No. 16-373

IN THE
Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
Petitioner,

v.

ANZ SECURITIES, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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April 5, 2017

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INTEREST OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a non-profit, public-interest law firm and policy center with supporters in all 50 States.[1] Founded nearly 40 years ago, WLF devotes a substantial portion of its resources to advocating for free-market principles, individual and business civil liberties, limited government, and the rule of law.

To that end, WLF has regularly appeared before this and other federal courts in numerous cases raising issues related to the proper scope of the federal securities laws. *E.g.*, Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioners, *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015) (No. 13-435); Brief of the Washington Legal Foundation as *Amicus Curiae* in Support of Petitioners, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (No. 13-317). In particular, WLF has participated in litigation regarding the applicability of the statutes of repose and statutes of limitations for the bringing of securities law claims. *E.g.*, Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioner, *Kokesh v. SEC,* No. 16-529 (petition for

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby state that no counsel for Petitioners or Respondents authored any part of this brief, and no person other than *amicus curiae* or its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a) of the Rules of this Court, letters of consent from all parties to the filing of this brief are on file or have been submitted to the Clerk of the Court.

cert. filed Oct. 18, 2016); Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioners, *Timbervest LLC v. SEC,* No. 15-1416 (D.C. Cir. appeal docketed Nov. 13, 2015).

Additionally, WLF's Legal Studies Division, the publishing arm of WLF, has published numerous studies, reports, and analyses on issues related to statutes of limitations and statutes of repose. *See, e.g.*, Eric J. Conn, *OSHA's Midnight Attempt to Overrule Federal Court's Decision Is Ripe for Rescission*, WLF Legal Opinion Letter, Feb. 24, 2017,), http://www.wlf.org/upload/legalstudies/legalopinionletter/022417LOL_Conn.pdf; Adam H. Charnes & Chris W. Haaf, *Fourth Circuit Misconstrues North Carolina's Statute of Repose—and State's High Court Cannot Help*, WLF Legal Opinion Letter, May 13, 2016,http://www.wlf.org/upload/legalstudies/legalopinionletter/051316LOL_Charnes.pdf; David Restaino, *High Court's Spill Act Statute of Limitations Ruling Alters New Jersey's Cleanup Landscape*, WLF Legal Opinion Letter, April 10, 2015; Samuel B. Boxerman, *Supreme Court Observations:* CTS Corp. v. Waldburger, WLF Legal Pulse, June 11, 2014.

Congress in § 13 of the Securities Act of 1933 imposes a 3-year statute of repose on the bringing of a civil action, and statutes of repose are not subject to tolling (unlike statutes of limitations). WLF is concerned that adopting a rule that provides for the tolling of the statute of repose in federal securities class actions would not substantially advance investors' interests, while unduly burdening defendants. WLF also is concerned that adopting such a rule may undermine or lead to uncertainty regarding other statutes of repose.

SUMMARY OF ARGUMENT

Petitioner's assertion that tolling the statute of repose for the claims of putative class members in federal securities class actions would greatly advantage investors and the judicial process rests on a pair of demonstrably incorrect assumptions.

First, Petitioner wrongly assumes that in the absence of tolling, investors cannot easily protect their claims and ability to opt out. Under the federal securities class-action procedures set forth in the Private Securities Litigation Reform Act of 1995, 109 Stat. 737 (codified at 15 U.S.C. §§ 77z–1 and 78u–4) ("PSLRA"), however, it is easy for investors to become passive named plaintiffs in a class action. Doing so during the repose period fully protects investors' ability to opt out at any time, without imposing any significant costs on themselves, any other parties, or the court. Despite becoming named plaintiffs, investors may remain passive in the action for as long as they choose, because under the PSLRA's procedures, it is only the court-appointed "lead plaintiff" who has oversight responsibility over the action and class counsel.

Second, Petitioner wrongly assumes that the tolling of a statute of repose does not impose countervailing burdens and costs that can outweigh whatever benefits it may confer. In fact, tolling substantially prejudices the vast majority of investors in a class by conferring greater settlement leverage on certain investors. As a result of that leverage, a defendant's settlement offer to the class is likely to be discounted by the defendant's expected "settlement tax"—*i.e.*, the often significant incremental costs necessary to settle, or litigate, opt-out claims that are strategically asserted by investors for the first time long after the class action has commenced. Tolling a statute of repose expands the opportunities for shareholders to extract such a "settlement tax," by increasing the amount of time in which shareholders can remain in the shadows until circumstances permit them to exercise optimal bargaining power to secure a separate settlement.

