Supreme Court, New York County, Index No. 401720/2005

State of New York
Court of Appeals

PEOPLE OF THE STATE OF NEW YORK BY ANDREW M. CUOMO,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

v.

MAURICE R. GREENBERG and HOWARD I. SMITH,

Defendants-Appellants.

BRIEF OF *AMICUS CURIAE* NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC., IN SUPPORT OF PLAINTIFF-RESPONDENT

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Dated: January 31, 2013

DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

In Compliance with Rule 500.1(f) of the Rules of Practice for the Court of Appeals of the State of New York, the North American Securities Administrators Association, Inc. ("NASAA") states that it is a non-profit corporation located in and organized under the laws of the District of Columbia. It does not have a parent entity and does not have any subsidiaries or affiliates.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Formed in 1919, the North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. It has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. The Office of the Attorney General is the member from the State of New York.

The U.S. members of NASAA are the state agencies responsible for administering state securities laws, commonly known as "Blue Sky Laws." *See generally* LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION ch. 1.B.1 (4th ed. 2012). Ultimately, NASAA's mission, and the mission of its members, is to protect investors from fraud and abuse.

NASAA and all of its U.S. members have an interest in this case because the Defendants seek a ruling that the New York Attorney General is preempted by federal law from pursuing an enforcement action that includes a claim for money damages based on harms to investors. Such a ruling would substantially narrow the states' traditional antifraud authority in a way that Congress did not intend. The decision below should be upheld to preserve the states' ability to pursue remedies designed to protect investors by deterring misconduct in the securities marketplace and obtaining appropriate compensation for defrauded investors.

NASAA supports the work of its members by promulgating model rules and providing training opportunities for state regulatory personnel. NASAA frequently represents the interests of its members in the federal legislative and rulemaking processes by offering testimony in Congress and submitting comment letters to the Securities and Exchange Commission ("SEC") and other regulatory agencies. NASAA also coordinates multi-state enforcement actions in which state regulators exercise their broad antifraud authority to eradicate dishonest practices originating not just in local communities but also on Wall Street. Drawing from this experience, NASAA offers its legal analysis and policy perspective to state and federal courts as *amicus curiae* in significant enforcement actions and other cases involving the interpretation of the securities laws and the rights of investors.

This case has enormous significance for NASAA members for two reasons. First, it is critical that this Court preserve the right of the New York Attorney General to deter serious fraudulent practices and obtain compensation for victims of such practices. NASAA members support the efforts of the New York Attorney General to combat fraud and protect the integrity of the securities markets, not merely because of the remuneration that may flow to investors in other states, but because each state has a legitimate interest in discouraging anyone – including a powerful business executive – from engaging in fraudulent conduct.

Second, this case has important implications for state securities regulators and investors on a broader level. As explained below, many state securities regulators have statutory authority to pursue victim-specific monetary relief for the benefit of harmed investors, and these remedies are vital weapons in the regulatory arsenal. In New York, the Martin Act gives the New York Attorney General similar authority. By asserting a strained interpretation of federal law and preemption, the Defendants attempt to eliminate one of the states' most effective tools for deterring future misconduct. The states' historic role in policing national securities offerings for fraud is at risk in this appeal, and such a dramatic restriction of the states' authority cannot be reconciled with Congress's language and intent.

Many cases, in addition to the instant one, illustrate the value of state enforcement in addressing large scale misconduct in the securities marketplace. For example, the states and their federal counterparts discovered in 2002 that research analysts at the country's leading investment banking firms issued inflated stock ratings in order to attract and keep lucrative underwriting business from the companies rated by the firms' analysts. After a coordinated state and federal investigation, ten of the country's largest investment banks consented to what has come to be known as the "global settlement," resolving claims for fraud and other misconduct in connection with their false and misleading analyst reports. *See* Joint Press Release, SEC, NASD, NYSE, and NASAA, Ten of Nation's Top Investment

Firms Settle Enforcement Actions Involving Conflicts of Interest Between Research and Investment Banking (Apr. 28, 2003).[1] These firms agreed to pay a total of almost $1.4 billion in restitution, fines, and investor education support, and further agreed to institute reforms designed to eliminate conflicts of interest between their investment banking and research departments. *Id.*

Officials from the agencies involved cited not only the benefits for investors, but also the extraordinary importance of collaboration between state regulators, the SEC, and the industry self-regulatory organizations (SROs) in tackling large scale frauds. The head of the New York Stock Exchange stated that "[t]he partnership between the SEC, state regulators, and the SROs and our lawmakers remains the best and most effective system of market regulation and the global settlement reflects that." *Id.* at 5 (statement of Dick Grasso). Then SEC Chairman Christopher Cox praised the collaborative enforcement efforts of the SEC and state securities regulators, citing the analyst settlement and a long list of other successes in large scale cases: "Partly as a result of our improved coordination in allocating enforcement resources, the SEC and state regulators have recently achieved some spectacular results in a number of high profile cases. The historic global analyst settlement is an excellent example of how much we can accomplish working

[1] *Available at* http://www.sec.gov/news/press/2003-54.htm.

together." *See* Christopher Cox, Chairman, SEC, Remarks to the North American Securities Administrators Association, at 2 (May 9, 2006).[2]

Another dramatic example of the states' contribution to investor protection occurred in 2003, when the New York Attorney General uncovered two widespread trading schemes in the mutual fund industry. Mutual funds allowed favored companies and individuals to engage in practices known as "late trading" and "market timing" to the detriment of average citizens holding mutual fund shares and in contravention of prospectus language disavowing such practices. New York first brought an enforcement action under the Martin Act and Executive Law § 63(12) against a hedge fund known as Canary Capital Partners, LLC, and it resulted in a settlement that included restitution payments of $30 million for the benefit of injured investors and a fine of $10 million. S*ee State of New York v. Canary Capital Partners, LLC,* Complaint, at 41-43 (Sept. 3, 2003);[3] s*ee also* Press Release, Office of New York State Attorney General, State Investigation Reveals Mutual Fund Fraud (Sept. 3, 2003).[4] Then, New York's continuing investigation exposed similar misconduct at other mutual funds and triggered a wave of enforcement actions by federal and state regulators. *See, e.g.,* Press Release, SEC,

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[2] *Available at* http://www.sec.gov/news/speech/2006/spch050906cc.htm.
[3] *Available at* http://www.ag.ny.gov/sites/default/files/press-release/archived/canary-complaint.pdf.
[4] *Available at* http://www.ag.ny.gov/press-release/state-investigation-reveals-mutual-fund-fraud.

