Nos. 11-56642 and 11-57135

United States Court Of Appeals
for the Ninth Circuit

STICHTING PENSIOENFONDS ABP,
Plaintiff-Appellant in No. 11-56642,

– and –

UNITED FINANCIAL CASUALTY COMPANY, PROGRESSIVE SPECIALITY INSURANCE COMPANY, PROGRESSIVE UNIVERSAL INSURANCE COMPANY, and PROGRESSIVE ADVANCED INSURANCE COMPANY,
Plaintiffs-Appellants in No. 11-57135,

– v. –

COUNTRYWIDE FINANCIAL CORPORATION, COUNTRYWIDE HOME LOANS INC., CWALT, INC., CWMBS, INC., CWABS, INC., CWHEQ, INC., COUNTRYWIDE CAPITAL MARKETS, COUNTRYWIDE SECURITIES CORPORATION, N. JOSHUA ADLER, BANK OF AMERICA CORPORATION, NB HOLDINGS CORPORATION, DEUTSCHE BANK SECURITIES INC., UBS SECURITIES, LLC, GREENWICH CAPITAL MARKETS, INC. A/K/A RBS GREENWICH CAPITAL, BARCLAYS CAPITAL INC., STANFORD L. KURLAND, DAVID A. SPECTOR, DAVID SAMBOL, ERIC P. SIERACKI, and ANGELO R. MOZILO,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

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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 the enforcement of clear rules regarding the time after which market participants are free from the fear of lingering liabilities based on stale evidence. SIFMA routinely appears as *amicus curiae* in appeals that implicate these concerns.[2]

Whether statutes of limitations and repose can be tolled by the filing of a class action by a party without standing to prosecute those claims raises issues important to the administration of the federal securities laws and to Rule 23. The position advocated by Plaintiff-Appellant ("ABP") would undermine principles that support the effective and efficient functioning of the securities markets,

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[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. All parties have consented to the filing of this brief.

[2] SIFMA was recently granted leave to file an amicus brief in the Second Circuit, discussing the practical reasons why—based on the real-world experience of its members—the statute of repose contained in Section 13 of the Securities Act of 1933 (the "Securities Act") is not subject to the tolling doctrine of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).

exacerbate the costs and risks of capital formation, invite the filing of overbroad lawsuits antithetical to Rule 23, and leave to the pens of plaintiffs and their counsel—rather than Congress—the time periods in which market participants are subject to litigation under the federal securities laws.

PRELIMINARY STATEMENT

This appeal raises two questions critical to the securities industry: (1) whether a plaintiff who did not invest in a security—and thus lacks standing to assert claims based on that security—can nonetheless extend limitations and repose periods for *others* merely by including claims based upon that security in a complaint that includes class action allegations; and (2) whether claims that Congress mandated could "in no event" be brought after three years can nevertheless be brought months or years later under the *American Pipe* tolling doctrine. SIFMA respectfully submits that the answer to both questions is—and should be—"no."

First, standing is a threshold jurisdictional issue that goes to the power of a federal court to grant affirmative relief. A plaintiff without standing to assert a claim thus cannot secure judicial orders affecting substantive rights with respect to that claim. *A fortiori*, a plaintiff without standing cannot alter substantive rights of others merely by filing a complaint she denominates as a "class action." Accordingly, as numerous courts in this Circuit have held, a class action claim

asserted by a standingless plaintiff cannot be the basis for altering statutes of limitations and repose with respect to that claim. *American Pipe* itself pointedly made clear that the tolling rule it announced was not being applied to claims where the named plaintiffs lacked standing to assert them. Otherwise, the rule would invite the abuse Justice Blackman warned against, incentivizing plaintiffs to file placeholder cases for claims the plaintiffs lacked standing to prosecute, in the hope of belatedly finding investors who might agree to champion those claims and thereby increase a class action's hydraulic leverage.

