No. 14-857

IN THE

Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

—v.—

JOSE GOMEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* NECA-IBEW WELFARE TRUST FUND, IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of purportedly complete relief on his claim.

2. Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of purportedly complete relief before any class is certified.

RULE 29.6 STATEMENT

NECA-IBEW Welfare Trust Fund is a Taft-Hartley fund that issues no stock and is neither a subsidiary of nor otherwise controlled by any publicly traded parent corporation.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

NECA-IBEW Welfare Trust Fund is a Taft-Hartley Fund that manages a large investment portfolio for the benefit of workers, retirees, and their dependents, and that in the course of executing its fiduciary duties from time to time seeks to prosecute federal securities class actions under the Securities Act of 1933 ("Securities Act" or "1933 Act") and the Securities Exchange Act of 1934 ("Exchange Act" or "1934 Act").

In so doing, it has had occasion to refuse an offer of judgment calculated to moot its individual claims and to frustrate its efforts to act as lead plaintiff seeking relief on behalf of a class of investors.

The NECA-IBEW Welfare Trust Fund thus has an interest in the rule to be adopted by the Court in this case. With this brief the Welfare Trust Fund urges the Court not to adopt a rule such as that advanced by the Petitioner, that permits defendants to moot individual class representatives' claims with offers of judgment, thereby hobbling class actions and seriously impairing enforcement of the federal securities laws.

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[1] Pursuant to the Supreme Court Rule 37.6, counsel for *amicus curiae* NECA-IBEW Welfare Trust Fund certifies that they authored this brief in whole, and that no person or entity other than the *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Pursuant to Rule 37.3(a), all parties have consented to the brief's filings, through blanket letters of consent filed with the Clerk.

SUMMARY OF ARGUMENT

In construing Federal Rule of Civil Procedure 68 and Article III of the Constitution, this Court should consider its ruling's potential effect on class actions in general, and on private enforcement of our nation's federal securities laws in particular. For the rule advanced by Petitioner would hobble the class-action device and frustrate effective enforcement of the federal securities laws.

Congress and this Court both have long recognized the critical importance of private litigation to the enforcement of our nation's securities laws – as well as the danger posed by strike suits purportedly filed on behalf of a class, but that merely extract a payoff to the individual plaintiff.

To strengthen private enforcement of the federal securities laws, and to curtail abusive practices, Congress enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA") with detailed procedures designed to ensure optimal enforcement of the federal securities laws by putting the class member "most capable of adequately representing the interests of [the] class" or "most adequate plaintiff" in charge of any federal securities class action.[2] As set forth herein, the PSLRA specifies that a class-action complaint asserting federal securities claims must be accompanied by a certification that the plaintiff will not accept "any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro-rata share of any recovery." 15 U.S.C. §§77z-1(a)(2)(A)(vi), 78u-4(a)(2)(A)(vi). The PSLRA

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[2] *See* 15 U.S.C. §§77z-1(a), 78u-4(a) (reproduced in this brief's Appendix).

then requires public notice informing other class members of the nature of the case, and that they have 60 days in which to seek appointment as lead plaintiff in the matter. 15 U.S.C. §§77z-1(a)(3), 78u-4(a)(3). The statute next directs the district court to consider motions for appointment of lead plaintiff within 90 days after the notice's publication, and to presume that the applicant with the largest stake in the case is the "most adequate plaintiff" to represent the class. 15 U.S.C. §§77z-1(a)(3), 78u-4(a)(3). Congress sought thereby to encourage the appointment of institutional investors, such as NECA-IBEW Welfare Trust Fund, to represent the class, thereby avoiding class representatives who might put their individual interest in recovery before that of the class.

As set forth below, adopting a construction of Rule 68 that permits defendants to "pick off" lead plaintiffs with offers of judgment would severely impair the functioning of this scheme, undermining effective enforcement of the federal securities laws and reducing the public confidence in the integrity of our nation's capital markets.

