES RETIREMENT SYSTEM OF THE STATE OF HAWAII, and NORTH CAROLINA DEPARTMENT OF STATE TREASURER,

Plaintiffs-Appellees,

(Caption Continued on Inside Cover)

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE NATIONAL CONFERENCE ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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TEACHERS RETIREMENT FUND, AON HEWITT INVESTMENT CONSULTING, INC., AURION INTERNATIONAL DAILY EQUITY FUND, BELL ALIANT REGIONAL COMMUNICATIONS INC., BMO GLOBAL EQUITY CLASS, CITY OF ALBANY PENSION PLAN, DESJARDINS DIVIDEND INCOME FUND, DESJARDINS EMERGING MARKETS FUND, DESJARDINS GLOBAL ALL CAPITAL EQUITY FUND, DESJARDINS OVERSEAS EQUITY VALUE FUND, DEVON COUNTY COUNCIL GLOBAL EMERGING MARKET FUND, DEVON COUNTY COUNCIL GLOBAL EQUITY FUND, DGIA EMERGING MARKETS EQUITY FUND L.P., ERIE INSURANCE EXCHANGE, FIRST TRUST/ABERDEEN EMERGING OPPORTUNITY FUND, GE UK PENSION COMMON INVESTMENT FUND, HAPSHIRE COUNTY COUNCIL GLOBAL EQUITY PORTFOLIO, LONDON BOROUGH OF HOUNSLOW SUPPERANNUATION FUND, MACKENZIE UNIVERSAL SUSTAINABLE OPPORTUNITIES CLASS, MARSHFIELD CLINIC, MOTHER THERESA CARE AND MISSION TRUST, MOTHER THERESA CARE AND MISSION TRUST, MTR CORPORATION LIMITED RETIREMENT SCHEME, MYRIA ASSET MANAGEMENT EMERGENCE, NATIONAL PENSION SERVICE, NPS TRUST ACTIVE 14, OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM, WASHINGTON STATE INVESTMENT BOARD, ABERDEEN LATIN AMERICAN INCOME FUND LIMITED, ABERDEEN GLOBAL EX JAPAN PENSION FUND PPIT, FS INTERNATIONAL EQUITY MOTHER FUND, NN INVESTMENT PARTNERS B.V., acting in the capacity of management company of The Mutual Fund NN Global Equity Fund and in the capacity of management company of The Mutual Fund NN Institutioneel Dividend Aandelen Fonds, NN INVESTMENT PARTNERS LUXEMBOURG S.A., acting in the capacity of management company SICAV and its Sub-Funds and NN (L) SICAV, for and on behalf of NN (L) Emerging Markets High Dividend, NN (L) FIRST, AURA CAPITAL LTD., WGI EMERGING MARKETS FUND, LLC, BILL AND MELINDA GATES FOUNDATION TRUST, BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM, TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP, LOUIS KENNEDY, individually and on behalf of all others similarly situated, KEN NGO, individually and on behalf of all others similarly situated, JONATHAN MESSING, individually and on behalf of all others similarly situated, CITY OF PROVIDENCE, individually and on behalf of all others similarly situated, UNION ASSET MANAGEMENT HOLDING AG,

Plaintiffs,

v.

PETROLEO BRASILEIRO S.A. PETROBRAS, BB SECURITIES LTD., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, BANK OF CHINA (HONG KONG) LIMITED, BANCA IMI, S.P.A., SCOTIA CAPITAL (USA) INC., THEODORE MARSHALL HELMS, PETROBRAS GLOBAL FINANCE B.V., PETROBRAS AMERICA INC., CITIGROUP GLOBAL

MARKETS INC., ITAU BBA USA SECURITIES, INC., J.P. MORGAN SECURITIES LLC, MORGAN STANLEY & CO. LLC, MITSUBISHI UFJ SECURITIES (USA), INC., HSBC SECURITIES (USA) INC., STANDARD CHARTERED BANK, BANCO BRADESCO BBI S.A.,

Defendants-Appellants,

JOSE SERGIO GABRIELLI, SILVIO SINEDINO PINHEIRO, PAULO ROBERTO COSTA, JOSE CARLOS COSENZA, RENATO DE SOUZA DUQUE, GUILLHERME DE OLIVEIRA ESTRELLA, JOSE MIRANDA FORMIGL FILHO, MARIA DAS GRACAS SILVA FOSTER, ALMIR GUILHERME BARBASSA, MARIANGELA MOINTEIRO TIZATTO, JOSUE CHRISTIANO GOME DA SILVA, DANIEL LIMA DE OLIVEIRA, JOSE RAIMUNDO BRANDA PEREIRA, SERVIO TULIO DA ROSA TINOCO, PAULO JOSE ALVES, GUSTAVO TARDIN BARBOSA, ALEXANDRE QUINTAO FERNANDES, MARCOS ANTONIO ZACARIAS, CORNELIS FRANCISCUS JOZE LOOMAN, JP MORGAN SECURITIES LLC, PRICEWATERHOUSECOOPERS AUDITORES INDEPENDENTES,

Defendants.