Second, the tolling doctrine announced by *American Pipe* applied only to statutes of limitations; extending it to statutes of repose—where the legislative branch has fixed a clear, outside date within which a claim must be brought—defeats repose (finality on an objectively determinable date), and accordingly adds to the burdens and costs of the capital formation process by extending the life of contingent liabilities. At the same time, declining to toll a statute of repose would not be unfair to the sophisticated institutional investors who (as in this case) are generally the litigants that eschew class actions and file their own individual lawsuits (before and after certification decisions are made).

ARGUMENT

I. CLASS ACTION CLAIMS ASSERTED BY A PLAINTIFF WITHOUT STANDING DO NOT TOLL ABSENT CLASS MEMBERS' CLAIMS

A. A Case Filed Without Standing to Assert a Claim Cannot Toll That Claim

Standing is a "threshold jurisdictional question." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998).[3] "'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Id.* at 94 (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1869)). Exercising judicial power in the absence of standing "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.*[4] "Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining

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[3] Since the enactment of the Securities Litigation Uniform Standards Act of 1998, federal courts have exclusive jurisdiction over securities class actions. *See* 29A Fed. Proc., L. Ed. § 70:322 ("state courts are no longer courts of competent jurisdiction to hear covered class actions raising a claim under the Securities Act").

[4] *See also Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 654 (9th Cir. 2002) ("The requirement of Article III standing is a core component of the separation of powers. The standing doctrine aids the federal judiciary to avoid intruding impermissibly upon the powers vested in the executive and legislative branches, by preventing courts from issuing advisory opinions not founded upon the facts of a controversy between truly adverse parties.").

them from acting permanently regarding certain subjects. For a court to pronounce upon the meaning . . . of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Id.* at 101-02.

A suit brought by named plaintiffs without standing is therefore not a juridical case, and can have no legal effect. *See Walters v. Edgar*, 163 F.3d 430, 432-33 (7th Cir. 1998) (Posner, J.) (where class action plaintiffs "never had standing to bring this suit . . . federal jurisdiction never attached" and "there was no case" for absent plaintiffs to join). There is a similar lack of judicial power over *claims* which the named plaintiff lacks standing to assert. *See Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 17-18 (2d Cir. 1981) (Friendly, J.) (where class action plaintiffs only had an interest in certain contracts they "had no power to [settle and] release any claims based on any other contracts" because "named plaintiffs in a class action cannot represent a class of whom they are not a part, and can represent a class of whom they are a part only to the extent of the interests they possess in common with members of the class"). Thus, judicial power cannot be conferred over a claim asserted by a plaintiff who only has standing to bring *other* claims.

As compelled by this principle, District Courts within this Circuit routinely hold that a class action whose named plaintiffs lack standing to assert certain claims does not toll the limitations periods for those claims. *See In re TFT-*

LCD (Flat Panel) Antitrust Litig., 2012 WL 149632, at *2-3 (N.D. Cal. Jan. 18, 2012) (Illston, J.); *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1130 (C.D. Cal. 2011) (Pfaelzer, J.); *In re Wells Fargo Mortg.-Backed Certificates Litig.*, 2010 WL 4117477, at *5 (N.D. Cal. Oct. 19, 2010) (Koh, J.); *Boilermakers Nat'l Annuity Trust Fund v. WaMu Mortg. Pass Through Certificates, Series AR1*, 748 F. Supp. 2d 1246, 1259 (W.D. Wash. 2010) (Pechman, J.); *Palmer v. Stassinos*, 236 F.R.D. 460, 465 n.6 (N.D. Cal. 2006) (Whyte, J.). So have courts elsewhere. *See* Answering Br. of the Countrywide Defs.-Appellees at 25-28 (collecting cases).

ABP's proposed rule (Br. at 30) confers power on a pleading to affect substantive rights—even where the court in which it is filed has no power to adjudicate that claim (including to alter a statutory time bar) because the plaintiff has no standing to pursue it. As a result, ABP's proposed tolling rule is completely detached from the foundational limiting principles of Article III and subject matter jurisdiction, and has no outer bound—other than the imagination of the complaint draftsperson.

