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No. 13-640

# In the Supreme Court of the United States

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI,
*Petitioner*,

v.

INDYMAC MBS, INC., ET AL.,
*Respondents*.

*On Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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## INTEREST OF *AMICUS CURIAE*[1]

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 securities litigation. SIFMA has an interest in the strong, accurate, and efficient enforcement of the federal securities laws. That interest is furthered by applying the statutory principle of repose – the principle that there should be clear rules providing a time within which a claim must be asserted, so that defendants can then seek to resolve it, and after which defendants (and their shareholders) are free from the fear of lingering liabilities.

Petitioner's position 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. Congress has adopted statutes of repose in a number of federal securities laws. *E.g.*, 15 U.S.C. § 77m (three-year repose period applicable to claims under Sections 11 and 12(a)(2) of Securities Act); 28 U.S.C. § 1658(b)(2) (five-year repose period applicable to securities fraud claims under Section 10(b) of Exchange Act).[2] Petitioner's position, if adopted by

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[1] All parties have consented to this filing in letters to the Clerk of the Court. No counsel for a party has authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel has made a monetary contribution to the preparation or submission of this brief.

[2] *See also* 15 U.S.C. § 78i(f) (three-year repose period applicable to price manipulation claims); 15 U.S.C. § 78p(b) (two-year repose period applicable to short-swing profit

the Court, would undermine principles that support the effective and efficient functioning of the securities markets, by permitting parties to bring a host of claims well after the congressionally mandated period of repose and by encouraging sophisticated institutional investors to engage in strategic opt-out behavior to the detriment of the securities industry, smaller shareholders, insurers, and the judicial system as a whole.

## SUMMARY OF ARGUMENT

SIFMA supports Respondents' arguments that the tolling doctrine of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), does not apply to extend the absolute statute of repose established by Section 13 of the Securities Act under a straightforward application of the statutory text and the Court's prior decisions in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), and *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014). SIFMA submits this brief to elaborate on the practical reasons – based on its members' extensive experience with securities litigation – why the strict statute of repose enacted by Congress makes sense and should be honored, and why the policy concerns raised by Petitioner and its amici are unfounded, in addition to being irrelevant under this Court's recent decision holding that policy considerations cannot trump an absolute repose period. *See CTS*, 134 S. Ct. at 2183.

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claims); 15 U.S.C. § 78r(c) (three-year repose period applicable to claims under Section 18 of Exchange Act).

**I.** A rule that would "toll" Section 13's statute of repose for any would-be individual plaintiff until after a decision on class certification would defeat the essential legislative purpose of that statute, and would frustrate the certainty and efficiency of the federal securities laws. In most securities cases, a class certification motion is not made – and will not be decided – until after extended motion practice and discovery. These proceedings frequently are lengthy: motions to dismiss are heavily litigated, class discovery usually overlaps with merits discovery, the district court is required to make findings concerning a number of factors, and appellate review may be sought. Thus, rather than the repose Congress conferred, under Petitioner's argument companies, and their officers and directors, would be subjected to lingering liability for many years. The extended uncertainty caused by allowing the investors who typically sue individually – sophisticated entities with substantial resources – to sit on the sidelines until a class certification decision also threatens both 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 defendants and the class.

**II.** Declining to toll the statute of repose would not prejudice absent class members or overwhelm the courts, as Petitioner and its amici speculate. Although the costs imposed on the parties and on the judicial system by even one late-filed action commenced after a class certification decision can be significant, there is no reason to believe that a rule requiring individual actions to be filed within

the repose period would impose any burdens either on the courts or on putative plaintiffs. Empirical evidence shows that investors as a whole have not flooded – and will not flood – courts with individual filings when faced with the risk that their claims will not be pursued in a class action. And opt-out actions filed by non-institutional investors are nearly non-existent. Further, the few investors interested in preserving their ability to pursue individual claims can do so inexpensively. Indeed, requiring putative opt-out plaintiffs to surface early and file either motions to intervene or (much more likely) a "me-too" complaint can only reduce costs and enhance efficiency for all involved by permitting courts to coordinate proceedings, eliminating wasteful and duplicative discovery and speeding the resolution of disputes.

## ARGUMENT

### I. APPLICATION OF SECTION 13'S STATUTE OF REPOSE IS CRITICAL TO SAFEGUARDING THE CERTAINTY AND EFFICIENCY THE SECURITIES LAWS WERE DESIGNED TO ACHIEVE

#### A. The Securities Laws Were Designed to Achieve Certainty and Efficiency

The securities laws are "an area that demands certainty and predictability," *Pinter v. Dahl*, 486 U.S. 622, 652 (1988), because unclear rules are "not a 'satisfactory basis for a rule of liability imposed on the conduct of business transactions.'" *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 755 (1975)). The Court has routinely rejected

arguments that would decrease efficiency in securities litigation, stating that it "would reject any theory" that raised the prospect of "protracted" litigation under the securities laws, *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1106 (1991), and declining to adopt rules that would create "uncertainty and excessive litigation" in the securities area. *Central Bank*, 511 U.S. at 189.

Rules that decrease the certainty and efficiency of the securities laws "can have ripple effects" across the financial markets including by "increas[ing] costs incurred by professionals," which "may be passed on to their client companies, and in turn incurred by the company's investors, the intended beneficiaries of the statute." *Id.* Principles of certainty and efficiency are thus fundamental to the federal securities laws and to the proper functioning of the financial markets.

