

12-1903-CV

United States Court Of Appeals
for the
Second Circuit

INTERNATIONAL FUND MANAGEMENT S.A.,

Plaintiffs-Appellees,

— v. —

CITIGROUP INC.,

Defendants-Appellants.

(for continuation of caption see inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS
ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-
APPELLANTS AND IN SUPPORT OF REVERSAL**

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SUPERANNUATION SCHEME, and DEKA INVESTMENT GMBH,

Plaintiffs-Appellees,

ETF LAB INVESTMENT GMBH and CITY OF RICHMOND, EX REL. CITY
OF RICHMOND RETIREMENT SYSTEM,

Plaintiffs,

– v. –

CITIGROUP GLOBAL MARKETS INC., CITIGROUP CAPITAL XXI, C.
MICHAEL ARMSTRONG, ALAIN J.P. BELDA, GARY CRITTENDEN,
GEORGE DAVID, KENNETH T. DERR, JOHN M. DEUTCH, ROBERT
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RAMIREZ, JUDITH RODIN, ROBERT L. RYAN, FRANKLIN A. THOMAS,
and ARTHUR H. TILDESLEY,

Defendants-Appellants.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae the Securities Industry and Financial Markets

Association states that it is not a subsidiary of another corporation, and no publicly held corporation owns more than 10% of its stock.

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The Securities Industry and Financial Markets Association (“SIFMA”) is an association comprised of hundreds of member securities firms, banks and asset managers, who are frequent targets of class action litigation.¹ As an organization, SIFMA has an interest in the strong, accurate, and timely enforcement of the federal securities laws. That interest is furthered by applying the statutory principle of repose – the principle that lawsuits be brought on a timely basis and that there be clear rules providing a time after which market participants should be free from the fear of lingering liabilities.

The position of the District Court in this case – that a statute of repose meant to provide certainty and finality can nonetheless be tolled indefinitely by the filing of a class action – raises an issue of particular importance to the securities industry. If adopted by this Court, the District Court’s position would undermine principles that support the effective and efficient functioning of the securities markets, by permitting parties to bring claims well after the congressionally-mandated absolute period of repose and placing market participants in peril of charges based on conduct that took place years ago.

¹ SIFMA hereby certifies that no counsel for a party authored this brief in whole or in part; that no party or counsel for a party contributed money that was intended to fund preparation or submission of this brief; and that no person other than the *amicus curiae*, its members, and its counsel, contributed money that was intended to fund preparation or submission of this brief.

PRELIMINARY STATEMENT

SIFMA supports the arguments of Defendants-Appellants that the tolling doctrine of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), does not apply to extend the absolute period of repose established by Section 13 of the Securities Act of 1933 (the “Securities Act”). SIFMA submits this brief to elaborate on the practical reasons, based on extensive experience with securities class action lawsuits, why Congress’s decision to create a strict statute of repose makes sense and should be honored.

A rule that would “toll” the statute of repose for any would-be individual plaintiff until after a decision on class certification would defeat the essential legislative purpose of Section 13’s statute of repose. In most securities cases, a class certification motion may not be made – and will not be decided – until well after motion practice and discovery. These proceedings frequently are lengthy: class discovery usually overlaps with merits-discovery, the court is required to make findings concerning a number of factors, and appeals may be sought. Thus, under the decision of the court below, rather than receiving repose within three years – as Congress intended – companies, and their officers and directors, would be subjected to uncertain and lingering liability for many years. The extended uncertainty caused by allowing individual plaintiffs – who are typically sophisticated investors with substantial resources – to sit on the sidelines

until a class certification decision also threatens judicial economy and other absent class members that lack the financial wherewithal to opt out. It would increase duplicative discovery and make settlement more difficult, to the ultimate detriment of both the defendant and the class.

The District Court's holding is fundamentally inconsistent with the purposes of a statute of repose, does little to further the purposes of Rule 23, and benefits a small number of sophisticated investors at the expense of defendants, judicial economy, and other absent class members. Accordingly, it should be reversed.

ARGUMENT

I. TOLLING THE THREE-YEAR PERIOD IN SECTION 13 WOULD DEFEAT THE CENTRAL PURPOSES OF A STATUTE OF REPOSE

A. Applying American Pipe Would Undermine The Certainty and Finality That Section 13 Was Intended to Promote

The language and legislative history of Section 13 are “pellucid.” *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir. 1987), *overruled on other grounds*, *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990). By providing that “[i]n no event shall any” action under the Securities Act be brought “more than three years after the security was bona fide offered to the public” or sold, 15 U.S.C. § 77m, Congress intended to legislate “certainty and finality” by “provid[ing] an easily ascertainable and certain date for the quieting of litigation.”

