No. 20-0197

IN THE SUPREME COURT OF TEXAS

IN RE SOUTHWESTERN ENERGY COMPANY, *et al.*,
Relators

On Petition for Writ of Mandamus
To the 61st Judicial District Court, Harris County, Texas
St. Lucie Cty. Fire Dist. Firefighters' Pension Tr. v. Sw. Energy Co., et al.,
No. 2016-70651
The Honorable Fredericka Phillips, presiding

BRIEF OF *AMICUS CURIAE* NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION

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INTEREST OF AMICUS CURIAE

Formed in 1919, the North American Securities Administrators Association ("NASAA") is the non-profit association of state, provincial and territorial securities regulators in the United States, Canada and Mexico. NASAA's U.S. members are responsible for administering state securities laws, commonly known as "Blue Sky Laws." *See generally* 1 LOUIS LOSS ET AL., SECURITIES REGULATION 55–251 (5th ed. 2014). The principal activities of NASAA's U.S. members include registering local securities offerings, licensing broker-dealer agents and investment adviser representatives, and bringing enforcement actions to address fraud and other misconduct. The overriding mission of NASAA and its members is to protect investors – particularly retail investors – from fraud and abuse while protecting the integrity of the marketplace so that capital formation is fair and efficient.

NASAA supports its members and the investing public by promulgating model statutes and rules, coordinating multi-state enforcement actions, and commenting on legislative and rulemaking proposals. NASAA also offers its legal analyses and policy perspectives to state and federal courts as *amicus curiae* in important cases involving the interpretation of state and federal securities laws and regulations, as well as other issues related to investor protection. NASAA and its members have an interest in this matter because the outcome could profoundly affect the ability of investors to obtain redress in cases where unscrupulous companies and

individuals commit fraud. The resolution of this case could also have significant effects on the integrity of the securities markets and the remediation of securities fraud.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

Plaintiff St. Lucie County Fire District Firefighters' Pension Trust ("St. Lucie") alleges that in October 2014 Defendant Southwestern Energy Company ("Southwestern") obtained $5 billion in loans to acquire property in West Virginia and Pennsylvania, referred to as the "Chesapeake acquisition." The value of the property was determined primarily by an estimate of oil and gas reserves issued as of June 2014. To repay these loans, Southwestern conducted a stock offering through a group of underwriters composed in part of the same institutions that made the loans, or their affiliates. Prior to closing the Chesapeake acquisition on December 22, 2014, the Defendants (collectively defined as Southwestern, certain of its officers and directors, and the underwriters) discovered licensing, environmental, geological, and other costs that materially impacted the profitability of the Chesapeake acquisition and devalued the reserve estimate. Defendants did not disclose this information before completing Southwestern's $1.75 billion stock offering, which became effective on January 16, 2015. A little more than a year later, on January 21, 2016, Southwestern disclosed in a regulatory filing that they were laying off 1100 employees, and on February 25, 2016, Southwestern disclosed

in a separate regulatory filing that the company was halting drilling activities and had taken an impairment charge of $2.8 billion in the fourth quarter of 2015.

St. Lucie filed a timely petition (the "Initial Petition") in Harris County District Court on October 17, 2016, alleging violations of Sections 11, 12 and 15 of the Securities Act of 1933 (the "Securities Act") for material misstatements and omissions contained in Southwestern's January 12, 2015 registration statement and other incorporated documents for its stock offering. (collectively, the "Offering Documents"). Southwestern removed the case to the U.S. District Court for the Southern District of Texas on December 5, 2016, where it was stayed pending the outcome of *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 583 U.S. ___ (2018). Upon the U.S. Supreme Court's affirmance of the authority of state courts to hear Securities Act claims in *Cyan*, the U.S. District Court remanded the case to the trial court below on May 4, 2018. Southwestern promptly filed a motion to dismiss, and St. Lucie amended its petition on May 25, 2018 (the "Amended Petition"). The Amended Petition alleges that the same Defendants (Initial Petition ¶¶ 2, 18-65; Amended Petition ¶¶ 2, 21-68), are liable under the same statutory causes of action (Initial Petition ¶¶ 85-104; Amended Petition ¶¶ 128-148), with respect to material misstatements and omissions in the same Offering Documents (Initial Petition ¶¶ 70-73; Amended Petition ¶¶ 96-101).