In sum, tolling a statute of repose in a securities class action does not, on balance, substantially advantage the vast bulk of putative class members or the judicial process. Instead, its primary effects would be to undermine Congress's purposes in enacting the statute of repose, provide tactical advantages to a handful of strategic investors at the expense of the rest of the class (and counter to Congress's frequently stated desire to curb "extortionate settlements" in federal securities cases) and fail to advance the underlying purposes of Fed. R. Civ. P. 23.

ARGUMENT

I. ADOPTING A RULE THAT PROVIDES FOR THE TOLLING OF A STATUTE OF REPOSE WOULD NOT SUBSTANTIALLY ADVANCE INVESTORS' INTERESTS

A. Investors Already Are Able—with Ease—to Adequately Protect Their Claims

A federal securities class action typically is brought on behalf of a group of investors who have purchased a company's securities. The complaint alleges that these investors were injured by having purchased their securities at a price that did not reflect the true value of the securities. In terms of their desire to participate in the securities class action, the investors usually fall into one of three categories.

First, there are investors who never want or need to exercise personal control over the litigation of their claims. In a securities class action, the vast majority of investors fit this description, usually because each investor has a relatively small damages claim, and the value of the claim is insignificant relative to the amount of resources that would be necessary for the investor to pursue the claim on its own. Indeed, the class-action device owes its very existence to this fact. As this Court has recognized, "[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[.]" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

Second, there are investors who are content to remain passive class members throughout the litigation of the case, but who (i) attach substantial value to their ability to opt out of any settlement and would therefore seek to protect that ability, and (ii) attach sufficient value to their claim that if the court refused to certify the class, they might separately pursue their claims.

Third, and finally, there are investors whose damages claims are so significant that the investors have a strong incentive to control the litigation of their claims. These investors are, for the most part, sophisticated "institutional" investors. *See generally* Blair A. Nicholas & Ian D. Berg, *Why Institutional Investors Opt-Out of Securities Fraud Class Actions and Pursue Direct Individual Actions* at 1 (2009), https://www.blbglaw.com/news/publications/data/00113/_res/id=File1/PLIreprint7_22_09#2.pdf ("By opting-out, an institutional investor has complete control over the prosecution of its own unique claims . . .").

A rule that provides for the tolling of a statute of repose is not needed to adequately protect the interests of *any* of these categories of investors. As a threshold matter, it is self-evident that the tolling of a statute of repose does not provide any substantial benefits to the first category of investors—*i.e.*, investors who neither want nor need to exercise their ability to opt-out or pursue litigation on their own, but are content to remain passive class members and let their fortunes rise or fall depending on the outcome of the class action.

Even investors of the second and third type described above, however, do not need tolling to adequately protect their claims and ability to opt-out. Nor is tolling needed to ensure that these investors' claims and ability to opt out are litigated in a manner that serves the interests of efficiency and judicial economy.

(1) Investors Who Want to "Wait and See" Can Adequately and Easily Protect Their Claims by Becoming Non-Lead Named Plaintiffs

Investors who are content to remain passive class members throughout the litigation of the case, but who (i) attach substantial value to their ability to opt-out of any settlement and would therefore seek to protect that ability, and (ii) attach sufficient value to their claim that if the court refused to certify the class, they might pursue their claim on their own, do not need a rule that provides for the tolling of a statute of repose to adequately protect their interests. These investors—with minimal effort and in a manner that serves the interests of efficiency and judicial economy—already can adequately protect their claims and ability to opt out *by becoming named plaintiffs in the class action*.

It is not difficult to become a named plaintiff in a securities class action because of the procedural requirements of the Private Securities Litigation Reform Act. Under the PSLRA, once a federal securities class action complaint has been filed by any plaintiff, that plaintiff must, within 20 days, "cause to be published, in a widely circulated national business-oriented publication or wire service, a notice" that advises all class members that the suit has been filed, and the nature of the claims. 15 U.S.C. § 78u-4(a)(3)(A)(i)(I) (2012).

The PSLRA also requires courts to appoint a "lead plaintiff" within 90 days of the filing of a securities complaint. 15 U.S.C. § 78u-4(a)(3)(B)(i) (2012). The lead plaintiff has oversight responsibility over the litigation of the action, including oversight over "select[ing], control[ling], and monitor[ing] class counsel." William B. Rubenstein, Newberg on Class Actions §§ 3:52, 10:13 (5th ed. 2011); 15 U.S.C. § 78u-4(a)(3)(B)(v) (2012).

