UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE AMERICAN INTERNATIONAL GROUP, INC. 2008 SECURITIES LITIGATION	Master File No. 08-CV-4772 (LTS)(DCF) ECF CASE ORAL ARGUMENT REQUESTED
This Document Relates To: All Actions	

MEMORANDUM IN SUPPORT
OF MOTION TO SEVER INDIVIDUAL CLAIMS

ABRAHAM, FRUCHTER & TWERSKY, LLP
One Penn Plaza, Suite 2805
New York, New York 10119
Tel: (212) 279-5050
Fax: (212) 279-3655

Attorneys for D. E. Shaw Oculus Portfolios, L.L.C.; D .E. Shaw Valence Portfolios, L.L.C.; and D. E. Shaw U.S. Large Cap Core Enhanced Portfolios, L.L.C.

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Nonnamed Class Members D. E. Shaw Oculus Portfolios, L.L.C.; D. E. Shaw Valence Portfolios, L.L.C.; and D. E. Shaw U.S. Large Cap Core Enhanced Portfolios, L.L.C. (collectively, the "D. E. Shaw Funds") respectfully submit this Memorandum of Law in support of their Motion to Sever Individual Claims in accordance with Federal Rule of Civil Procedure 21 ("Rule 21"), pursuant to which they seek to sever their claims against (i) defendant American International Group, Inc. ("AIG") and the Section 10(b) Defendants[1] for violations of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder ("Rule 10b-5"); (ii) the Executive Defendants[2] for violations of Section 20(a) of the Exchange Act; (iii) defendants AIG, the Signing Executive Defendants,[3] the Director Defendants,[4] and the Underwriter Defendants[5] for violations of Section 11 of the Securities Act of 1933 (the "Securities Act"); (iv) the Underwriter Defendants for violations of Section 12(a)(2) of the Securities Act; and (v) against the Executive Defendants for violations of Section 15 of the Securities Act (collectively, their "Claims").

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[1] The term "Section 10(b) Defendants," as defined in the operative Consolidated Class Action Complaint, Dkt. No. 95 (the "Class Complaint"), means defendants Martin J. Sullivan, Steven J. Bensinger, Joseph Cassano, Andrew Forster, David. L. Herzog and Robert Lewis.

[2] The term "Executive Defendants," as defined in the Class Complaint, means defendants Martin J. Sullivan, Steven J. Bensinger, Joseph Cassano, Andrew Forster, David L. Herzog, and Robert Lewis. Defendant Thomas Athan was previously severed from this action.

[3] The "Signing Executive Defendants," as defined in the Class Complaint and as applied to the claims of the D. E. Shaw Funds include Defendants Sullivan, Bensinger and Herzog.

[4] The "Director Defendants," as defined in the Class Complaint and as applied to the claims of the D. E. Shaw Funds include Defendants Bollenbach, Cohen, Feldstein, Futter, Hammerman, Holbrooke, Miles, Offit, Orr, Rometty, Sutton, Tse, Willumstad, and Zarb.

[5] The "Underwriter Defendants," as defined in the Class Complaint and as applied to the claims of the D. E. Shaw Funds include Defendants Citigroup, JP Morgan, BoA, Merrill Lynch, Morgan Stanley, UBS, Wachovia, Dowling, Fox-Pitt, and Keefe Bruyette. Together, AIG, the Section 10(b) Defendants, the Executive Defendants, the Signing Executive Defendants, the Director Defendants and the Underwriter Defendants are collectively referred to herein as "Defendants."