Southwestern responded to the Amended Petition on June 13, 2018 by filing another motion to dismiss, claiming that St. Lucie failed to allege any material misstatements or omissions, and that the Amended Petition was barred by the statute of repose found in Section 13 of the Securities Act. The trial court denied the motion on August 14, 2019, and Southwestern petitioned the Court of Appeals for the First Judicial District on September 25 and 26, 2019 for an emergency stay and a writ of mandamus ordering the trial court to dismiss St. Lucie's petition. The Court of Appeals rejected the writ and emergency stay, and Southwestern filed the petition currently before this Court.

SUMMARY OF THE ARGUMENT

State and federal securities laws are designed to serve important remedial purposes, one of which is maintaining confidence in the securities markets by establishing mechanisms to detect, prevent and redress fraud and other abusive practices. In order to ensure that those remedial purposes are met, state and federal courts have uniformly held that the securities laws should be interpreted flexibly. Indeed, uniformity in the application of the securities laws is itself critical to ensure that all investors are protected equally, and that no jurisdiction becomes a more favorable environment for misconduct.

This Court should accordingly apply well-established precedents to hold that the misstatements and omissions alleged here are actionable under the Securities

Act. Specifically, if St. Lucie's allegations are taken as true – as is required at this stage of litigation – then Defendants' alleged withholding of materially negative information that they learned shortly before the offering constitutes a fraudulent omission under the Securities Act. This omission was not cured by Defendants' disclosure of stale data provided to investors "as of" a certain date. Likewise, Defendants' boilerplate disclosures about the potential risks of the investment do not negate their material omissions of fact. To accept Defendants' restrictive view of disclosure requirements is to create the very sort of material information gaps that the Securities Act and similar state laws are designed to eliminate.

This Court should also hold that an amended petition – brought against the same Defendants, for the same causes of action, and based on the same offering documents – is not barred by the Securities Act's statute of repose. The time limits for Defendants' susceptibility for being haled into court for fraudulent misstatements and omissions surrounding Southwestern's January 2015 securities offering were satisfied when St. Lucie sued them in October 2016. Defendants have since spent the last five years engaging in one failed procedural maneuver after another to avoid answering St. Lucie's allegations. This is just one more. Once an investor alleges they were harmed by a fraudulent offering, the question of liability for that offering is joined, and St. Lucie's decision to amend its allegations in the manner allowed under Texas civil procedure does not create a new time-barred matter. To let

Defendants avoid this Court's jurisdiction through delay tactics could allow corporate defendants generally to substitute procedural maneuvering for resolution and accountability, and would endanger the rights of investors generally to seek relief for their injuries. That, too, would be antithetical to the remedial purposes of the securities laws.

Finally, contrary to Southwestern's position, private class actions are not exceptionally coercive or burdensome compared to conventional litigation. There is little evidence to support that class actions force defendants to settle, and trial and settlement rates for class actions are similar to those for conventional litigation. Even if Southwestern's characterizations of class actions were accurate, it would not diminish the role of private class actions as an important component of the Securities Act's remedial goals, and this Court should not accept Southwestern's self-serving arguments as the basis to frustrate the important purposes served by the vital class action mechanism.

ARGUMENT

I. Southwestern's Restrictive Interpretation of Its Disclosure Requirements Is Contrary to the Rule that the Securities Laws Must be Construed Flexibly to Effectuate Their Remedial Purposes.