Once a lead plaintiff and lead counsel are appointed, courts invariably permit the lead plaintiff to file an amended complaint that will become the operative complaint in the case. If at that time, any other investors wish to fully protect their ability to opt out and file individual claims at a later date, they need simply to contact lead counsel and ask to be included in the operative amended class action as named plaintiffs.

The PSLRA and Rule 23 contain no obstacles to the addition of non-lead named plaintiffs to an operative amended class-action complaint, and the naming of such plaintiffs is quite common.[2] Indeed,

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2 For example, the court in *In re Lucent Technologies Inc. Securities Litigation*, No. 2:00-CV-621, 2002 WL 32815233 (D.N.J. July 16, 2002), noted the existence of "forty-one named, non-lead plaintiffs." *Id.* at *1. Likewise, in *Sanchez v. Crocs, Inc.*, 667 F. App'x 710 (10th Cir. 2016), the operative complaint included two non-lead named plaintiffs in addition to the lead plaintiff group. *Id.* at 714. In *In re Municipal Mortgage & Equity, LLC*, three non-lead named plaintiffs were included in the operative complaint. *See* Consolidated and Amended Class Action Complaint at 41-42, *In re Municipal Mortg. & Equity, LLC*, 876 F. Supp. 2d 616 (D. Md. 2012) (No. MJG-08-1961-MDL), *aff'd sub nom. Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874 (4th Cir. 2014). In *In re Citigroup, Inc.*, the district court noted that "although they have not been appointed as Lead Plaintiffs," two parties "are specifically named as plaintiffs" in the last-filed complaint. *See In re Citigroup, Inc.*, No. 08 Civ. 3095(LTS), 2011 WL 744745, at *1 (S.D.N.Y. Mar. 1, 2011), *aff'd sub nom. Finn v. Barney*, 471 F. App'x 30 (2d Cir. 2012). In *Ryan v. Flowserve Corp.*, two pension funds served as non-lead named plaintiffs alongside the lead plaintiff pension fund. *See* Fifth Amended Complaint at 126, *Ryan v. Flowserve Corp.*, 245 F.R.D. 560 (N.D. Tex. 2007) (No. 3:03-CV-1769-M), *rev'd in part, vacated in part sub nom. Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221 (5th Cir. 2009). In *In re Satyam Computer Services Ltd. Securities Litigation*, there were two non-lead named plaintiffs in the operative securities class-action complaint. *See* First Amended Consolidated Class Action Complaint at 9-10, *In re Satyam Comput. Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450 (S.D.N.Y. 2013) (No. 09-MD-2027-BSJ).

in one of the key recent securities cases addressed by this Court—*Tellabs Inc. v. Makor Issues & Rights*, 551 U.S. 308 (2007)—the final operative complaint named four non-lead plaintiffs who had also purchased Tellabs stock.[3] Thus, there can be no doubt that those investors who wish to protect their abiity to bring their own claims or opt out can, with relative ease, simply become named plaintiffs.

This procedure also is available to investors who want to protect their ability to bring their own claims or opt out after a federal securities class action is underway. These investors can ask class counsel to file a motion adding them to the complaint as named plaintiffs, which is permitted by Fed. R. Civ. P. 15 & 21. *See generally* Wright & Miller, 6. Fed. Prac. & Proc. Civ., § 1474 (3d ed. 2016).

Although under both Fed. R. Civ. P. 15 and 21 "the moving party must demonstrate an absence of prejudice to the nonmoving party," *Data General Corp. v. Grumman Systems Support Corp.*, 825 F. Supp. 340, 344 (D. Mass. 1993), *aff'd in part*, *rev'd in part on other grounds*, 36 F.3d 1147 (1st Cir. 1994), this burden will not be hard to satisfy. Lead plaintiffs will need no convincing to move to add additional named plaintiffs, because they will prefer to retain control over the entire action rather than see it splinter. Defendants will likewise prefer to

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[3] *See* Second Consolidated Amended Class Action Complaint at 8, *Johnson v. Tellabs, Inc.*, 303 F. Supp. 2d 941 (N.D. Ill. 2004) (No. 02-CV-4356), *aff'd in part*, *rev'd in part sub nom. Makor Issues & Rights v. Tellabs Inc.*, 437 F.3d 558 (7th Cir. 2006), *vacated*, 551 U.S. 308 (2007), *remanded to* 513 F.3d 702 (7th Cir. 2008).