I. INTRODUCTION

On October 7, 2014, this Court issued an Order preliminarily approving a settlement of the above-captioned class action (the "Class Action") that, if approved, provides the D. E. Shaw Funds with a recovery of only approximately 2% of their actionable losses resulting from Defendants' alleged wrongful conduct (the "Preliminary Approval Order," Dkt. 463). Pursuant to the Preliminary Approval Order, the D. E. Shaw Funds have concurrently with the filing of this Memorandum timely entered their appearance in this Class Action through their undersigned counsel (*id*., at ¶14); and, have moved this Court pursuant to Rule 21 for the severance of their Claims in order to individually continue with the prosecution of those Claims to trial (if necessary), to pursue their right to seek recoveries in amounts that are truly commensurate with the value of their Claims. The D. E. Shaw Funds' motion is in line with what has been a bedrock of U.S. Supreme Court jurisprudence. Federal Rule of Civil Procedure 23 ("Rule 23") was designed to provide for efficiency and economy of litigation and thus permits – and even encourages – class members to forgo taking any action to pursue or preserve their individual claims until the class has been certified and notice of the class action has been provided. *See Menominee Indian Tribe of Wis. vs. U.S.*, 614 F.3d 519, 527 (D.C. Cir. 2010) (citing *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551 (1974)); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176, n. 13 (1974)). This avoids the multiplicity of activity that undermines the purpose and design of Rule 23. Thus, following provisional certification of the Class, the D. E. Shaw Funds now seek to individually pursue their Claims.

The rights of nonnamed class members to seize control of their own claims and individually litigate those claims are afforded and safeguarded by both Rule 23 and the

Constitution. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (the Constitution requires "minimal due process protection" such that absent class members "receive notice plus an opportunity to be heard and participate in the litigation;" "opportunity to remove [themselves] from the class;" and to have their interests adequately represented "at all times"); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011) (underscoring "the need for plaintiffs with individual monetary claims to decide for themselves whether to tie their fates to the class representatives' or to go it alone."); *see also* Expert Declaration of Professor William B. Rubenstein ("Rubenstein Decl."), ¶¶33-42, submitted herewith in support of this Motion;[6] Fed. R. Civ. P. 23(c)(2)(B) (class members must be given notice "that the court will exclude from the class any member who requests exclusion"). Nonnamed class members, such as the D. E. Shaw Funds, have two ways to seize control of their own claims and separate from the class suit. One way is to opt-out of the class (*i.e.*, request exclusion from the Class pursuant to the terms of the Preliminary Approval Order) and file a separate law suit; the other way is to take control of their own claims and sever them from the class suit. Rubenstein Decl., ¶35

For many years, the route of opting-out and filing a separate case was sufficient, particularly with any statute of limitations tolled under *American Pipe* and its progeny. In this case, however, because the Class was provisionally certified upon preliminary approval of the proposed settlement more than six years after the action commenced, nonnamed class members who elected to opt-out and file a separate action faced the risk of a statute of repose defense based on the Second Circuit's 2013 decision in *IndyMac*.[7] And, while the D. E. Shaw Funds

[6] Professor Rubenstein is the Sidley Austin Professor of Law at Harvard Law School, the current sole author of the treatise, *Newberg on Class Actions*, and a leading national expert on class action law and practice. *See* Rubenstein Decl., ¶¶1-7. Ex. A (C.V.).

[7] *Police & Fire Ret. Sys. of the City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), *cert. granted*, 134 S. Ct. 1515 (2014), *cert. dis'd as improvidently granted*, 135 S. Ct. 42 (2014).

maintain that such a defense would ultimately prove meritless, the risk of having their claims time-barred under a statute of repose is not present if the D. E. Shaw Funds are permitted to sever their claims under Rule 21. *See infra* p. 9-13; *see* Rubenstein Decl., ¶¶27-32.