Prudential to Pay $600 Million in Global Settlement of Fraud Charges in Connection With Deceptive Market Timing of Mutual Funds (Aug. 28, 2006).[5]

The SEC and other securities experts applauded New York for its aggressive work on behalf of the nation's investors. Stephen Cutler, then Director of the SEC's Division of Enforcement, testified before the Senate Banking Committee that the SEC was aggressively pursuing wrongdoing in the mutual fund industry and would "continue to work closely and cooperatively with state officials who also are taking steps to protect investors." *See Testimony Concerning Recent Commission Activity to Combat Misconduct Relating to Mutual Funds, Hearing Before the Sen. Comm. on Banking, Housing, and Urban Affairs,* at 5, 9 (Nov. 20, 2003) (statement of Stephen M. Cutler, Director, Division of Enforcement, SEC).[6] Mercer Bullard, one of the nation's leading experts on mutual funds, declared that "[t]hese findings that prominent mutual fund managers collude with hedge funds to pick the pockets of fund shareholders undermines the integrity of the fund industry and reminds us of the importance of state regulators' enforcement efforts in uncovering and fighting securities fraud." *See* Press Release, Office of New York State Attorney General, State Investigation Reveals Mutual Fund Fraud, at 2 (Sept. 3, 2003), cited *supra.*

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[5] *Available at* http://www.sec.gov/news/press/2006/2006-145.htm.
[6] *Available at* http://www.sec.gov/news/testimony/ts112003smc.htm.

A third example of state-level policing of the securities markets occurred after the collapse of the market for auction rate securities in 2008. Wall Street firms had assured investors that the securities were safe and liquid – calling these securities "cash equivalents" – despite warning signs known to the firms. When the market collapsed and liquidity froze, thousands of investors were left without access to the money they needed and expected to be readily available to purchase homes, make tuition payments, and in some instances pay employees. As complaints to the states increased, state regulators formed a multi-state task force to investigate whether the nation's most prominent brokerage firms had misled investors. *See* NASAA Auction Rate Securities Information Center, *available at* http://www.nasaa.org/regulatory-activity/enforcement-legal-activity/auction-rate-securities-information-center/ (last visited Jan. 25, 2013). In the end, twelve firms were ordered to repay more than $61 billion to harmed investors. *Id.* (*see* links to individual enforcement actions); *Testimony Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight, Before the House Subcommittee on Capital Mkt. and Gov't Sponsored Enter.* (September 13, 2011) (statement of Steven D. Irwin, Pa. Sec. Comm'r and Chairman, Fed. Legislation Comm., NASAA).[7]

[7] *Available at* http://www.nasaa.org/5587/ensuring-appropriate-regulatory-oversight-of-broker-dealers-and-legislative-proposals-to-improve-investment-adviser-oversight/

Other examples abound. More recent cases include the New York Attorney General's case against Ivy Asset Management, in which an investment adviser concealed negative facts it knew about Bernard Madoff in order to keep earning millions of dollars in fees,[8] and the earlier settlement by AIG in this very case. These cases, and countless others like them, illustrate the vital role of the states in policing the securities markets, a role which Congress allowed to continue unabated after the passage of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the National Securities Markets Improvement Act of 1996 ("NSMIA"), and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA").

While Congress has preempted certain aspects of state registration requirements, Congress has consistently acknowledged the importance of state securities regulators and has explicitly preserved their antifraud authority. The Defendants-Appellants' arguments should be rejected by this Court because they are wholly without merit and contrary to the plain language of the applicable statutes and the legislative history behind them. Preserving state power as Congress intended is vital, not only in this case, but for the sake of promoting investor confidence in our securities markets.

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[8] *See* Press Release, A.G. Schneiderman Obtains $210 Million Settlement With Ivy Asset Management In Connection With Madoff Ponzi Scheme (Nov. 13, 2012), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-obtains-210-million-settlement-ivy-asset-management-connection-madoff.

QUESTION PRESENTED

1. Whether the Attorney General's authority to obtain damages in this enforcement action under the Martin Act and Executive Law § 63(12) is preserved rather than preempted by two federal statutes that (a) preclude certain private securities class actions under state law and (b) preempt certain state-law securities registration requirements, but expressly preserve state officials' longstanding authority to enforce state securities fraud statutes.

Both lower courts found that the Attorney General's claim is not preempted.

STATEMENT OF THE CASE

NASAA relies upon the Statement of the Case provided by the New York Attorney General in the Brief for Respondent.

ARGUMENT

The Defendants argue that the civil enforcement action brought against them by the New York Attorney General is expressly preempted by SLUSA, insofar as it seeks damages, because it is purportedly a de facto private class action (Joint Br. for Defs.-Appellants 26). They further assert that the action is impliedly preempted by the supposed interplay between NSMIA, the PSLRA, and SLUSA. *Id.* at 33. The Defendants' arguments rest on a fundamental misunderstanding of the complementary state-federal regulatory structure in the United States and, more specifically, the role of state securities regulators in pursuing enforcement actions.

The clear, unambiguous language of these statutes *preserves*, not preempts, state enforcement authority, including the authority of the New York Attorney General to obtain damages in an enforcement action against the Defendants for alleged violations of state law.

I. The Authority of State Securities Regulators to Bring Enforcement Actions to Protect Investors and Maintain the Integrity of the Capital Markets was not Diminished by NSMIA.