add named plaintiffs if the alternative is defending against multiple actions. As a consequence, it will be straightforward to demonstrate "an absence of prejudice to the nonmoving party." *Id.*

Once the new named plaintiffs are added to the complaint, they will not have to take on any additional responsibilities. There is, for example, no requirement that named plaintiffs serve as class representatives (although they could later seek to serve as class representatives if they wish). *See* William B. Rubenstein, Newberg on Class Actions § 2:1 n.8 (5th ed. 2011) ("Courts use the phrase 'class representatives' interchangeably with the phrase 'named plaintiffs' although the two are not necessarily the same. . . . Class counsel need not put forward all named plaintiffs, or only named plaintiffs, as proposed class representatives."). Moreover, courts routinely refuse to permit discovery requests against named plaintiffs who are not class representatives, reasoning that those plaintiffs are no different than absent class members. *See, e.g.*, *In re Lucent Techs., Inc. Sec. Litig.*, 2002 WL 32815233, at *2 ("[T]he forty-one non-lead, non-representative plaintiffs should be treated as passive class members and thus not subject to discovery."); *In re USA Classic Sec. Litig.*, No. 93 Civ. 6667, 1995 WL 686724, at *1 (S.D.N.Y. Nov. 17, 1995) (same); *In re Carbon Dioxide Indus. Antitrust Litig.*, 155 F.R.D. 209, 211-12 (M.D. Fla. 1993) (same); *see generally* William B. Rubenstein, Newberg on Class Actions § 9:12 (5th ed. 2011). These decisions are consistent with the renewed emphasis on proportionality in discovery found in the recent amendments to the Rules of Civil Procedure. *See, e.g.*, Fed. R. Civ. P. Rule 26(b).

Once investors become named plaintiffs (prior to the running of the repose period), they no longer need to worry about the impact of the statute of repose in the event there is a denial of class certification. Even after a denial of class certification —including if that event occurs after the expiration of the repose period—investors will be able to pursue the claims that were originally asserted in the class-action complaint in which they were a named plaintiff. *See, e.g.*, *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 194, 197 (2d Cir. 1987) ("The denial of class certification does not preclude individual plaintiffs properly before the court from pressing their own claims.").

Similarly, if a class settlement is reached from which an investor who was added as a named plaintiff to the operative complaint wants to opt out, the investor can just continue to litigate the original action in its own name. The settlement class will be dismissed from the action as a result of the settlement. The investor can then choose to continue to litigate or pursue a separate settlement. In sum, by being added as a named plaintiff to the operative class-action complaint, an investor preserves his ability to pursue the action even in the event there is a class settlement or denial of class certification either during or outside the period of repose.

(2) Investors with Valuable Claims They Want to Litigate Themselves Can Protect Their Claims by Filing Separate Actions, Which Can then Be Consolidated with the Class Action

There also may be some investors whose damages claims are so significant that the investors have a strong incentive to control the litigation of their claims. These investors do not need a rule that provides for the tolling of a statute of repose to adequately protect their interests. These investors can simply file a separate suit, which can then be consolidated with the underlying class action.

Recently, several such investors pursued this course and opted out of *In re Petrobras Securities Litigation*, No. 14–cv–9662 (S.D.N.Y. filed Dec. 8, 2014). The class-action complaint in *Petrobras* alleged that Petrobras's market capitalization dropped by more than $270 *billion* as a result of fraud. Consolidated Fourth Amended Complaint at 1, *In re Petrobras Sec. Litig.*, No. 14–cv–9662 (S.D.N.Y. Nov. 30, 2015), ECF No. 342. Unsurprisingly, the massive damages available to individual plaintiffs (and, perhaps, the likelihood that the company would enter bankruptcy) spurred large shareholders to opt out. Although not all of the opt-out plaintiffs identified their damages or individual holdings, those that did generally held hundreds of thousands or millions of shares. *See, e.g.*, Complaint at 13-14 & Apps. A-C, *Skagen AS v. Petroleo Brasileiro S.A.–Petrobras*, No. 1:15-cv-02214-JSR (S.D.N.Y. Mar. 23, 2015); Complaint App. A, *Alaska Dep't of Revenue v. Petroleo Brasileiro S.A.–Petrobras*, No. 1:15-cv-08995 (S.D.N.Y. Nov. 16, 2015).