There is no reason to adopt such a construction. Federal Rule of Civil Procedure 68 says "[a]n unaccepted offer is considered withdrawn," permitting the plaintiff to litigate its claims. And one who chooses to do so, and to litigate on behalf of a class, surely presents a live "case or controversy" within the meaning of Article III.

ARGUMENT

A. Private Securities Class Actions are Critical to Enforcement of the Federal Securities Laws

This Court has many times affirmed that "private actions provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to Commission action.'"[3] "The securities statutes seek to maintain public confidence in the marketplace. . . . by deterring fraud, in part, through the availability of private securities fraud actions." *Dura Pharms., Inc. v. Broudo,* 544 U.S. 336,

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[3] *Bateman Eichler, Hill Richards, Inc. v. Berner,* 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak,* 377 U.S. 426, 432 (1964)); s*ee, e.g., Randall v. Loftsgaarden,* 478 U.S. 647, 664 (1986) (defining damages rule to enhance "the deterrent value of private rights of action, which, we have emphasized, 'provide "a most effective weapon in the enforcement" of the securities laws and are a "necessary supplement to Commission action"'" (citations omitted); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353, 380 (1982) (reiterating "the Court's recognition in *Borak,* 377 U.S. at 432, that private enforcement of Commission rules may '[provide] a necessary supplement to Commission action'") (this Court's brackets); *Piper v. Chris-Craft Inds., Inc.,* 430 U.S. 1, 25 (1977) ("Indeed, the Court in *Borak* carefully noted that because of practical limitations upon the SEC's enforcement capabilities, '"[p]rivate enforcement . . . provides *a necessary supplement to Commission action.*"') (Court's emphasis, added in *Piper*); *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 730 (1975) (quoting *Borak,* 377 U.S. at 432); *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 382 (1970) ("private enforcement . . . 'provides a necessary supplement to Commission action'") (same).

345 (2005). "This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 313 (2007) (citing *Dura,* 544 U.S. at 345, and *J.I. Case Co. v. Borak,* 377 U.S. 426, 432 (1964)).

"Private securities fraud actions, however, if not adequately contained, can be employed abusively," as this Court has itself recognized. *Tellabs*, 551 U.S. at 313. At worst, individual investors can assert class claims not because they seek to benefit the class, but instead to get extra leverage only to obtain payment of their own individual claims. "As a check against abusive litigation by private parties, Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737." *Id.* (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit,* 547 U.S. 71, 81 (2006)); *see generally*, 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* §1806, at 423-68 (3d ed. 2005); *see also Halliburton Co. v. Erica P. John Fund Inc.*, 134 S.Ct. 2398, 2413 (2014); *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 133 S.Ct. 1184, 1200-01 (2013).

Congress gave close attention to optimal enforcement of the securities laws when it framed the PSLRA's detailed scheme for federal securities class actions. Advancing the public interest was its primary objective for, as the 1995 legislation's Conference Report reiterates, private securities class actions truly are "an indispensable tool" for investors and the nation:

> The overriding purpose of our Nation's securities laws is to protect investors and to maintain confidence in the securities markets, so that our national savings, capital formation and investment may grow for the benefit of all Americans.
>
> The private securities litigation system is too important to the integrity of American capital markets to allow this system to be undermined by those who seek to line their own pockets by bringing abusive and meritless suits. Private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action. Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs. This legislation seeks to return the securities litigation system to that high standard.

H.R. Conf. Rep. No. 104-369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 730; *see Dabit,* 547 U.S. 71 (2006) (quoting H.R. Conf. Rep. No. 104-369, at 31).

As set forth below, the rule urged by Petitioner in this case would take us away from that high standard, upending the Congressional scheme for securities class actions, and frustrating optimal enforcement of the nation's securities laws.

B. Congress' Carefully Designed Procedures for Appointment of Lead Plaintiffs to Ensure Effective Enforcement of the Nation's Securities Laws Would be Frustrated if Defendants Could "Pick Off" Representative Plaintiffs with Offers of Judgment

To control and correct perceived abuses of securities class actions, the PSLRA sets out a carefully crafted scheme for the appointment of lead plaintiffs to prosecute those actions – as the legislation's Conference Report explains in some detail. *See* H.R. Conf. Rep. No. 104-369, at 31-41; *see also* Wright & Miller, *Federal Practice & Procedure*, *supra* §1806, at 423-68. Petitioner's rule would upset that scheme.