### B. Application of Section 13's Statute of Repose Promotes Those Goals and Tolling Would Impede Them

Applying Section 13's statute of repose as written serves the purposes of certainty and efficiency underlying the federal securities laws: any lawsuit based on an offering must be brought within a fixed period of time so that claims can be resolved and putative defendants can enjoy repose from the fear of lingering liabilities. *See CTS*, 134 S. Ct. at 2183 ("Like a discharge in bankruptcy, a statute of repose can be said to provide a fresh start or freedom from liability."). The rule applies regardless whether the putative plaintiff did not know of the misstatement, is incapable of suing

(e.g., too young), or files a defective claim. *Id.* at 2187. There is no exception from that absolute bar because a class action was pending.

1. Petitioner and its amici are mistaken when they argue that the filing of a class action satisfies the purposes of the statute of repose by providing defendants with notice of "the substantive claims being brought against them [and] the number and generic identities of the potential plaintiffs who may participate in the judgment." Pet'r at 30-31; AARP at 14; Am. Ass'n for Justice at 5; Professors at 16; Huff at 29; Pension Funds at 29.

There is a critical difference between notice and the purpose of Section 13's statute of repose. The statute of repose sets forth the time period within which a party must assert a claim and thus set in motion the judicial processes through which lingering liabilities are resolved. Without a statute of repose, a defendant would be at risk of claims being filed into perpetuity. The mere notice of that risk does not put it to rest – whether the notice comes from a class action complaint, or from an individual action based upon the same events and asserting the same claims.

2. Certain amici argue that defendants can predict their potential opt-out exposure by looking at the class definition and reviewing public disclosures concerning large investors. *See* Professors at 16. That misses the point in two ways.

a. First, the statute of repose is designed not just to provide defendants notice of a potential claim that could be made years in the future, but

also to require the filing of actual claims so that potential liabilities can be definitively known and timely resolved. Notice of putative class members alone does not provide a mechanism by which a liability can be extinguished or remotely satisfy the purpose of the statute of repose.

b. Second, even on its own terms, amici's suggestion that the class definition and SEC filings give defendants sufficient notice of actual claims is mistaken. Mere awareness of large investors within a class definition does not provide notice of which of them will actually pursue a claim. Many will not. To defend against a Section 11 claim, a defendant is entitled to assert various plaintiff-specific arguments, such as that the plaintiff "knew of" the alleged misstatement, 15 U.S.C. § 77k(a), or that the misstatement caused no loss to that plaintiff, 15 U.S.C. § 77k(e). Investors subject to these defenses, accordingly, may not choose to pursue such claims. They may also not do so for other reasons, such as that they are opposed to litigation pursuant to the securities laws or class proceedings, or that they are current shareholders. *E.g.*, 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).[3] Because

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[3] *See also* 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 30 percent of institutional investors file claims in class action settlements); 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)

defendants cannot reliably know which large investors will actually pursue individual claims, Petitioner's rule would put defendants in the position of having to collect evidence and recollections with respect to every potential such plaintiff lest defendants guess wrong and miss the institutional investor who chooses to sue on its own and such evidence is lost through the extensive passage of time that a virtually limitless statute of repose would create.

Empirical evidence demonstrates that SEC filings do not provide notice of who among the institutional investors may pursue an individual action or, indeed, who may participate in a class action resolution. Item 403(a) of Regulation S-K and Section 13(f) of the Exchange Act simply require disclosure of the identify of large shareholders. *See* 17 C.F.R. § 229.403(a); 15 U.S.C. § 78m(f)(1). Empirically, however, mere magnitude of ownership does not determine likelihood of pursuing a claim individually. To take just a few examples, in four large securities lawsuits – those filed by investors in WorldCom Inc., AOL Time Warner, Qwest Communications International Inc., and Countrywide Financial Corporation [4] – four

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("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) ("institutional investors are likely to continue to prefer passivity [in securities litigation] for extrinsic and reputational reasons").

[4] *See* Amir Rozen, et al., Cornerstone Research, *Opt-Out Cases in Securities Class Action Settlements*, at 4 (Nov. 19,

investors were identified in the companies' annual filings immediately prior to the class action as owning more than five percent of the defendant company's stock, but none of the identified shareholders actually opted out to pursue an individual action. In contrast, hundreds of plaintiffs did pursue individual actions, but none were the subject of Item 403(a) disclosures. Similarly, S&P Capital IQ, a website that identifies investors with substantial positions in public companies (from a variety of sources, including disclosures under Section 13(f)), was examined in the quarter immediately prior to the filing of class actions against Countrywide Financial Corporation and Lehman Brothers Holdings Inc. Of nearly 1,000 investors identified in these two companies, only 10 actually filed an opt-out action. On the other hand, dozens of investors who filed opt-out cases from these two class actions were not identified as large shareholders by this search. Under Petitioner's position, even if there was no merit to a putative class claim, each of those investors would have been able to delay filing an individual action by virtue of the mere filing of a class action lawsuit, depriving defendants of certainty and imposing costs on the court system and parties alike.

3. In addition, as a practical matter, tolling the statute of repose would leave officers, directors, others who participate in offerings, and their insurers at risk of new lawsuits filed years after their involvement ended, undermining the repose objective of Section 13. *See* Resp'ts. Br. at 4-6, 22.

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2013) (the "Opt-Out Study") (identifying these class actions as involving "Major Opt-Out Cases").

The evidence cited by Petitioner's amici demonstrates that class certification decisions often come well after the repose period has expired. *See* Professors at 5, 8. But Petitioner's amici draw the wrong conclusion: this evidence demonstrates why tolling is antithetical to the certainty and finality that a repose period is intended to provide, and how Petitioner's rule would prejudice defendants, who cannot obtain necessary plaintiff-specific discovery until years after the events in question (if ever).