The U.S. Supreme Court recently reaffirmed in *Lorenzo v. SEC*, 139 S. Ct. 1094, 587 U.S. ___ (2019) that the federal securities laws are intentionally robust

and are designed to provide redress for all forms of securities fraud. *Id.* at 1104 (explaining that "Congress intended to root out all manner of fraud in the securities industry."). One "fundamental purpose" of the Securities Act is to prevent and redress fraud by "substitut[ing] a philosophy of full disclosure for the philosophy of caveat emptor" that reigned before its enactment. *Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 151 (1972) (internal quotations omitted) (referring to the Securities Exchange Act of 1934 "and its companion legislative enactments," including the Securities Act) (*citing SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963)). Congress reaffirmed these remedial purposes when it enacted the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 (2012). *See* S. Rep. No. 104-98, at 23 (1995) ("Congress adopted Section 12(2) of the [Securities] Act to deter material misrepresentations and omissions in the purchase or sale of securities," and this provision was "modeled after Section 11 of the Securities Act."); H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.) ("The overriding purpose of our Nation's securities laws is to protect investors and to maintain confidence in our capital markets ....").

As a remedial statute designed to address fraud and other abusive practices, the Securities Act must be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes." *Affiliated Ute*, 406 U.S. at 151. A flexible interpretation is necessary in order to ensure that individuals and companies cannot

easily evade accountability – a result which would severely undermine the purposes of the securities laws. *See*, *e.g.*, *SEC v. Zandford*, 535 U.S 813, 819-25 (2002) (flexibly construing the phrase "in connection with the purchase or sale of any security" in Section 10(b) of the Securities Exchange Act of 1934 to protect investors by tying misappropriated proceeds to the otherwise lawful sale of securities); *SEC v. Glenn W. Turner Enters.*, 474 F.2d 476, 482 (9th Cir. 1976) (flexibly interpreting the elements of the term "investment contract" to affirm the lower court's holding that in order to serve the remedial purpose of the federal securities laws, a modicum of effort by an investor does not exclude an instrument from meeting the definition of a security).

This Court has previously embraced this principle. *See Life Partners, Inc. v. Arnold*, 464 S.W.3d 660, 671 n.9 (Tex. 2015) (broadly construing investment contracts to account for economic realities; the Court followed the lead of numerous other courts by holding that "the federal securities laws are to be construed 'not technically and restrictively, but flexibly to effectuate (their) remedial purposes'") (*quoting Glen–Arden Commodities, Inc. v. Costantino*, 493 F.2d 1027, 1035 (2d Cir. 1974)). Other states are in accord, and this is the conventional approach to interpreting and applying the securities laws. *See, e.g., Frishman v. Maginn*, 912 N.E.2d 468, 477-78 (Mass. App. Ct. 2009) (construing the Securities Act broadly to hold an assignment contract unenforceable for selling unregistered investments to

unaccredited investors); *State v. McGuire*, 735 N.W.2d 555, 561 (Wis. 2007) (construing the Wisconsin Uniform Securities Law to hold a promissory note can be a security subject to the law's antifraud provisions); *Bahre v. Pearl*, 595 A.2d 1027, 1031 (Me. 1991) (discussing the definition of "security" under the federal securities laws and the Revised Maine Securities Act to hold a promissory note can be a security); *Casali v. Schultz*, 732 S.W.2d 836, 837 (Ark. 1987) (discussing the definition of "security" under the Arkansas Securities Act to hold interests in a general partnership which owned all stock of an investment banking firm was a security); *Waugh v. Heidler*, 564 P.2d 218, 220 n.2 (Okla. 1977) (construing the Oklahoma Securities Act to cover aider and abettor liability for violating the Act's antifraud provisions); *Adamson v. Lang*, 389 P.2d 39, 42 (Or. 1964) (stating that the Oregon securities law "is to be liberally construed to afford the greatest possible protection to the public.").

This Court should follow similar logic here and reject Southwestern's restrictive and forced interpretation of its obligation to fully disclose all material facts to its investors. Acceptance of Southwestern's interpretation would harm the ability of investors to seek redress for fraud and would undermine the remedial purposes of the Securities Act.

II. The Material Misrepresentations and Omissions Alleged by St. Lucie Are Sufficient to Support Causes of Action Under Sections 11 and 12 of the Securities Act.