Amici who support Petitioner seek to turn *Petrobras* on its head by arguing that these class members only opted out because they feared the expiration of the statute of repose. *See* Br. of Institutional Investors as Amici Curiae Supporting Pet'r ("Br. of Institutional Investors") 15-16 (Mar. 6, 2017); *cf.* Pet'r Br. 24. But, the Institutional

Investors later acknowledge that a few of the numerous opt-out plaintiffs *failed to account for the statute of repose* and "had their Securities and Exchange Act claims dismissed." Br. of Institutional Investors 16 (emphasis added). No plaintiff would attempt to preserve their claims by filing an opt-out claim *after the repose period expired*.

Rather than being motivated by concerns over the statute of repose, the behavior of the class members in *Petrobras* appears to be completely consistent with the behavior of large investors in other high-profile securities litigations. For example, the *AOL/Time Warner* securities class action settled for $2.4 billion in 2006. Nicholas & Berg, *supra* at 2. Well before that settlement, more than 100 investors with large claims decided to pursue their own claims. The Regents of the University of California, for example, opted out in 2003 and pursued their claim until a 2007 settlement. *AOL Time Warner Inc. Opt-Out Litigations*, Robbins, Geller, Rudman & Dowd, LLP (last visited Apr. 4, 2017), https://www.rgrdlaw.com/cases-aol-time-premium-recoveries.html.

There is no reason that large investors who want to control their own claims cannot file separate actions before the repose period expires. Indeed, these investors can ascertain the value of their claim and determine that it requires personal attention as soon as the class action is filed.

The fact that these suits get filed *prior* to the running of the repose period does not impact judicial economy—courts do not experience *additional* burdens merely because investors file an action *sooner*. To the contrary, courts (and parties) are likely to benefit if these investors are required to opt out and file their own actions before the repose period expires, especially from the consolidation of discovery across multiple overlapping actions.[4] When parallel actions are consolidated, defendants can review documents only once in response to document requests. They can conduct the factual investigation necessary to respond to interrogatories once, rather than repeating the process again years later after employees have left the company. And, witnesses only need to be deposed once.

The benefits of coordinated discovery are far more likely to be realized if investors are forced to file actions that they intend to bring anyway before the repose deadline. Witnesses may not yet have been deposed, and the review of documents may not have been completed. As a result, by enforcing the statute of repose against investors who opt out of class actions, actions that would have been filed anyway become easier to judicially administer.

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4 *See, e.g.*, *MacAlister v. Guterma*, 263 F.2d 65, 69 (2d Cir. 1958) ("The benefits achieved by consolidation and the appointment of general counsel, [including] elimination of duplication . . . will most certainly redound to the benefit of all parties to the litigation."); *Waldman v. Electrospace Corp.*, 68 F.R.D. 281, 283 (S.D.N.Y. 1975) ("It is well recognized that consolidation of stockholders' suits often benefits both the court and the parties by expediting pretrial proceedings, avoiding duplication of discovery and minimizing costs."); *Gudimetla v. Ambow Educ. Holding Ltd.*, No. CV-12-5062 PSG (AJWx), 2012 WL 12887767, at *2 (C.D. Cal. Nov. 19, 2012) ("Consolidation would avoid duplication of efforts by the parties during pretrial discovery and in trial.").

(3) Petitioner's and Its *Amici*'s Arguments that a Statute of Repose Unduly Burdens Investors and the Courts Are Unfounded

Petitioner and its *Amici* fail to recognize that investors generally fall into one of the three categories discussed above and, as a result, caution the court about hypothetical burdens that will never materialize. Indeed, Petitioner and its *Amici* paint an entirely unrealistic portrait of investors and use that as a basis for the litany of problems that they assert refusing to toll the statute of repose will cause. Specifically, they contend that class members both "prefer . . . to remain members of the class and not intervene or file separate actions," Br. of Institutional Investors 11, *and* nevertheless will actively participate in the action if they intervene or otherwise become involved in the action. *See id.* at 18-19.

Investors do not possess both of these contrary impulses. Rather, as discussed above (and in accordance with common sense), they will *either* vigorously pursue their own claims *or* seek to remain a part of the class action. To the extent that large investors want to take control of their claims and pursue individual actions, they will do so. Enforcing the statute of repose against these investors does not impact judicial economy at all, because these investors will file their own claims anyway.

