No. 16-___

IN THE

Supreme Court of the United States

SRM GLOBAL MASTER FUND LIMITED PARTNERSHIP,

Petitioner,

v.

THE BEAR STEARNS COMPANIES LLC, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the timely filing of a putative class action serves, under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), to satisfy the five-year period of repose in 28 U.S.C. § 1658(b)(2) applicable to fraud claims under the Securities Exchange Act of 1934, with respect to the claims of class members?

PARTIES TO THE PROCEEDING

Petitioner SRM Global Master Fund Limited Partnership was the plaintiff in the district court and the appellant in the Second Circuit.

Respondents The Bear Stearns Companies LLC (f/k/a Bear Stearns Companies Inc.), Alan D. Schwartz, Samuel L. Molinaro, Jr., James Cayne, Warren Spector, and Deloitte & Touche LLP were the defendants in the district court and the appellees in the Second Circuit.

RULE 29.6 DISCLOSURE STATEMENT

SRM Global Master Fund Limited Partnership has no parent, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

SRM Global Master Fund Limited Partnership respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's opinion (Pet. App. 1a-9a), is awaiting publication and currently available at 2016 WL 3769735. The district court's opinion (Pet. App. 10a-54a) is reported at 995 F. Supp. 2d 291.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 2016. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1658(b) of Title 28 of the U.S. Code provides in relevant part:

> [A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—
>
> > (1) 2 years after the discovery of the facts constituting the violation; or
> >
> > (2) 5 years after such violation.

STATEMENT OF THE CASE

This case presents a critical question about the application of this Court's holding in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), to securities fraud claims that are subject to the time limitations in Section 1658(b) of Title 28. *American Pipe* held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id*. at 554. In *American Pipe* itself, this Court applied that rule to allow putative class members to intervene in a case after the district court denied class certification and the limitations period had run. In a subsequent case, this Court held that the same rule applies when a class member seeks to file an individual action after class certification is denied. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983).

In *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), this Court granted certiorari to decide whether *American Pipe* tolling applies to securities fraud claims that are subject to the three-year "statute of repose" in Section 13 of the Securities Act of 1933, 15 U.S.C. § 77m. The Second Circuit had held that it did not, *see Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), and this Court granted review. During the briefing and argument in the case, however, this Court became aware that a tentative settlement was awaiting the district court's approval and dismissed the writ of certiorari as improvidently granted. *See IndyMac*, 135 S. Ct. 42 (2014).

In this case, the Second Circuit extended *IndyMac* to apply to the five-year repose period applicable to Securities Exchange Act claims, 28 U.S.C. § 1658(b)(2), further limiting the scope of *American Pipe*. Accordingly, this case presents the Court with the perfect opportunity to decide the question it left unanswered in *IndyMac*, while at the same time resolving an expanding and troubling circuit conflict over whether *American Pipe* tolling applies to "statutes of repose."

1. Prior to its collapse in March 2008, Bear Stearns ("Bear") operated as a global investment bank and brokerage firm whose stock traded on the New York Stock Exchange. Between December 2007 and March 2008, Bear and its officers made fraudulent statements regarding its financial condition that artificially inflated the price of its publicly traded securities. Petitioner SRM Global Master Fund Limited Partnership ("SRM") lost more than $200 million when the value of its Bear securities[1] declined as Bear's fraud was exposed. Pet. App. 13a-14a.

[1] SRM owned Bear common stock and Bear "total return swaps." These swaps are synthetic security-based instruments designed to mimic all aspects (*i.e.*, the "total return") of a stock as though the stock itself had been purchased. Pet. App. 14a. SRM's Bear swaps were the functional equivalent of shares of Bear common stock. The prices of SRM's Bear swaps were thus inflated to precisely the same extent and by precisely the same

a. On March 17, 2008, days after Bear's collapse, the first of a number of securities fraud class actions was filed against Bear on behalf of "all persons who purchased or otherwise acquired the common stock of [Bear] between December 14, 2006 and March 14, 2008," which included petitioner SRM. Complaint, *Eastside Holdings Inc. v. Bear Stearns Cos. Inc.*, No. 08-cv-2793-RWS, Dkt. No. 1, at 1 (Mar. 17, 2008). That class complaint alleged, *inter alia*, that public statements made by Bear and its officers misrepresented and omitted material facts concerning the value of Bear's underlying mortgage assets, Bear's exposure to subprime mortgage assets, the adequacy of Bear's liquidity, and the extent of Bear's risk management.