At the case's outset, the PSLRA requires any plaintiff filing a class-action complaint to provide a sworn certification stating, among other things, "that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery." 15 U.S.C. §§77z-1(a)(2)(A)(vi), 78u-4(a)(2)(A)(vi), The only exception is that the court may award the named plaintiff "reasonable costs and expenses (including lost wages) directly relating to the representation of the class." 15 U.S.C. §§77z-1(a)(4), 78u-4(a)(4).

Permitting defendants to moot a claim by offering the named plaintiff its individual damages would frustrate the statute's rather obvious objective of ensuring that class-action complaints should *not* be filed with hopes of using the threat of class proceedings to recover a larger award for the named

plaintiff than for other class members. Petitioner asks the Court to bless such individual payoffs to named plaintiffs – with nothing going to the class that they seek (or purport) to represent.

A plaintiff whose complaint asserts federal securities claims on behalf of a class must, within 20 days of the class-action complaint's filing, publish notice, in a leading business journal or wire service, advising putative class members of the action's pendency, and that they have 60 days in which any of them may seek appointment as lead plaintiff for the class.[4] The PSLRA then requires the district court,

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[4] Parallel 1933 Act and 1934 Act provisions both state:

> **(3) Appointment of lead plaintiff**
>
> **(A) Early notice to class members**
>
> **(i)** In general. Not later than 20 days after the date on which the complaint is filed, the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class—
>
> **(I)** of the pendency of the action, the claims asserted therein, and the purported class period; and
>
> **(II)** that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.
>
> **(ii)** Multiple actions. If more than one action on behalf of a class asserting substantially the same claim or claims arising under this subchapter is filed,

within 90 days of the notice's publication, to consider whatever motions class members may file seeking appointment as lead plaintiff, "including any motion by a class member who is not individually named as a plaintiff in the complaint."[5] The statute directs that the court "shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members," whom the statute's framers designate the "most adequate plaintiff."[6] The statute further directs the district

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> only the plaintiff or plaintiffs in the first filed action shall be required to cause notice to be published in accordance with clause (i).
>
> **(iii)** Additional notices may be required under Federal rules. Notice required under clause (i) shall be in addition to any notice required pursuant to the Federal Rules of Civil Procedure.

15 U.S.C. §77z-1(a)(3), §78u-4(a)(3); *see* H.R. Conf. Rep. No. 104-369, at 33 ("A plaintiff filing a securities class action must, within 20 days of filing a complaint, provide notice to members of the purported class in a widely circulated business publication. This notice must identify the claims alleged in the lawsuit and the purported class period and inform potential class members that, within 60 days, they may move to serve as lead plaintiff.").

[5] 15 U.S.C. §§77z-1(a)(3)(B), 78u-4(a)(3)(B); *see* H.R. Conf. Rep. No. 104-369, at 34 ("Within 90 days of the published notice, the court must consider motions made under this section and appoint the lead plaintiff.").

[6] Parallel 1933 Act and 1934 Act provisions both state:

[continued on next page]

court to adopt a rebuttable "presumption that the

(B) Appointment of lead plaintiff

(i) In general

Not later than 90 days after the date on which a notice is published under subparagraph (A)(i), the court shall consider any motion made by a purported class member in response to the notice, including any motion by a class member who is not individually named as a plaintiff in the complaint or complaints, and shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members (hereafter in this paragraph referred to as the "most adequate plaintiff") in accordance with this subparagraph.

(ii) Consolidated actions

If more than one action on behalf of a class asserting substantially the same claim or claims arising under this subchapter has been filed, and any party has sought to consolidate those actions for pretrial purposes or for trial, the court shall not make the determination required by clause (i) until after the decision on the motion to consolidate is rendered. As soon as practicable after such decision is rendered, the court shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions in accordance with this subparagraph.