To understand the impact of NSMIA and the later changes brought about by the PSLRA and SLUSA, it is important to understand the historic role of the states in regulating securities. Governmental regulation of securities began in 1911 at the state level, not the federal level, when Kansas became the first state to adopt a blue sky law. *See* Rick Fleming, *100 Years of Securities Law: Examining a Foundation Laid in the Kansas Blue Sky*, 50 WASHBURN L.J. 583 (2011). The law was intended to place the offer and sale of securities under "rigid governmental control" for the protection of investors. *State v. Short*, 247 P. 114, 116 (Kan. 1926). Nearly every other state soon followed suit, including New York, which adopted the Martin Act in 1921. *CPC Int'l., Inc. v. McKesson Corp.*, 120 A.D. 2d 221, 234, 507 N.Y.S.2d 984, 992 (N.Y. App. Div. 1986). The purpose of the Martin Act is to "protect the public by curbing abuses in the offer and sale of securities and commodities in and from New York." *Id.*

In general, blue sky laws build upon three fundamental rules. *See* LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION ch. 1.B.4 (4th ed. 2012); Fleming, 50 WASHBURN L.J. 583, 601. First, before securities can be sold, they must be properly registered with the government or qualify for an exemption from registration. *See* Uniform Securities Act (1956) § 301; Uniform Securities Act (2002) § 301.[9] The registration process requires the filing of detailed offering materials designed to provide full disclosure to investors of the terms and risks of the offering.[10] Second, a person selling securities (a "broker-dealer") or giving advice concerning securities (an "investment adviser") must be properly licensed, thereby subjecting the licensed person to ethical rules and a full panoply of regulatory requirements. *See* Uniform Securities Act (1956) § 201; Uniform Securities Act (2002) §§ 401 & 403. Third, a person is prohibited from engaging in fraudulent or deceptive conduct in connection with a transaction in securities, which may involve either affirmative misrepresentations or omissions of material fact. *See* Uniform Securities Act (1956) § 101; Uniform Securities Act (2002) § 501.

[9] According to the Prefatory Note to the Uniform Securities Act (2002), the Uniform Securities Act of 1956 was adopted by 37 states. The 2002 Act was created to replace the 1956 Act and has been adopted by 17 states. *See Jurisdictions Adopting the Uniform Securities Act of 2002*, Blue Sky L. Rep. (CCH) ¶ 6431.

[10] New York's Martin Act is distinctive among state blue sky laws because it does not impose registration requirements for securities offerings, except in limited circumstances not relevant here.

With respect to the first fundamental rule, states took two different philosophical approaches to the registration requirements. LOUIS LOSS, SECURITIES REGULATION 36-37 (1st. ed. 1951); Uniform Securities Act (2002) § 306(a)(7), Official Comment #8. Some states, known as "disclosure" states, granted registration to any security, regardless of whether it was offered on fair terms or was otherwise equitable, provided that accurate and adequate information was made available to the public so that each investor could make an informed investment decision. *Id.* Other states, known as "merit" states, required the disclosure of all material risks to investors but retained the authority to deny registration if a securities offering was deemed unfair to investors. *Id.* These competing philosophies led to disparities in the registration requirements of different states. *See* Kenneth I. Denos, *Blue and Gray Skies: The National Securities Markets Improvement Act of 1996 Makes the Case for Uniformity in State Securities Law*, 1997 UTAH L. REV. 101, 110 (1997). Furthermore, when the federal government began to regulate the sale of securities in 1933, Congress chose to follow the model of disclosure regulation. LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION ch. 1.G (4th ed. 2012).

Critics complained that the varying registration requirements were unduly burdensome and made it too difficult to conduct nationwide securities offerings. They sought relief in the form of federal legislation that would streamline state and

federal regulatory requirements for nationwide securities offerings. *See, e.g.*, Brian J. Fahrney, *State Blue Sky Laws: A Stronger Case for Federal Pre-Emption Due to Increasing Internationalization of Securities Markets*, 86 NW. U. L. REV. 753 (1992). The result was the passage of NSMIA in 1996.

The Congressional intent behind NSMIA is clear. Congress was primarily focused upon solving the problem of a patchwork of varying state securities registration requirements – especially merit standards – being applied to nationwide offerings. S. REP. NO. 104-293, at 5 (1996) ("This 'crazy quilt' of regulation has made registration of mutual fund shares unnecessarily cumbersome"); *see* LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION ch. 1.B.4.c.ii (4th ed. 2012) ("In the period before enactment of [NSMIA], the wisdom of merit standards emerged as the leading policy debate concerning state securities regulation."). Toward this end, Congress amended Section 18 of the Securities Act of 1933, 15 U.S.C. § 77r, to preclude state registration of any "covered security." National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416, § 102 (1996). A covered security was defined to include securities sold on national stock exchanges, securities issued by investment companies (*i.e.*, mutual fund shares), and securities sold in certain offerings that are exempt from federal registration requirements. *Id.*

While NSMIA made significant changes in the regulation of securities offerings, it had a smaller impact on the regulation of securities professionals such as broker-dealers and investment advisers. Congress preempted some of the state-level regulations governing broker-dealers, including certain requirements related to record-keeping and the use of margin, but states retained their full authority to license broker-dealers and regulate their sales practices. Pub. L. No. 104-290, § 103.

NSMIA had even less impact on the states' ability to police fraud. Denos, 1997 UTAH L. REV. 101, 131 ("The preservation of state police power to prosecute fraud, regardless of the size of the transaction, remains one of the last vestiges of state authority unhindered by the NSMIA"). NSMIA included a broad savings clause that expressly retained state-level authority to institute enforcement proceedings for fraudulent or deceptive conduct:

> (c) PRESERVATION OF AUTHORITY. –
> (1) FRAUD AUTHORITY. – Consistent with this section, the securities commission (or any agency or office performing like functions) of any state shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions with respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with securities or securities transactions.
>
> Securities Act of 1933, § 18(c), as adopted in NSMIA § 102 (codified at 15 U.S.C. § 77r).

The plain language of NSMIA makes it clear that the Act does not preempt an enforcement action by the New York Attorney General that is based upon fraud or deceit, regardless of the state law remedies that are sought. When the text of a statute is unambiguous, "judicial inquiry is complete," and there is no need to look beyond the language for interpretive guidance. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254, (1992) (internal citations omitted).

Despite the plain language of the savings clause, the Defendants argue that the New York Attorney General's enforcement action against them will obstruct Congressional intent to establish national standards for the securities markets. (Joint Br. for Defs.-Appellants at 33.) However, the legislative history of NSMIA confirms its plain language and shows an unmistakable intent on the part of Congress to permit this type of enforcement action.