The class action asserted claims under Sections 10(b) and Section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j, 78t, as well as SEC Rule 10b–5, 17 C.F.R. § 240.10b–5, which impose liability for any act or omission resulting in fraud or deceit in connection with the purchase or sale of any security. These claims are subject to the time limitations set forth in Section 1658(b), which provides:

> [A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act

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misrepresentations and omissions as Bear common stock. *Id*. at 14a-15a.

> of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—
>
> (1) 2 years after the discovery of the facts constituting the violation; or
>
> (2) 5 years after such violation.

28 U.S.C. § 1658(b).

On August 18, 2008, the U.S. Judicial Panel on Multidistrict Litigation consolidated the above class action with multiple other similar actions for pretrial purposes. A consolidated class action complaint was filed on February 27, 2009, and was expanded to include all persons who "purchased or otherwise acquired [Bear's] publicly traded common stock or other equity securities." Consolidated Class Action Complaint, *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, No. 08-md-1963-RWS, Dkt. No. 61, at ix (S.D.N.Y. Feb. 27, 2009). On June 12, 2012, a settlement class following the definition of the consolidated complaint was certified and there is no dispute that SRM was a member of the certified class. Order Granting Preliminary Approval of Partial Class Action Settlement, *In re Bear Stearns Cos.*, No. 08-md-1963-RWS, Dkt. No. 289, at 2 (S.D.N.Y. June 12, 2012).

The proposed settlement, which released claims "that relate to the purchase of [Bear's] publicly traded common stock or other equity securities," would have released SRM's claims based on its purchase of both Bear common stock and Bear swaps given that swaps are an "equity security." Pet. App. 28a. However, the settlement provided recovery only for class members holding the rights to "common stock," restricted "stock unit[s]," "call option[s]", "put option[s]", and "Preferred shares." Notice of Pendency of Class Action, *In re Bear Stearns*, No. 08-md-1963-RWS, at 2 (S.D.N.Y. June 27, 2012), *available at* http://www.bearstearnssecuritieslitigation.com/Notice.pdf. SRM therefore had a choice: remain in the class and release its swap-based claims for no value whatsoever, or exercise its right to opt out of the settlement class and pursue its own claims. SRM requested to opt out. The District Court approved SRM's request, Final Order & Judgment as to the Bear Stearns Defendants, *In re Bear Stearns*, No. 08-md-1963-RWS, Dkt. No. 249, at 11 (S.D.N.Y. Nov. 29, 2012) (listing valid exclusions), and SRM filed its complaint five months later alleging, *inter alia*, that Bear and its officers fraudulently misrepresented Bear's exposure to subprime mortgages, the adequacy of its capital reserves and liquidity, the value of its assets, and the quality of its risk management. Complaint, *SRM Global Master Fund Ltd. P'ship v. The Bear Stearns Cos. LLC et al.*, No. 13-cv-2692-UA, Dkt. No. 1 (S.D.N.Y. Apr. 24, 2013).

On February 5, 2014, relying on *IndyMac*, the district court dismissed SRM's complaint as untimely, rejecting SRM's argument that the pendency of the timely filed class action, of which SRM was indisputably a member, rendered its complaint timely under *American Pipe*. Pet. App. 26a.

2. The Second Circuit affirmed. *Id*. 1a-9a. The court of appeals began by observing that it had previously held "that *American Pipe* tolling does not

apply to the statute of repose in Section 13 of the Securities Act of 1933," citing its decision in *IndyMac. Id*. 6a.

a. In *IndyMac*, retirement pension systems from Detroit and Wyoming filed separate putative class actions against the same defendant, alleging false and misleading statements in multiple offerings of mortgage-backed securities. When the cases were consolidated, Wyoming was appointed lead plaintiff and Detroit was left to be represented by Wyoming as a member of Wyoming's putative class. Wyoming then amended its complaint to include securities that Detroit had purchased, but Wyoming had not. Approximately six months later, the district court determined that Wyoming did not have standing to assert claims arising from the securities it had not purchased on behalf of the class (including Detroit). When several members of the putative class, including Detroit, moved to intervene to assert those claims, the district court held it was too late – by then, Section 13's three-year limitations period had run on the claims and, the court held, *American Pipe* tolling did not apply. *See* 721 F.3d at 102-03.