Rule 21 enables the Court to sever either claims or parties at any time, "on just terms" and in the interest of fundamental fairness. Fed. R. Civ. P. 21; *see also Augme Technologies, Inc. v. AOL Inc.*, 2012 U.S. Dist. LEXIS 88463, at *5-6 (S.D.N.Y. June 26, 2012) (collecting cases). Towards that end, courts are instructed to grant severance if it is in the interest of justice, such as when it is necessary to avoid prejudice; and courts have done so in a variety of circumstances in the class action context. *See infra* p. 9, n.8; Rubenstein Decl., ¶¶24-26. In this case, unless their severance motion is granted, the D. E. Shaw Funds will be prejudiced by having their Claims compromised upon final approval of the Class Action Settlement and entry of the Final Judgment without them having had a meaningful opportunity following the Court's certification of the Class to litigate those Claims individually and without risk of those claims being dismissed as untimely. The prejudice here is all the greater when considering that the D. E. Shaw Funds, large institutional investors with substantial losses, are estimated under the Plan of Allocation to receive a small fraction of their actionable losses; and, moreover, the Plan of Allocation deprives them of any recovery for an entire category of damaged shares, as discussed further herein. *See, infra,* at p. 10-11.

Ultimately, in light of *IndyMac*, the two mechanisms for the D. E. Shaw Funds to separate themselves from the class action to pursue their own claims have dramatically different consequences, with the "opting-out" route potentially terminating the D. E. Shaw Funds' claims due to the statute of repose defense now available under *IndyMac*, and the "severance" route safeguarding against that "gratuitous harm" as justice and fundamental fairness require. *Elmore*

v. Henderson, 227 F.3d 1009, 1012 (7th Cir. 2000) (finding District Court "could and should have allowed [the] claim … to continue as a separate suit so that it would not be time-barred"); *see also In re New Oriental Educ. & Tech. Group Sec. Litig.*, 293 F.R.D. 483, 487-88 (S.D.N.Y. 2013) (granting severance where denial would effectively dismiss those claims due to statute of limitations).

Under these circumstances, the D. E. Shaw Funds Motion to Sever should be granted in order to afford the D. E. Shaw Funds a meaningful opportunity to exercise their right to individually litigate their Claims without risk of dismissal based on a statute of repose defense, and in order to avoid the prejudice of having their Claims unfairly compromised.

II. PROCEDURAL BACKGROUND AND PROPOSED SETTLEMENT

Beginning on May 21, 2008, a series of proposed class actions alleging violations of the federal securities laws by some or all of the Defendants were filed in this Court. On March 20, 2009, the Court consolidated the actions as *In re American International Group 2008 Securities Litigation*, Master File No. 08 Civ. 4772, and appointed the State of Michigan Retirement Systems, as custodian of the Michigan Public School Employees' Retirement System, the State Employees' Retirement System, the Michigan State Police Retirement System, and the Michigan Judges Retirement System ("SMRS") as Lead Plaintiff pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(a)(3)(B)(i).

On May 19, 2009, Lead Plaintiff SMRS filed the Class Complaint, which alleges that some or all of the Defendants violated Sections 11, 12(a)(2) and 15 of the Securities Act and/or Sections 10(b) and 20(a) of the Exchange Act and asserts claims on behalf of all purported class members – including the D. E. Shaw Funds, but excluding Defendants and their affiliates – who (a) purchased AIG Securities traded on a U.S. public exchange from March 16, 2006 through

September 16, 2008 (the "Settlement Class Period") or (b) purchased or acquired AIG Securities in or traceable to a public offering by AIG during that period, and suffered damages as a result. Then, on September 27, 2010, the Court issued an Opinion and Order denying Defendants' motions to dismiss the Complaint.

On April 1, 2011, Lead Plaintiff SMRS first moved for certification of the class. On May 6, 2011, in light of the Supreme Court's grant of certiorari in *Erica P. John Fund, Inc. v. Halliburton*, No. 09-1403 (U.S. Jan. 7, 2011) (*Halliburton I*), the Court terminated the motion without prejudice to renewal following the Supreme Court's decision in that case. Lead Plaintiff SMRS filed a renewed motion for class certification on July 6, 2011. On November 2, 2011, the Court terminated the motion without prejudice pending the completion of class certification-related discovery. Lead Plaintiff SMRS again filed its motion for class certification on March 30, 2012.