In the Initial and Amended Petitions, St. Lucie alleged that Southwestern made material misstatements and omissions in its Offering Documents in violation of Sections 11, 12 and 15 of the Securities Act. The core determination in this review of St. Lucie's allegations and Southwestern's motion to dismiss is whether Southwestern disclosed all material facts regarding the value of the Chesapeake acquisition necessary to make the June 2014 statement not misleading so that a reasonable investor could make a fully informed investment decision. This sort of determination "requires delicate assessments of the inferences a 'reasonable [investor]' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." *TSC Indust., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). While the assessment of the particular statements is an issue most appropriately handled by the trier of fact, it is clear that under the federal securities laws St. Lucie has made sufficient allegations as a matter of law to establish its claims.

A. Southwestern Withheld Material Information Necessary to Make Statements in its Offering Materials Not Misleading.

When Congress enacted the federal securities laws, it sought "to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry." *Capital Gains*, 375

U.S. at 186. The purpose of Congress in doing so was to protect investors and to maintain confidence in our capital markets. This purpose extends to the Securities Act provisions before this Court, which require offering documents to be free from both material misrepresentations and omissions, an important part of which is the affirmative duty to disclose "known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in a material way." 17 C.F.R. § 229.303.

In this case, Southwestern failed to provide the complete and accurate disclosure necessary for investors to make fully informed decisions. Among other alleged misstatements, Southwestern's Offering Documents contained materially misleading statements involving its Chesapeake acquisition. These statements included Southwestern's estimate that the Chesapeake property contained approximately $5 billion in oil and gas reserves. *See* Real Party in Interest St. Lucie County Fire District Firefighters' Pension Trust's Brief on the Merits ("St. Lucie Brief"), 4 (Mar. 1, 2021). However, before the effective date of the offering, Southwestern obtained additional information that the estimated value of these reserves had changed drastically – an approximately $1 billion drop in value. *See* St. Lucie Brief at 7. Such a large drop in the value of reserves not only rendered the earlier estimates reflected in the Offering Documents materially misleading, but also

would undoubtedly have "significantly altered the total mix of information made available" in the Offering Documents. *Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988) (internal quotes omitted).By failing to disclose this information, Southwestern fell far short of the fulsome disclosure required under the federal securities laws.

B. <u>Technical Compliance with Regulation S-X Cannot Excuse Fraud</u>.

Even assuming, *arguendo*, that Southwestern did in fact comply with the technical requirements of the Securities and Exchange Commission's Regulation S-X with respect to how issuers treat reserve estimates, the technical requirements in SEC reporting rules do not constitute a license to withhold material information from investors. Regulation S-X does allow for proved oil and gas reserves to be priced at "the average price during the 12-month period prior to the ending date of the period…" 17 C.F.R. § 210.4-10 Southwestern argues that they cannot be liable for fraud because the "as of" reserve estimates complied with the technical requirements of Regulation S-X concerning such calculations. *See* Southwestern Energy *Relators Brief on the Merits* (the "Merits Brief"), 43-49 (Nov. 12, 2020). However, it is nonsensical that the inclusion of this disclosure, when coupled with the omission of more recent information that completely undermined the value of the reserve estimate, somehow resulted in an accurate and reliable offering. In fact, just the opposite occurred; Defendants' misleading combination of disclosure and omission

is the basis of the alleged fraud. This is exactly what the prohibitions in Sections 11 and 12(a)(2) of the Securities Act are meant to prevent; they prohibit the omission of facts necessary to make disclosed facts not misleading. Reporting requirements cannot be read to trump the antifraud provisions of the federal securities laws. *See City of Philadelphia v. Fleming Companies, Inc.,* 264 F.3d 1245, 1267 (10th Cir. 2001) ("[I]t is possible for securities fraud defendants to comply technically with SEC reporting requirements … and yet still be omitting information that is material and should therefore be disclosed."); *accord Zell v. InterCapital Income Sec., Inc.*, 675 F.2d 1041, 1044 (9th Cir. 1982) (noting that the defendant's compliance with the technical requirements of Schedule 14A in drafting its proxy statement did not mean that the defendant had disclosed all required material information). Regulation S-X allows companies to make statements in a prescribed manner *as long as* those statements are not false or misleading. To accept Southwestern's interpretation that the technical application of Regulation S-X supersedes the antifraud provisions throughout the Securities Act and the Securities and Exchange Act of 1934 would eviscerate clear legislative and regulatory priorities and would not effectuate the investor protection and remedial purposes of the securities laws.