P. Stolz Family P'ship L.P. v. Daum, 355 F.3d 92, 104 & n.7 (2d Cir. 2004).²

Congress was concerned that “fear [of] lingering liabilities would disrupt normal business and facilitate false claims.” *Norris*, 818 F.2d at 1332. Section 13 was intended to reduce “uncertain[ty]” for directors, and to “give greater assurance to the honest officials of a corporation” that all suits would “be brought only within 3 years.” 78 Cong. Rec. 10,186 (1934). It was also intended to prevent strategic delay by investors, who could otherwise use that delay to seek “recoveries based on the wisdom given by hindsight” and the “volatile” prices of securities. *Short*, 908 F.2d at 1392.

The statute of repose thus serves a “distinct” office and interest from a statute of limitations. *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 88 n.4 (2d Cir. 2010). In contrast to a statute of limitations which has an

² See also *Marchesani v. Pellerin-Milnor Corp.*, 269 F.3d 481, 489 (5th Cir. 2001) (a statute of repose seeks “to provide certainty and finality as to the time within which [defendants] could be subjected to a liability claim”); *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1196 n.9 (10th Cir. 1998) (“A statute of repose runs from a fixed date readily determinable by the defendant, thus serving the need for finality.”); *Caviness v. Derand Res. Corp.*, 983 F.2d 1295, 1300 n.7 (4th Cir. 1993) (a statute of repose “serves the need for finality in certain financial and professional dealings”); *Eddings v. Volkswagenwerk, A.G.*, 835 F.2d 1369, 1371 n.2 (11th Cir. 1988) (“statutes of repose are designed and intended to . . . ultimately foster certainty and finality in liability”); *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 980 (Ind. 2000) (a statute of repose “provides certainty and finality with a bright line bar to liability”); *Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Son, Inc.*, 782 P.2d 188, 189 (Utah 1989) (“Statutes of repose promote the public goal of certainty and finality in the administration of commercial transactions[.]”).

evidence-preservation purpose and may be tolled, the three-year period is “absolute.” *P. Stolz*, 355 F.3d at 102. It is not “subject to equitable defenses, the various forms of tolling, and the potential application of the discovery rule.” *Id.* It is based on the notion that, after a determinate period of time, the “economic best interests of the public as a whole” are better served by providing defendants with a right to be free from additional litigation than by allowing plaintiffs to pursue even meritorious claims. *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989).³

The decision of the court below – applying *American Pipe* tolling to override the three-year legislative period of repose set forth in Section 13 – undermines the very principles of certainty and finality that the provision was intended to legislate. Since at least the 2003 amendments to Rule 23, class

³ See also *Bradway v. Am. Nat’l Red Cross*, 992 F.2d 298, 301 n.3 (11th Cir. 1993) (“In passing a statute of repose, a legislature decides that there must be a time when the resolution of even just claims must defer to the demands of expediency.”); *Aldrich v. ADD Inc.*, 770 N.E.2d 447, 454 (Mass. 2002) (“In establishing the [statute of repose], the Legislature struck what it considered to be a reasonable balance between the public’s right to a remedy and the need to place an outer limit on the tort liability of [defendants.]”); *Damiano v. McDaniel*, 689 So.2d 1059, 1061 (Fla. 1997) (“In creating a statute of repose . . . , the legislature attempted to balance the rights of injured persons against the exposure of [defendants] to liability for endless periods of time.”); *Penkava v. Kasbohm*, 510 N.E.2d 883, 887 (Ill. 1987) (“The repose periods reflect the legislature’s balancing of an individual’s interest in recovery against the problems and costs perceived in medical malpractice actions and the public’s interest in having available to it affordable health care.”).

certification motions need not be made “as soon as practicable” but only at “an early practicable time.” Fed R. Civ. P. 23 advisory committee’s note; *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 39 (2d Cir. 2006) (the 2003 amendments “permit a more extensive inquiry into whether Rule 23 requirements are met than was previously appropriate”). As the commentary to Rule 23 reflects, this amendment was warranted because of “the many valid reasons that may justify deferring the initial certification decision.” Fed R. Civ. P. 23 advisory committee’s note. In the typical securities class action, those circumstances include – after the filing of the initial complaint – the provision of notice of the pendency of the action and of the right of any member of the purported class to move within 60 days to serve as lead plaintiff. *See* 15 U.S.C. § 77z-1(a)(3)(A). It also includes the appointment of lead plaintiffs and lead counsel. *See* 15 U.S.C. § 77z-1(a)(3)(B). And, it includes in all but the most unusual cases, the filing of a consolidated amended complaint by the party that is appointed lead plaintiff.⁴ Moreover, because of the statutory discovery stay under the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), 15 U.S.C. § 77z-1(b)(1), the making of a