RULE 26.1 CERTIFICATION

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

The National Conference of Public Employee Retirement Systems has no parent company. No publicly held company owns 10% or more of its stock.

CONTENTS

AUTHORITIES

Cases

Other Authorities

INTEREST OF *AMICUS* [1]

This brief is submitted on behalf of the National Conference on Public Employee Retirement Systems ("NCPERS"). NCPERS is the largest national, non-profit public pension trade association, with a membership that includes over 550 pension funds in the United States, Canada, and Australia which manage nearly $3 trillion in assets held in trust for approximately 21 million active and retired public employees, including law enforcement, firefighters, teachers, judges and other public servants. NCPERS and its public pension fund members have a strong interest in the effective enforcement of the securities laws to deter fraud and to ensure compensation for those injured by violations of these laws.

Since 1941, NCPERS has worked to protect the pensions of public employees. Because of NCPERS' interest in preserving retirement benefits for public employees, it is very concerned about fraudulent practices in the securities industry and the nation's capital markets. NCPERS recognizes the need to combat securities fraud and restrain corporate excess and appreciates the role of private securities class actions in providing a means to deter corporate wrongdoing and compensate victims of securities fraud.

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[1] No party's counsel authored this brief in whole or in part. No party or party counsel, and no person other than *Amicus* and its counsel, contributed money that was intended to fund preparing or submitting this brief. This brief is filed with the consent of all parties.

NCPERS believes that purchasers on secondary markets would be denied access to class action remedies if the position of the Defendants is approved. Limiting the class to domestic transactions does not render the class indeterminate nor does the ordinary administrative claims process adversely affect whether the class is ascertainable. NCPERS is concerned that that the Defendants' position would narrow the protections of federal securities laws available to retirement systems as institutional investors and would threaten the financial security of our dedicated public officers and employees. The primary economic engine for NCPERS' members is investment return. Anything which enhances the opportunity for fraud to adversely affect retirement system assets not only diminishes retirement security, but increases the potential burden on taxpayers to bear the effects of corporate misconduct.

SUMMARY OF ARGUMENT

Amicus agrees with Plaintiffs-Appellees and the court below that the class as certified is sufficiently ascertainable through ordinary documentation that would be submitted during an administrative claims process, and that limiting the class to purchasers in domestic transactions does not render the class indeterminate, unfair to class members or Defendants, or otherwise defective. *See* Plaintiffs-Appellees

Brief at 16-37. *Amicus* also agrees that, Defendants having expressly argued that the location of a transaction under *Absolute Activist* "can be easily determined based on recognized and readily understood standards," they are in no position now to claim the opposite. Plaintiffs-Appellees Br. at 6, 18 (quoting Defendants' claim and the district court's reliance thereon).

Amicus files this brief in order to emphasize the radical implications of Defendants' current suggestion that *potential* difficulties in proving whether some purchasers on the secondary market meet the domestic transaction requirement for class membership render the entire certification impermissible. Under such a theory, all purchasers on secondary markets would be denied class action procedures and hence, for many of them, denied any effective remedy at all. Such a radical narrowing of class action remedies is not required by any precedents concerning "domestic transactions" or ascertainability, and would severely undercut both class actions and the securities laws.

Furthermore, under the logic of Defendants' overly narrow approach to ascertainability, numerous other types of classes, routinely certified by the courts, would fail based on the mere anticipation of ordinary and mundane proof issues during any *post hoc* administrative claims process. Many classes are limited to

persons "injured by" various unlawful acts, yet the fact and amount of any individual damages are routinely determined by the submission of documentation during an administrative claims process following judgment or settlement. Defendants' narrow view would effectively eliminate such classes. What Defendants seek thus would be a sea change in the law and an extreme contraction of class-action procedures and remedies.

ARGUMENT

I. DEFENDANTS' NARROW VIEW OF ASCERTAINABILITY WOULD IMPROPERLY ELIMINATE THE OPTION OF CLASS ACTIONS FOR SECONDARY PURCHASERS AND EFFECTIVELY INSULATE DEFENDANTS FROM SUBSTANTIAL LIABILITY.