C. Public Companies Cannot Rely on Tepid Disclosures While Possessing Materially Conflicting Information.

Well-established precedent and authority require public companies to disclose known material facts and documentation. This Court should apply these precedents

in a manner that is faithful to the remedial purposes of the Securities Act and hold that Southwestern cannot rely on tepid, boilerplate risk disclosures to escape liability if they withheld new information that rendered their prior statements significantly misleading.

Southwestern seeks to avoid liability by relying on boilerplate risk disclosures in the Offering Documents and invoking the bespeaks caution doctrine, which stands for the proposition that forward-looking statements are not misleading if they are accompanied by adequate risk disclosures. Southwestern's disclosures included:

- The reserves "may increase or decrease as a result of market conditions, future operations, changes in regulations, or actual reservoir performance."
- There may be "difficulty associated with coordinating geographically separate assets."
- There may be a "failure to realize the full benefit that we expect in estimated proved reserves ..."

See Rec. 684.

The bespeaks caution doctrine does not apply to this case. The doctrine "is essentially shorthand for the well-established principle that a statement or omission must be considered in context, so that accompanying statements may render it immaterial as a matter of law." *In Re Donald J. Trump Casino Securities Litigation-Taj Mahal Litigation*, 7 F.3d 357, 364 (3rd Cir. 1993). But the context of a cautionary statement changes when the stated risk or potential outcome *has already*

come to pass. In these circumstances, cautionary statements themselves can become materially misleading. *See Huddleston v. Herman & Maclean*, 640 F.2d 534, 544 (5th Cir. 1981) ("To warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit.") *aff'd in part, rev'd in part on other grounds* 103 S. Ct. 683 (1983); *In Re Prudential Securities Inc. Ltd. P'shps Litig.*, 930 F. Supp. 68, 72 (S.D.N.Y. 1996) ("[t]he doctrine of bespeaks caution provides no protection to someone who warns his hiking companion to walk slowly because there might be a ditch ahead when he knows with near certainty that the Grand Canyon lies one foot away."). Southwestern's failed prophylactic statements – that there *may* be difficulties, that the investments *may* not realize their full benefit, and that the reserve estimate *may* increase or decrease – provide no protection when they knew with certainty that materially adverse events had already occurred.

Southwestern further argues that a negotiated $400 million discount to the purchase price of the Chesapeake acquisition should have alerted investors to operational risks that lowered the property's value. *See* Southwestern Energy *Petition for Writ of Mandamus,* 42 (Sept. 24, 2019). Such a negotiated discount could have many causes, none of which would be known outside of Defendants' inner circle without explicit disclosure. Supporting this position and requiring investors to read the proverbial tea leaves without disclosure is precisely what the

Securities Act's disclosure requirements and antifraud provisions were designed to eliminate.

The vital importance of complete and accurate disclosures of risks, particularly when those risks have come to pass, cannot be overstated in advancing the fundamental policy underlying federal securities laws – transparency is the *sine qua non* of investor protection. *See Marcus v. J.C. Penny Co., Inc.*, No. 6-13-CV-736-MHS-KNM, 2015 WL 5766870, at *3 (E.D. Tex. Sept. 29, 2015) (holding that "When cautionary language is 'glossed over as a future risk . . . rather than the certain dangers that had already begun to materialize' then the warnings are no longer meaningful."); *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 986 F. Supp. 2d 487, 513 (S.D.N.Y. 2013) ("[I]ntra-quarter updates may be required if intervening events trigger a duty to disclose."). Southwestern cannot overcome the Securities Act's disclosure obligations by merely stating that there may be negative outcomes when those outcomes had already occurred.