B. By Its Terms *American Pipe* Does Not Toll Statutes of Limitations For Persons Who Would Not Be Included in the Class Action

ABP's contrary argument, that a class action filed by a plaintiff without standing tolls the statute of limitations for those with standing, is also inconsistent with *American Pipe* itself. There, the Supreme Court considered

whether the running of the statute of limitations precluded intervention in a timely case brought as a class action by those who "would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. The Court held that where the motion for class certification was denied for lack of numerosity under Rule 23(a)(1), class members would not be precluded from filing an otherwise untimely intervention motion, but emphasized that tolling would only apply to "all members of the class as subsequently determined," *id.* at 550—i.e., "to all those who might subsequently participate in the suit as well as for the named plaintiffs." *Id.* at 551. And, in justifying its conclusion, the Court also stressed that "[t]he policies of ensuring essential fairness to defendants . . . are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit." *Id.* at 554-55.

This is a narrow exception to the rule that the filing of a lawsuit by one party does not toll the statute of limitations for other parties who have the same claim. The Court only permitted (1) intervention in an *existing lawsuit* where (2) the party who initiated that lawsuit had standing to assert a class claim and was representative of the class by (3) those who would be members of the class action

had the case been permitted to continue as a class action where (4) class certification was denied on Rule 23 grounds for lack of numerosity.[5]

ABP's proposed rule satisfies none of these requirements. It seeks permission to pursue a separate lawsuit alleging a claim that the party who commenced the class action had no standing to assert in the first place. As a result, were class certification granted in the original action, the claim ABP seeks to prosecute would not (and could not) have been part of a certified class. And the barrier to inclusion of that claim in the class would not have been an exercise of discretion under Rule 23, but the absence of subject matter jurisdiction because of lack of standing. ABP's proposed rule, therefore, would enable a complete stranger to ABP's claim to grant rights to ABP that Congress denied and that the court presiding over the class action itself could not grant.

C. Standing Defects are Fundamentally Different From Rule 23 Concerns

The Supreme Court in *American Pipe* was "careful" to state that "maintenance of the class action was denied not . . . for lack of standing." *Id.* at 553 (quoting *Utah v. Am. Pipe & Constr. Co.*, 473 F.2d 580, 584 (9th Cir. 1973)). This statement was hardly inadvertent. There is an important distinction between

[5] The Supreme Court has broadened the contours of the *American Pipe* tolling doctrine it announced only once, by permitting absent class members to benefit from tolling even if they file separate actions rather than seeking to intervene in the original class action. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). In all other respects the Court has left *American Pipe* unaltered.

cases that a district court might determine do not satisfy the requirements of Rule 23, and claims that cannot be maintained as class claims because the named plaintiff lacks standing.

Class certification decisions under Rule 23 can be discretionary and fact-specific. Even if the class representative adduces evidence satisfying each of the Rule 23 elements,[6] the district court may deny class certification because of discretionary factors, including the court's assessment whether the class vehicle presents a "superior" method for adjudicating the controversy. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186-92 (9th Cir. 2001) (affirming denial of class certification on predominance and superiority grounds, and stating "the trial court has broad discretion [regarding whether] to certify a class"). As *American Pipe* highlighted, whether a case will satisfy Rule 23 cannot be ascertained from the face of the complaint or at the outset of the litigation. *See* 414 U.S. at 553-54. Accordingly, no absent putative class member could reasonably be expected to predict whether a particular class representative would be able to satisfy Rule 23.

Standing is entirely different. It is a threshold legal issue that must be apparent from the face of the complaint. *See Maya v. Centex Corp.*, 658 F.3d

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[6] *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012).