⁴ *See, e.g., Richman v. Goldman Sachs Grp., Inc.*, 274 F.R.D. 473, 480 (S.D.N.Y. 2011) (appointing lead plaintiff and directing parties to “prepare a Civil Case Management Plan with due allowance for time to file an amended class action pleading”); *Baughman v. Pall Corp.*, 250 F.R.D. 121, 130 (E.D.N.Y. 2008) (appointing lead plaintiff and ordering that “the Consolidated Amended Complaint shall be filed no later than 45 days after entry of this Order”).

class certification motion is typically preceded by briefing and decision on motions to dismiss, which may add still more months to the time period from the filing of a complaint to a class certification motion.

Assuming that the complaint survives a motion to dismiss, months (or potentially years) of discovery will follow. The Supreme Court has held that “[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). “Frequently, th[is] ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim.” *Id.*; *see also IPO*, 471 F.3d at 40-41. The analysis may include issues of individual class members’ knowledge that would cause individual issues to predominate and thus preclude class certification. *See, e.g., N.J. Carpenters Health Fund v. RALI Series 2006-Q01 Trust*, Nos. 11-1683-cv, 11-1684-cv, 2012 WL 1481519, at *2 (2d Cir. Apr. 30, 2012). In cases involving a presumption of reliance under *Basic Inc. v. Levinson*, 485 U.S. 224, 245-47 (1988), which are frequently coupled with Securities Act claims (*see, e.g., IPO*, 471 F.3d at 43), it may also include questions regarding market efficiency, materiality, and price impact. *See In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 482-84 (2d

Cir. 2008). And, even then, the district court may hold a hearing before making a class certification decision. *See IPO*, 471 F.3d at 41.⁵

Thus, under the District Court's ruling, the putative defendant would not know within the three-year statutory period after an offering – or for many years thereafter – which of the many sophisticated institutional investors who chose to purchase securities in that offering were intending to bear the cost and burden of litigation. Nor would it enjoy the benefit of the statutory grant of repose three years after the offering. Based on a survey of cases within the Southern District of New York alone (the Court to which this petition is directed), class certification decisions routinely are not made until four or five years after a complaint is filed.⁶ During that time period, the putative defendant would not have

⁵ Even after a class certification motion is granted, a defendant may seek review, potentially adding still more time to the timetable. Fed. R. Civ. P. 23(f).

⁶ For example, of the 52 securities class actions filed in the Southern District of New York during 2007 (*see Stanford Law School Securities Class Action Clearinghouse*, <http://securities.stanford.edu>), all but 8 were dismissed, stayed, transferred or settled prior to reaching a class certification decision. Of the 8 remaining cases, as of the date of this brief, one case remains at the motion to dismiss phase: *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225 (S.D.N.Y. filed Dec. 13, 2007). Four cases have pending class certification motions that have not yet been decided: *City of Livonia's Emps.' Ret. Sys. v. Wyeth*, No. 07 Civ. 10329 (S.D.N.Y. filed Nov. 14, 2007); *In re Sanofi-Aventis Sec. Litig.*, No. 07 Civ. 10279 (S.D.N.Y. filed Nov. 13, 2007); *In re Citigroup Inc. Sec. Litig.*, No. 07 Civ. 9901 (S.D.N.Y. filed Nov. 8, 2007); *Freudenberg v. E*Trade Fin. Corp.*, No. 07 Civ. 8538 (S.D.N.Y. filed Oct. 2, 2007) (pending class certification motion filed in connection with proposed settlement). Two cases reached a class certification decision during 2012 – more than 4 years after the actions were filed: *Munoz v.*

the “repose” or peace Congress intended to grant it. Potential litigation would not be quieted. Rather, the putative defendant would be kept uncertain years after the date by which Congress intended it to have repose as to which purchasers intended to bring suit, and which not, which purchasers it would have to defend against, and which purchasers it could assume it was at peace with.