Southwestern further argues that the mere existence of the negative information did not create a duty to disclose because the representations "as of" June 2014 could not have remained "alive" in the mind of investors at the time of the offering. *See* Merits Brief at 39-44. However, St. Lucie alleges that this is not an instance where subsequent discoveries rendered statements in the offering documents false or misleading *after* the IPO. *See Krim v. BancTexas Group, Inc.*,

989 F.2d 1435, 1445 (5th Cir. 1993) (holding that omission claims under Sections 11, 12 and 15 must allege "that the information allegedly omitted from the Prospectus was known to the issuer at the time the Prospectus was distributed, …"). In this case, Southwestern was *in possession of* material negative facts, trends, and information, and withheld that information in order to secure investor funds to maintain their business operations. The known, material, negative facts impacting the profitability of the Chesapeake acquisition and supporting a devaluation of reserve estimates that Southwestern allegedly withheld are precisely the type of intervening events that require disclosure.

III. **The Statute of Repose Does Not Bar the Allegations Made in St. Lucie's Amended Petition.**

The Initial Petition was filed with the trial court within the time required by Section 13 of the Securities Act. In that petition, St. Lucie named the Defendants, stated which securities laws were violated, and identified the Offering Documents in which those violations occurred. The Amended Petition names the same Defendants, states the same causes of action, and relies on the same Offering Documents. Those facts alone defeat the Defendants' statute of repose argument.

Section 13 of the Securities Act states that "[i]n no event shall any such *action* be brought to enforce a liability created under [Sections 11 and 12(a)(1)] more than three years after the security was bona fide offered to the public, or under [Section

12(a)(2)] more than three years after the sale." 15 U.S.C. § 77m (emphasis added). In a recent case involving Section 13, the U.S. Supreme Court held that "[t]he term 'action,' however, refers to a judicial 'proceeding,' or perhaps a 'suit' – not to the general content of claims." *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2046, 582 U.S. ___ (2017) ("*CalPERS*"). All questions before this Court are part of the same suit, and therefore part of the same "action" for purposes of Section 13.

Defendants' argument that differences in allegations between pleadings within the same suit create a new action has been tried before and has failed. For instance, in *Rotstain v. Trustmark National Bank*, 2016 WL 8216509 (N.D. Tex. 2016), the defendants argued that class plaintiffs did not allege sufficient facts to state their claims under the Texas Securities Act ("TSA"), and therefore the plaintiffs' amended complaint was barred by the statute's deadline. *Id.* at *3. The court disagreed, holding that the plaintiffs "adequately stated their TSA claims in their original complaint[,]" which "cut off the statute of repose." *Id.* at *4. The court explained further that "[t]he fact that Class Plaintiffs subsequently amended their complaint to state their claims with greater specificity, additional factual support, or to state that the previously-alleged facts supported liability under a new legal theory does not violate the already-satisfied statutory deadline." *Id.* The court held that the allegations in the original complaint provided the defendants with sufficient notice

of the claims against them. *Id.* Likewise, in *Cosby v. KPMG*, 2018 WL 3723712 (E.D. Tenn. 2018), the court rejected the defendant's argument that the plaintiff's amendment to more specifically allege how class plaintiffs purchasing preferred stock versus class plaintiffs purchasing common stock were harmed was time barred because the court found both the original and amended allegations emanated from the same offering documents that contained material misrepresentations and was misleading. *Id.* at *11. In both cases discussed above, the parties, the causes of action, and the securities filings at issue were the same in the original and amended pleadings. Further, in both cases the courts found that differences in allegations did not create new claims because the plaintiffs provided sufficient information to put defendants on notice regarding the causal theory. The same is true here; St. Lucie's Initial Petition, which alleged misrepresentations and omissions surrounding the Chesapeake acquisition, put Defendants on sufficient notice that the disclosures surrounding that acquisition would be the subject of litigation.