On November 15, 2013, the Supreme Court granted certiorari in *Halliburton Co. v. Erica P. John Fund, Inc.* ("*Halliburton II*"). On January 30, 2014, the Court stayed the Class Action pending a decision in *Halliburton II*. Then, on June 23, 2014, the Supreme Court decided *Halliburton II*. On July 14, 2014, Lead Plaintiff SMRS and Defendants' submitted letters to the Court regarding the impact of *Halliburton II* on the Class Action.

On September 12, 2014, Lead Plaintiff SMRS and Defendants filed the Stipulation and Agreement of Settlement (the "Stipulation" or "Settlement"), and Lead Plaintiff SMRS moved for preliminary approval of the Settlement and certification of a Settlement Class. The proposed Plan of Allocation of the proposed Settlement of $970.5 million, however, would result in the recovery of approximately 2% of the D. E. Shaw Funds' recoverable losses**,** using the same method of loss calculation adopted in the proposed Plan of Allocation.

On October 7, 2014, the Court granted preliminary approval of the Settlement and certified the Class. Pursuant to the Preliminary Approval Order, notice of the terms of the settlement was then disseminated to Class members on or about November 6, 2014. The Preliminary Approval Order certifying the class, as well as the subsequent notice mailed to Class Members, state that Class members may enter an appearance in this Class Action no later than twenty-one calendar days before the Settlement Hearing. Preliminary Approval Order (¶14). Since the Settlement Hearing is scheduled for March 20, 2015, any such appearance is timely if entered on or before February 27, 2015. *Id* at ¶5, ¶14.

III. ARGUMENT

A. The D. E. Shaw Funds Have The Right To Pursue Their Own Claims Individually

The Supreme Court has long recognized that a class action is an aggregation of each individual member's claims that are separately and properly before the court, with each member of a certified class a party to the suit until and unless they received notice of the suit and chose not to continue. *See American Pipe*, 414 U.S. at 550-51; Rubenstein Decl., ¶¶33-37. In *American Pipe*, the Supreme Court explained:

> [T]he filing of a timely class action complaint commences the action for all members of the class as subsequently determined. Whatever the merit in the conclusion that one seeking to join a class after the running of the statutory period asserts a 'separate cause of action' which must individually meet the timeliness requirements, such a concept is simply inconsistent with Rule 23 as presently drafted. A federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions. Under the circumstances of this case, where the District Court found that the named plaintiffs asserted claims that were 'typical of the claims or defenses of the class' and would 'fairly and adequately protect the interests of the class,' the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue. Thus, the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs. (451 U.S. at 550-51.)

More recently, in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court underscored that a Rule 23(b)(3) class action involves the aggregation of individual monetary damage claims, rejecting the resolution of such claims through a non-opt-out Rule 23(b)(2) class on the very basis that each individual class member has the right to control her individual monetary damage claim. 131 S. Ct. at 2559; *see also* Rubenstein Decl., ¶36. In so finding, the Supreme Court emphasized "the need for plaintiffs with individual monetary claims to decide for themselves whether to tie their fates to the class representative' or to go it alone." *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2559.

While Rule 23 enables a representative to proceed to litigate the class's claims in the aggregate, the rights of nonnamed class members are protected by both the Constitution and Rule 23. Chief among those protections is the right for nonnamed class members to seize control of their own claims and separate them from the class action. In *Phillips Petroleum Co. v. Shutts*, the Supreme Court affirmed that absent class members are protected by the Constitution, which requires "minimal due process protection" such that absent class members "receive notice plus an opportunity to be heard and participate in the litigation;" "opportunity to remove [themselves] from the class;" and to have their interests adequately represented "at all times." 472 U.S. at 811-12; *see also* Rubenstein Decl., ¶¶38-39.