These costs and concerns are real. So-called “out-opt” lawsuits are not a mere sideshow in major securities litigation. They can be the main show. As recent experience shows, opt-out actions can impose significant additional liability on top of a class action. *See, e.g.,* John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 Colum. L. Rev. 288, 311-13 (2010) (listing hundreds of millions of dollars in settlements for individual plaintiffs in *WorldCom*, *AOL Time Warner*, and *Qwest* securities litigations). Indeed, in at least one recent litigation, plaintiffs who filed individual suits received larger combined settlements than the class as a whole. *Id.* at 313 (“The Qwest class action settled in 2005 for \$400 million, but Qwest has disclosed payments of \$411 million to opt-outs.”). Yet, under the ruling below, each of these would-be plaintiffs – all of whom would have substantial claims on their own – could wait in

China Expert Tech., Inc., No. 07 Civ. 10531, ECF No. 227 (S.D.N.Y. Jun. 6, 2012); *Billhofer v. Flamel Techs., S.A.*, ___ F.R.D. ___, No. 07 Civ. 9920, 2012 WL 928147 (S.D.N.Y. Mar. 15, 2012). Only one case reached a class certification decision before 2012: *In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132 (S.D.N.Y. 2008).

the shadows until after class-certification is ruled upon before informing the defendants of their decision to file suit.

B. Application of *American Pipe* to Section 13's Statute of Repose Would Have Other Pernicious Results

Application of *American Pipe* to Section 13's statute of repose would have other pernicious results.

1. Discovery Would Be More Difficult

Application of *American Pipe* here would make discovery and pretrial proceedings more difficult, more burdensome, and more expensive to the judicial system as a whole and to all but the would-be opt-outs.

Under a system that permits institutional investors to delay filing a solo securities action, few institutional investors would refrain from delaying. They can let class counsel do the hard work of investigating and filing a comprehensive consolidated complaint and – if satisfied by the work class counsel has done – free-ride off of that work at the motion to dismiss stage. They can also let class counsel do the hard work (and incur the expense) of framing discovery requests, serving interrogatories, and taking depositions – benefitting from that work if it is helpful with little consequence if it is not. *See, e.g.,* Michael A. Perino, *Class Action Chaos? The Theory of the Core and An Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 Emory L.J. 85, 105 (1997). The admission of a party defendant will be admissible in subsequent opt-out litigation (even if

made only to class counsel) while, of course, the exculpatory statement in a deposition will not. See Fed. R. Evid. 801(d)(2). Thus, under a system that gives the putative institutional plaintiff the opportunity to defer filing and participation in discovery until after discovery by the class is virtually complete, the institutional plaintiff would have every incentive to avail itself of that opportunity: it could impose on defendants, the class, the witnesses and the court system the cost of taking discovery while preserving for itself the right to take duplicative discovery – including repetitive depositions of the same witnesses – if it does not like the evidence the class has adduced.⁷

At the same time, extending *American Pipe* would also give an institutional investor an added opportunity to avoid or delay discovery of itself – depriving defendants of the ability to receive timely and fresh recollections from the parties who frequently have the most significant claims. Although some courts have theorized that putative class members are, in essence, parties to the litigation,⁸

⁷ See, e.g., *Seth Co. v. United States*, No. 3:01CV1584(PCD), 2003 WL 1874738 (D. Conn. Mar. 3, 2003) (allowing depositions of four witnesses previously deposed in a related action); *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, 175 F.R.D. 34, 43-44 (S.D.N.Y. 1997) (permitting individual plaintiffs to depose expert retained in related class action); *In re Agent Orange Prod. Liab. Litig.*, 105 F.R.D. 577, 581 (E.D.N.Y. 1985) (same).

⁸ See, e.g., *Joseph v. Wiles*, 223 F.3d 1155, 1168 (10th Cir. 2000); *Int'l Fund Mgmt. S.A. v. Citigroup, Inc.*, 822 F. Supp. 2d 368, 381 (S.D.N.Y. 2011); *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 810 F. Supp. 2d 650, 667 (S.D.N.Y. 2011).

putative class members (who have not yet filed suit) clearly do not share that view. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011) (describing as “novel and surely erroneous” the argument “that a nonnamed class member is a party to the class-action litigation before the class is certified”). A member of an uncertified class is *not* considered a party to the class action for preclusion purposes, and is therefore free to re-litigate adverse decisions from the class action. *Id.* at 2379-82.⁹ More important, although putative class members may be subject to Rule 45 subpoenas, they are not considered “parties” subject to Rule 26 discovery – and are therefore not generally required to answer interrogatories or requests to admit.¹⁰ And, even if a defendant could take discovery of such an erstwhile individual plaintiff through the other methods permitted under the Rules, the defendant would not know which institutional investors – many of whom may still be shareholders

⁹ *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810-11 (1985) (“[A]bsent plaintiff class members are not subject to other burdens imposed upon defendants. . . . Nor will an adverse judgment typically bind an absent plaintiff for any damages He may sit back and allow the litigation to run its course . . . and if he takes advantage of th[e] opportunity [to opt out] he is removed from the litigation entirely.”).