1060, 1067-68 (9th Cir. 2011).[7] Standing also turns upon ascertainable facts—in securities cases, it presents an objective question: did the named plaintiff purchase the securities on which the asserted claim is based. *See Maine State Ret. Sys. v. Countrywide Fin. Corp.*, 722 F. Supp. 2d 1157, 1163 (C.D. Cal. 2010) ("Every court to address the issue . . . has concluded that a [class action] plaintiff lacks standing . . . to represent the interests of investors in MBS offerings in which the plaintiffs did not themselves buy.").[8]

The Private Securities Litigation Reform Act of 1995 (the "PSLRA") also makes plaintiffs furnish facts concerning standing. It requires plaintiffs to file certifications at the outset of a case "set[ting] forth all of [their] transactions . . . in the security that is the subject of the complaint." 15 U.S.C. § 77z-1(a)(2)(A)(iv). And, if there were any ambiguity on the issue—which there is not—the PSLRA further provides that in appointing the lead plaintiff early in the litigation, the court is required to consider, and receive briefs on, whether the lead plaintiff is "adequate," thereby further exposing any standing issues. 15 U.S.C. § 77z-

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[7] *See also Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 821 (9th Cir. 2002) ("The party seeking to invoke the jurisdiction of the federal courts has the burden of alleging specific facts sufficient to satisfy the . . . elements" of standing.).

[8] Moreover, to the extent that there may be any question regarding the application of the law to the alleged facts, a would-be plaintiff would have it in their means to file a solo lawsuit simply to prevent the time for filing their claim from running. *See infra* at 25-28.

1(a)(3)(B); *see also In re Netflix, Inc. Sec. Litig.*, 2012 WL 1496171, at *5 (N.D. Cal. Apr. 27, 2012) (considering standing challenge in connection with motion for lead plaintiff appointment). Thus, unlike with respect to Rule 23 determinations, there is no secret whether a claim purportedly alleged on a would-be plaintiff's behalf is being asserted by a person with standing.

D. Extending Tolling to Claims a Named Plaintiff Lacks Standing to Assert Would Frustrate the Purposes of Rule 23 and the Federal Securities Laws, and Breed Abuse

ABP's proposed rule would "invit[e] abuse" and conflict with the purposes of both Rule 23 and of the federal securities laws. *See Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring) ("[t]he tolling rule of *American Pipe* is a generous one, inviting abuse"); *Am. Pipe*, 414 U.S. at 561 (Blackmun, J., concurring) (*American Pipe* tolling "must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights").[9]

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[9] *See also Williams v. Boeing Co.*, 517 F.3d 1120, 1136 (9th Cir. 2008) (refusing to toll "a claim for compensation discrimination" based on a class action asserting "promotion discrimination, hostile work environment, and retaliation claims" because "the [*American Pipe*] tolling rule does not leave a plaintiff free to raise different or peripheral claims" that defendants did not receive notice of from the class action); *Robbins v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987) (refusing to extend tolling to subsequent class claims because *American Pipe* "represent[s] a careful balancing of the interests of plaintiffs, defendants, and the court system" and "to extend tolling to class actions tests the outer limits of the

The Supreme Court has recently and pointedly emphasized that the "class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only" and that "to justify a departure from that rule, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Wal-Mart*, 131 S. Ct. at 2550. The rule advocated by ABP is inconsistent with those fundamental principles. It would encourage persons who are not "part of the class" and do not "possess the same interest [or] suffer the same injury as the class members" to assert the broadest possible claims—including those in which they have no personal stake—so as to preserve them for others and, by artificially increasing the *in terrorem* leverage, unfairly enhance the settlement value of their class action. Neither objective is consistent with the substantive purpose of limitations periods generally, the policy judgment made by Congress in enacting the specific limitations and repose periods at issue here, and the efficiency and fairness objectives of the Federal Rules of Civil Procedure.

Lawsuits are supposed to constitute actual cases and controversies, not placeholders designed to undermine statutory defenses if and when an actual case

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American Pipe doctrine and falls beyond its carefully crafted parameters into the range of abusive options").

or controversy materializes.[10] Further, empowering those without standing to extend for considerable periods when timely suits can be brought by parties with the legal right to pursue them is completely antithetical to why limitations and repose periods exist in the first place, and would wedge open the courtroom doors for claims the named plaintiffs had no standing to pursue.