The definition of the Exchange Act class in this case necessarily limits it to persons or entities that purchased in domestic transactions. It defines the class, in relevant part, as:

> all purchasers who, between January 22, 2010 and July 28, 2015, inclusive (the "Class Period") purchased or otherwise acquired the securities of Petroleo Brasileiro S.A. ("Petrobras"), including debt securities issued by Petrobras International Finance Company S.A. ("PifCo") and/or Petrobras Global Finance B.V. ("PGF") on the New York Stock Exchange (the "NYSE") or pursuant to other domestic transactions, and were damaged thereby.

That class is bounded both temporally and by the objective nature of the transactions involved. Defendants' primary objection to this class is that the limitation to domestic transactions is indeterminate and difficult of proof,

rendering class certification inappropriate. *See* Petrobras Defendants-Appellants Brief ("Petrobras Br.") at 36-45; Underwriter Defendants-Appellants Brief ("Underwriters Br.") at 19-34.

Amicus agrees with Plaintiffs and the court below that such objections are without merit. The Supreme Court in *Morrison v. National Australian Bank Ltd.*, 561 U.S. 247, 266 (2010), and this Court in *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012), set forth straight-forward criteria for analyzing the domestic transaction requirement, and such criteria are capable of proof through much of the same the ordinary documentation that would likewise be submitted during any eventual claims process. Indeed, in many instances, Defendants themselves are in possession of the relevant documentation.

In *Morrison*, the Supreme Court held that Section 10(b) reaches only "domestic transactions" in securities not listed on domestic exchanges, but regularly purchased or sold in the United States over the counter or otherwise. 561 U.S. at 267. In responding to calls for a "clear test" that would avoid unwarranted extraterritorial application of the securities laws the Court concluded that the "transactional test we have adopted – whether the purchase or sale is made in the

United States, or involves a security listed on a domestic exchange – meets that requirement." *Id*. at 269-70.

In *Absolute Activist*, this Court elaborated upon the Supreme Court's test by setting forth specific elements that would render a transaction "domestic" or that reflect a purchase or sale in the United States. This Court held that "transactions involving securities that are not traded on a domestic exchange are domestic if irrevocable liability is incurred or title passes within the United States." 677 F.3d at 67. This Court explained that "the point of irrevocable liability can be used to determine the locus of a securities purchase or sale" and parties on a motion to dismiss merely need to allege facts leading to a plausible inference "that the purchaser incurred irrevocable liability within the United States to take and pay for a security, or that the seller incurred irrevocable liability within the United States to deliver a security." *Id*. at 68. Additionally, "a sale of securities can be understood to take place at the location in which title is transferred." *Id*.[2]

In discussing the types of evidence that could demonstrate a domestic transaction, this Court specifically noted that plaintiffs' intent to rely on the

[2] This Court specifically noted that "'[a] purchaser's citizenship or residency does not affect where a transaction occurs; a foreign resident can make a purchase

"underlying transactional documents" as well as "trading records, private placement offering memoranda, and other documents indicating that the purchases became irrevocable upon payment and that payment was made . . . in the United States" was sufficient to grant leave to amend. *Id*. at 71. Both *Morrison* and *Absolute Activist* thus demonstrate that claims under Section 10(b) are available to any purchaser – foreign or domestic – so long as the *transaction* occurred in the United States.

Contrary to Defendants' suggestions, the types of proof needed to establish the elements of a domestic transaction typically are readily available and amenable to the ordinary claims administration processes in securities cases. Indeed, *Absolute Activist* enumerated fairly straight-forward elements for determining the location of the transaction. Other cases likewise have viewed these elements as simple and direct. *United States v. Georgiou*, 777 F.3d 125, 136 (3d Cir. 2015) (agreeing with *Absolute Activist* and other circuits that "'commitment' is a simple and direct way of designating the point at which . . . the parties obligated themselves to perform what they had agreed to perform"), *cert. denied*, 136 S. Ct. 401 (2015). Indeed, the Third Circuit in *Georgiou* identified numerous simple and

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within the United States, and a United States resident can make a purchase outside the United States.'" *Id*. at 69 (citation omitted).

easily documented facts concerning over-the counter transactions that sufficed as indicia of domestic transaction. Those facts included the location of the "'formation of the contracts, the placement of purchase orders, the passing of title, or the exchange of money,'" involvement of "an American market maker," entry into "investment agreements in the United States," and sending money for the purchase from a United States account. *Id.*[3]