On the other hand, the investors who are content to remain passive class members throughout the litigation of the case, but who (i) attach substantial value to their ability to opt out of any settlement and would therefore seek to protect that ability, and (ii) attach sufficient value to their claim that if the court refused to certify the class, they might pursue their claims on their own, can simply utilize the procedure discussed above and seek to be added as a named plaintiff. *See supra* Section I.A.1. They will not have to take an active role in the litigation or do anything they would not have done as class members.

It is therefore unsurprising that although Petitioner's *Amici* warn that, for example, investors "seeking to preserve their rights in the event of denial of class certification would have needed to file protective actions in as many as 1175 [Rule 10b-5] cases," Br. of Civil Procedure and Securities Law Professors as Amici Curiae Supporting Pet'r ("Br. of Civil Procedure and Securities Law Professors") 11, they are unable to point to any *actual* hardships that have materialized in the more than three years since *IndyMac* was decided. In most cases, there is no reason for investors to take protective action, because they have no interest in an individual action at all.[5]

Amici's supposed concerns that enforcing the statute of repose will lead to extensive motion

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5 Indeed, few investors opt out of securities class actions at all. Although it is difficult to estimate exactly how many opt-out actions are filed annually, one recent study found that, between 1996 and 2014, investors opted out of only 3.3% of securities class-action settlements. Amir Rozen et al., *Opt-Out Cases in Securities Class Action Settlements 2012-2014 Update*, Cornerstone Research, 2 (2016), https://www.cornerstone.com/Publications/Reports/Opt-Out-Cases-in-Securities-Class-Action-Settlements-2012-2014.

practice on the issue of intervention, 4, 17-19, or that protective actions will be filed in "distant forums," *see, e.g.*, *id.* at 4, 17, 19, are likewise illusory. There is simply no reason for class members who prefer to "remain a part of the class" to take either course or to do *anything* other than ask to become named plaintiffs, which, as explained above, imposes minimal burdens on courts and the judicial process.

B. Tolling a Statute of Repose Can Have Collateral Consequences that Prejudice the Vast Majority of Class Members

Not only does the tolling of the statute of repose provide investors with negligible benefits (*see supra* Section I), but it also can substantially prejudice the interests of the vast majority of class members in a federal securities class action.

Tolling provides large investors with an enhanced opportunity to wait until settlement negotiations for the class action are underway—or after a settlement with the lead plaintiff has been negotiated—to opt out and litigate their claims and/or pursue an individual settlement with the defendants. Investors who opt out at this late stage of the litigation possess two forms of undue leverage.

First, the defendants in a securities class action often seek a fair and reasonable settlement with the class in order to obtain "global peace." *See Sullivan v. DB Inv. Inc.*, 667 F.3d 273, 310-11 (3rd Cir. 2011) ("From a practical standpoint . . . achieving global peace is a valid, and valuable, incentive to class action settlements."). If global peace cannot be achieved, the value to defendants of reaching a settlement with the class is greatly diminished. *See, e.g.*, *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015) ("[D]efendants like Lexis surely will not agree to settlements like this one if they cannot buy something approaching global peace."); *Klein v. O'Neal, Inc.*, No. 7:03-CV-102-D, 2009 WL 1174638, at *3 (N.D. Tex. Apr. 29, 2009) ("In a class action settlement setting, defendants seek and pay for global peace—*i.e.*, the resolution of as many claims as possible. Accordingly, allowing plaintiffs to opt out of a class action after the deadline and during a period of active settlement negotiations so that they can pursue their claims individually can make settlement less valuable to defendants and less likely to occur."). Conversely, if global peace is feasible, defendants attach so much value to it that they may be prepared to pay a premium to reach a comprehensive class settlement.

The desire for global peace obviously can be frustrated by the litigation of opt-out claims, and so to achieve true global peace, defendants need to settle any pending or threatened opt-out suits in addition to the underlying class action. The strong impetus for defendants to settle opt-out claims gives the opt-out plaintiffs significant leverage in the settlement of their claims. *See, e.g.*, Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 Emory L.J. 85, 131 (1997) ("[T]he ability to opt-out can give [large] claimants significant bargaining leverage over other class members who do not have credible opt-opt options"); *see also* Rozen et. al., *supra*, at 4 ("The mere threat of an opt-out can be a powerful negotiating tool for plaintiffs."). Unless defendants are able to appease these large investors, they will be unable to secure the global peace they seek.