In cases predating the passage of NSMIA, states frequently took a lead role in cases with a nationwide impact, especially in cases involving fraud or deceit. For example, a multi-state task force led an enforcement action against Prudential Securities, alleging the unsuitable and fraudulent sale of 700 separate limited partnerships during the 1980's. As part of the settlement, Prudential Securities agreed to establish a fund of $330 million to compensate investors who were defrauded. JOHN M. DOYLE, INVESTORS MAY GET MONEY BACK IN PRUDENTIAL SETTLEMENT, http://www.apnewsarchive.com/1993/Investors-May-Get-Money-

Back-in-Prudential-Securities-Settlement/id-19e9984f058a16fc6389416971dedb5. *See also* KURT EICHENWALD, SERPENT ON THE ROCK: BACKSTABBING. LYING. EMBEZZLING. COVER-UPS. JUST ANOTHER DAY ON WALL STREET IN HISTORY'S BIGGEST CORPORATE SWINDLE 445 (2005). States also took a lead role in prosecuting fraudulent penny stock offerings in the late 1980's before Congress passed legislation to deal with the problem. Christopher R. Lane, *Halting the March Toward Preemption: Resolving Conflicts Between State and Federal Securities Regulators*, 39 New Eng. L. Rev. 317, 328 (2005).

The legislative history of NSMIA reveals that Congress was well aware of the states' important role in combating fraud and clearly intended to preserve their enforcement authority. The Congressional record accompanying the passage of NSMIA repeatedly affirmed this goal:

- "The Committee intends to **preserve** the ability of the States to investigate and bring enforcement actions under the laws of their own State with respect to fraud and deceit." H.R. REP. NO. 104-622, at 34 (1996) (emphasis added).
- "It is also the Committee's intention **not to alter**, limit, expand, or otherwise affect in any way any State statutory or common law with respect to fraud and deceit . . . ." *Id.* (emphasis added).
- "The Managers have preserved the authority of the states to protect investors through application of state antifraud laws. This preservation of authority is intended to permit state securities regulators to **continue to exercise** their police power to prevent fraud and broker-dealer sales practice abuses . . . ." H.R. CONF. REP. NO. 104-864, at 40 (1996) (emphasis added).

Consistent with the savings clause in contained in NSMIA, states have continued to bring significant antifraud cases, including those involving securities sold on national exchanges. The research analyst conflict-of-interest cases, the mutual fund market timing cases, and the auction rate securities cases, discussed *supra*, were national in their scope and illustrate the value of state enforcement work in addressing large scale misconduct in the securities markets. In those cases alone, billions of dollars have been returned to investors, and those results would not have been possible had Congress preempted state authority as suggested by the Defendants. Moreover, the SEC would not be able to fill the enforcement gap if states were preempted because "[f]ederal regulators are unable to cope with all the enforcement that needs to be done." Richard B. Smith, *A New Uniform Securities Act,* 6 No. 9 GLWSLAW 8, at 2 (Westlaw) (Feb. 2003).

Fortunately, when Congress adopted NSMIA, it preserved the enforcement authority of state securities regulators. Its intent is evidenced in both the plain language of the Act and its legislative history. The very heading of Section 18(c) makes the Congressional intent crystal clear – the "*preservation*" of state antifraud authority – and states have relied upon this preservation of authority to carry out important work on behalf of investors. This Court should categorically reject any argument that NSMIA somehow places limits on the authority of states to bring enforcement actions that are grounded upon fraud or deceit.

II. SLUSA Did Not Alter the Role of State Securities Regulators or Limit Their Ability to Pursue Enforcement Actions.

Two years after the passage of NSMIA, Congress adopted SLUSA as part of an effort to reform private securities litigation, but did so in a way that maintained the role of state securities regulators. Like NSMIA, the text of SLUSA and the legislative record express a clear Congressional intent to preserve state enforcement authority.

As a predecessor to SLUSA, Congress passed the PSLRA to reduce the risk that companies would be sued in abusive private class action lawsuits for making forward-looking statements about their future prospects. Statement on Signing the Securities Litigation Uniform Standards Act of 1998, 2 PUB. PAPERS 2247 (Nov. 3, 1998). These companies had been subjected to "strike suits," the purpose of which was "to extract a sizeable settlement from companies that are forced to settle, regardless of the lack of merits of the suit, simply to avoid the potentially bankrupting expense of litigating." H.R. REP. NO. 105-803, at 13 (1998) (Conf. Rep.). The reforms adopted in the PSLRA were designed to allow companies to "provide the public with valuable information about their prospects, thus benefiting investors by enabling them to make wiser decisions." 2 PUB. PAPERS 2247 (Nov. 3, 1998) (statement of President William J. Clinton).

The formal Congressional findings contained in Section 2 of SLUSA indicate the reasons Congress adopted it so soon after the PSLRA.

> Sec. 2. FINDINGS. The Congress finds that –
>
> (1) the Private Securities Litigation Reform Act of 1995 sought to prevent abuses in private securities fraud lawsuits;
>
> (2) since enactment of that legislation, considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State courts;
>
> (3) this shift has prevented that Act from fully achieving its objectives.
>
> Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 2, 112 Stat. 3227 (1998)

Members of the Conference Committee on Senate Bill 1260 ("S. 1260"), the bill enacted as SLUSA, were explicit in explaining the need for SLUSA. The goal of the legislation, according to Congressman Mike Oxley, was "preventing lawyers from using securities class actions filed in State court for their personal gains." 144 CONG. REC. H10779 (1998). Congressman Christopher Cox alleged that "[t]rial lawyers, using professional plaintiffs, were filing class action lawsuits against publicly traded companies alleging fraud, often with no more evidence than a drop in the price of these companies' stock." 144 CONG. REC. H10781. Similarly, Congressman Billy Tauzin characterized the strike suits that were being brought in state court to avoid the PSLRA as "shakedown lawsuits" and

complained that "no grandmother ever got a dime out of this, just the unscrupulous trial lawyers who brought these kinds of lawsuits." 144 CONG. REC. H10786.