Although the Petrobras Defendants-Appellants speculate, at 39, that purchasers will not have access to documents demonstrating such domestic characteristics, even the most basic common sense suggests otherwise. There necessarily will be documentation of any and all purchases of the Petrobras securities at issue in this case, and typically such purchases will have been made through brokers or market makers. Where the actual entity conducting the purchase or sale is in the United States, that generally will suffice as evidence of a

[3] *See also SEC v. Levine*, 462 F. App'x 717, 719 (9th Cir. 2011) ("sales closed in Nevada when Marie Levine received completed stock purchase agreements and payments"); *Seijas v. Republic of Argentina*, 606 F.3d 53, 56 (2d Cir. 2010) (*Seijas I*) (Noting that public filings could be used to determine aggregate recoveries for various classes or Argentine debt-holders and that class members could then apply for individual awards based on documentation of their purchases and holdings); *Brecher* v. *Republic of Argentina*, 806 F.3d 22, 26 (2d Cir. 2015) (noting that although class of Argentine debt purchasers, including those who bought on the secondary market, "may have presented difficult questions of calculating damages, it did not suffer from a lack of ascertainability").

domestic transaction. *Georgiou*, 777 F.3d at 136. As Plaintiff-Appellees have noted, the bulk of securities at issue in this case were bought and sold through such domestic entities. *See* Plaintiffs-Appellees Br. at 19-21. Any concern regarding the limited number of transactions not conducted using U.S. brokers, market-makers, or financial institutions seems best handled, if necessary, through establishing class-wide rules applicable to claims for such categories on the margin and through basic discovery. All of those approaches are more efficiently handled in a class action rather than in a slew of individual trials, and even if they posed some difficulty, denying class certification where the mine run of cases do not pose any such difficulty seems like throwing out the baby with the bathwater.[4]

[4] The Petrobras Defendants-Appellants, at 39, suggest that some securities sales might occur via so-called "dark pools" and hence the location of such transactions might be difficult to determine. Aside from offering no evidence that the relevant Petrobras securities were purchased via dark pools, such pools themselves are comparable to markets or market makers, are often located in the United States, and are regulated and keep trading records, even if some information is not made public. *See* Investopedia, *Dark Pool Liquidity Definition* (http://www.investopedia.com/terms/d/dark_pool_liquidity.asp) (viewed Aug. 28, 2016) ("In 2016, there are more than 50 dark pools operating in the United States, run mostly by investment banks."); D. Keith Ross, *10 Things People Don't Get About Dark Pools*, CNBC, Feb. 2, 2013 (http://www.cnbc.com/id/100424690) (viewed Aug. 28, 2016) ("Dark Pools are highly regulated. All Dark Pools are broker-dealers registered with the SEC and The Financial Industry Regulatory Authority (FINRA) and subject to regular audits and examinations, similar to an exchange.").

The specter raised by Defendants of numerous mini-trials to determine the domestic quality of individual transactions is no more than a red herring. As the district court noted, many of the essential facts for determining domesticity are available via purchase records and can be resolved administratively. A-6003-04; *see also Byrd v. Aaron's Inc.*, 784 F.3d 154, 169 (3d Cir. 2015) (finding proposed classes ascertainable because "there are 'objective records' that can 'readily identify' these class members"); *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 640 (5th Cir. 2012) ("A quick look at [the] trading records is all that is required . . . It is a mechanical and objective standard . . . "), *cert. denied*, 133 S. Ct. 317 (2012); *In re Facebook, Inc, IPO Sec. and Derivative Litig.*, 312 F.R.D. 332, 353 (S.D.N.Y. 2015) ("Given that the subclasses may be ascertained with reference to investor records, it is administratively feasible to determine whether an investor is a member of the institutional investor subclass, the retail investor subclass, or no subclass at all.").

Indeed, much of the evidence regarding a transaction's location will be identical to the evidence necessary to prove damages – basic purchase and sale records showing when orders were made, through whom, how paid for, and where delivered. While the damages claims process often involves such individual submission of supporting documentation, "it is well-established that the fact that

damages may have to be ascertained on an individual basis is not sufficient to defeat class certification." *Seijas v. Republic of Arg.*, 606 F.3d 53, 58 (2d Cir. 2010) ("*Seijas I*") (citing *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008)).

To the extent there is disagreement whether particular factors support a determination of domesticity, those *factors* can be litigated on a class-wide basis, the district court can rule on them, and then they can be applied to individual claimants during the administrative claims process if Plaintiffs succeed via trial or settlement. Applying such domesticity factors during the claims process would be no different than determining whether and to what extent class members were damaged by looking at their varying purchases and sales and calculating their losses, if any, according to class-wide criteria established or approved by the court.