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." Fed R. Civ. P. 23, Advisory Committee's Note. 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." *Id.* In the typical securities class action, those circumstances include providing notice of the pendency of the action and of the right of any member of the class to move to serve as lead plaintiff, 15 U.S.C. § 77z-1(a)(3)(A), appointing lead plaintiffs and lead counsel, 15 U.S.C. § 77z-1(a)(3)(B), and, in all but the most unusual cases, the filing of a consolidated complaint by the party appointed lead plaintiff. Moreover, because of the statutory discovery stay, 15 U.S.C. § 77z-1(b)(1), a class certification motion is typically preceded by briefing 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 before a class certification motion is decided. "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.* 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 claims, it may also include questions regarding market efficiency. And, the district court may hold a hearing before making a class certification decision. *E.g.*, *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006).

Thus, class certification motions in securities actions are often resolved years after the repose period, leaving defendants uncertain – under Petitioner's theory – of who will be suing them and for what for years after the statute of repose should have expired. Defendants' ability to mount plaintiff-specific defenses is also jeopardized because they cannot take necessary discovery until those plaintiffs in fact become parties to lawsuits. Indeed, those sideline plaintiffs may not even be subject to an obligation to preserve relevant documents. *E.g.*, Jamie S. Gorelick, et al., Destruction of Evidence § 13.3 ("[a]ll parties to litigation have some duty to preserve" evidence, but "[w]hat triggers that duty" before litigation is filed "varies from jurisdiction to jurisdiction and among factual situations").

4. These costs and concerns are real. Individual actions can be the main event in securities litigation. As recent experience demonstrates, opt-outs can impose significant 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 individual plaintiffs in recent securities litigations).[5] Indeed, in at least one recent litigation, opt-out plaintiffs 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.").

The proceedings in this case well illustrate this point. Despite class certification, more than 20 individual actions have been filed by large investors in the relevant offerings – including actions asserting significant claims filed by several government conservators (such as the FHFA, FDIC, and NCUA), various Federal Home Loan Banks, a number of large insurance companies, and several international financial institutions. Yet, under Petitioner's proposed rule, each of these would-be plaintiffs – all of whom have substantial claims on their own – could wait many years to file suit, regardless of the merit of any claim for class certification.

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[5] *See also* Julie Triedman, *Heavy-Hitters Hit Pfizer with New Securities Suit, Highlighting Opt-Out Trend*, Am. Lawyer, at 2 (Nov. 15, 2012) (quoting lawyer, who "has been leading opt-out litigation at [a prominent plaintiff's firm] for years," as stating, "'[o]verwhelmingly, we have resolved our opt-outs for multiples' of what clients would take home as class members").

### C. Application of the Statute of Repose to Preclude Tolling Has Other Salutary Results

The application of Section 13 to require securities lawsuits to be brought within three years of an offering not only satisfies the purposes of certainty and efficiency underlying the federal securities laws, but also leads to other salutary results consistent with the statute.

1. It permits district courts to reduce costs and improve efficiency by coordinating discovery across class actions and related individual actions, and by preventing later opt-outs from imposing duplicative discovery costs.

a. Petitioner's system would permit institutional investors opportunistically to delay filing individual actions. They can let class counsel do the hard work of investigating and filing a comprehensive 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 incur the expense of framing discovery requests and taking depositions – benefitting from that work if it is helpful with little consequence if it is not. *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, 104 (1997). For example, the admission of a party defendant is admissible in subsequent opt-out litigation (even if made only to class counsel) but, of course, exculpatory deposition testimony is not. *See* Fed. R. Evid. 801(d)(2). Under the Federal Rules, discovery taken in a prior action

generally (and absent a hearsay exception) is not admissible in a subsequent action involving a different party. *See* Mitchell A. Lowenthal & Howard M. Erichson, *Modern Mass Tort Litigation, Prior-Action Depositions and Practice-Sensitive Procedure*, 63 Fordham L. Rev. 989, 992 (1995). Even assuming the defendant can locate, potentially years after the fact, a favorable witness who has previously testified, the defendant and the witness will be put to the cost of re-taking a deposition. The individual plaintiff who, given the benefit of *American Pipe*, elects to delay filing until after class discovery is completed would enjoy all of the benefits of class discovery with none of the costs and risks. The sideline plaintiff will reap the reward of any inculpatory statements while preserving the right to exclude any exculpatory evidence adduced in the class action, and to force on defendants, the witnesses, third parties and the courts the cost of re-taking that discovery (if it can be taken at all).

b. Extending *American Pipe* would also give institutional investors an added opportunity to avoid or delay plaintiff-specific discovery – depriving defendants of the ability to receive timely and fresh recollections from the persons who frequently have the most significant claims. Absent members of a putative class are not parties to a litigation. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011). A member of an uncertified class is also 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.[6]

As important, discovery from absent class members is "generally disfavored" and "ordinarily not permitted." *See* William B. Rubenstein, *Newberg on Class Action* § 9:11 n.10 (5th Ed.). Furthermore, even if a defendant could take discovery of such an erstwhile individual 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. Most large investors are not known to the defendant and, as demonstrated above, even if they were so large as to require an SEC filing, the defendant would still have no way of knowing which of them would choose to sue and which would not.

2. Application of the statute of repose without an exception for tolling also facilitates the prompt and fair settlement of securities litigation by allowing defendants to know with certainty the size of their potential exposure, so that they can resolve that exposure on a global basis without unfairly reducing the class recovery to account for the possibility of additional opt-outs in the future.