¹⁰ *See, e.g., Guenther v. Sedco, Inc.*, No. 93 Civ. 4143 (WK), 1998 WL 898349, at *6 (S.D.N.Y. Dec. 22, 1998) (“Absent class members are not parties for discovery purposes under Rules 33 and 34. As a result, a strong showing is typically required before discovery of absent class members is compelled.”); *Dubin v. E.F. Hutton Grp. Inc.*, No. 88 Civ. 0876 (PKL), 1992 WL 6164, at *3-4 (S.D.N.Y. Jan. 8, 1992) (collecting cases rejecting discovery of absent class members); *Enter. Wall Paper Mfg. Co. v. Bodman*, 85 F.R.D. 325, 327 (S.D.N.Y. 1980) (“[D]iscovery” that “relates to individual issues, should ordinarily be postponed until after the common questions have been determined.”).

of the company – intended to sue and were therefore an important subject of discovery.¹¹

2. Settlement Would Be More Difficult

There is still another burden of extending *American Pipe* to statutes of repose. The costs of modern electronic discovery exert hydraulic pressure on defendants to settle class actions regardless of their merits. The extension of *American Pipe*, however, makes settlement at an early stage more difficult.

A principal objective of the PSLRA is to “empower one or several investors with a major stake in the litigation to exercise control over the litigation

¹¹ By no means will every institutional investor who is a member of a putative class choose to bring an individual claim. See, e.g., H.R. Conf. Rep. 104-369, at 34 (1995) (recognizing that institutional investors have incentive to bring “meritorious securities litigation” rather than weaker claims); see also Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 Colum. L. Rev. 1489, 1504 (2006) (even after the PSLRA, “there has not been substantial involvement by private institutional investors, such as mutual funds, banks, and insurance companies” in securities litigation); Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 Yale L.J. 2053, 2110 (1995) (acknowledging that “concerns about client and customer pressure . . . are not inconsequential” and “may account for much of institutional investors’ . . . passivity” in pursuing securities claims); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1352 n.25 (1995) (“[I]nstitutional investors are likely to continue to prefer passivity [in securities litigation] for extrinsic and reputational reasons[.]”); James D. Cox & Randall S. Thomas, *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 Stan. L. Rev. 411, 413 (2005) (less than thirty percent of institutional investors file claims in class action settlements).

as a whole,” *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 83 n.13 (2d Cir. 2004), including over the settlement of the class action. That objective is furthered by the three-year statute of repose set forth in Section 13. At a relatively early stage and date within the litigation, the defendant, lead plaintiff, and lead counsel have the certainty necessary to resolve a case. They will know whom lead counsel represents and who has preserved the potential for pursuing an individual claim by filing a motion to intervene or a timely follow-on complaint. If a putative plaintiff has not timely preserved its rights by filing its own complaint or motion, the threat of additional liability will be extinguished. The defendant thus can evaluate its liability and settle it. It can get all the relevant parties in the negotiating room and agree on a sum certain for resolution of the entire matter.

The same is not true under a regime that would permit institutional investors to delay filing complaints or intervention motions until after class certification. Under that regime, defendants would not know for certain until after class certification who has the intent and ability to file a solo action and who does not. In any case where there is the potential for large solo claims that would be pursued by opt outs, any rational defendant would need to be fearful that a settlement negotiated with class counsel before class certification – and before those opt-outs are forced to come out of the woodwork – would set merely a floor but not a ceiling for resolution of subsequent cases. Thus, as commentators have

confirmed, the fear of “[m]ore opt-outs . . . means that the class action settlement process will be slower and more difficult, because the defendant does not achieve finality. Lacking finality, defendants may be slower to settle, fearing that the settlement may trigger a wave of opt-outs[.]” Coffee, 110 Colum. L. Rev. at 328; see also Perino, 46 Emory L.J. at 126 (“preserving opt-out rights may reduce the prospects for negotiated class action settlements because it may be difficult for defendants to obtain global peace”).