Any concern that such ordinary processes will be too cumbersome in the mine run of situations can be addressed by the district court at the appropriate time. But such concerns are a matter of case management best left to the district court's sound discretion, not a justification for rejecting a certified class. *Seijas I*, 606 F.3d at 58 (addressing similar concerns regarding Argentine bonds traded on the secondary market and noting that "manageability is an issue peculiarly within a

district court's discretion" and "we see no reason to second guess the district court's judgment as to manageability"); *In re Visa Check/MasterMoney Antitrust Litg.*, 280 F.3d 124, 141 (2d Cir. 2001) (regarding similar concerns as to damages, explaining that "[t]here are a number of management tools available to a district court to address any individualized damages issues," such as "bifurcating liability and damage trials," or "appointing a magistrate judge or special master to preside over individual damages proceedings"), *overruled on other grounds by In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 42, (2d Cir. 2006); *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 562 (6th Cir. 2007) (same), *cert. denied*, 555 U.S. 1032 (2008).

In addition to the exaggerated concerns raised by Defendants, the narrow view of ascertainability they propose, if accepted, would effectively eliminate class actions as an available procedure in any case involving securities not traded on an exchange, such as the trillions of dollars of municipal and corporate bonds traded in the United States. Essentially *all* securities traded outside of formal U.S. markets have at least the potential to include non-domestic transactions, and according to Defendants, that mere possibility would require individual determinations that preclude class certification.

Denying class-action procedures for frauds involving such a large swath of traded securities would constitute a spectacular contraction of the class-action remedy. For smaller investors it would make recovery for fraud nearly impossible given that the amounts at stake would never be sufficient to justify the expense of significant securities litigation. And even for many large investors, such as the members of NCPERS, the cost of significant securities litigation may be too much to bear alone or may so severely cut into any recovery that such suits would be an inefficient disservice to those who were injured.

It is precisely because individual suits might be impractical or impossible that Congress provided for class-action remedies in the first place. *See Beattie*, 511 F.3d at 567 ("In *Windsor*, the Supreme Court explained that litigation should be brought as a class action if individual suits would yield small recoveries. The Court stated that '"[t]he policy at the very core of the class-action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."'") (internal citations omitted); *id*. ("Here, individual suits would yield only a small amount of damages …. Such a small possible recovery would not encourage individuals to bring suit, thereby making a class action a superior mechanism for adjudicating this dispute").

Defendants' narrow approach to ascertainability would leave numerous purchasers on their own and thus deny them any effective remedy at all.

Such a radical contraction of class action remedies for securities fraud cannot have been the intent of either *Morrison* or *Absolute Activist*. Accepting Defendants' contention that the "domestic transaction" requirement adopted by *Morrison* and applied by *Absolute Activist* unintentionally made it impossible to bring Section 10(b) class actions for non-exchange traded securities would be a great disservice to investors and the economy, and would be an unreasonable windfall to current and future defendants, who then would be insulated from a substantial portion of the responsibility for their bad acts.

And that certainly could not have been the intent of *Brecher*'s implied requirement of ascertainability. In *Brecher*, this Court was primarily concerned with the fluidity of the class due to an open-ended definition, rather than with ordinary challenges concerning proof as to concrete class criteria. 806 F.3d at 23-24. The class definition included a "continuous holder" requirement that helped fix the composition of the class notwithstanding that the securities were traded on the secondary market. An earlier definition that included all holders – even those who bought during the litigation or perhaps after the entry of judgment – was "too

fluid" given that class membership was constantly in flux. *Id.*; *see also id.* at 25 ("Without a defined class period or temporal limitation, such as the continuous holder requirement, the nature of the beneficial interest itself and the difficulty of establishing a particular interest's provenance in the particular circumstances of this case make the objective criterion used here inadequate."). This Court similarly allowed a class involving globally traded Argentine securities in *Seijas I*, 606 F.3d at 58, again with temporal limits included.

In this case, there are no concerns regarding fluidity – the class is fixed both as to the time of the transactions and the location of the transactions – both historical facts not subject to change during the litigation. In this sense the composition of the class is entirely ascertainable, regardless whether individual membership is in fact ascertained before, during, or after the litigation. As this Court observed in *Brecher*, "'identifiable' does not mean 'identified'; ascertainability does not require a complete list of class members at the certification stage." 806 F.3d at 25 n. 2; *see also id.* ("'The class need not be so finely described, however, that every potential member can be specifically identified at the commencement of the action; it is sufficient that the general parameters of membership are determinable at the outset.'" (quoting 1 MCLAUGHLIN ON CLASS ACTIONS § 4:2 (11th ed. 2014)).