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[6] *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 . . . . 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.").

a. A principal objective of the Private Securities Litigation Reform Act of 1995 (the "PSLRA") is to "increase the likelihood that institutional investors – parties more likely to balance the interests of the class with the long-term interests of the company – would serve as lead plaintiffs," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 (2007), so that they can exercise control over securities class actions, including over the settlement of such actions. That objective is furthered by Section 13's statute of repose. At a relatively early stage within the litigation, all parties will surface and 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. 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 and resolve its liability by getting all the relevant parties in the room and negotiating the resolution of the entire matter.

b. In contrast, Petitioner's regime would permit an unpredictable number of institutional investors to delay filing complaints or intervention motions until potentially well after the repose period. Parties will necessarily be slower to settle; defendants would not know for certain until after class certification (and as late as three years 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 opt-out claims, 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 identify themselves – would set merely a floor but not a ceiling for resolution of subsequent cases: 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 causes defendants to reduce the size of class settlements in order to account for the possibility of additional settlements with unknown future opt-outs. *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).[7]

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[7] *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 provide a "significant premium" to receive "global peace" 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

c. Petitioner and its amici are thus wrong when they say that application of Section 13 will impede settlement. *See* Public Citizen at 12-14. Just the opposite. The fairness of settlements is insured by the objection mechanism, not by opt-outs. *See* Fed. R. Civ. P. 23(e)(5). And by creating uncertainty, a rule that would permit an institutional plaintiff to file a new complaint years after the offering would only impede settlement.[8]

3. Applying the statute of repose as written thus minimizes prejudicial opportunism by institutional investors. *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").[9]

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desirable settlements [to the class] because they face the frightening possibility of an inordinate and unpredictable number of separate suits.").

[8] Moreover, there is no reliable mechanism to avoid this now. Settling parties in securities class actions routinely use "blow-up" clauses that permit renegotiation or termination of the class settlement if there are too many opt-outs. *See* Jordan Milev, et al., NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2011 Year-End Review*, at 15-16 (Dec. 14, 2011). These are common, yet crude, and rarely triggered provisions. And where the bust up is not triggered (no matter how close it comes to being triggered), defendants must pay the full settlement amount.

[9] *See also* David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and "Indivisible" Remedies*, 79 Geo. Wash. L. Rev. 542, 572 (2011) (opt-outs "extract rents from members remaining in the class"); Myriam Gilles & Gary B.

## II. THE UNFOUNDED PARADE OF HORRIBLES

Seeking to avoid *Lampf* and *CTS*, Petitioner and its amici conjure a parade of horribles they contend will occur if the Court applies the repose period as written. Each of their arguments is unfounded and irrelevant under *CTS*, which underscores that a clear statute of repose may not be trumped by policy concerns. *See* 134 S. Ct. at 2183.

### A. Absent Class Members Will Not Be Deprived of their Opt-Out Rights

The opt-out right is anything but illusory under the Second Circuit's holding. *But see* AARP at 11-12; Huff at 3-4; Public Citizen at 12-14; Pension Funds at 18. Due process protects the right not to be bound by a class action settlement without notice. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). It does not confer a right to pursue untimely claims or trump statutory

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Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 133 (2006) ("class members . . . effectively subsidize opt-outs, who are able to free-ride on the litigation work of class counsel"); Perino, 46 Emory L.J. at 105 ("small claimants may subsidize large claimants' individual [opt-out] suits and similarly situated plaintiffs may receive substantially different recoveries" because opt-outs "benefit from . . . 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 them to "be subsidized by the public, particularly . . . the rest of the victim class").

language requiring claims to be brought within the congressionally defined time period.

1. Under the Second Circuit's holding, the opt-out right has real meaning. It protects the right of a member of a putative class who has preserved its claim by filing within the repose period to pursue its own individual claim regardless of class certification and a class resolution. Absent an opt-out, such an investor will be bound by the class resolution even if she has filed an individual action. *See McLaughlin on Class Actions* § 2:41 (10th Ed.) ("It is well established that the pendency of an individual action does not excuse a class member from having to opt out of a class action in order to preserve his or her claim.").[10]

2. And even for an investor who has not preserved its ability to pursue a separate Securities Act claim by timely commencing suit within the repose period, the opt-out right has real meaning. Absent class members are bound, in the case of a negotiated resolution, by the class representative's election to release all claims that arise out of the same nucleus of facts as the Securities Act claim as part of a settlement and, in the case of a litigated resolution, by the doctrines of issue and claim preclusion as they might affect other claims. *E.g.*, *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381-86 (1996) (settlement in state court class action "asserting purely state law causes of action"

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[10] *See also Penson v. Terminal Transp. Co.*, 634 F.2d 989, 996 (5th Cir. 1981); *Nat'l Student Mktg. Litig. v. Barnes Plaintiffs*, 530 F.2d 1012, 1015-16 (D.C. Cir. 1976); *Supermarkets Gen. Corp. Ration v. Grinnell Corp.*, 490 F.2d 1183, 1186 (2d Cir. 1974).

could release unasserted federal securities fraud claims). Thus, an investor who failed to timely file a separate complaint or motion to intervene within the repose period can still opt-out and pursue other claims with longer (or no) repose periods, including claims under the Exchange Act – which has a five-year statute of repose, *see* 28 U.S.C. § 1658(b)(2) – as well as various state securities laws or the common law.

Indeed, many individual plaintiffs already pursue such claims, as evidenced by the wave of individual actions filed by investors in mortgage-backed securities, which routinely assert claims under state law. *E.g.*, *NCUA Bd. v. Nomura Home Equity Loan, Inc.*, 727 F.3d 1246 (10th Cir. 2013) (asserting individual claims under the Kansas Uniform Securities Act and California Corporate Securities Law), *vacated*, No. 13-576, 2014 WL 2675836 (Sup. Ct. June 16, 2014).[11]

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[11] Amici argue that application of *American Pipe* to extend the time period for filing under the statute of repose is necessary to protect "the opt-out rights of class members who . . . rely on the timely filing by the class representative to satisfy the statute." Public Citizen at 12. But that circular argument assumes the answer to the question presented and does not support it. A class member who does not take the elementary steps of filing a motion to intervene or a "me-too" complaint within the repose period is not entitled to rely on the filing of a putative class action by another person to preserve its rights. Accordingly, applying *American Pipe* to the statute of repose is not required to protect a reliance interest that itself finds no support in the law.