The Second Circuit affirmed. It began from the premise that Section 13's three-year limitations period established a statute of repose, not a statute of limitations. *See id*. at 107. As such, the court believed, the three-year provision created a "*substantive* right in those protected to be free from liability after a legislatively-determined period of time." *Id*. at 106 (citation omitted). This mattered, the court stated, because "while statutes of limitations are often subject to tolling principles, a statute of repose *extinguishes* a plaintiff's cause of action after the passage of a fixed period of time" and therefore is not subject to equitable tolling. *Id*. (citations and internal quotation marks omitted). According to the court of appeals, that is why, for example, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), this Court refused to apply equitable tolling to Section 13's three-year period, which establishes a statute of repose. *See IndyMac*, 721 F.3d at 109.

The question in *IndyMac*, then, was whether *American Pipe* had created a principle of equitable tolling that was presumptively inapplicable to a statute of repose, or a rule of legal tolling, which could apply. On that question, the Second Circuit acknowledged, the "Courts of Appeals are divided." *Id*. at 108 (citing cases from the Second, Fourth, Ninth, Tenth, and Federal circuits); *see also id*. ("Experienced and capable judges of the district courts in our Circuit have similarly drawn disparate conclusions and are without consensus.").

Rather than decide the issue, the Second Circuit instead concluded that it made no difference. On the one hand, if *American Pipe*'s "tolling rule is properly classified as 'equitable,' then application of the rule to Section 13's three-year repose period is barred by *Lampf*, which states that equitable 'tolling principles do not apply to that period.'" *Id*. at 109 (quoting *Lampf*, 501 U.S. at 363). But "[e]ven assuming, *arguendo*, that the *American Pipe* tolling rule is 'legal'—based upon Rule 23, which governs class actions—we nonetheless hold that its extension to the statute of repose in Section 13 would be barred by the Rules Enabling Act." *Id*. The court observed that the Rules Enabling Act provides that in issuing federal rules of practice and procedure, the courts "shall not abridge, enlarge or modify any substantive right." *Id*. (quoting 28 U.S.C. § 2072(b)). And while the Second Circuit recognized that this Court had rejected a Rules Enabling Act objection in *American Pipe* itself, it concluded that *American Pipe* "did not consider whether procedural rules authorize tolling of a statute of repose defining a substantive right," because the statutory provision at issue in *American Pipe* was "procedural," *id*. at 109 n.17, unlike Section 13's statute of repose, which "creates a *substantive* right," *id*. at 109. The court of appeals did not analyze whether *American Pipe* violated the Rules Enabling Act under the criteria set forth by this Court in *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), and *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407-08 (2010) (plurality opinion).

The Second Circuit acknowledged that "failure to extend *American Pipe* tolling to the statute of repose in Section 13 could burden the courts and disrupt the functioning of class action litigation." *IndyMac*, 721 F.3d at 109. But it was confident that "sophisticated, well-counseled litigants" would find some unspecified way of avoiding those consequences. *Id*. And if they did not, that problem rests with Congress, not the courts. *Id*. at 110.

b. In this case, the Second Circuit extended its *IndyMac* opinion to all statutes of repose and concluded that *IndyMac* therefore required dismissal of SRM's complaint. Pet. App. 6a-7a. The court determined that "as a statute of repose, § 1658(b)(2) is not subject to equitable tolling" and that "it creates a substantive right in defendants to be free from liability after five years—a right that *American Pipe* tolling cannot modify without running afoul of the Rules Enabling Act." *Id*. Although *American Pipe* plainly stated that "the filing of a timely class action complaint commences the action for all members of the class," 414 U.S. at 550, the Second Circuit refused to acknowledge that holding. It also declined to review its Rules Enabling Act analysis in *IndyMac*, which SRM argued was fundamentally flawed, or to distinguish on other grounds *IndyMac*'s now unbounded holding that *American Pipe* tolling does not apply to any "repose" period. *See* Pet. App. 7a.