A timely suit like the one brought by St. Lucie here is sufficient under Section 13 not only because it meets the literal terms of the provision, but also because it satisfies the policy underlying the statute of repose. The U.S. Supreme Court explained in *CalPERS* that Congress intended to "offer defendants full and final security after three years," 137 S. Ct. at 2053, in order to give them certainty. As the court explained, "[i]f the number and identity of individual suits, where they may

be filed, and the litigation strategies they will use are unknown, a defendant cannot calculate its potential liability or set its own plans for litigation with much precision" and therefore "[t]hese uncertainties can put defendants at added risk in conducting business going forward, causing destabilization in markets which react with sensitivity to these matters." *Id.* In other words, the statute of repose gives a public company peace of mind by setting a date certain after which it can no longer be called to account for misrepresentations and omissions in its offering documents and related communications. But the opposite is also true; Section 13 defines the time within which a public company can expect to be haled into court and held liable for misrepresentations and omissions. *See id.* at 2056 (Ginsberg, J., dissenting) (stating that Section 13's repose period is designed to afford a defendant "notice of their potential liability within a fixed time window."). St. Lucie properly met those expectations by suing Defendants within the time in which the Securities Act says that they could expect to be sued for the alleged misconduct. Therefore, neither the terms of Section 13, nor the policy imperatives behind it, were offended by St. Lucie's Amended Petition.

Defendants' argument, on the other hand, would offend both the terms and purpose of Section 13. By conflating "action" with "allegation," Southwestern hopes for this Court to create a rule under which a complaint must be pleaded exhaustively the first time. Such an interpretation would be inconsistent with Texas

pleading standards, which require "a short statement of the cause of action sufficient to give fair notice of the claim involved." TEX. R. CIV. P. 47(a).

Further, there is no indication that the U.S. Supreme Court or Congress intended a different result regarding Section 13. Likewise, courts that have considered the question have found that amended allegations do not create new actions where they allege the same kind of misconduct consistently from pleading to pleading. To accept Defendants' argument would not only create an impossible pleading standard, but it would also invite future defendants to engage in endless procedural maneuvering in an attempt to game the statute of repose, preventing plaintiff's ability to amend despite having pre-existing full knowledge of plaintiff's claims.

IV. **Class Actions Are Not Exceptionally Coercive and any Purported Burden on Defendants is Justified by the Benefits to the Health and Efficient Operation of the U.S. Capital Markets.**

Although the ability of this suit to proceed *as a class action* is not directly before this Court, Southwestern frames this case as a "paradigm of the meritless federal securities class action," complains about "extortionate settlements," and contends that dismissal of the Amended Petition "is essential here given the staggering discovery costs and crushing settlement pressure that accompany securities class actions that survive a motion to dismiss." Merits Brief at 1, 15-16; *See also* Brief of the Securities Industry and Financial Markets Association and

Chamber of Commerce of the United States of America as *Amici Curiae* in Support of the Petition for Writ of Mandamus at 24-31 (Nov. 18, 2020); Brief of Amici Curiae American Petroleum Institute Association of America, and American Exploration and Production Council in Support of the Petition for Writ of Mandamus at 2 (May 15, 2020); Brief of Amici Curiae Law Professors in Support of Relators for the Petition of Writ of Mandamus at 6 (Nov. 30, 2020). However, these concerns do not justify Southwestern's technical and restrictive proposed interpretation of the law, nor do they warrant dismissal of this case.

Contrary to the position urged upon this Court by Southwestern and certain *amici*, class actions do not appear to be exceptionally coercive, compared to conventional lawsuits. While "commentators have despaired of blackmail settlements since the [Fed. R. Civ. P.] 23(b)(3) class was created ... there appears to be no hard evidence to support the claim [that class actions coerce defendants to settle]." Joanna C. Schwartz, *The Cost of Suing Business*, 65 DePaul L. Rev. 655, 663 (2016). For example, available evidence suggests that settlement and trial rates for class actions appear to be comparable to those for non-class litigation. *See id.* at 664-65. Further, data suggests that businesses sue each other far more often than classes of plaintiffs sue businesses, and "the absolute costs of class action litigation appear comparable to, or smaller than, businesses' other litigation-related costs." *Id.* at 673; *see generally id.* at 665-73.