### B. Federal Courts Will Not Be Overwhelmed by Placeholder Filings

1. Empirical evidence also contradicts the argument of Petitioner and its amici that courts will be overwhelmed by a deluge of placeholder filings unless the statute of repose is tolled. *See* Pet'r at 32; AARP at 11; Am. Ass'n for Justice at 2; Professors at 2-3; Huff at 20; Pension Funds at 4. The evidence shows that the Second Circuit's rule would not lead to a large number of filings by small investors but rather would prevent opportunistic behavior by the small number of large sophisticated investors.

a. In 2013, a prominent research firm, Cornerstone Research, released a comprehensive study of opt-out cases from securities class action settlements. It found that opt-out cases were filed in only 3% of the settlements reached between 1996 and 2011. *See* Opt-Out Study at 2. Thus, there is no basis for Petitioner and its amici's assumption that the Second Circuit's rule will lead to a plethora of small individual claims being filed.

Indeed, the Opt-Out Study reported that "[t]he most frequently observed opt-out plaintiffs are pension funds, followed by other types of asset management companies." *Id.* at 1. These well-financed investors need this Court's protection the least.

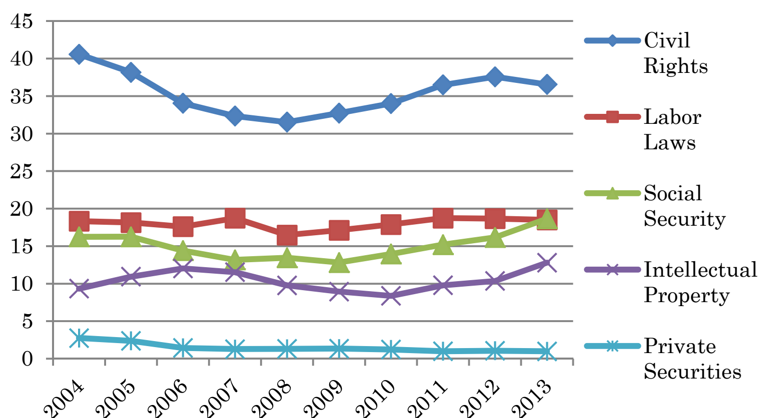
b. Contrary to the assumption by Petitioner and its amici, the empirical evidence also shows that the denial of class certification is not followed by a flood of individual actions by small investors – precisely the opposite of what one would expect if

Petitioner's argument were true. There were five securities class actions filed between 2006 and 2009 by investors in publicly offered corporate securities where class certification was denied on the merits: those against Southern Farm Bureau Life Insurance Company, Abercrombie & Kent, Inc., First American Corporation, ING Groep N.V., and Genworth Holdings, Inc. A search of the federal dockets for securities actions filed against the defendants after class certification was denied demonstrates that no individual actions were filed against any of these companies by investors that were part of the putative class. If individual investors do not overwhelm the courts to pursue claims after class certification is denied, there is no reason to suspect that they will make placeholder filings in order to protect rights that, empirically, many of them have no interest in pursuing.

2. Further, while securities litigation unquestionably imposes a significant burden on defendants, empirical evidence demonstrates that the filing of motions to intervene or placeholder complaints does not create any incremental burden on the judicial system. If anything, it decreases the burden.

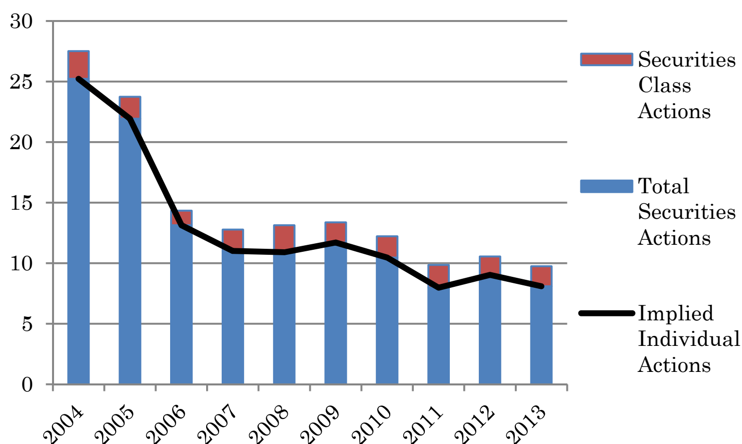
a. As illustrated in Figure 1, statistics from the Administrative Office of the United States Courts show that private securities actions represent a significantly smaller proportion of the federal docket than many other types of cases. *See* Federal Judicial Caseload Statistics, available at http://www.uscourts.gov/Statistics.

**Figure 1. Civil Cases Commenced by Nature of Suit (in thousands), 2004-2013**




The number of private actions asserting securities claims has also decreased substantially over the past decade – from 2,751 in 2004 to 975 in 2013. *Id.* Notably, the number of securities class actions has remained largely constant over the same time. *See* Cornerstone Research, *Securities Class Action Filings: 2013 Year in Review,* at 3 (Jan. 28, 2014). The implication of this data, as illustrated in Figure 2, is that the decline in total securities cases has been driven by a large drop in individual actions over the last decade – further undercutting the contention that investors will flood federal courts with such actions.