REASONS FOR GRANTING THE WRIT

This case presents yet another application of the Second Circuit's erroneous *IndyMac* rule—contributing to an ever-deepening circuit split over the correctness of that decision. Because the limitations periods set forth in Section 13 and Section 1658(b) function similarly, the tolling analysis is the same with respect to both statutes. This case accordingly provides an ideal vehicle to address whether *American Pipe* tolling applies to statutes of repose applicable to securities claims. It also presents the Court an opportunity to correct the Second Circuit's generalization that *American Pipe* tolling cannot apply to any statute of repose.

I. The Question The Court Granted Certiorari To Decide In *IndyMac* Remains Certworthy.

The years since this Court granted certiorari in *IndyMac* have done nothing but increase the need for this Court's review.

A. The Circuit Conflict Continues To Expand.

To start, the widely acknowledged[2] circuit conflict over *American Pipe*'s application to statutes of repose has only grown, with the Sixth and Eleventh Circuits recently joining the pre-existing split.

1. The Tenth, Seventh, and Federal Circuits Hold That American Pipe Applies To Statutes of Repose.

a. The first circuit to address *American Pipe*'s application to a period of repose was the Tenth. In

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[2] *See Dusek v. JPMorgan Chase & Co*., No. 15-14463, – F.3d – , 2016 WL 4205857, at *3 (11th Cir. Aug. 10, 2016) (observing that "[c]ourts have disagreed over the basis for the Supreme Court's decision in *American Pipe*" and, as a consequence, over its application to statutes of repose); *Stein v. Regions Morgan Keegan Select High Income Fund, Inc*., 821 F.3d 780, 792 (6th Cir. 2016) ("Our fellow Circuits are split."); *Hall v. Variable Annuity Life Ins. Co*., 727 F.3d 372, 375 n.5 (5th Cir. 2013) (acknowledging division); *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 535 (9th Cir. 2011) (same); *In re Lehman Bros. Sec. & ERISA Litig.*, No. 15-1879, 2016 WL 3648259, at *2 (2d Cir. July 8, 2016) ("Our decision in *IndyMac* created a circuit split.").

Joseph v. Wiles, 223 F.3d 1155, 1168 (10th Cir. 2000), a class action asserting claims under Section 11 of the Securities Act was timely filed in federal court. Later, after the expiration of Section 13's three-year limitations period, one of the class members filed his own suit. The initial class action was subsequently certified, but the individual suit was deemed untimely. On appeal, the Tenth Circuit reversed, holding that *American Pipe* saved the individual claim. *Id*. at 1166-68.

In particular, the court rejected the argument that *American Pipe* applied a principle of equitable tolling inapplicable to Section 13's statute of repose. For one thing, the court concluded that *American Pipe* was best viewed as applying legal, not equitable, tolling. The court explained that "[e]quitable tolling is appropriate where, for example, the claimant has filed a defective pleading during the statutory period, or where the plaintiff has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id*. at 1166 (citations omitted). "In contrast," the Tenth Circuit explained, *American Pipe* applied "legal tolling that occurs any time an action is commenced and class certification is pending." *Id*. at 1166-67. For that reason, the defendants' reliance on *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), was misplaced even if *Lampf* stood for the proposition that equitable tolling principles could never apply to a statute of repose. *Joseph*, 223 F.3d at 1166.

Lampf was also inapposite, the Tenth Circuit held, because it simply stated that "litigation must be *commenced* . . . within three years after [a] violation." *Id*. at 1167 (quoting *Lampf*, 501 U.S. at 364 (first alteration in original)). *American Pipe* had decided, however, that the filing of a class action commences the litigation for all putative class members for purposes of any limitations period. *Id*. at 1167. For that reason, "in a sense, application of the *American Pipe* tolling doctrine to cases such as this one does not involve 'tolling' at all." *Id*. at 1168.