15 U.S.C. §77z-1(a)(3)(B)(i)-(ii), §78u-4(a)(3)(B)(i)-(ii).

most adequate plaintiff" is that person (or group) that "either filed the complaint or made a motion in response to a notice," which "in the determination of the court has the largest financial interest in the relief sought by the class," and "otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure."[7] Institutional investors will, of

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[7] Parallel 1933 Act and 1934 Act provisions both state:

> **(iii) Rebuttable presumption**
>
> **(I) In general**
>
> Subject to subclause (II), for purposes of clause (i), the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this subchapter is the person or group of persons that—
>
> (aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);
>
> (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
>
> (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.
>
> **(II) Rebuttal evidence**
>
> The presumption described in subclause (I) may be rebutted only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff—
>
> (aa) will not fairly and adequately protect the interests of the class; or
>
> (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

course, typically have the largest financial interest in the relief sought.

Congress' central concern, here, was to ensure that securities class actions would be led not by individuals seeking primarily to maximize their own personal recoveries, but by institutional investors best positioned to represent the interests of the entire class of investors and long-term interests of the companies in which many retain a stake. *See* H.R. Conf. Rep. No. 104-369, at 32-35. The legislation's Conference Report explains that the PSLRA

> amends the Securities Act of 1933 (the "1933 Act") by adding a new section 27 and the Securities Exchange Act of 1934 (the "1934 Act") by adding a new section 21D. These provisions are intended to encourage the most capable representatives of the plaintiff class to participate in class action litigation and to exercise supervision and control of the lawyers for the class. These provisions are intended to increase the likelihood that parties with significant holdings in issuers, whose interests are more

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> **(iv)** Discovery. For purposes of this subparagraph, discovery relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class.

15 U.S.C. §77z-1(a)(3)(B)(iii), 78u-4(a)(3)(B)(iii).

> strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel.

H.R. Conf. Rep. No. 104-369, at 32. Thus, the Report explains, "[t]he Conference Committee seeks to increase the likelihood that institutional investors will serve as lead plaintiffs by requiring courts to presume that the member of the purported class with the largest financial stake in the relief sought is the 'most adequate plaintiff.'" H.R. Conf. Rep. No. 104-369, at 34.

As this Court recognized in *Tellabs*, Congress sought thereby "to increase the likelihood that institutional investors – parties more likely to balance the interests of the class with the long-term interests of the company – would serve as lead plaintiffs." *Tellabs*, 551 U.S. at 321. The legislation's Conference Report explains that the statute's provisions are grounded in a conviction "that increasing the role of institutional investors will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions." H.R. Conf. Rep. No. 104-369, at 34.

Allowing defendants instead to "pick off" the most capable class representatives with offers of judgment in the midst of the lead-plaintiff appointment process would throw a monkey wrench into the legislative scheme. To permit defendants to pick off lead plaintiffs after appointment, but before a class is certified would effectively destroy it.

The opportunity for mischief should be apparent. No motion for class certification can be entertained

until after appointment of the lead plaintiff. Without doubt, the PSLRA permits a preliminary consideration of whether the lead plaintiff "otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. §77z-1(a)(3)(B)(iii)(I)(cc), §78u-4(a)(3)(B)(iii)(I)(cc). But consideration of Rule 23's factors is strictly constrained at this stage by a provision limiting rebuttal to "proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff" either "will not fairly and adequately protect the interests of the class," or "is subject to unique defenses that render such plaintiff incapable of adequately representing the class."[8] Defendants, who

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[8] Parallel 1933 Act and 1934 Act provisions both state:

(iii) Rebuttable presumption

(I) In general

Subject to subclause (II), for purposes of clause (i), the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this subchapter is the person or group of persons that—

(aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

(II) Rebuttal evidence.

The presumption described in subclause (I) may be rebutted only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff—

may later challenge class certification, lack standing to do so at this early stage. [9]

> (aa) will not fairly and adequately protect the interests of the class; or
>
> (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.
>
> **(iv) Discovery**
>
> For purposes of this subparagraph, discovery relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class.