**Figure 2. Implied Individual Securities Actions Commenced (in hundreds), 2004-2013**

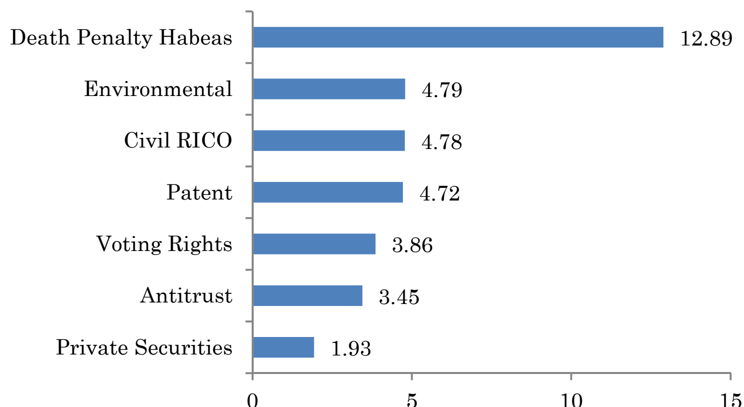



Sources: Administrative Office of the United States Courts and Cornerstone Research

b. In general, each private securities litigation filed also imposes a relatively light burden on the courts. In 2005, the Federal Judicial Center released a case-weighting study, which analyzed the events that district court judges must complete to process a case and the amount of time required to accomplish these events across many categories of cases. *See* Federal Judicial Center, *2003-2004 District Court Case-Weighting Study*, at 1 (2005), available at https://bulk.resource.org/courts.gov/fjc/CaseWts0.pdf. As shown in Figure 3, the study concluded that the average private securities litigation imposes a much lighter burden on district courts than many other types of cases – including roughly half the burden imposed by a case asserting antitrust, civil RICO, environmental, patent, or voting rights claims; and less than one-

sixth of the burden imposed by a death penalty habeas case. *Id.* at 5.

**Figure 3. District Court Case Weights by Nature of Suit, as Calculated by Federal Judicial Center**




3. Most important, to the extent that applying the statute of repose as written would lead putative plaintiffs who want to preserve the ability to file a claim to make a protective filing, the federal courts and parties in securities litigation also can (and do) apply well-developed case management techniques to reduce any associated burden.

a. As an initial matter, Congress designed the Multidistrict Litigation Act to ensure that class actions and individual actions be coordinated and consolidated together precisely to promote the "just and efficient conduct of such actions." 28 U.S.C. § 1407(a); *see also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353 (1983) (declining to restrict *American Pipe* to intervenors because, *inter alia*, "[o]ther avenues exist by which the burdens of multiple lawsuits may be avoided" including consolidation, change of venue, and multidistrict

litigation). The JPML's procedures "are designed to promote fairness [and] efficiency." John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 Tul. L. Rev. 2225, 2235 (2008). The deadlines for motions are "relatively short," oral arguments are quick, and the JPML's decisions are "brief and to the point." *Id.* at 2235. Centralization orders are routinely granted, as a result of "the clarity of the standards that the Panel has applied faithfully and consistently over the years." *Id.* at 2229.

After a multidistrict litigation has been established, transferring additional cases for coordination of pretrial proceedings is virtually cost-free: either a court clerk or a party can bring such a "tag-along" action to the JPML's attention and the JPML then issues a Conditional Transfer Order, which (absent objection) automatically transfers the action. *Id.* at 2233 ("This work happens quite efficiently and quietly every day."). In about 90% of cases, such Conditional Transfer Orders are unopposed. *Id.*

These rules demonstrate the recognition by Congress and the practical reality that judicial efficiency and justice are promoted, not impeded, when actions alleging "one or more common questions of fact," 28 U.S.C. § 1407(a), are all timely filed and consolidated or coordinated before a single district judge who can weigh the competing considerations all at once and not by seriatim actions before different judges filed at different times.

b. That justice and efficiency are promoted by the timely filing of many actions is confirmed by

experience. Many mechanisms, including those suggested in the Manual on Complex Litigation, exist to reduce the burden of such actions for both the court and the parties. These include:

- Staying individual actions during the pendency of motion practice in related class actions, *e.g.*, Pretrial Order No. 5, *In re Lehman Bros. Sec. & ERISA Litig.*, No. 09 MD 2017 (LAK) (S.D.N.Y. Mar. 5, 2009);

- Agreeing not to re-brief arguments resolved in the related class action and instead treating those arguments as if raised in the individual actions, so that they are preserved for appeal, *e.g.*, Stipulation & Order, *Wolf Opportunity Fund Ltd. v. McKinnell*, No. 12 Civ. 8379 (LTS) (S.D.N.Y. Jan. 16, 2013);

- Appointing liaison counsel to coordinate discovery across individual actions and related class actions, including by serving shared discovery requests and cross-noticing depositions, *e.g.*, Pretrial Order No. 61, *In re Lehman Bros. Sec. & ERISA Litig.*, No. 09 MD 2017 (LAK) (S.D.N.Y. Jan. 23, 2013);

- Postponing initial disclosures, *e.g.*, *Manual for Complex Litigation* (4th Ed.) § 40.21;

- Staying counterclaims, *e.g.*, *Manual for Complex Litigation* (4th Ed.) § 40.53;[12]

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[12] Because initial disclosures and counterclaims can be stayed in case management orders, Petitioner's amici are incorrect when they argue that their costs and risks will impose a significant burden on individuals that file

- Creating shared document repositories, *e.g.*, Pretrial Order No. 56, *In re Lehman Bros. Sec. & ERISA Litig.*, No. 09 MD 2017 (LAK) (S.D.N.Y. Jan. 17, 2013);