At the same time, applying *American Pipe* to both time limits under Section 13 "serves the purposes of Rule 23." *Id*. at 1167. That rule, the court explained, "encourages judicial economy by eliminating the need for potential class members to file individual claims." *Id*. But if "all class members were required to file claims in order to insure the limitations period would be tolled, the point of Rule 23 would be defeated." *Id*. Moreover, the "notice and opt-out provision of Rule 23(c)(2) would be irrelevant without tolling because the limitations period for absent class members would most likely expire, making the right to pursue individual claims meaningless." *Id*. (citation and internal quotation marks omitted).

Finally, the Tenth Circuit recognized that the legislative purposes of Section 13's limitations periods were satisfied because once the class action was filed, "defendants were on notice of the substantive claim as well as the number and generic identities of potential plaintiffs." *Id*. at 1168.

b. The Tenth Circuit's holding in *Joseph* is consistent with decisions of the Seventh and Federal Circuits that have likewise concluded that *American*

Pipe applies to limitations periods that are otherwise not subject to equitable tolling.

In *Appleton Electric Co. v. Graves Truck Line, Inc.*, 635 F.2d 603 (7th Cir. 1980), the Interstate Commerce Commission had invalidated a tariff that governed shipping prices charged by trucking companies to customers. One such customer sued under the Interstate Commerce Act on behalf of overcharged shippers naming as defendants a class of trucking companies that had charged the invalidated rate. One of the members of the defendant class, Graves Truck Line, did not receive individual notice and an opportunity to opt out until after the statute of limitations had expired. *Id*. at 607. When Graves subsequently opted out, the plaintiff sued it individually, giving rise to the question whether the pendency of the class action had satisfied the limitations period against Graves. *Id*. at 607-08.

Appleton is relevant here because this Court had deemed the statute of limitations at issue in that case jurisdictional. 635 F.2d at 608 (citing 49 U.S.C. § 16(3)). And a jurisdictional limitations period shares the two features *IndyMac* and other cases have said render *American Pipe* inapplicable to statutes of repose: (1) a jurisdictional limitation is not subject to equitable tolling;[3] and (2) the running of the limitations period "not only bars the remedy but also

[3] *See, e.g.*, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134 (2008); *Cada v. Baxter Healthcare Corp*., 920 F.2d 446, 451 (7th Cir. 1990).

destroys the liability." *Id.*; *see also IndyMac*, 721 F.3d at 106.

Accordingly, the Seventh Circuit faced the same essential question as the Tenth Circuit in *Joeseph* and the Second Circuit in *IndyMac*: whether these features precluded applying *American Pipe* to save the plaintiff's claims. Like the Second Circuit in *IndyMac*, the Seventh Circuit viewed the case as presenting a "conflict between the operation of the statute of limitations and Rule 23." *Appleton*, 635 F.2d at 609. But unlike the Second Circuit, the Seventh resolved that perceived conflict in favor of "'effectuat[ing] the purpose of litigative efficiency and economy,' (which Rule 23 was designed to perform)." *Id.* (quoting *Am. Pipe*, 414 U.S. at 556). It held that "where a class action suit is instituted against a class a class of unnamed defendants . . . the statute of limitations is tolled as to all putative members of the defendant class." *Id.* at 609-10. "A contrary rule would sound the death knell for suits brought against a defendant class, nullifying that part of Rule 23 that specifically authorizes such suits." *Id.* at 610. "Plaintiffs would, in each case, be required to file protective suits, pending class certification, to stop the running of the statute of limitations." *Id.* In a case like the one before it, the court observed, that would result "in the filing of a staggering number of complaints." *Id.* At the same time, applying *American Pipe* to a jurisdictional time limit "was not truly inconsistent with the operation of the statute of limitations." *Id.* at 609.

The Federal Circuit likewise has concluded that *American Pipe* applies to jurisdictional time limitations. In *Bright v. United States*, 603 F.3d 1273, 1287 (Fed. Cir. 2010), that court considered application of *American Pipe* to the jurisdictional limitations period for the Tucker Act, 28 U.S.C. § 2501. The Federal Circuit held that *American Pipe* applied because it applies a legal, not an equitable, tolling rule. *Id*. at 1287-88. A contrary conclusion would create a class action process that was "so cumbersome and unwieldy" that it would "frustrat[e] the purpose of avoiding multiplicity of suits." *Id*. at 1289.