This same principle illustrates the fallacy of Defendants' due process objection regarding whether potential class members can determine whether to opt out and whether defendants can make a reasonable estimate of their prospective liability and hence devise a defense strategy accordingly. Ascertainability merely addresses the outer bounds of a class and ensures that it is not so fluid as to allow entry and exit at will, even after the opt-out date. For prospective class members, all they need to know is that they are *potentially* members of the class – not whether they are definitively members. Issues of notice and opt-out procedures are routinely addressed by ensuring that class notice is circulated broadly to potential class members, even if some of those persons may not ultimately meet the class definition. *In re Cendant Corp. Litig.*, 264 F.3d 201, 226 (3d Cir. 2001) ("the court approved the form of the notice of the class action to be sent to *potential* class members and ordered its dissemination."; notice sent to owners of stock, brokers, and published), *cert. denied sub nom. Mark v. Cal. Public Employees' Ret. Sys.*, 535 U.S. 929 (2002).

In this case, anyone who purchased the Petrobras securities at issue were on notice that they were potential members of the class even in the face of uncertainty whether their transactions were domestic or foreign. To the extent prospective class members wanted to preserve their individual causes of action, they had

enough information to opt out, or at least to inquire into the provenance of their purchases.[5] Such notice is more than sufficient for due process purposes. Indeed, courts addressing related objections regarding class definitions that include the "injured thereby" limitation have no difficulty in finding such notice to potential class members adequate and thus the class sufficiently identifiable to protect their interests. *See In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp.2d 319, 340-41 (S.D.N.Y. 2005) (rejecting claims that "the phrase 'who were injured thereby' necessitates 'a subjective, merits-based inquiry far beyond a simple determination of whether a given person did or did not purchase or acquire WorldCom, Inc. securities during the class period,' rendering Class membership 'unknowable'" or that "the Class Definition might be confusing to a person who had isolated losses but net gains … or who faced divergent results from purchases of different types of securities"; holding that class definition was sufficient to put purchasers "on notice" and it "is sufficient that the Class Definition gave putative Class Members who believed they had colorable legal claims arising from purchases of WorldCom securities enough information to alert them that they needed to opt out of the Class

[5] If they desired to pursue claims on their own, they would need to discover the provenance of their transactions in any event, but would elect to opt out as a prophylactic measure even before knowing the answer to that question.

if they wished to pursue their claims separately."); *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, 2006 U.S. Dist. LEXIS 17588, at *56-58 (S.D.N.Y. Apr. 6, 2006) (rejecting due process claim based on the alleged *ex ante* uncertainty of the class definition requirement that purchasers be "injured thereby," endorsing the analysis of the same issue in *Worldcom*, and holding that any areas of uncertainty in calculating injury were provided for later at the allocation phase).

In this case, the prospective universe of class members is discrete and concrete and the only steps that would remain are administrative in nature. As with damages, such matters may pose some challenges in the rare case, but that is *not* a question of ascertainability. *Brecher*, 806 F.3d at 26 ("Although the class as originally defined by the District Court may have presented difficult questions of calculating damages, it did not suffer from a lack of ascertainability.").

Any potential difficulties in proof, of course, would likewise exist in individual actions, and hence do not bear upon the superiority of a class action even if some individual issues remain.[6] Indeed, given that the bulk of transactional

[6] The only way in which individual actions would be less burdensome is if they did not get filed at all. The proper comparison regarding difficulties and superiority of class adjudication cannot be the class action as compared to nothing, but must be the class action as compared to numerous individual suits by small investors. Assuming that such small investors will not sue (because it is not worth it) does not

information can be obtained through collective discovery aimed at various document custodians (including many of the Defendants), and that the *types* of records needed to show domesticity can also be litigated on class-wide basis, such common issues and procedures confirm that class treatment is superior even as to establishing a rational claims process for managing individualized proof requirements. Class action need not be superior as to every single issue involved, merely as to the case as a whole. And it is clear that class actions are superior as to the vast majority of issues in this case, and are certainly no worse than individual actions as to any few remaining individual issues.

II. DEFENDANTS' NARROW VIEW OF ASCERTAINABILITY WOULD IMPROPERLY ELIMINATE NUMEROUS CLASSES CERTIFIED BY THIS AND OTHER COURTS UNDER WHICH INDIVIDUAL ELIGIBILITY IS NECESSARILY ESTABLISHED AT THE CLAIM PROCESSING STAGE.