The perverse incentives ABP's proposed rule would create, and the potential for abuse it would foster, are also inconsistent with the structure and fabric of the federal securities laws. Securities class actions "'present[] a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general'" because "[e]ven weak cases . . . may have substantial settlement value . . . [as] 'the very pendency of the lawsuit may frustrate or delay normal business activity.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80 (2006) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739-40 (1975)).[11] A specific vice the PSLRA sought to eliminate was lawyer-

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[10] As the District Court rightly recognized, the class action ABP seeks to harvest was such an "abusive placeholder lawsuit." *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, __ F. Supp. 2d __, 2012 WL 1574285, at *4 (C.D. Cal. Mar. 9, 2012).

[11] *See also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) ("Private securities fraud actions . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law."); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (noting securities plaintiffs may file "largely groundless claim[s] to simply take up the time of a number of other people, with the right to do so

driven class actions. *See AUSA Life Ins. Co. v. Ernst & Young*, 206 F.3d 202, 218 (2d Cir. 2000) (the PSLRA was intended "to empower investors so that they—and not their lawyers—exercise primary control over private securities litigation") (quoting S. Rep. No. 104-98, at 4 (1995)).[12] It did so by enacting a statutory presumption that the most appropriate plaintiff to lead a securities class action is the entity (or group) that "has the largest financial interest in the relief sought by the class." 15 U.S.C. § 77z-1(a)(3)(B)(iii).

The extension of *American Pipe* to claims for which the named plaintiffs lack standing would encourage precisely the type of lawyer-driven lawsuits Congress amended the federal securities laws to forestall. Tolling limitations periods either to confer on private parties (and their counsel) more time to solicit new litigants who possess an interest in pursuing claims, or to bulk up further the

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representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence"); *In re Bos. Scientific Corp. Sec. Litig.*, __ F.3d __, 2012 WL 2849660, at *6 (1st Cir. July 12, 2012) (Boudin, J.) ("One reason why securities class actions 'pose a special risk of vexatious litigation,' is that the cost of defending, coupled with potentially enormous liability, may make it advisable for the defendant to settle even unlikely or frivolous claims.") (quoting *Dabit*, 547 U.S. at 86).

[12] *See also Tellabs*, 551 U.S. at 322 (the "PSLRA's twin goals" are "to curb frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims"); *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 192 (3d Cir. 2005) ("[T]he PSLRA strives to ensure that the lead plaintiff will have both the incentive and the capability to supervise its counsel in the best interests of the class.").

risks and costs to defend against class claims the named plaintiffs have standing to pursue, rewards the very conduct the PSLRA was enacted to stamp out.

E. Tolling Where Class Plaintiffs Lack Standing Would Undermine the Purposes of Limitations and Repose Periods

In passing Section 13 and requiring Securities Act claims to be brought within one year of discovery and "in no event" more than three years after the date of the offering or sale, Congress expressed the fear that, with any longer periods, "lingering liabilities would disrupt normal business and facilitate false claims." *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir. 1987) (Easterbrook, J.), *overruled on other grounds by Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990). Indeed, as originally enacted, the applicable periods were longer. *Id.* In the face of evidence that longer periods impeded the capital formation process, especially given the limited burden imposed upon plaintiffs asserting Securities Act claims, Congress shortened them to what they are today. *Id.*

Statutes of limitations are intended "to promote fair and timely resolution of legal disputes." *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 1005 (9th Cir. 2006). They are legislative judgments designed "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared," *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944), "to prevent plaintiffs from sleeping on their rights," *Edes*

v. Verizon Communications, Inc., 417 F.3d 133, 142 (1st Cir. 2005), and to promote an end to disputes. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997). Statutes of repose are intended to provide certainty and finality—by establishing an objective date certain after which there will be no cause of action. *See infra* at 19-20.