These precedents establish that class actions operate by enabling a putative class representative to file all of the putative class's claims in the aggregate, while safeguarding each individual class member's right to separate from the aggregated action and take control of her own claims. *See* Rubenstein Decl., ¶40. Historically, class members did so by opting-out of the class and filing a separate action. In this case, however, that option posed a great risk to the D.

E. Shaw Funds, in light of *IndyMac* and a potentially applicable statute of repose defense (that the D. E. Shaw Funds believe to be meritless).

B. The D. E. Shaw Funds May Sever Their Claims To Separate Them From The Class Action

Rule 21 provides that the Court may "sever any claim against any party" on "such terms that are just." Fed. R. Civ. P. 21. "A claim or counterclaim properly severed from another by virtue of Rule 21 'may be proceeded with separately,'" and the "justification for severance is not confined to misjoinder of parties…" *Spencer, White & Prentis v. Pfizer, Inc.*, 498 F.2d 358, 361 (2d Cir. 1974) (citing *Wyndham Assoc. v. Blintlif*, 398 F.2d 614 (2d Cir.), *cert. denied*, 393 U.S. 977 (1968); 3 A Moore's Federal Practice, Para. 21.05(2)). In fact, courts have employed severance under Rule 21in a variety of circumstances to enable or require individual class members to sever themselves or their claims from a class suit. *See* Rubenstein Decl., ¶25.[8]

Trial courts have "broad discretion" to employ Rule 21's procedural severance device, which may be ordered when it "will serve the ends of justice." *Augme Technologies, Inc.*, 2012 U.S. Dist. LEXIS 88463 at *5 (citing *New York v. Hendrickson Bros. Inc.*, 840 F.2d 1065 (2d Cir.), *cert. denied*, 488 U.S. 848 (1988); *Wausau Bus. Ins. Co. v. Turner Constr. Co.*, 204 F.R.D. 248, 250 (S.D.N.Y. 2001)); *see also In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 247 F.R.D. 420, 427 (S.D.N.Y. 2007) (finding severance warranted due to principles of "judicial efficiency and fundamental fairness").

[8] The Rubenstein Declaration (¶25, n.12-n.16) cites numerous examples where courts have enabled or required severance: (i) of the claims of class representatives and named plaintiffs whose claims were not certified (*see, e.g., Young-Perry v. Eli-Lilly & Co.*, 2011 WL 6122636, at *1 (S.D. Ind. Dec. 8, 2011)); (ii) of individual claims raising distinct issues from the class (*see, e.g., Washington v. CSC Credit Servs., Inc.*, 194 F.R.D. 244, 248 (E.D. La. 2000)); (iii) to expedite the class suit or the severed suit (*see, e.g., Simon v. Philip Morris Inc.*, 200 F.R.D. 21, 29-31 (E.D.N.Y. 2001); *CSC Credit Servs., Inc.*, 194 F.R.D. at 249)); and (iv) for jurisdictional purposes (*see, e.g., Fielder v. Credit Acceptance Corp.*, 188 F.3d 1031, 1039 (8th Cir. 1999); *Erausquin v. Notz, Stucki Management (Bermuda) Ltd.*, 806 F. Supp. 2d 712, 720-23 (S.D.N.Y. 2011)).

Courts weighing severance are instructed to consider the following factors: "(1) whether the claims arise out of the same transaction or occurrence; (2) whether the claims present some common questions of law or fact; (3) whether settlement of the claims or judicial economy would be facilitated; (4) whether prejudice would be avoided if severance were granted; and (5) whether different witnesses and documentary proof are required for the separate claims." *Augme Technologies, Inc.*, 2012 U.S. Dist. LEXIS 88463 at *6; *accord Cestone v. General Cigar Holdings, Inc.*, 2002 U.S. Dist. LEXIS 4504, at *7 (S.D.N.Y. Mar. 18, 2002). "Severance requires the presence of only one of these conditions." *Id.* However, courts most often focus their inquiry on whether prejudice would be avoided; as, "[a]bove all, courts must consider principles of fundamental fairness and judicial efficiency." *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 247 F.R.D. 420 at 424 (quotation omitted).