Apart from the unreasonable consequences of Defendants' view for securities purchasers in secondary or off-exchange transactions, the logic of their view also would threaten numerous other types of classes routinely certified by the federal courts. Under Defendants' view, whenever class membership depends on facts to be submitted to and determined by a post-judgment administrative process,

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support the notion that individual suits are more manageable. Rather it supports the notion that such individual suits are not manageable or practical at all.

such a class is non-ascertainable. *See* Def. Brief at 40, 42 (claiming a right to know at the start of the litigation the number of class members and that using a "post-trial 'bureaucratic process'" to determine eligibility is too late). But ultimate membership in a class for particular claimants is routinely determined in such end-stage administrative claims proceedings. Defendants' position thus is erroneous and would radically curtail the availability of class actions in a wide variety of areas if adopted.

For example, in numerous securities cases, the class is defined as persons who purchased within a particular date range and "were injured thereby." *In re Cendant Corp. Litig.*, 264 F.3d at 226 (certified class included "'all purchasers or acquirers of Cendant Corporation or CUC International, Inc. publicly traded securities between May 31, 1995 and August 28, 1998 who were injured thereby.'"); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp.2d at 323 ("class consisting of all persons and entities who purchased or otherwise acquired publicly traded securities of WorldCom during the period beginning April 29, 1999 through and including June 25, 2002, and who were injured thereby.").

The injuries, if any, suffered by individual claimants typically are determined via an administrative claims process where purchase and sales

documentation is submitted and any recovery allotted accordingly. Where the documentation demonstrates no injury – whether due to no loss at all, or due to a netting process applied by some courts, *see In re Amaranth Nat. Gas Commodities Litig.*, 269 F.R.D. 366, 381-82 (S.D.N.Y. 2010) (class definition required "identifying whether potential class members had *net* short or long positions"), *aff'd*, 730 F.3d 170 (2d Cir. 2013) – the claimant not only does not recover, he or she does not even meet the class definition. Injury, no less than domesticity, is a requirement for a cause of action under the most laws and under numerous class definitions, yet is routinely determined in a *post-hoc* claims process.

Even though determining the existence and extent of injury is subject to a limited amount of discretion and uncertainty, that does not render an "injured thereby" limitation non-ascertainable when typically included as part of the class definition. Such classes, of course, remain appropriate for certification because, while determining injury for particular claimants occurs after resolution of the case, the *criteria* for what constitutes injury, how it is measured (*e.g.*, LIFO, FIFO, or simple netting of proceeds spent versus proceeds remaining), and whether it is offset by related gains, are determined on a class-wide basis and can thereafter be applied fairly mechanically. *See In re Amaranth Nat. Gas Commodities Litig.*, 269 F.R.D. at 381-82 (rejecting argument that "identifying whether potential class

members had *net* short or long positions, as required by the class definition, will make it impracticable for the court to determine whether a particular individual is a member," and holding that "[a]lthough it will require some complex math, whether a proposed class member held a net long or short position on a particular contract can be determined objectively through mechanical calculation. Accordingly, the proposed class is not rendered unascertainable by the limitation that the class members held *net* long or short positions on specific contracts at specific times."). And a "damaged" or "injured" limitation on a class definition remains valid – indeed, often necessary – even though the court may not rule on the class-wide damages principles until well into the case. *See, e.g.*, *In re Barrick Gold Secs. Litig.*, 314 F.R.D. 91, 103 (S.D.N.Y. 2016) (courts have discretion in selecting theories of damages); *Gordon v. Sonar Cap. Mgmt. LLC*, 92 F. Supp.3d 193, 202 (S.D.N.Y. 2015) (choice of proper approach to damages often "best be reserved until the time of trial"). Notwithstanding that the class-wide damages rules – and hence one delimiting feature of the class – will not be established until later in the case, the fact that it *will* be established and impose objective criteria is sufficient to make such classes ascertainable.

The same approach and determinations apply with respect to the domestic nature of particular transaction, no less than to the extent of any injury from such transactions.