ABP's proposed extension of *American Pipe* would undermine and conflict with each of these objectives. Rather than "promot[ing] the fair and timely resolution of disputes," it would permit disputes over one set of claims (those possessed by plaintiffs with standing) to be deferred indefinitely until a class certification motion filed by a party who cannot press the claims is denied. It would also not further the presentation of fresh evidence because there are limits on the discovery defendants can take from absent class members (even if they somehow knew who they were), *In re Cement Antitrust Litigation*, 688 F.2d 1297, 1309 (9th Cir. 1982), *aff'd*, 459 U.S. 1191 (1982), and therefore defendants will not be able to seek necessary evidence from plaintiffs with standing until after (potentially years after) the applicable time periods have run. And such evidence may be critical to the defense of Securities Act claims. *See N.J. Carpenters Health Fund v. RALI Series 2006-Q01 Trust*, 2012 WL 1481519 (2d Cir. Apr. 30, 2012) (affirming denial of class certification in MBS case due to individual issues concerning knowledge and reliance).

Nor would ABP's proposed rule prevent plaintiffs with standing from sleeping on their rights. To the contrary, it would permit them to refrain from asserting claims on a timely basis, evaluate the progress of the class action as prosecuted by the named plaintiff, and either belatedly seek to intervene to provide the standing otherwise absent or simply arrogate the fruits of the class litigation in an individual action they later pursue—thereby exacerbating the discovery and related costs visited on the defendant and providing undue settlement pressure.

Last, it would frustrate the principles of repose underlying a statute of limitations and eviscerate the purposes of certainty and finality underlying a statute of repose, by replacing a fixed period that has an objectively determinable end date with an open-ended and completely uncertain one dictated both by litigants (and their counsel) who have no legal interest in the claim and by the caseload of the district court.

II. SECTION 13'S STATUTE OF REPOSE IS NOT SUBJECT TO *AMERICAN PIPE* TOLLING

American Pipe dealt with a statute of limitations, a statute that is procedural, not substantive. Indeed, the Supreme Court emphasized that the rule it announced did not (and, because of the Rules Enabling Act, could not) alter substantive rights because only a statute of limitations was at issue. *See* 414 U.S. at 558 n.29. In contrast, repose periods are substantive; they confer rights that Rules of Civil Procedure cannot "alter, amend or abridge." 28 U.S.C. § 2072.

Only legislative enactments may alter these time periods. And, Congress has not only failed to enact *American Pipe* as a means for extending the applicable repose period here, it has left intact since Section 13 was amended in 1934 a proscription against tolling: "in no event" shall an action be brought under Sections 11 or 12(a)(2) more than, respectively, three years after the offering or the sale.

As this case shows, the litigants who exploit *American Pipe* to extend statutory repose periods are institutional investors. They have the incentive and wherewithal to bring solo actions if class certification is denied, to opt out if it is granted, or to file solo actions even when class certification remains unresolved.[13] Moreover, the PSLRA machinery, coupled with the access to information afforded by the internet, ensures that these substantial investors quickly become aware of class action filings. The PSLRA aims for institutional investors to be lead plaintiffs, alerting them to class action cases by requiring that their filing be published "in a widely circulated national business-oriented publication or wire service." 15 U.S.C. § 77z-1(a)(3)(A)(i). Moreover, particularly in the context of claims based on securities that trade in public or even private markets, such investors are surely aware of price declines in those securities, a (if not the) main motivator for seeking legal redress for their purchases.

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[13] *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985) ("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.").

The extension of the three-year repose period while a class certification motion is pending is thus not necessary for the select investors who could avail themselves of the benefit of such a rule. They face no obstacles to filing timely lawsuits. Nor does doing so disqualify them from enjoying the benefit of a class action if a class ultimately is certified: the filing of a solo lawsuit does not preclude an investor later from electing instead to participate in the class action. *See Bowman v. UBS Fin. Servs., Inc.*, 2007 WL 1456037, at *2 (N.D. Cal. May 17, 2007) ("The mere pendency and continued prosecution of a separate suit . . . neither registers nor preserves a litigant's election to 'opt out' of the related class action."). But permitting tolling to extend a repose period would confer a windfall on them, antithetical to Congress's purposes in passing a statute of repose and inconsistent with the orderly and efficient administration of justice that both Rule 23 and the federal securities laws (including the PSLRA) are designed to achieve.