Indeed, some commentators have suggested that uncertainty concerning large opt-outs causes defendants to reduce the size of class settlements. See, e.g., David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 Harv. L. Rev. 831, 871 (2002) (a “[b]ack-end opt-out” harms individuals that remain in the class “by reducing the defendant’s fixed class-settlement offer by an amount equal to the expected value of the” opt-out).¹²

¹² See also Jon Romberg, *The Hybrid Class Action as Judicial Spork: Managing Individual Rights in a Stew of Common Wrong*, 39 J. Marshall L. Rev. 231, 245 (2006) (defendants are willing to provide a “significant premium” to receive “global peace” through a class action settlement and, “[g]iven this ‘global peace dividend,’ absent class members will likely be harmed when opt-out is permitted”); Lesley Frieder Wolf, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 Colum. L. Rev. 1847, 1875 (2000) (“Companies may not offer equally desirable settlements [to the class] because they face the frightening possibility of an inordinate and unpredictable number of separate suits.”); Perino, 46 Emory L.J. at 136 (“[P]roviding an unrestrained right to opt out of a class action . . . may impose significant costs on other claimants[.]”).

3. Other Absent Class Members Would Be Prejudiced

Thus, applying *American Pipe* to a statute of repose could prejudice the vast majority of absent class members that lack the means to pursue an individual claim – by unwittingly forcing those investors, whose interests are at the very “core” of Rule 23, *see infra* at 17, to subsidize the much larger recoveries received by sophisticated investors with the resources to strategically file individual actions. *Cf. Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 n.35 (1999) (recognizing that mandatory class actions that limit opt outs may be desirable “to prevent claimants” that “might attempt to maintain costly individual actions” from “unfairly diminishing the eventual recovery of other class members”) (quoting *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 292 (2d Cir. 1992)).¹³

¹³ See also David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and “Indivisible” Remedies*, 79 Geo. Wash. L. Rev. 542, 571-72 (2011) (“[A]n opt-out right creates the possibility of strategic behavior, in which some parties who stand to gain from class treatment nonetheless opt out (or threaten to do so) to extract rents from members remaining in the class.”); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 133 (2006) (“[C]lass members and class counsel effectively subsidize opt-outs, who are able to free-ride on the litigation work of class counsel, are relieved of litigating often difficult class certification issues, and only have to prove their own damages.”); Perino, 46 Emory L.J. at 105 (“In effect, small claimants may subsidize large claimants’ individual suits and similarly situated plaintiffs may receive substantially different recoveries” because opt-outs are able to “benefit from . . . class discovery or trial preparation that may be more extensive than any individual litigant could afford on its own.”); David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. Rev. 695, 705-06 (1989) (class actions “remov[e] the costs and risks of trying common questions” for opt outs, allowing

II. **APPLYING AMERICAN PIPE TO A STATUTE OF REPOSE IS NOT NECESSARY TO SERVE THE PURPOSES OF RULE 23**

The *American Pipe* Court observed that “[a] contrary rule . . . would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure” by inducing absent class members “to file protective motions to intervene.” 414 U.S. at 553. The Court reiterated that comment in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 351 (1983), observing that an alternative rule applied to a statute of limitations would result in “a needless multiplicity of actions – precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid.” But those interests, which have decreased in importance in the 38 years since *American Pipe* was decided, do not support extending *American Pipe* to Section 13’s statute of repose.

A. **Tolling a Statute of Repose Would Not Further the “Core” Purpose of Rule 23**

Since *American Pipe*, the Supreme Court has recognized that Rule 23 is not primarily designed to achieve judicial efficiency or to avoid the filing of multiple motions, but rather “[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the

their actions to “be subsidized by the public, particularly by the segment composed of the rest of the victim class”).

incentive for any individual to bring a solo action prosecuting his or her rights.”

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997).¹⁴

Refusing to apply *American Pipe* to Section 13’s statute of repose would not undermine that policy or achieve a harsh result. The investor whose “small recover[y]” would not provide sufficient incentive to “bring a solo action” before a class action is filed would not have the incentive to do so after a class certification motion is denied. Application of *American Pipe* to the statute of repose would not help that investor. Rather, *American Pipe* benefits primarily those persons whose potential recovery is sufficiently great to provide an incentive to bring a solo action if class certification is denied. But, as experience and logic demonstrate, if that investor (usually an institutional investor) would have the

¹⁴ See also *Shutts*, 472 U.S. at 809 (“Class actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually.”); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (where an individual’s recovery is “inconsequential,” “[e]conomic reality dictates that petitioner’s suit proceed as a class action or not at all”); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 329 (3d Cir. 2011) (“[T]he policy at the very core of the class action mechanism is to provide sufficient incentive to prosecute an action by aggregating the relatively paltry potential recoveries into something worth someone’s . . . labor[.]”); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011) (“the aggregation of similar, small, but otherwise doomed claims” is “Rule 23’s core concern”); *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 41 (1st Cir. 2003) (“The core purpose of Rule 23(b)(3) is to vindicate the claims of consumers and other groups of people whose individual claims would be too small to warrant litigation.”); *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 665 (7th Cir. 2001) (“[T]he core function of [the class action] is to enable the litigation of claims too small to warrant the costs of prosecuting a separate suit for each claim.”).