Defendants' arguments, that *post hoc* application of such criteria is too late or too individualized (or may occasionally pose close questions), thus would condemn far more than classes involving secondary purchasers. Rather, it would threaten the availability of class certification for virtually any securities class, antitrust class, or even product liability class that limited the class to persons injured as typically required by the causes of action in such cases. *See, e.g.*, *Union Asset Mgmt.*, 669 F.3d at 639-40 (certifying settlement class of investors who purchased common stock "directly or beneficially" and "were damaged thereby," as "a quick look at [the] trading records" is all that is required to determine whether someone did so" and the objectors' "worry about individualized 'mini-trials' is misplaced") (citations omitted); *Schleicher v. Wendt*, 618 F.3d 679, 685, 687 (7th Cir. 2010) (fact that identifying who can recover and who cannot must await a later determination does not militate against class certification in securities case); *Facebook,* 312 F.R.D. at 338 (certifying two Securities Act classes of investors who purchased in or traceable to Facebook's IPO, and "were damaged thereby"); *In Re Holocaust Victim Assets Litig.*, 413 F.3d 183, 186 (2d Cir. 2001)

(approving settlement classes seeking recovery for class of victims of Nazi persecution whose bank accounts and assets were stolen and who were forced into slave labor; noting that the "existence and estimated value of the claimed deposit accounts" – and hence evidence delineating class membership – "was established by extensive forensic accounting" and that class members would be able to submit documentation that would demonstrate their entitlement to participate in the settlement); *In re Libor-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 (NRB), 2016 U.S. Dist. LEXIS 63745 (S.D.N.Y. May 12, 2016) (antitrust class including only "traders in Eurodollar futures who "were harmed" by manipulation of LIBOR"); *cf. Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525-26 (6th Cir. 2015) (approving consumer class of purchasers of nutritional supplements in specific States; "single state sub-classes can be determined with reasonable – but not perfect – accuracy. Doing so would require substantial review, likely of internal P&G data. But as the district court pointed out, such review could be supplemented through the use of receipts, affidavits, and a special master to review individual claims."), *cert. denied*, 136 S. Ct. 1493 (2016).

The sweeping consequences of Defendants' position are more than enough to reject it out of hand. Class determinations of numerous common questions of law and fact should not be foreclosed merely because those determinations will

eventually have to be applied to a limited range of individual factual circumstances. All classes cover a range of behavior and hence there will always be determinations regarding whether and where individuals come within those limits. *Byrd*, 784 F.3d at 170-71 (rejecting an ascertainability challenge to a class that included "household members," noting that there "will always be some level of inquiry required to verify that a person is a member of a class," but finding such inquiries by a anyone "charged with administering the fund resulting from a successful class action" would not be unduly burdensome). In most cases such determinations are largely ministerial, even though defendants remain free to challenge specific claims as not matching the relevant criteria. But as with most securities damages claims, the vast majority of class members here need only produce simple documentation of their purchases and there will be no dispute whether they were domestic or not. If even the prospect or possibility that some determinations may be more difficult to resolve renders class certification impossible, then virtually no class requiring subsequent application of class-wide rulings would be permissible.

The district court, having actually made determinations of domesticity as to a variety of class and individual plaintiffs, was in the best position to determine whether such a process would be feasible and manageable as to the class as a

whole. That first-hand experience was all the court needed to support its findings, and such matters are left to the discretion of the district court. Defendants have produced no evidence that that the court abused its discretion or that the claims process involving basic transaction documentation from claimants, from Defendants themselves, or from third-party discovery conducted on behalf of the class would be impossible as to class members generally.

In the end, Defendants are simply reaching too far – they seek to drive a spike through the heart of class actions for the very same small and mid-sized plaintiffs for whom the remedy is most important. Demanding, as a condition of class certification, the complete absence of individualized determinations relating to class membership – however ministerial – is unreasonable and not even remotely required by Rule 23 or this Court's precedents. This Court thus should decline Defendants' invitation to impose such an onerous limit on class certification and leave district courts with the appropriate discretion to determine that a class is manageable notwithstanding the eventual need to apply class-wide limitations and rulings to specific purchasers.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court certifying the class in this case and remand for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of the National Conference on Public Employee Retirements Systems as *Amicus Curiae* In Support of Plaintiffs-Appellees, complies with the type-face requirements of Fed. R. App. P. 32(a)(5) & (6) and the 7,000 word type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) in that it uses Times New Roman 14-point type and contains 5,810 words, excluding the table of contents, table of authorities, and certificates of counsel. The number of words was determined through the word-count function of Microsoft Word.

s/ Erik S. Jaffe
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I hereby certify that the foregoing Brief of the National Conference on Public Employee Retirements Systems as *Amicus Curiae* submitted in PDF format via the ECF system was scanned using the current version of Norton Internet Security and no viruses or other security risks were found.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of September, 2016, I caused the foregoing Brief of *Amicus Curiae*, to be served via the ECF system on all counsel therein:

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