A. Applying Section 13's Clear and Plain Terms is Consistent with the Purposes of a Statute of Repose

It is well established that "[t]here is a crucial distinction in the law between 'statutes of limitations' and 'statutes of repose.'" *Munoz v. Ashcroft*, 339 F.3d 950, 957 (9th Cir. 2003). "[S]tatute[s] of repose [are] a fixed, statutory cutoff date, usually independent of any variable," that are "not subject to equitable tolling." *Id.* A statute of repose seeks to provide defendants with "certainty and

finality as to the time within which [they] could be subjected to a liability claim." *Marchesani v. Pellerin-Milnor Corp.*, 269 F.3d 481, 489 (5th Cir. 2001).[14] They reflect the legislative judgment that, after a fixed and objectively determinable 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).

Those are precisely the objectives Congress intended to achieve through Section 13's repose period. That statute provides—in unambiguous terms—that "[*i*]*n no event* shall any such action be brought to enforce a liability created under section 11 or 12(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 12(a)(2) of this title more than three years after the sale." 15 U.S.C. § 77m (emphasis added). "In no event" means just that. Congress intended to reduce "uncertain[ty]" for Securities Act defendants by ensuring that all suits would "be brought *only* within 3 years." 78 Cong. Rec. 10,186 (1934) (emphasis added).

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[14] *See also P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 104 & n.7 (2d Cir. 2004) (statutes of repose create "certainty and finality" by "provid[ing] an easily ascertainable and certain date for the quieting of litigation"); *Caviness v. Derand Res. Corp.*, 983 F.2d 1295, 1300 n.7 (4th Cir. 1993) (statutes of repose "serve[] the need for finality in certain financial and professional dealings").

Those objectives would be defeated by tolling the repose period until the determination of a class certification motion. Since at least the 2003 amendments to Rule 23, class certification motions need not be made "as soon as practicable," but only at "an early practicable time," 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 securities context, those circumstances include the provision of notice of the pendency of the action, the appointment of lead plaintiffs and counsel, and (in all but the most unusual cases) the filing of a consolidated complaint by that party. *See* 15 U.S.C. § 77z-1(a)(3). Moreover, because of the PSLRA discovery stay, 15 U.S.C. § 77z-1(b)(1), a class certification motion is typically preceded by motions to dismiss. If the complaint survives such motions, months (or potentially years) of discovery will follow, so that the "party seeking class certification [can] affirmatively demonstrate his compliance" with Rule 23, and "be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 131 S. Ct. at 2551 (noting class certification issues "[f]requently . . . will entail some overlap with the merits of the plaintiff's underlying claim").

Applying *American Pipe* to statutes of repose deprives the defendant of the sole substantive right a repose period provides: the finality of a fixed time period that "in no event" can be altered. Creating an exception—enacting an

"event"—means that contingent liabilities remain outstanding for an open-ended period. And it means that defendants may not learn until months or years after an offering which of the many institutional investors who purchased securities in that offering were intending to bear the cost and burden of litigation. The putative defendant would be kept uncertain as to which purchasers intended to bring suit, and which not, which purchasers it would have to defend against, and with which purchasers it could assume it was at peace.[15]

B. Tolling the Statute of Repose Would Have Other Pernicious Results

Beyond doing violence to clear statutory language, applying *American Pipe* to Section 13's statute of repose is antithetical to the orderly and efficient administration of justice.

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[15] These costs and concerns are real. "Out-opt" lawsuits are not a mere sideshow in securities litigation. They can be the main show. By definition, investors with little at stake rely on the class action for any recovery. Opt outs are brought by institutions with lots at stake and with the resources to pursue complex litigation. As experience shows, institutional investor opt-out actions can impose significant additional liability on top of a class action. *See* 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 plaintiffs pursuing individual claims despite the pendency of related securities class actions). Yet, if the statute of repose could be tolled, each of these would-be plaintiffs—all of whom would have substantial claims on their own—could wait in the shadows until after class certification is resolved before informing the defendants of their decision to file suit.