- Staging discovery, *e.g.*, *Manual for Complex Litigation* (4th Ed.) § 31.6;

- Permitting prior document productions and deposition testimony to be admissible in related actions, *e.g.*, Stipulation and Order Regarding Use of Prior Deposition Testimony, *In re Merck & Co., Inc. Sec., Deriv. & ERISA Litig.*, No. 2:05-CV-01151-SRC-TJB (D.N.J. Mar. 12, 2010); and

- Establishing a procedure for individual plaintiffs to pursue additional discovery that the lead plaintiffs in the class action choose not to pursue, *e.g.*, *Manual for Complex Litigation* (4th Ed.) § 40.22.[13]

These mechanisms can be used if the relevant parties surface within the repose period. They are of no value under a rule that would permit putative plaintiffs to defer filing after discovery in the class proceeding is well underway.

c. Nor will motions to intervene impose a heavy burden, as certain amici contend. *See* Pension

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placeholder complaints or motions to intervene. *See* Former Judges at 17-18.

[13] Case management orders and judicial oversight can also be used to prevent parties in the class action from "slow-walking" the proceedings in order to run out the statute of repose, as certain amici fear. *See* Professors at 12-13.

Funds at 16; Former Judges at 15. As a threshold matter, individual investors can avoid any burdens posed simply by filing a separate complaint rather than a motion to intervene. These pleadings generally do no more than rely on the facts about the defendants set forth in the pleading filed by the court-appointed lead plaintiff while adding facts about the individual investor that the investor can easily provide – including its identity, the type and amount of securities it purchased and when, and (in certain cases) whether and how it relied on the alleged misstatements. *E.g.*, Julie Triedman, *Heavy-Hitters Hit Pfizer with New Securities Suit, Highlighting Opt-Out Trend*, Am. Lawyer (Nov. 15, 2012), at 1 (noting that opt-out complaint filed by institutional investors "rehashes most of the claims pending in the class action and draws heavily on discovery in that case"). There is no shortage of law firms who specialize in filing such complaints. Thus, there is no reason to expect a significant number of motions to intervene.

Nonetheless, even assuming there may be an increase in the number of such motions, there is also no evidence that a protective motion to intervene will require the expenditure of significant judicial resources. Where an absent class member seeks to intervene into a class action purporting to assert her claims, most intervention factors will be easily satisfied, including "an interest relating to the . . . transaction that is the subject of the action" and that could be impaired by "disposing of the action," if intervention is as of right, or "a claim . . . that shares with the main action a common question of law or fact," if intervention is permissive. Fed. R. Civ. P. 24(a)(2) & (b). The only

remaining issues would be whether the motion was "timely" or would "unduly delay or prejudice the adjudication of the original parties' rights." *Id.* at (b)(3). But such motions should never require significant expenditure of judicial resources, because: if the consequence of denying a motion to intervene is inviting a separate lawsuit, the court would be unlikely to exercise its discretion to deny intervention on these grounds.

Indeed, empirical evidence shows that motions to intervene rarely impose a substantial burden on the courts. For example, of the 5,476 motions that were pending before district and magistrate judges for more than six months as of September 30, 2013, only 12 (or 0.2%) were motions to intervene and none were in securities cases. *See* Civil Justice Reform Act of 1990, *Table 8 – Report of Motions Pending Over Six Months For Period Ending September 30, 2013*, available at http://www.uscourts.gov/Statistics. Therefore, even ordinary motions to intervene – that do not present the simplicity of motions to intervene into class actions filed by absent class members – do not take significant time for district courts to resolve.

d. Nor would declining to toll the statute of repose result in courts being burdened by more pro se filings, as certain amici contend. *See* Former Judges at 16-17.

As several of Petitioner's amici recognize, the issue before the Court will only impact investors who have both the financial interest and ability to file their own actions. The vast majority of smaller investors do not have enough at stake to justify

individual action. *See 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").[14] For such investors – including pro se litigants – whether a person needs to file a protective action within the repose period or only after a class certification decision is a matter of indifference; they will never file such an action.

Indeed, empirical evidence demonstrates that pro se litigation is a rarity in securities litigation: the Opt-Out Study does not identify a single pro se opt-out action from a securities class action settlement. Nor does the article cited by Petitioner's amici – even though that article studied the pro se docket in the Southern District of New York, which is one of the courts with the largest amount of securities litigation. *See* Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 Fordham Urb. L.J. 305, 383 (2002).

Moreover, even if there were an increase in pro se filings as a result of applying the statute of repose as written, federal courts have a number of mechanisms in place to effectively work with pro se

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[14] *See also* Huff at 3 (clients only opt-out if they "possess claims that in the aggregate are sufficient to justify prosecuting individual litigation"); Pension Funds at 7 (tolling "is particularly pressing for pension funds and other institutional investors that often have large stakes in the action").

parties. *See* Federal Judicial Center, *Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Court and Chief Judges*, at 1-4 (2011), available at http://www.fjc.gov/public/pdf.nsf/lookup/proseusdc.pdf/$file/proseusdc.pdf.

Further, any problems presented by pro se litigants would be more difficult to deal with if such litigants could delay filing their own action until after a class certification decision, than if they were required to file at a time when their litigation could be coordinated with other related actions.

4. The risks of decertification or delays in the lead plaintiff appointment process do not require (or justify) judicial modification of Section 13's clear language. *But see* AARP at 23-24; Am. Ass'n for Justice at 7-9; Pension Funds at 11-12; Former Judges at 9.