From the Congressional record, it is clear that Congress adopted the PSLRA to prevent unscrupulous private plaintiffs and their attorneys from profiting through meritless class action litigation, and SLUSA was adopted to prevent an end run around the PSLRA through state-level class actions. Congress was focused on reigning in the activities of *private actors, not public officials*, and nothing in the Congressional record indicates any concern with litigation by government officials who derive no monetary benefit from the recovery of funds on behalf of investors. On the contrary, the legislative history shows a deliberate choice by Congress to preserve state enforcement authority.

Senator Chris Dodd, a sponsor of S. 1260, explained during its introduction that "[t]he legislation does not affect any State enforcement action, whether civil or criminal. State regulators retain their full authority to bring enforcement actions in any venue allowed under State law." 143 CONG. REC. S10477 (1997) (Statements on Introduced Bills and Joint Resolutions). He went on to "emphasize what the bill does not do: ...***it does not impact on State regulators***." *Id.* (emphasis added).

S. 1260 was later amended, and the final version of the bill made the Congressional intent explicit. In addition to the three formal Congressional

findings in Section 2 of SLUSA as set forth above, the findings contain two statements that reveal what the legislation was *not* intended to change:

> (4) **State securities regulation is of continuing importance**, together with Federal regulation of securities to protect investors and promote strong financial markets; and
>
> (5) In order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, **while preserving the appropriate enforcement powers of State securities regulators** and not changing the current treatment of individual lawsuits.
>
> Pub. L. No. 105-353, § 2 (1998) (emphasis added)

For these reasons, Congress expressly preserved state enforcement authority by inserting a "savings clause" in SLUSA, as codified in subsection 16(e) of the Securities Act of 1933 and subsection 28(f)(4) of the Securities Exchange Act of 1934. 15 U.S.C. §§ 77p & 78bb. These sections, both entitled "Preservation of State Authority," contain identical language: "The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions." *Id.* As explained by Congressman Tauzin, the bill was carefully designed to make sure that "States themselves and our own Securities Exchange Commission can still

exercise its authority to prevent abuses of fraud in securities trading in America." 144 CONG. REC. H10786.[11]

III. The New York Attorney General's Action is not Preempted by NSMIA or SLUSA.

Under the Supremacy Clause of the Constitution, federal law displaces state law where (1) Congress expressly preempts state law; (2) Congress establishes a comprehensive regulatory regime over an entire field; or (3) state law "directly conflicts with federal law or interferes with the achievement of federal objectives." *Zuri-Invest AG v. Natwest Fin., Inc.*, 177 F.Supp.2d 189, 191 (S.D.N.Y. 2001) (internal citations omitted). However, there remains a presumption against preemption. "In the interest of avoiding unintended encroachment on the authority of the States ... a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption." *Id.* at 191-92 (quoting *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658 (1993)). To overcome the presumption that federal law does not preempt a state's police powers, a party must show that preemption was the "clear and manifest purpose of Congress." *Id.* at 192 (internal citations omitted).

[11] Interestingly, in a separate section of SLUSA, Congress demonstrated an intent to *enhance* state enforcement authority in multi-state cases, not restrict it. Section 102 of SLUSA directs the Securities and Exchange Commission to encourage state regulators to provide for reciprocal enforcement of out-of-state subpoenas issued by other state securities regulators. Pub. L. No. 105-353, 112 Stat. 3227 (1998).

In the instant case, the Defendants assert that the Attorney General's action is expressly preempted by SLUSA to the extent that it seeks recovery that would benefit private investors. The Defendants also argue that the action is impliedly preempted because it conflicts with NSMIA, SLUSA, and the PSLRA, or that it interferes with the objectives sought by those acts. The Defendants do not assert a field preemption argument. [12]

A. The New York Attorney General's Action Is Not Expressly Preempted by SLUSA.

The Defendants argue that the New York Attorney General is precluded[13] from pursuing its state-law antifraud claims because of SLUSA. The relevant section of SLUSA provides as follows:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

[12] Field preemption requires the extraordinary showing that the federal scheme of regulation is "so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it," or that the federal statute in question "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *See Zuri-Invest AG v. Natwest Fin., Inc.*, 177 F.Supp.2d 189, 195 (S.D.N.Y. 2001) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 219 (1947)). Few statutes have been held to preempt state regulation entirely, and "[i]t is well-settled that federal law does not enjoy complete preemptive force in the field of securities." *Zuri-Invest AG,* 177 F.Supp.2d at 195; *see also Jevne v. Superior Court,* 111 P.3d 954, 964 (Cal. 2005) (noting that because the 1934 Act contains two savings clauses, field preemption is not at issue).

[13] The Defendants assert express "preemption" under SLUSA, but this is a mischaracterization of the statute. The Supreme Court has explained that "SLUSA does not actually pre-empt any state cause of action. It simply denies plaintiffs the right to use the class-action device to vindicate certain claims." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006).

> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.
>
> Pub. L. No. 105-353, § 101 (1998) (codified at 15 U.S.C. § 77p(b)).

The Defendants stretch the plain statutory language of SLUSA beyond its breaking point to argue that the action brought by the New York Attorney General is a covered "class action" by a "private party." They also strain plain language in an attempt to convince the Court that the action does not qualify for the express savings clause in SLUSA that preserves state jurisdiction "under the laws of such State to investigate and bring enforcement actions." Pub. L. No. 105-353, § 101(1998) (codified at 15 U.S.C. § 77p(e)).

The Defendants' arguments are wholly without merit and should be rejected by this Court. An action brought by a state regulator that seeks monetary relief for harmed investors is a traditional "enforcement action" that falls within the SLUSA savings clause for state regulators. Moreover, a state regulator is not transformed into a "private party," nor is an enforcement action converted into a "class action," merely because the regulator seeks monetary relief that, in addition to deterring fraud, will also result in recompense for widely dispersed victims who purchased a covered security.

1. An Action Brought By a State Securities Regulator Seeking Victim Compensation is an Enforcement Action that Qualifies for the SLUSA Savings Clause.