wherewithal and interest to file a solo action if class certification is denied, it would also have the same wherewithal and interest to file a complaint or motion to intervene to preserve its rights after a class action complaint is filed but before class certification has been decided. *Cf. Shutts*, 472 U.S. at 813 (“If . . . the plaintiff’s claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney or have thought about filing suit, and should be fully capable of exercising his right to ‘opt out.’”).¹⁵ Thus, applying Section 13 by its terms would not achieve a harsh result: it would merely require sophisticated institutional investors who do not need the benefit of a class action and who have the ability to file their own actions (without the benefit of tolling) to file those actions within three years, and give the defendants the certainty and finality Section 13’s statute of repose was intended to achieve.

¹⁵ Thus, as the underlying cases here (and others) demonstrate, institutional investors who would be inclined to pursue their own rights if class certification is denied, often pursue individual actions regardless whether class certification is denied. *See, e.g., Wash. State Inv. Bd. v. Ebberts*, No. 04 Civ. 2033 (S.D.N.Y. filed Dec. 12, 2003) (individual action filed after class certification motion was granted in *WorldCom* on October 24, 2003). Indeed, the flood of individual actions recently filed by investors in residential mortgage-backed securities and collateralized debt obligations (as well as the prior tolling agreements negotiated by many of these parties) show that institutional investors have the motivation and ability to pursue their claims on an individual basis regardless of the application of *American Pipe*. *See, e.g.,* Conditional Transfer Order (CTO-14), *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, MDL No. 2265, ECF No. 349 (J.P.M.L. filed June 7, 2012) (conditionally transferring individual MBS action against Countrywide Financial Corporation to District Court presiding over 19 prior MBS actions against Countrywide Financial Corporation).

Requiring an institutional investor to file a complaint or motion to intervene before class certification is decided also would not prejudice that investor if class certification were granted. Such an action does not constitute a final and binding decision to opt-out from the class action under the “well-established authority in this and other circuits.” *In re Auction Houses Antitrust Litig.*, No. 00 Civ. 0648 (LAK)(RLE), 2004 WL 2624896, at *6 (S.D.N.Y. Nov. 18, 2004).¹⁶ Moreover, in the securities class action context (unlike the antitrust context of *American Pipe*), class action plaintiffs are required by the PSLRA to publish – within “20 days after the date on which the complaint is filed” and “in a widely circulated national business-oriented publication or wire service” – “a notice advising members of the purported plaintiff class of the pendency of the action, the claims asserted therein, and the purported class period.” See 15 U.S.C. § 77z-1(a)(3)(A)(i). This notice gives the absent class member “sufficient information . . . so that he . . . could make an informed determination whether intervention [is] appropriate to protect his interests.” *In re Direxion Shares ETF Trust*, 279 F.R.D.

¹⁶ See also *Manhattan-Ward, Inc. v. Grinell Corp.*, 490 F.2d 1183, 1186 (2d Cir. 1974); *Giles v. AT&T, Inc.*, No. 6:09-cv-293 (MAD/ATB), 2012 WL 398990, at *19 (N.D.N.Y. Feb. 7, 2012); *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2005 WL 1048073, at *3 (S.D.N.Y. May 5, 2005); *In re Prudential Secs., Inc. Ltd. P’ships*, 164 F.R.D. 362, 370 (S.D.N.Y. 1996), *aff’d*, MDL No. 1005, 107 F.3d 33, 1996 WL 739258 (2d Cir. Dec. 27, 1996); *Berman v. L.A. Gear, Inc.*, No. 91 Civ. 2653, 1993 WL 437733 at *5 n.1 (S.D.N.Y. Oct. 26, 1993), *aff’d*, No. 93-9260, 29 F.3d 621 (2d Cir. June 21, 1994)).

221, 235 (S.D.N.Y. 2012). Furthermore, after the filing of a complaint any ongoing burden on that plaintiff would be reduced – if not eliminated – by the case-management techniques that have been developed since *American Pipe* was decided. *See infra* at 21-23.

B. Declining to Apply *American Pipe* Would Not Result in a “Needless” Multiplicity of Actions or Defeat Judicial Efficiency

To the extent that Rule 23 is further motivated by an interest in avoiding “a needless multiplicity of actions” and maintaining judicial efficiency, these concerns also do not justify extending *American Pipe* to a statute of repose.

As an initial matter, this Court has previously stated that “it was not the purpose of *American Pipe* . . . to reduce the number of suits filed.” *In re WorldCom Sec. Litig.*, 496 F.3d 245, 256 (2d Cir. 2007).