Given the relevant standards, decertification is rare in securities class actions. *See In re Vivendi Universal S.A. Sec. Litig.*, No. 02 Civ. 5571 (RJH) (HBP), 2009 WL 855799, at *3 (S.D.N.Y. Mar. 31, 2009) ("decertifying or redefining the scope of a class should only be done where defendants have met their 'heavy burden' of proving the necessity of taking such a 'drastic' step"). This is because issues of commonality and predominance, once decided, will rarely be the subject of reconsideration, and the securities laws already require extensive testing and competition before a party is appointed the lead plaintiff. *See* 15 U.S.C. § 77z-1(a)(3)(B). And even if in the rare case a class is decertified, that would not cure the harm to the defendant of a late claim.

If – as amici suggest – a court may take more than three years from the offering to resolve a motion for class certification, any protective motion to intervene or individual complaint can and should be filed before or while class certification is pending. A party who foregoes taking such action and relies on the class mechanism alone does so at its own risk.

### C. Protective Filings Will Be Inexpensive for the Few Investors That May Pursue Individual Actions

There is no reason to suspect that applying the statute of repose in Section 13 as written would increase the burden or expense of absent class members who want to preserve their claim. *See* Pension Funds at 12-13; Former Judges 17-18.

1. The investors who would want to preserve the ability to pursue an individual action necessarily would know the date they purchased their securities and can readily learn when the securities were issued. Therefore, calculating when the statute of repose will expire (three years later) will not prove difficult or expensive. With that information, there would be no need to monitor the related class actions to preserve the right to pursue an individual claim.

2. Moreover, even if there were a need, all investors are informed of the filing of class actions by the statutory notices required by the PSLRA. *See* 15 U.S.C. § 77z-1(a)(3)(A)(i) (requiring class plaintiffs to publish notice of the action "in a widely circulated national business-oriented publication or wire service"). Companies also disclose securities

class actions in their annual and quarterly filings, which are publicly available to investors for free on the Securities and Exchange Commission's website. *See* Item 103 of Regulation S-K, 17 C.F.R. § 229.103 (requiring companies to "[d]escribe briefly any material pending legal proceedings," including "the name of the court . . . in which the proceedings are pending . . . [and] a description of the factual basis alleged to underlie the proceeding).

Further, although not mentioned by amici, almost all securities class actions are filed in federal court, where dockets are electronically accessible for minimal (or no) cost. *See* PACER Fee Information, available at http://www.pacer.gov/documents/pacer_policy.pdf (stating there is no registration fee for the docket system, access to dockets and filings costs $0.10 per page, but "no account is billed for usage of less than $15 in a quarter" and "[c]ertain accounts may be designated . . . as exempt from fees"). Other free websites also exist that closely monitor securities class action dockets and provide free access to significant filings. *E.g.*, Stanford Law School Securities Class Action Clearinghouse, available at http://securities.stanford.edu (providing case summaries, dockets, and copies of significant pleadings from all securities class actions filed since 1995, updated on a daily basis).

Many plaintiff-side law firms likewise offer free portfolio monitoring services to institutional investors, which can be broadened to include monitoring of the statute of repose. *E.g.*, *Iron Workers Local No. 25 Pension Fund v. Credit-Based Asset Servicing & Securitization, LLC*, 616

F. Supp. 2d 461, 464-66 (S.D.N.Y. 2009) (describing "free monitoring" offered by plaintiffs' firms and noting one pension fund "relies on . . . twelve different firms to monitor its investments"); Client Services, Portfolio Monitoring, Grant & Eisenhofer P.A., available at http://www.gelaw.com/client-services/portfolio-monitoring (advertising monitoring service that allows investors to "[l]earn about existing and potential class action litigation in time to participate in a meaningful way as a lead plaintiff or class member," including by pursuing "an individual, opt-out action").[15]

### D. Lead Counsel Will Not Be Burdened By New Notice Requirements

Finally, contrary to the claim of amici, the notice that might be required if the Second Circuit's holding is affirmed does not justify tolling a repose period. *See* Former Judges at 11, 18-19.

District courts and lead counsel will not be burdened by "alert[ing] class members that opting out of the class would end any chance for recovery under the Securities Act because those rights have expired." *Id.* at 19. Many notices already do provide such alerts. *E.g.*, Notice of Pendency of Class Action, *In re Merck & Co., Inc. Sec., Deriv. &*

[15] *See also* Kessler Topaz's Portfolio Monitoring & Claims Administration Program, Kessler Topaz Meltzer & Check, LLP, available at https://www.ktmc.com/investors_portfolio.php (advertising monitoring services provided "at NO cost" to "more than 200 institutional investors," including quarterly reports on class actions provided to clients "regardless of whether they are serving as representative plaintiffs" so that they can "actively monito[r] securities class actions in which they have a financial interest").

*ERISA Litig.*, No. 2:05-CV-01151 (D.N.J. Sept. 4, 2013), at 3 ("Please note, if you decide to exclude yourself from the Class, you may be time-barred from asserting the claims covered by the Action by a statute of repose."), available at http://www.blbglaw.com/cases/00040_data/NOP.[16]

[16] *See also* Notice of Pendency and Proposed Settlement of Class Actions, Fairness Hearing and Motion for an Award of Attorneys' Fees and Litigation Expenses, *Me. State Ret. Sys. v. Countrywide Fin. Corp.*, No. 2:10-CV-00302 MRP (MANx) (C.D. Cal. Aug. 7, 2013), at 13 ("Should you elect to exclude yourself from the Class, you should understand that Defendants will have the right to assert any and all defenses" including that your "claims are untimely under applicable statutes of limitations and statutes of repose."), available at http://www.countrywidembssettlement.com/docs/notice.pdf.

## CONCLUSION

For the foregoing reasons, SIFMA urges the Court to affirm the judgment of the Circuit Court.

Respectfully submitted,

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