1. Severance Must Be Granted To Avoid Prejudice And Gratuitous Harm, As Due Process Requires

If the D. E. Shaw Funds' claims are not severed from the Class Action, their claims will be unfairly compromised and terminated upon final approval of the proposed Class Action Settlement and entry of a final judgment without the D. E. Shaw Funds having been afforded an opportunity following certification of the Class to individually litigate their Claims as Rule 23 and due process require, without the risk of those Claims being dismissed pursuant to a statute of repose defense predicated on the Second Circuit's decision in *IndyMac*. Preliminary Approval Order ¶¶ 12-13.

This litigation has been underway for more than six years, with extensive discovery taken. Under the proposed Class Settlement, the D. E. Shaw Funds' Claims against Defendants would be terminated in exchange for the recovery of only approximately 2% of the D. E. Shaw Funds' recoverable losses, as estimated under the terms of the proposed Settlement Plan of

Allocation. The D. E. Shaw Funds consider this to be inadequate considering the strength of their individual claims against Defendants. Indeed, the D. E. Shaw Funds are not deterred by the prospective burdens, expenses, or uncertainties of continuing litigation through trial, if necessary; nor are they deterred by the time involved in proceeding to trial, all of which are presented by the named parties in the Class Action as reasons justifying the proposed Settlement. *See* Notice Of Class Action, Proposed Settlement, Motion for Attorneys' Fees and Expenses, and Settlement Hearing (Dkt. No. 445-1 at 6, "Reasons for the Settlement"). Furthermore, the proposed Plan of Allocation in the Class Action Settlement inexplicably excludes a broad category of damaged shares transacted by the D. E. Shaw Funds, which demonstrates that the D. E. Shaw Funds' interests have not been adequately protected. *See, Id.*, at 39 ("II. RECOGNIZED LOSS FORMULAS, (iii)(e)," explaining that Class Members will have no Recognized Loss with respect to purchases made during the Relevant Period to cover short sales.) There has been no disclosed basis in law that explains or justifies the release of these claims without any consideration, as contemplated under the Plan of Allocation.

Notably, the D. E. Shaw Funds do not take a positon on whether the proposed Class Action Settlement is the interests of other Class Members, who may face greater litigation hurdles or have less economic incentive to pursue their own claims. As such, the D. E. Shaw Funds do not "object" to the class-wide settlement or otherwise wish to impede the rights of any other Class Members. The D. E. Shaw Funds have, however, determined that they wish to separate themselves from the Class and not be bound by the Class Settlement so that they may pursue their Claims individually.

Over the past several decades, it has become established practice for nonnamed class members, such as the D. E. Shaw Funds, to exercise their right to separate from a certified class

by simply requesting exclusion from a class pursuant to court order and thereafter filing a separate action – and they have done so with the understanding that any statute of limitation was tolled under *American Pipe* and its progeny. *See Menominee Indian Tribe*, 614 F.3d at 527 (citing *American Pipe*, 414 U.S. at 551; *Crown, Cork & Seal Co.*, 462 U.S. at 353-54). Now, after the Second Circuit's decision in *IndyMac*, class members who pursue their right to individual litigation through this mechanism after the statute of repose has run on their claims face a potential defense that their claims are time-barred. *See, generally, IndyMac*, 721 F.3d 95. And, while the D. E. Shaw Funds believe that such arguments are ultimately without merit, they nevertheless faced the substantial risk of having their individual claims dismissed by virtue of the applicable statute of repose if they individually pursued their Claims through this established opt-out or exclusion mechanism that was provided in the Preliminary Approval Order. This leaves severance as the only viable route for pursuing their individual claims raised in the Class Action without risking the sort of prejudice that justifies Rule 21 severance. Rubenstein Decl., ¶24.