Others have reached similar conclusions about settlement pressure in class actions. *See* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1402 (2003) ("When compared to conventional lawsuits, class actions do not seem exceptionally coercive."); Bruce Hay & David Rosenberg, *"'Sweetheart' and 'Blackmail' Settlements in Class Actions: Reality and Remedy*, 75 Notre Dame L. Rev. 1377, 1379 (2000) (stating that "the risks of ... blackmail settlements have been overstated"); Thomas E. Willging et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 61 (1996), *available at* https://www.uscourts.gov/sites/default/files/rule23_1.pdf (finding no evidence that "the certification decision itself, as opposed to the merits of the underlying claims, coerce[s] settlements with any frequency.").

The claim of "staggering discovery costs" is likewise flawed. If discovery costs were a substantial factor in class action defendants' settlement decisions, one would reasonably expect that the vast majority of certified class actions would settle before discovery to avoid these costs. However, available evidence suggests that most class actions that are certified do not settle before discovery, implying that the costs of discovery are more manageable than "staggering." *See* Schwartz, *The Cost of Suing Business*, 65 DePaul L. Rev. at 665.

Even if class actions were as burdensome as Southwestern and certain *amici* contend, the burden is justified by the important role that class actions play in ensuring the health and efficient operation of the U.S. capital markets. Investor confidence in the markets requires both "confidence that the laws will be obeyed and that, when they're not, that the fraudsters will be made to pay." Luis A. Aguilar, Commissioner, U.S. Securities and Exchange Commission ("SEC"), *Address at the Council of Institutional Investors Spring Meeting: Facilitating Real Capital Formation* (Apr. 4, 2011), *available at* https://www.sec.gov/news /speech/2011/spch040411laa.htm.

Private actions, including class actions, are necessary to augment government enforcement because state and federal securities regulators lack the budgets and staff to address all possible wrongdoing. *See* James D. Cox & Randall S. Thomas, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 Duke L.J. 737, 762 (2003); *see also 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)); *accord Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) ("[M]eritorious private actions to enforce federal antifraud and securities laws are an essential supplement to criminal prosecutions and civil enforcement action brought . . . by the Department of Justice and the [SEC]."). The class action mechanism makes private litigation viable as a practical matter in many instances by permitting injured investors to share

litigation costs and make the potential return large enough to incentivize counsel to devote the necessary resources to the development of complex securities fraud cases. Lisa L. Casey, *Class Action Criminality*, 34 Iowa J. Corp. L. 153, 163-64 (2008); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); Schwartz, *The Cost of Suing Business*, 65 DePaul L. Rev. at 672; Benjamin Kaplan, *A Prefatory Note*, 10 B.C. L. Rev. 497 (1969).

In sum, private class actions are not exceptionally coercive or burdensome, as Southwestern suggests, especially as compared to conventional litigation. Even if these contentions were correct, however, private class actions are nevertheless an important part of the fulfillment of the Securities Act's remedial goals, and this Court should not accept Southwestern's self-serving policy arguments as the basis to frustrate the important purposes served by a vital class action mechanism.

CONCLUSION

The federal securities laws are designed to redress harms inflicted by bad actors and those who would prey on the uninformed. These laws need to be read flexibly to effectuate their remedial purpose and fulfil legislative designs for investor protection. These laws also require full, accurate, adequate disclosures, and cannot abide an issuer promulgating tepid statements of outdated information with boiler plate "risk warnings" for issues that have already come to pass. Finally, the class action mechanism cannot be dismantled under self-serving policy arguments to

frustrate the importance of this essential form of redress. For these reasons, as discussed in detail above, we respectfully ask that this Court rule in favor of Plaintiffs and remand this case for a hearing on the merits.

Respectfully submitted,

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