2. The Second, Sixth, And Eleventh Circuits Refuse To Apply American Pipe To Repose Periods.

The Second, Sixth, and Eleventh Circuits disagree. As discussed, the Second Circuit in *IndyMac* reasoned that Section 13 created a statute of repose to which *American Pipe* could not be applied consistent with the Rules Enabling Act. Since this Court dismissed the writ of certiorari in *IndyMac*, the Second Circuit has adhered to and extended this rule to all statutes of repose. In *Dekalb County Pension Fund v. Transocean Ltd*., 817 F.3d 393, 414 (2d Cir. 2016), *as amended* (Apr. 29, 2016), *petition for cert. docketed*, 16-206 (Aug. 15, 2016), the court applied *IndyMac* to the three-year statute of repose limiting claims under Section 14(a) of the Securities Exchange Act, 15 U.S.C. § 78n(a). Here, the court of appeals continued that project, applying *IndyMac* to the five-year period in Section 1658(b)(2) and extending its reach to all statutes of repose. Pet. App. 6a-7a. In the *Lehman Bros*. litigation, the Second Circuit declared that "unless and until the Supreme Court informs us that our decision was erroneous, *IndyMac* continues to be the law of the Circuit." *In re Lehman Bros.*, 2016 WL 3648259, at *2.

The Sixth Circuit recently reached the same conclusion. In *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 792 (6th Cir. 2016), the Sixth Circuit acknowledged that its "fellow Circuits are split" over *American Pipe*'s application to both Section 13's three-year limitations period and the five-year period in Section 1658(b)(2). But after examining both the Tenth and Second Circuit's reasoning, the Sixth Circuit concluded that "*IndyMac* has the more cogent and persuasive rule." *Id*. at 793.[4]

Most recently, the Eleventh Circuit found the reasoning of the Sixth and Second Circuits more persuasive. *See Dusek v. JPMorgan Chase & Co*., No. 15-14463, – F.3d –, 2016 WL 4205857 (11th Cir. Aug. 10, 2016). The plaintiffs in *Dusek* brought claims under Section 20(a) of the Securities Exchange Act, which is subject to the limitations period in Section 1658. The Eleventh Circuit explained that, like Section 13, Section 1658(b) has been "construed by courts as having a two-year statute of limitations and

[4] In those circuits that have no governing circuit precedent, district courts have reached conflicting decisions, although the overwhelming majority has held that *American Pipe* applies to statutes of repose. *See Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 177-78 (D. Mass. 2009) (collecting citations); Petition for a Writ of Certiorari at 17-18, *Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, No. 13-640 (Nov. 22, 2013).

a five-year period of repose." 2016 WL 4205857 , at *2. The court then examined the reasoning of *Joseph*, *IndyMac*, and *Stein*. *Id*. at *3-*4. After recounting that the "district court ultimately relied on these decisions in determining that the *American Pipe* rule is one of equitable tolling," the Eleventh Circuit affirmed and held that "*American Pipe* tolling does not apply to the statute of repose at issue in th[at] case." *Id*. at *5.

B. The Second Circuit's Decisions In This Case And *IndyMac* Are Incorrect.

Review is also warranted because the decision below and the underlying decision in *IndyMac* were wrong.

1. *American Pipe Did Not Establish A Rule Of Equitable Tolling Inapplicable To A Statute Of Repose.*

First, there is no basis for the Second Circuit's suggestion that *American Pipe* created the kind of equitable tolling inapplicable to a statute of repose.

Unlike equitable tolling, which generally is available at a judge's discretion "when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action," *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014); *Holland v. Florida*, 560 U.S. 631, 649 (2010), this Court has made clear that *American Pipe* tolling applies to all class members, whether or not they have paid attention to the suit or diligently pursued their rights, *see Am. Pipe*, 414 U.S. at 551-52.

That is because the rule of *American Pipe* was derived not from equity, but from this Court's interpretation of Rule 23, which was promulgated through an exercise of this Court's rulemaking authority under the Rules Enabling Act, 28 U.S.C. § 2072. Applying ordinary tools of legal interpretation – rather than equitable balancing – the Court examined the text, history, and purposes of the rule. *Am. Pipe*, 414 U.S. at 453-58. The Court was "convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554.