Second, opt-out claims can be unduly burdensome for defendants to litigate (*see supra* Section I.A.2 regarding the potential for expansive, uncoordinated discovery across multiple actions). This too gives defendants the motivation to quickly resolve any opt-out claims, thereby providing further leverage to opt-out plaintiffs in the settlement of their claims.[6]

The foregoing two forms of leverage that opt-out plaintiffs have (often) lead them to seek to extract individual settlements with defendants that are disproportionate to what the class members will receive. Indeed, plaintiffs' attorneys advise large shareholders to "strategically" opt out of "certain securities class actions" to "achieve[] significant premiums on their recovery of losses." Nicholas & Berg, *supra* at 1. Upon opting out, some shareholders settle before even filing a complaint, suggesting that their sole purpose in opting out was to obtain a more favorable settlement. *See id.* ("Notably, a substantial majority of the opt-out

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6 *See, e.g., Am. Bank v. City of Menasha*, 627 F.3d 261, 265–66 (7th Cir. 2010), as amended (Dec. 8, 2010) ("The purpose of authorizing stays of state-court discovery relating to federal securities litigation is similar to that of the enhanced pleading requirements of the Private Securities Litigation Reform Act at issue in the *Tellabs* litigation, and of the Supreme Court's recent *Iqbal* and *Twombly* decisions. *It is to prevent settlement extortion—using discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff regardless of the merits of his suit.*" (emphasis added) (citations omitted)).

settlements in *Qwest* involved institutional investors that reached resolution of their opt-out claims before filing a complaint or engaging in any litigation or discovery.").

The settlement leverage obtained by opt-out claimants—especially those who opt out long after the commencement of the case—ultimately prejudices all investors who are in the class and potentially covered by a class settlement. Notably, the defendant's class-settlement offer in such circumstances is likely to be discounted by the defendant's expected "settlement tax"—*i.e.*, the often significant additional incremental costs necessary to settle, or litigate, the opt-out claims. In other words, in light of the "significant premium that defendants place on global peace," defendants are likely to offer a reduced settlement to remaining class members if opt outs occur (or are anticipated). Jon Romberg, *The Hybrid Class Action as Judicial Spork: Managing Individual Rights in a Stew of Common Wrong*, 39 J. Marshall L. Rev. 231, 245 (2006). Thus, "absent class members will likely be harmed when opt-out is permitted and class members are allowed to defect from a group that furthers their common interests." *Id.; see also* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 133 (2006) ("[C]lass members and class counsel effectively subsidize opt-outs, who are able to free-ride on the litigation work of class counsel, are relieved of litigating often difficult class certification issues, and only have to prove their own damages.").[7]

Moreover, this "settlement tax" can be substantial depending on the overall circumstances. In cases (like *Petrobras* or *AOL/Time Warner*) where "full or even partial recovery of [alleged] damages would likely bankrupt the defendant company," investors are forced to compete for the limited funds that are available. *See* Nicholas & Berg, *supra* at 2. In such cases, opt-out plaintiffs often are able to "extract a disproportionate share of the class recovery" by using their bargaining power to obtain more of the defendants' limited resources. Romberg, *supra,* at 244-45; *accord* Perino, *supra* at 97 (opting out "may permit individual litigants to obtain a disproportionately large portion of [limited] assets").

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[7] *See also, e.g.*, David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and "Indivisible" Remedies*, 79 Geo. Wash. L. Rev. 542, 571-72 (2011) ("[A]n opt-out right creates the possibility of strategic behavior, in which some parties who stand to gain from class treatment nonetheless opt out (or threaten to do so) to extract rents from members remaining in the class."); Perino, *supra*, at 105 ("In effect, small claimants may subsidize large claimants' individual suits and similarly situated plaintiffs may receive substantially different recoveries" because opt-outs are able to "benefit from . . . class discovery or trial preparation that may be more extensive than any individual litigant could afford on its own."); David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. Rev. 695, 705-06 (1989) (class actions "remov[e] the costs and risks of trying common questions" for opt-outs, allowing their actions to "be subsidized by the public, particularly by the segment composed of the rest of the victim class").

The plaintiffs' bar acknowledges this possibility. When a limited fund is available, plaintiffs' lawyers advise large investors to opt out to "recover a larger percentage of its losses without any such recovery limitation based on potential insolvency of the defendant company." Nicholas & Berg, *supra*, at 2.