1. Discovery Would Be More Difficult

Creating an "event" that would alter a time period that Section 13 provides can "in no event" be extended encourages institutional investors to postpone filing timely actions. By delaying, they can let class counsel do the hard (and expensive) work of investigating a complaint and conducting discovery, benefitting from that work if it is helpful with little if any consequence if it is not, while preserving for themselves the right to take duplicative discovery—including seeking repetitive depositions—if they do not like the evidence generated by the class.

At the same time, extending *American Pipe* to the statute of repose would also give institutional investors an opportunity to avoid or delay discovery of themselves—depriving defendants of the ability to record fresh recollections from the parties who frequently have the most significant claims. Absent class members are generally not considered "parties" for discovery purposes, *supra* at 16, but even if a defendant could take discovery of an absent plaintiff, the defendant would not know which institutional investors—many of whom may still be shareholders of the company—intended to sue and were therefore an important subject of discovery.

2. Settlement Would Be More Difficult

Extending *American Pipe* to statutes of repose would also make settlement at an early stage more difficult. Declining to toll the three-year statute of repose would provide the defendant, lead plaintiff, and lead counsel—at a relatively early stage of the litigation—with 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. The defendant thus can evaluate its liability, and resolve it.

Permitting institutional investors to delay filing complaints or intervention motions until after class certification makes class settlements harder to achieve. 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 individual 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 shadows—would merely set a floor for future negotiations with whoever emerges. 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).

3. Other Absent Class Members Would Be Prejudiced

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 25-26, 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").

C. Application of *American Pipe* to the Statute of Repose is Not Necessary to Serve the Purposes of Rule 23

Even were courts in the business of re-writing clear legislation, there is no need to do so here. 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 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).[16]

Interpreting "in no event" to mean what it says would not undermine that policy or achieve a harsh result. Applying *American Pipe* to the statute of repose would not help the investor whose "small recover[y]" does not provide sufficient incentive to "bring a solo action." Such investor will face the same disincentives to pursuing a solo action after class certification is denied as they would prior to a class certification decision. Rather, doing so benefits primarily those entities whose potential recovery is sufficiently great as to provide an incentive to bring a solo action (whether or not class certification is denied). But, investors with the wherewithal and interest to file an individual action if class certification is denied would also have the wherewithal and interest to file such an action to preserve its rights before class certification is decided. Thus, felicity to congressional intent by enforcing clear statutory language would not achieve a harsh result: it would merely require institutional investors who have the ability to file their own actions to file those actions within three years.[17]

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[16] *See also 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").

[17] Moreover, in securities cases (unlike the antitrust context of *American Pipe*), named plaintiffs are required to publish notice within 20 days of filing their complaint, 15 U.S.C. §77z-1(a)(3), which informs absent plaintiffs "of their host of

Declining to apply *American Pipe* to the statute of repose also would not impair judicial efficiency. In the four decades since *American Pipe* was decided, courts have developed mechanisms to reduce the cost and burden of "protective motions to intervene." A wide range of case management techniques exist, including deferring answers and dispositive motion practice in individual actions, appointing "liaison counsel" for individual plaintiffs, providing individual plaintiffs with access to discovery from the class action, permitting (but not requiring) counsel from the individual actions to participate in depositions, and allowing all counsel to participate in settlement discussions. *See, e.g.*, *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217 (9th Cir. 2006) (describing case management orders in a multi-district litigation involving "hundreds of cases and thousands of plaintiffs").

If anything, the extension of *American Pipe* to a statute of repose would disserve judicial efficiency, including by preventing the consolidation necessary to apply the case management techniques described above. Such a rule 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. The expense such cases impose on the

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options," including "making a motion for lead plaintiff status, opting out, and making a motion to intervene." *Emps.-Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Capital Advisors*, 498 F.3d 920, 924 n.2 (9th Cir. 2007).

defendant can lead to the same undue need to settle even questionable claims that led to the adoption of the PSLRA in the first place. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991).

CONCLUSION

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

Dated: New York, N.Y.
July 26, 2012

Respectfully submitted,

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s/ Lewis J. Liman
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Dated: July 26, 2012

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