15 U.S.C. §77z-1(a)(3)(B)(iii), (iv), §78u-4(a)(3)(B)(iii), (iv).

[9] *See* 15 U.S.C. §§77z-1(a)(3)(B)(iii)(II), 78u-4(a)(3)(B)(iii)(II) (permitting only "a member of the purported plaintiff class" to rebut the lead-plaintiff presumption); *In re Merck & Co. Sec. Litig.*, 432 F.3d 261, 266-67 (3d Cir. 2005) (noting in dictum that "the weight of authority" denies defendants standing to oppose the choice of lead counsel); *see, e.g.*, *In re USEC Sec. Litig.*, 168 F. Supp. 2d 560, 565 (D. Md. 2009); *Cal. Pub. Emps' Ret. Sys. v. Chubb Corp.*, 127 F. Supp. 2d 572, 575 n.2 (D.N.J. 2001) (most courts have denied defendants the right to challenge "the adequacy of lead plaintiffs and their chosen counsel" and citing cases); *Holley v. Kitty Hawk, Inc.*, 200 F.R.D. 275, 277 (N.D. Tex. 2001) (statute "does not provide for defendants to weigh in"); *Gluck v. CellStar Corp.*, 976 F. Supp. 542, 550 (N.D. Tex. 1997) (holding that defendants cannot challenge the appointment of a lead plaintiff); *Greebel v. FTP Software, Inc.*, 939 F. Supp. 57, 60 (D. Mass. 1996); *In re Lucent Techs., Inc., Sec. Litig.*, 194 F.R.D.

Congress thought the PSLRA's provisions important to the national interest, ensuring effective enforcement of our securities laws by securing the best representation in securities class actions. *See* H.R. Conf. Rep. 104-369, at 31-32. To permit a defendant to pick off the "most adequate plaintiff" by mooting its claims, thereby manipulating the appointment of a different lead plaintiff to prosecute the class action, would defeat Congress' plan and frustrate its aims.

This Court recognized in *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1980), that allowing defendants to "pick off" class representatives would be destructive to the class-action device. This Court explained that holding the case moot

> simply because the defendant has sought to "buy off" the individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

137, n. 17 (D.N.J. 2000); *In re Nice Sys. Sec. Litig.*, 188 F.R.D. 206, n. 11 (D.N.J. 1999); *In re Milestone Sci. Sec. Litig.*, 183 F.R.D. 404, 414-15, n. 14 (D.N.J. 1998). *But see King v. Livent*, 36 F. Supp. 2d 187, 190-91 (S.D.N.Y. 1999).

445 U.S. at 339, *aff'g Roper v. Consurve, Inc.*, 578 F.2d 1106, 1108 (5th Cir. 1978) ("defendants cannot moot the class claim by attempting to pay off the class representatives"). *Roper* considered "whether a tender to named plaintiffs in a class action of the amounts claimed in their individual capacities, followed by the entry of judgment in their favor on the basis of that tender; over their objection, moots the case," and held emphatically that it does not. *Id.* at 327; *see also* 5 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* §15:29, at 97 (2002) ("a court cannot render class claims moot by first denying class certification and then entering judgment for the plaintiffs based on the defendants' tendering an offer of judgment in the amount of the plaintiff's claims").

Allowing defendants to "pick off" claimants would, as we have shown, be utterly destructive of the PSLRA's scheme for enforcement of the federal securities laws by means of private class action. Adopting the Petitioner's position also would run counter to the policy of discouraging "strike suits," where a plaintiff seeks to coerce a settlement of its own claim by also asserting claims on behalf of a class but with no intention of prosecuting the case for the benefit of the class. "Permitting the defendants to pay off the plaintiffs" with offers of complete relief on their individual claims clearly "raises the danger of strike suits" contrary to Rule 23's underlying policies. Conte & Newberg, *supra*, §15:29, at 97. In *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 371 (1966), a shareholder derivative suit asserting 1933 Act and 1934 Act claims, this Court acknowledged that the federal rules governing class actions and shareholder suits are designed "to discourage 'strike suits.'" But Petitioner's rule would encourage them, inviting

actions filed for quick payoffs to the putative class representative.