Large investors also are incentivized to elicit a significant "settlement tax" in cases where a defendant has already made a substantial settlement offer to the class (*i.e.*, the "certain class actions" where opting out is advantageous). In such cases, the size of the settlement notifies investors that the defendant is willing to devote significant resources to obtain global peace, and therefore incentivizes larger investors to use their bargaining power to obtain a larger "settlement tax."[8] Tolling a statute of repose plainly would expand the opportunities for strategic shareholders to extract such a "settlement tax," by increasing the amount of time in which shareholders can remain in the shadows until the case reaches a stage where circumstances permit them to exercise their enhanced bargaining power.

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[8] It is therefore no accident that studies have found that "as class-action settlements get larger the propensity of plaintiffs to bring an opt-out case also increases." Rozen et. al., *supra*, at 3.

II. TOLLING A STATUTE OF REPOSE, WHILE NOT PROVIDING ANY SUBSTANTIAL OFFSETTING BENEFITS, UNDERMINES CONGRESS'S PURPOSES IN ENACTING THAT STATUTE AND OTHER FEDERAL SECURITIES STATUTES

As discussed above, if the Court allows tolling of the statute of repose, defendants would face a greater prospect of opt-out investors seeking disproportionately large individual settlements, and defendants would also be subjected to a variety of other discovery and litigation burdens. This outcome is contrary to the purposes of a statute of repose. It also undermines Congress's efforts at securities class-action reform.

Congress long ago recognized the propensity for investors to file "strike suits" that asserted federal securities law claims on a class basis to extort settlements from corporate defendants. In an effort to protect defendants from these vexatious suits and implement procedural safeguards against abusive litigation, Congress enacted landmark legislation—the Private Securities Litigation Reform Act of 1995, and the Securities Litigation Uniform Standards Act of 1998—which governs all securities class actions filed in federal court, including the instant action. As reflected in the House Conference Report accompanying what would later be enacted as the PSLRA, the curtailment of "extortionate settlements" was among the intended effects of the PSLRA. H.R. Conf. Rep. No. 104–369, pp. 31-32 (1995); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80-81 (2006) (referring to exorbitant settlements as a ground for the PSLRA's procedural reforms).

It plainly would undermine the effectiveness of statutes of repose—and likewise undermine the objective of the PSLRA and SLUSA to curb "extortionate settlements"—if a statute of repose could be tolled. The inevitable result would be that opt-out investors could lie in wait for many years after the operative events and the filing of an underlying class action, only to emerge at a point when defendant companies would be most vulnerable to succumbing to an investor's exorbitant settlement demands.

III. ADOPTING A RULE THAT PROVIDES FOR THE TOLLING OF A STATUTE OF REPOSE WOULD NOT ADVANCE THE UNDERLYING PURPOSES OF FED. R. CIV. P. 23

Finally, it bears emphasis that adopting a rule that provides for the tolling of the statute of repose would not further the purposes of Fed. R. Civ. P. 23. The Supreme Court has recognized 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[.]'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). Refusing to toll a statute of repose would not undermine that policy or achieve a harsh result. The investor whose "small recover[y]" would not provide sufficient incentive to "bring a solo action" before a class action is filed does not benefit from the tolling of a statute of repose (and, as shown above, may be prejudiced by it).

Moreover, if an investor has the wherewithal and interest to file its own action if class certification is denied, it certainly would have the same wherewithal and interest to file a complaint, move to intervene, or, most easily, seek to be added as a named plaintiff after a class- action complaint is filed. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985) ("If . . . the plaintiff's claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney or have thought about filing suit, and should be fully capable of exercising his right to 'opt-out.'"). Thus, refusing to apply tolling to the statute of repose in the 1933 Act would simply require investors who have the ability to take steps to preserve their ability (without a need for tolling) to do so within three years, while at the same time providing the defendants the finality and certainty that the statute of repose was intended to achieve. *See, e.g.*, *Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 109 (2d Cir. 2013) ("Given the sophisticated, well-counseled litigants involved in securities fraud class actions," refusing to toll the statute of repose is unlikely to "burden the courts and disrupt the functioning of class action litigation.").

CONCLUSION

In sum, refusing to toll the statute of repose protects the vast majority of class members and defendants' repose interests without any significant offsetting burdens for larger investors and the courts. WLF therefore respectfully urges the Court to affirm the Second Circuit and refuse to extend *American Pipe* tolling to the statute of repose in § 13 of the Securities Act of 1933.

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April 5, 2017

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