Like the New York Attorney General, many state securities regulators have the authority to seek recompense for harmed investors. State securities administrators in at least 46 states have specific statutory authority to pursue restitution along with a broad range of other civil enforcement remedies.[14] Some of those states – California, Colorado, Illinois, Oregon, and Washington – expressly give the securities regulator the power to seek damages as well as restitution, and many other states have the general authority to seek "other relief as the court considers appropriate," which may include damages.[15] The pursuit of restitution and damages is frequently used by state securities regulators as part of their enforcement arsenals, leading to judgments ordering the return of more than

[14] ALA. CODE § 8-6-16 (1975); ARIZ. REV. STAT. ANN. § 44-2032; ARK. CODE ANN. § 23-42-209; CAL. CORP. CODE § 25530; COLO. REV. STAT. ANN. § 11-51-602; CONN. GEN. STAT. ANN. § 36b-72; DEL. CODE ANN. tit. 73, § 602; D.C. CODE § 31-5606.03; FLA. STAT. ANN. § 517.191; GA. CODE ANN. § 10-5-72; HAW. REV. STAT. § 485A-603; IDAHO CODE ANN. § 30-14-603; 815 ILL. COMP. STAT. ANN. § 5/11; IND. CODE § 23-19-6-3; IOWA CODE ANN. § 502.603; KAN. STAT. ANN. § 17-12a603; KY. REV. STAT. ANN. § 292.470; ME. REV. STAT. ANN. tit. 32, § 16603; MD. CODE ANN., CORPS. & ASS'NS § 11-702; MICH. COMP. LAWS ANN. § 451.2603; MINN STAT. ANN. § 80A.80; MISS. CODE ANN. § 75-71-603; MO. ANN. STAT. § 409.6-603; MONT. CODE ANN. § 30-10-309; NEB. REV. STAT. § 8-1116; NEV. REV. STAT. ANN. § 90.640; N.H. REV. STAT. ANN. § 421-B:21; N.J. STAT. ANN. § 49:3-69; N.M. STAT. § 55-8-502 (1978); N.Y. GEN. BUS. LAW § 353; N.C. GEN. STAT. ANN. § 78C-28; N.D. CENT. CODE § 51-23-13; OHIO REV. CODE ANN. § 1707.261; OKLA. STAT. ANN. tit. 71, § 1-603; OR. REV. STAT. § 59.255; 70 PA. STAT. ANN. § 1-509; R.I GEN. LAWS § 7-11-603 (1956); S.C. CODE ANN. § 35-1-603; S.D. CODIFIED LAWS § 47-31B-603; TEX. REV. CIVIL STAT. ANN. art. 581, § 32; UTAH CODE ANN. § 61-1-20 (1953); VT. STAT. ANN. tit. 9, § 5603; VA. CODE ANN. § 13.1-521; WASH. REV. CODE ANN. § 21.20.390; W. VA. CODE § 32B-2-3; WIS. STAT. ANN. § 551.603; WYO. STAT. ANN. § 17-4-124.

[15] *Id.* *See* Uniform Securities Act (2002) § 603(b)(3).

$20 billion to investors in the past three years. NASAA Enforcement Report, Oct. 2012, at 6.[16]

To promote its preferred interpretation of SLUSA, the Defendants argue that the meaning of the term "enforcement action" must be determined by reference to federal law. (Joint Br. for Defs.-Appellants 32.) This is an important distinction to the Defendants because, in their view, federal law does not empower the SEC to seek damages on behalf of private shareholders. *Id.*

Although federal law may not empower the SEC to sue for damages directly, SEC actions often result in payments to individual investors. This happens through the administration of the Fair Fund whereby civil penalties and disgorgement collected by the SEC are deposited into a fund that is used to pay defrauded investors. 15 U.S.C. § 7246.[17] Thus, SEC "enforcement" actions commonly result in compensation to victims.

More importantly, there is simply no support for the argument that the term "enforcement action" should be defined by reference to federal law. The very text of the SLUSA savings clause says that a state securities regulator shall retain jurisdiction to investigate and bring enforcement actions "under the laws of such

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[16] *Available at* http://www.nasaa.org/wp-content/uploads/2011/08/2012-Enforcement-Report-on-2011-Data1.pdf.

[17] Even before the creation of Fair Funds in the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745, the SEC has made repayment of investors a priority in its settlements. For example, a 1992 settlement with Salomon Brothers included the creation of a $100 million fund to compensate victims of a fraud involving Treasury bond auctions. *See* SEC News Digest 92-99, *SEC Files and Settles Salomon Brothers Case (*May 21, 1992), *available at* http://www.sec.gov/news/digest/1992/dig052192.pdf.

State." Pub. L. No. 105-353, § 102, 112 Stat. 3227 (1998) (codified at 15 U.S.C. 77p(e)). As explained by Congresswoman Anna Eshoo, the chief Democratic sponsor of the House version of SLUSA that was ultimately adopted, "State regulators would continue to have the ability to *enforce State laws* and bring civil actions." 144 CONG. REC. H10780 (1998) (emphasis added). This obviously means that members of Congress intended for state authorities to pursue the enforcement remedies available to them under state statutes.

Under state law, an action brought by a state securities regulator for restitution or damages is clearly an "enforcement action." The Uniform Securities Act of 1956, adopted by 37 states, included restitution as an enforcement remedy in section 408.[18] Later, when the 1956 model act was replaced by the Uniform Securities Act (2002), the new section that empowered regulators to seek restitution was specifically entitled "Civil *Enforcement*."[19] Since 1956, these model statutes have been adopted in many states to provide the authority for the state securities regulators to obtain restitution for investors in their lawsuits against securities law violators.[20] As stated by Christine A. Bruenn, a former Maine

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[18] *See supra*, n. 9.

[19] Uniform Securities Act (2002) § 603 (emphasis added). At least 15 states use the word "Enforcement" in the heading of the statute that gives the securities regulator the authority to pursue restitution or damages, including Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, New Mexico, Oklahoma, South Carolina, South Dakota, Vermont, and Wisconsin. *Supra*, n. 14.

[20] *See supra*, n. 14. Interestingly, according to the Prefatory Note to the 2002 Act, the drafters were consciously attempting to reconcile the 2002 Act with the preemption contained in NSMIA and SLUSA. As a result, the private cause of action in Section 509 expressly refers to SLUSA.