Petitioner's rule entails extremely undesirable consequences. But nothing at all in either Rule 68 or this Court's Article III jurisprudence requires or justifies Petitioner's position that would-be class representatives may be "picked off" against their will. Rule 68 unequivocally states that an unaccepted offer of judgment "is considered withdrawn," Fed. R. Civ. P. 68(b), and a withdrawn offer cannot sensibly be deemed to moot anyone's claims. Nothing in this Court's jurisprudence suggests it should "adopt[] a rule that an individual seeking to proceed as a class representative is required to accept a tender of only his individual claims." *Roper*, 445 U.S. at 341 (Rehnquist, J., concurring). And Article III merely requires a live case or controversy, which clearly is present when an eager litigant refuses an offer of judgment in order to litigate on behalf of itself and a larger class. *See Roper*, 445 U.S. at 327; *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1970) (noting the "flexible character of Art. III mootness doctrine"); *see also Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523, 1532-37 (2013) (Kagan, J., dissenting); *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878 (7th Cir. Aug. 6, 2015).

CONCLUSION

For all the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

DATED: August 31, 2015

Respectfully submitted,

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APPENDIX

APPENDIX

Securities Act of 1933 §27, 15 U.S.C. §77z-1(a), and Securities Exchange Act of 1934 §21D, 15 U.S.C. §78u-4(a) both provide:

(a) Private class actions

(1) In general

The provisions of this subsection shall apply to each private action arising under this subchapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.

(2) Certification filed with complaint

(A) In general

Each plaintiff seeking to serve as a representative party on behalf of a class shall provide a sworn certification, which shall be personally signed by such plaintiff and filed with the complaint, that—

(i) states that the plaintiff has reviewed the complaint and authorized its filing;

(ii) states that the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel or in order to participate in any private action arising under this subchapter;

(iii) states that the plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary;

(iv) sets forth all of the transactions of the plaintiff in the security that is the subject of the complaint during the class period specified in the complaint;

(v) identifies any other action under this subchapter, filed during the 3-year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff has sought to serve, or served, as a representative party on behalf of a class; and

(vi) states that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4).

(B) Nonwaiver of attorney-client privilege

The certification filed pursuant to subparagraph (A) shall not be construed to be a waiver of the attorney-client privilege.

(3) Appointment of lead plaintiff

(A) Early notice to class members

(i) In general

Not later than 20 days after the date on which the complaint is filed, the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class—

(I) of the pendency of the action, the claims asserted therein, and the purported class period; and

(II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.

(ii) Multiple actions

If more than one action on behalf of a class asserting substantially the same claim or claims arising under this subchapter is filed, only the plaintiff or plaintiffs in the first filed action shall be required to cause notice to be published in accordance with clause (i).

(iii) Additional notices may be required under Federal rules

Notice required under clause (i) shall be in addition to any notice required pursuant to the Federal Rules of Civil Procedure.

(B) Appointment of lead plaintiff

(i) In general

Not later than 90 days after the date on which a notice is published under subparagraph (A)(i), the court shall consider any motion made by a purported class member in response to the notice, including any motion by a class member who is not individually named as a plaintiff in the complaint or complaints, and shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members (hereafter in this paragraph referred to as the "most adequate plaintiff") in accordance with this subparagraph.

(ii) Consolidated actions

If more than one action on behalf of a class asserting substantially the same claim or claims arising under this subchapter has been filed, and any party has sought to consolidate those actions for pretrial purposes or for trial, the court

shall not make the determination required by clause (i) until after the decision on the motion to consolidate is rendered. As soon as practicable after such decision is rendered, the court shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions in accordance with this subparagraph.

(iii) Rebuttable presumption

(I) In general Subject to subclause (II), for purposes of clause (i), the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this subchapter is the person or group of persons that—

(aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

(II) Rebuttal evidence

The presumption described in subclause (I) may be rebutted only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff—

(aa) will not fairly and adequately protect the interests of the class; or

(bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

(iv) Discovery

For purposes of this subparagraph, discovery relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class.