In *Elmore v. Henderson*, 227 F.3d 1009, the Seventh Circuit addressed tolling in the context of a class action where the District Court dismissed as time-barred a subsequent suit alleging claims against parties to the original action that were dismissed for misjoinder. In reversing the dismissal, the Seventh Circuit explained that when formulating a remedy for misjoinder, "the judge is required to avoid gratuitous harm to the parties" and held that where the claim could have been severed and saved, rather than dismissed and destroyed, "[t]he judge could and should have allowed [the] claim . . . to continue as a separate suit so that it would not be time-barred." *Id.* at 1012.

Likewise, in *In re New Oriental Educ. & Tech. Group Sec. Litig.*, 293 F.R.D. 483, Judge Koeltl in this District found that the severance of claims should be granted to avoid the potential repercussion of those claims being time-barred if filed as a separate action. In that action, an absent class member sought to sever claims that were no longer being alleged by the appointed lead plaintiff. The court found that because those claims were no longer being alleged, the statute of limitations was running; and, because those claims were at risk of being extinguished by the running statute of limitations, severance was proper to allow the absent class member to pursue his claims individually. *Id.* at 487-88 (distinguishing cases that denied severance without considering the implications of the statute of limitations).

In this case, it is clear that the D. E. Shaw Funds would be prejudiced if severance were denied, because they did not have a viable opportunity without substantial risk of dismissal to otherwise separate from the Class, as Rule 23 and minimal due process require.

2. The Remaining Factors Do Not Preclude Severance

With the prejudice to the D. E. Shaw Funds clearly established if severance were denied, nothing more is required. *See Augme Technologies, Inc.*, 2012 U.S. Dist. LEXIS 88463 at *6; *accord Cestone*, 2002 U.S. Dist. LEXIS 4504, at *7 (finding Severance requires the presence of only one of the factors weighed). Nevertheless, the remaining factors either support severance or are non-determinative and therefore do not preclude its application under the facts discussed herein.

Three of the factors considered by courts in determining whether to grant severance weigh whether there would be an overlap between the initial action and the severed action, and consist of: (1) whether the claims arise out of the same transaction or occurrence; (2) whether the claims present common questions of law or fact; and (3) whether different witnesses and documentary proof are required for the separate claims (the fifth factor listed by the Court in

Augme Technologies, Inc.). *Id.* Courts weigh these "overlap" factors in order to prevent the possibility of inconsistent rulings on commonly disputed issues in actions separated by severance, particularly if those issues are crucial to the outcome of the litigation. *See In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 247 F.R.D. at 425. Here, there is no risk of inconsistent rulings if the D. E. Shaw Funds' claims are severed upon final approval of the Class Action Settlement because the Class Action will be terminated. Likewise, there will be no impairment to judicial efficiency if the D. E. Shaw Funds' claims are severed, also due to the termination of the Class Action. *Id.* Moreover, Defendants already face parallel actions involving Class members that have requested exclusion pursuant to the Preliminary Approval Order and filed individual actions, which means that there will be no material increased burden to Defendants in litigating the individual claims if severance is granted. Thus, these three factors favor severance, or are at least non-determinative and therefore do not preclude it from being granted.

The remaining factor – whether settlement of the claims or judicial economy would be facilitated (the third factor considered by the court in *Augme Technologies, Inc.*) – also favors severance. *See Augme Technologies, Inc.*, 2012 U.S. Dist. LEXIS 88463 at *6. By electing to separate from the Class through severance, rather than by requesting exclusion from the Class through the mechanism provided in the Preliminary Approval Order and thereafter filing a separate action, the D. E. Shaw Funds are able to avoid what would certainly be lengthy and costly litigation and appeals over the application of the statute of repose and principles of tolling.