Moreover, for claims subject to a statute of repose, protective motions and complaints are not “needless.” To the contrary, such complaints and motions to intervene are *necessary* for claims subject to a statute of repose in order to satisfy the congressional purpose of providing defendants with certainty and finality within a fixed period of time. *See supra* at 8-10.

Declining to apply *American Pipe* to a statute of repose also would not defeat judicial efficiency. Since *American Pipe* was decided, courts have developed mechanisms to reduce the cost and burden of “protective motions to intervene” both on the parties and on the Court system. A wide range of case

management techniques exist. As the authors of the *Manual for Complex Litigation* have recognized:

[T]he original *Manual* broke new ground in advocating judicial case management. By 1985, however, the role of the judge as a case manager had become widely accepted And by 1994, that role had evolved from an option to an acknowledged judicial responsibility. Given the federal courts' growing dockets and the increasing complexity, cost, and time demands of litigation, judicial control through effective management techniques and practices is now considered imperative. These changes in the environment of complex litigation also lead to a change in the role of the *Manual*: The procedures it describes and suggests have now moved from the cutting edge into the mainstream of litigation.

Manual for Complex Litigation (Third), Preface at xiii-xiv (1995).¹⁷

These case management techniques include deferring answers and dispositive motion practice in individual actions until after motions are decided with respect to the class complaint, allowing counsel in individual actions to appoint a law firm to serve as a "liaison counsel" for individual plaintiffs before

¹⁷ See also Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing, Contexts, Selective Memories, and Limited Imagination*, 98 W. Va. L. Rev. 171, 196-99 (1995) (although "judges recoiled at permitting relaxation of other procedural rules to permit more group litigation" as late as "the early and mid-1980s," "[t]oday aggregation has become the ordinary and expected response whenever patterns of similar cases appear in the federal and state courts"); Judith Resnik, *From "Cases" to "Litigation,"* 54 Law & Contemp. Probs. 5, 6 (1991) ("Over the past three decades, the aggregation of civil cases . . . has moved from being the exceptional and specially justified event to the more ordinary and expected response whenever patterns of similar cases appear in the federal courts.").

the district court and in discussions with class action counsel, providing individual plaintiffs with access to discovery from the class action, permitting (but not requiring) counsel from the individual actions to participate in depositions, recognizing that communications between counsel for separate plaintiffs can be privileged, and allowing all counsel an opportunity to participate in settlement discussions. *See, e.g., In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2003 WL 21219037 (S.D.N.Y. May 22, 2003) (consolidating “a plethora of Individual Actions” with a class action for pretrial purposes and describing the scope of that consolidation).¹⁸

Indeed, extension of *American Pipe* to a statute of repose would – if anything – disserve judicial efficiency, including by preventing the consolidation necessary to apply the case management techniques described above. Such a rule

¹⁸ *See also* Pre-trial Scheduling Order, *In re Beacon Assocs. Litig.*, 09 Civ. 0777 (LBS) (AJP), ECF No. 208 (S.D.N.Y. filed Dec. 8, 2010) (providing for “the conduct of joint depositions and the coordination of any document requests, interrogatories and requests for admission” across related actions); *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d 498 (S.D.N.Y. 2009) (establishing discovery plan for 9,090 related cases); Pretrial Order No. 1, *In re Lehman Bros. Sec. & ERISA Litig.*, No. 09-md-02017-LAK, ECF No. 1 (S.D.N.Y. filed Jan. 9, 2009) (appointing executive committee of plaintiffs’ counsel to coordinate discovery across related actions); Case Management Order, *In re Sept. 11 Prop. Damage & Bus. Loss Litig.*, 21 MC 97 (AKH), ECF No. 741 (S.D.N.Y. filed Mar. 3, 2006) (appointing liaison counsel, coordinating discovery, and maintaining privilege of communications between counsel in related actions); Case Management Order No. 4, *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596, ECF No. 70 (E.D.N.Y. filed Aug. 18, 2004) (establishing procedures for coordinating discovery in related actions).

would also create incentives for absent class members to sit on the sidelines until class certification is decided, only to impose duplicative discovery and motion practice after class certification is decided. And such a rule would increase uncertainty for defendants and thereby discourage settlements – which are a primary source of judicial efficiency. *See supra* at 13-15.

CONCLUSION

For the foregoing reasons, SIFMA respectfully submits that the decision of the District Court should be reversed.

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June 15, 2012

Respectfully submitted,

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/s/ Lewis J. Liman
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Dated: June 15, 2012