(v) Selection of lead counsel

The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.

(vi) Restrictions on professional plaintiffs

Except as the court may otherwise permit, consistent with the purposes of this section, a person may be a lead plaintiff, or an officer, director, or fiduciary of a lead plaintiff, in no more than 5 securities class actions brought as plaintiff class actions pursuant to the Federal Rules of Civil Procedure during any 3-year period.

(4) Recovery by plaintiffs

The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly

relating to the representation of the class to any representative party serving on behalf of the class.

(5) Restrictions on settlements under seal

The terms and provisions of any settlement agreement of a class action shall not be filed under seal, except that on motion of any party to the settlement, the court may order filing under seal for those portions of a settlement agreement as to which good cause is shown for such filing under seal. For purposes of this paragraph, good cause shall exist only if publication of a term or provision of a settlement agreement would cause direct and substantial harm to any party.

(6) Restrictions on payment of attorneys' fees and expenses

Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.

(7) Disclosure of settlement terms to class members

Any proposed or final settlement agreement that is published or otherwise disseminated to the class shall include each of the following statements, along with a cover page summarizing the information contained in such statements:

(A) Statement of plaintiff recovery

The amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis.

(B) Statement of potential outcome of case

(i) Agreement on amount of damages

If the settling parties agree on the average amount of damages per share that would be recoverable if the plaintiff

prevailed on each claim alleged under this subchapter, a statement concerning the average amount of such potential damages per share.

(ii) Disagreement on amount of damages

If the parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this subchapter, a statement from each settling party concerning the issue or issues on which the parties disagree.

(iii) Inadmissibility for certain purposes

A statement made in accordance with clause (i) or (ii) concerning the amount of damages shall not be admissible in any Federal or State judicial action or administrative proceeding, other than an action or proceeding arising out of such statement.

(C) Statement of attorneys' fees or costs sought

If any of the settling parties or their counsel intend to apply to the court for an award of attorneys' fees or costs from any fund established as part of the settlement, a statement indicating which parties or counsel intend to make such an application, the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought.

(D) Identification of lawyers' representatives

The name, telephone number, and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer questions from class members concerning any matter contained in any notice of settlement published or otherwise disseminated to the class.

(E) Reasons for settlement

A brief statement explaining the reasons why the parties are proposing the settlement.

(F) Other information

Such other information as may be required by the court.

(8) Attorney conflict of interest

If a plaintiff class is represented by an attorney who directly owns or otherwise has a beneficial interest in the securities that are the subject of the litigation, the court shall make a determination of whether such ownership or other interest constitutes a conflict of interest sufficient to disqualify the attorney from representing the plaintiff class.

(b) Stay of discovery; preservation of evidence

(1) In general

In any private action arising under this subchapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon the motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(2) Preservation of evidence

During the pendency of any stay of discovery pursuant to this subsection, unless otherwise ordered by the court, any party to the action with

actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

(3) Sanction for willful violation

A party aggrieved by the willful failure of an opposing party to comply with paragraph (2) may apply to the court for an order awarding appropriate sanctions.

(4) Circumvention of stay of discovery

Upon a proper showing, a court may stay discovery proceedings in any private action in a State court as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this subsection.

(c) Sanctions for abusive litigation

(1) Mandatory review by court

In any private action arising under this subchapter, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(2) Mandatory sanctions

If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall

impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(3) Presumption in favor of attorneys' fees and costs

(A) In general

Subject to subparagraphs (B) and (C), for purposes of paragraph (2), the court shall adopt a presumption that the appropriate sanction—

(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action.

(B) Rebuttal evidence

The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that—

(i) the award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden

on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) Sanctions

If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

(d) Defendant's right to written interrogatories

In any private action arising under this subchapter in which the plaintiff may recover money damages only on proof that a defendant acted with a particular state of mind, the court shall, when requested by a defendant, submit to the jury a written interrogatory on the issue of each such defendant's state of mind at the time the alleged violation occurred.