Securities Administrator and NASAA President, "[A] primary and routine objective of state securities regulators is to obtain restitution for investors as part of enforcement actions." *Testimony Concerning the Securities Fraud Deterrence and Investor Restitution Act of 2003, Before the Sen. Subcommittee on Capital Mkt. Insurance, and Gov't Sponsored Enter.*(June 5, 2003) (statement of Christine A. Bruenn). [21]

The power to seek monetary remedies on behalf of investors is a traditional state enforcement power that predates SLUSA. As discussed above, when Congress adopted SLUSA, it was aware of the states' important role in policing the markets and expressed an unambiguous intent to preserve state enforcement authority. This authority had long included the power to seek monetary relief for victims, and Congress expressed no desire to constrain the ability of states to continue seeking compensation for harmed investors.

2. An Action By a State Securities Regulator Is Not a "Class Action" By a "Private Party."

The Defendants argue that the instant case should be treated as a covered "class action" by a "private party" for purposes of SLUSA because the Attorney General seeks recompense for widely dispersed victims who purchased a security

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However, Section 603 authorizes civil actions by regulators and makes no reference to SLUSA, presumably because the drafters saw no conflict between SLUSA and an enforcement action brought by a state regulator in which restitution is sought.

[21] *Available at* http://www.nasaa.org/880/the-securities-fraud-deterrence-and-investor-restitution-act-of-2003-h-r-2179/.

traded on a national securities market. However, the pursuit of damages serves a broader public interest than merely the repayment of investors. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 296 (2002) (an enforcement action may "vindicate a public interest...even when it pursues entirely victim-specific relief"). An action by a public official is clearly distinct from a private class action, even if the official seeks damages that flow to the investor.

To create a meaningful deterrent, regulators need the full arsenal of enforcement remedies, including the ability to require full recompense for the damages caused by misconduct. SEC Commissioner Luis Aguilar recently remarked about the lack of deterrence when a wrongdoer is not required to pay in full for the damages inflicted upon the public:

> During the financial crisis, there were a number of instances in which fraudulent misrepresentation of a public company's financial condition resulted in a relatively small pecuniary gain to the company itself or to the corporate managers who committed the fraud. However, such frauds often result in enormous losses to investors. As a result, the maximum penalty available to the Commission may not reflect the seriousness of the violation or the harmful impact on victims.
>
> For example, in SEC v. Citigroup Global Capital Markets, Inc., investors lost almost $700 million, but the maximum penalty the SEC could have obtained was $160 million, and in fact, the SEC settled to only a $95 million penalty. The settled penalty amount was a tiny fraction of the $11.3 billion in profits Citigroup earned in the year 2011, and less than 13.6% of the harm suffered by investors.

> Luis Aguilar, Commissioner, SEC, Taking a No-Nonsense Approach to Enforcing the Federal Securities Laws at the Securities Enforcement Forum 2012 (October 18, 2012).[22]

In his speech, Commissioner Aguilar called upon Congress to increase the sanctions that could be sought by the Commission, including penalties up to the full amount of losses suffered by investors. *Id.* Under federal law, those penalties would ultimately flow back to investors through the Fair Fund. 15 U.S.C. § 7246.

Likewise, under state law, civil penalties are typically capped. *See* Uniform Securities Act (2002) § 604(d). If the ill-gotten gains to a wrongdoer are insignificant in comparison to the harm caused to the public, disgorgement can also be an insufficient deterrent. Therefore, it is often in the public interest to require a wrongdoer to repay harmed investors, not merely disgorge ill-gotten gains or pay fines, in a civil enforcement action brought by a state regulator. This is why legislatures around the country have empowered state regulators to seek this remedy and why it is commonly used by those regulators.

Even though state regulators commonly seek recompense for investors, they retain independent enforcement objectives and act on behalf of the State, not as a personal representative of the investors. In fact, the interests of a single investor or group of investors may be inconsistent with the interests of the public at large. For example, a regulator may choose to revoke a stock broker's license to protect the

[22] *Available at* http://www.sec.gov/news/speech/2012/spch101812laa.htm.

general public, even though the revocation could impair the broker's ability to pay restitution to the harmed investors. As a result, regulators commonly advise investors to retain their own independent counsel to protect their interests. *See, e.g.*, Ala. Sec. Comm'n, Procedure For Filing A Complaint, http://www.asc.state.al.us/Complaint. htm ("[A]ny action by the [Alabama Securities Commission] would not necessarily result in any monetary benefit to you. If you have suffered monetary loss, you should consider contacting a private attorney to discuss your legal rights and remedies under the Alabama Securities Act or other statutes.")

Most regulators do not have the resources to pursue every possible case. By necessity, a regulator must decide how it will conduct its enforcement actions and which remedies to pursue based on several factors, including the egregiousness of the conduct, the broader deterrent effects of the action, and available resources. Thus, even if a regulator chooses to pursue damages or restitution in a particular case, the choice to bring the case was influenced by factors beyond the investors' personal interests. Individual investors may benefit from awards of damages, but the cases were chosen because the regulator believed they were of sufficient public importance to justify the expenditure of finite public resources. The Defendants would have this Court impair the discretion of public officials by second-guessing their enforcement priorities and the remedies they seek to deter misconduct.

If this Court were to accept the argument that civil actions brought by state regulators are subject to SLUSA when they pursue recovery that could benefit investors, it would also lead to illogical results. For example, the Defendants argue that SLUSA would require regulators to plead scienter because antifraud claims must be brought under federal law using federal pleading standards. However, in many states scienter is not even an element of the *crime* of securities fraud. *See* Uniform Securities Act (1956) § 409 and Official Code Comment; Uniform Securities Act (2002) § 508 and Official Comment 2. There is no support for the argument that Congress intended to hold state regulators to heightened scienter standards when they choose to pursue enforcement through civil actions instead of criminal prosecution.