C. Severance Is Consistent With Class Action Jurisprudence And Minimal Due Process Requirements, And Will Not Undermine Any Statute Of Repose Argued To Be Applicable

As previously discussed herein, the D. E. Shaw Funds' motion seeking severance is consistent with prior class action jurisprudence concerning the constitutional right of nonnamed

class members to separate themselves from a class and individually pursue their claims. Accordingly, the motion should be granted to avoid prejudice and to preserve due process. *See, generally,* Rubenstein Decl., ¶¶33-43. This motion also cannot be characterized as an attempt to subvert any statute of repose argued by Defendants to be applicable. Rubenstein Decl., ¶40. Indeed, the goals of any repose statute argued to be applicable are not undermined by severance for the simple reason that well-settled principles governing severance dictate that the D. E. Shaw Funds' Claims have been pending before this court since the inception of the initial filed class action. *Id.; see also In re Palermo*, 739 F.3d 99, 105 (2d Cir. 2014) ("Unlike a suit dismissed without prejudice, in which a suit is treated for statute of limitations purposes as if it had never been filed, when a court 'severs' a claim . . . the suit simply continues against the severed defendant in another guise. The statute of limitations is held in abeyance, and the severed suit can proceed so long as it initially was filed within the limitations period.") (internal quotations and citations omitted); *DirecTV, Inc. v. Leto*, 467 F.3d 842, 845 (3d Cir. 2006) (same). Furthermore, the severance procedural device has long been utilized in class action context, when appropriate, as set forth herein. *Supra*, at p. 9, n.8; Rubenstein Decl., ¶25.

A rejection of severance in this case, and the resulting prejudice to the D. E. Shaw Funds, would undermine the goals of class actions. Rubenstein Decl., ¶41. The class action strives to resolve claims in the aggregate, to the benefit of both plaintiffs and defendants, in the hopes that a global resolution will forestall the need for individual actions. *Id.* Nevertheless, class members are given the opportunity to separate themselves from the class under Rule 23 and principles of due process. These rights would be illusory if class members are not permitted to sever their claims in the face of an applicable statute of repose that has expired. *Id.* If that were the case, nonnamed class members would not be able to sit back with the assurance that their

rights are being adequately protected as *Shutts* explains they may do. *Id.*; *Shutts*, 472 U.S. at 810 ("Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.").

The fact that severance serves the same goals as equitable tolling does not mean that the Second Circuit's decision in *IndyMac* – which holds that a statute of repose cannot be subject to equitable tolling – bars severance in the context of this case. *See* Rubenstein Decl., ¶42. The severance approach is a distinct and independent approach to protecting the right of class members to pursue their individual claims without relying on tolling. *Id.* Indeed, the severance approach is consistent with the courts' long-standing approach favoring the procedural path that does the least amount of harm. *Id*.

IV. CONCLUSION

For the foregoing reasons, the Court should grant the D. E. Shaw Funds. Motion to Sever their Individual Claims.

Dated: February 23, 2015
New York, New York

Respectfully submitted,

ABRAHAM, FRUCHTER & TWERSKY, LLP

/s/ *Mitchell M.Z. Twersky*

Mitchell M.Z. Twersky (MT-6739)
Jack Fruchter (JF-8435)
Atara Hirsch (AH-6771)
One Penn Plaza, Suite 2805
New York, New York 10119
Tel: (212) 279-5050
Fax: (212) 279-3655
mtwersky@aftlaw.com
jfruchter@aftlaw.com
ahirsch@aftlaw.com

and

Ian D. Berg (to be admitted *pro hac vice*)
Takeo A. Kellar (to be admitted *pro hac vice*)
12526 High Bluff Drive, Suite 300
San Diego, CA 92130
Tel: (858) 792-3448
Fax: (858) 792-3449
iberg@aftlaw.com
tkellar@aftlaw.com

Attorneys for D. E. Shaw Oculus Portfolios, L.L.C.; D. E. Shaw Valence Portfolios, L.L.C.; and D .E. Shaw U.S. Large Cap Core Enhanced Portfolios, L.L.C