B. The New York Attorney General's Action is not Impliedly Preempted by Federal Law.

The Defendants next argue that the New York Attorney General's action is impliedly preempted because it would conflict with Congressional intent to create uniform securities litigation standards through the passage of NSMIA and SLUSA. However, Congress expressly *preserved* the authority of states to bring antifraud enforcement actions under NSMIA, and it likewise preserved state enforcement authority under SLUSA, as discussed *supra*. When Congress has expressly preserved the authority of states to bring antifraud enforcement actions, this Court should look no further to determine whether preemption is "implied."

Conflict preemption can occur in two forms: where it is "impossible for a private party to comply with both state and federal requirements...or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Zuri-Invest AG v. Natwest Fin., Inc.,* 177 F. Supp. 2d 189, 195 (S.D.N.Y. 2001). In this case, the action by the New York Attorney General presents no such conflict.

The antifraud provisions of the Martin Act do not require a person to choose between obeying state law or federal law. On the contrary, New York law is consistent with federal law.[23] The Defendants were sued under General Business Law §§ 352(1) and 353, which grant the Attorney General authority to redress "deceptions, misrepresentations, concealments, suppressions, frauds, false pretenses, false promises," and other "fraudulent practices" in connection with the sale of securities. This is similar to Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q, which prohibits the use of any "device, scheme, or artifice to defraud," any "untrue statement of a material fact or any omission to state a material fact...," or any "transaction or course of business which operates or would

[23] Notably, there is no "patchwork quilt" of state securities fraud statutes, so the application of state antifraud law imposes no particular burden upon the national markets. As stated in *Zuri-Invest,* "'[s]tate law prohibitions on false statements of material fact do not create 'diverse, non-uniform, and confusing' standards.'" *Zuri-Invest AG,* 177 F. Supp. 2d at 197, quoting *Cippollone v. Liggett Group Inc.,* 505 U.S. 504, 528-29 (1992). Moreover, the antifraud provisions of the Uniform Securities Acts were modeled after Section 17(a) of the Securities Act of 1933 and SEC Rule 10b-5. Uniform Securities Act (2002) § 501, Official Comment 1. Thus, the complaints that drove the passage of NSMIA do not apply to antifraud enforcement, where the interests of the states are aligned with each other and with the federal government.

operate as a fraud or deceit." Therefore, it is entirely possible to comply with both state and federal requirements – a person simply has to disclose all material facts to investors.

For similar reasons, the enforcement of New York law also does not stand as an obstacle to the accomplishment of Congressional objectives or frustrate Congressional intent. "The overriding purpose of our nation's securities laws is to protect investors and to maintain confidence in our capital markets." H.R. CONF. REP. NO. 104-369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 731. Rather than frustrating this objective of investor protection, state antifraud laws further the same goal. *Testimony Concerning Spurring Job Growth Through Capital Formation While Protecting Investors, Before the Sen. Comm. on Banking, Housing, and Urban Affairs* (December 1, 2011) (Statement of Jack E. Herstein, President, NASAA).[24] ("Our primary goal and mission is to act for the protection of investors"); *see Rousseff v. Dean Witter & Co.*, 453 F. Supp. 774, 781 (D.C. Ind. 1978) (The primary purpose of federal securities laws is protecting the investing public by insuring it receives full disclosure of information necessary to effect informed securities transactions; a longer state statute of limitations enhances investor protection and therefore does not conflict with federal law).

[24] *Available at* http://www.nasaa.org/8409/spurring-job-growth-through-capital-formation-while-protecting-investors/

Furthermore, in enacting both SLUSA and NSMIA, Congress relied upon state-level antifraud enforcement to ensure that limits placed on private class actions and securities registration did not leave investors without adequate protection. The fourth and fifth Congressional findings in SLUSA, set forth *supra*, suggest that Congress felt free to curtail abuses by plaintiffs in class actions because federal and state regulators were able to reign in abuses by fraudsters. The legislative history of NSMIA is even more explicit. In the Committee Report on S. 1815, the Senate version of NSMIA that was amended into H.R. 3005, the Committee noted that "[a]s long as states continue to police fraud in these offerings, compliance [with the securities registration requirements] at the federal level will adequately protect investors." S. REP. NO. 104-293 (1996). Similarly, the United States Supreme Court has relied on the presence of public enforcement as part of its justification for barring aider-and-abettor liability in private suits under Rule 10b-5, noting that investors are adequately protected because state regulators have the power to seek restitution from aiders and abettors. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008).

These developments show a consistent pattern: private rights of action have been constrained by Congress and the Courts in reliance upon the continued existence of state authority to bring enforcement actions, including actions for restitution. Thus, a public action seeking victim-specific relief does not conflict

with the limits on private litigation or frustrate the objectives of federal law. On the contrary, state enforcement authority supports the accomplishment of federal objectives because it has given Congress and the Courts comfort in knowing that limits they placed on private actions will not open the way for fraudsters to harm investors.

CONCLUSION

By seeking to curtail the enforcement power of a state securities regulator, it is the Defendants who seek to frustrate Congressional intent. Congress recognized the important role of state securities regulators by adopting a savings clause in NSMIA to preserve their authority to bring actions for fraud and deceit. In addition, Congress included a savings clause in SLUSA to preserve the ability of state regulators to bring antifraud actions. This Court should not find an implicit preemption in NSMIA or SLUSA that contradicts the explicit non-preemptive language of those acts.

For these reasons, the Court should affirm the decision of the Appellate Division that federal law does not preempt the Attorney General's claim.

Respectfully Submitted,

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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AFFIDAVIT OF SERVICE BY OVERNIGHT FEDERAL EXPRESS NEXT DAY AIR

I, Rick A. Fleming, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age, and resides at 9115 Lake Braddock Drive, Burke, Virginia 22015.

On January 31, 2013, deponent served the within **Brief of *Amicus Curiae* North American Securities Administrators Association, Inc., in Support of Plaintiff-Respondent** upon the following attorneys at the addresses designated by them for that purpose by depositing 3 true copies of the same, enclosed in a properly address wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the District of Columbia.

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District of Columbia: SS
Subscribed and sworn to before me, in my presence,
this 31 day of JANUARY, 2013
Faye Gordon
Notary Public, D.C.
My commission expires JANUARY 1, 2015

FAYE GORDON
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires January 1, 2015