This "interpretation" of Rule 23 was "necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve." *Id.* at 555-56 (emphasis added). The Court reaffirmed that *American Pipe* was an interpretation of Rule 23 in *Chardon v. Fumero Soto*, 462 U.S. 650 (1983), explaining that in *American Pipe*, it had "*interpreted the Federal Rules of Civil Procedure* to permit a federal statute of limitations to be tolled between the filing of an asserted class action and the denial of class certification," *id*. at 654 (emphasis added), in order to achieve the "federal interest in assuring the efficiency and economy of the class action procedure," *id*. at 661.

2. *Applying* American Pipe *To Section 13 and Section 1658(b) Does Not Contravene The Rules Enabling Act.*

The Second Circuit also erred in concluding that applying *American Pipe* to Section 13 and Section 1658 would violate the Rules Enabling Act. The court reasoned that the Act prohibits applying the federal rules in a way that would "abridge, enlarge, or modify any substantive right," 28 U.S.C. § 2072(b). It then concluded that statutes of repose "create[] a *substantive right*, extinguishing claims after a three-year period." *IndyMac*, 721 F.3d at 109. "Permitting a plaintiff to file a complaint or intervene after the repose period" had run, the court concluded, "would therefore necessarily enlarge or modify a substantive right and violate the Rules Enabling Act." *Id*. That reasoning fails for several reasons.

First, *American Pipe* itself rejected the premise that the Rules Enabling Act prohibits any application of a rule that can be said to affect substantive rights. 414 U.S. at 557-58.[5] The question "is not whether a

[5] *IndyMac* also overstated the degree to which either Section 13's three-year limitations period or Section 1658's five-year limitations period establish materially more substantive rights than the shorter limitations periods in each statute, which are subject to *American Pipe*. The statutory text does not expressly extinguish or confer any rights, nor does it forbid tolling. In fact, the language of these provisions is no more absolute than the Clayton Act's limitations provision at issue in *American Pipe*, which stated that an action "shall be forever barred" if not commenced in time. 15 U.S.C. § 15b. If that language did not extinguish rights in the manner of a statute of repose, it is

time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *Id.* The "mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *Id*. at 559.

The same is true of the statutes of repose in Sections 13 and 1658(b). The question is whether applying *American Pipe* to actions like this one is consistent with the statute's purposes. If it is, then its application invades no substantive right of a defendant but rather reflects that Congress never intended defendants to be free from liability to the class members whose claims were timely filed under the rule.

Second, applying the correct standard, *American Pipe* is consistent with the Rules Enabling Act because it is entirely consonant with the limitations schemes applicable to Securities Act and Securities Exchange Act claims.

Language. Section 13 requires that any Section 11 action "be brought" within three years after the security was offered to the public. 15 U.S.C. § 77m. Section 1658 similarly provides that a fraud claim must "be brought" within five years of the violation. 28

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difficult to see why the language of Section 13 or Section 1658(b) does.

U.S.C. § 1658(b)(2). "'Brought' in this context means 'commenced.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1568 (2016) (quoting *Brought*, Black's Law Dictionary (3d ed. 1933)). And in *American Pipe*, this Court held that "a timely class action complaint commences the action for all members of the class as subsequently determined." 414 U.S. at 550. That interpretation of the statute is supported by the provision's use of the passive voice – "be brought" – which encompasses a representative bringing a suit on another's behalf. By refusing to address the question more specifically than that, Congress left it to the courts to decide how the provision would apply to representative actions (including class actions). *American Pipe* took up that responsibility, answering the question by sensibly considering the rules governing, and purposes behind, class action litigation.

Purposes. Applying *American Pipe* to Section 13 and Section 1658(b) is also consistent with the legislative purposes of the Securities Act and the Securities Exchange Act. "Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights, but these ends are met when a class action is commenced." *Crown, Cork & Seal Co.*, 462 U.S. at 352 (citation omitted). Moreover,

> a class complaint "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." The

> defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class.

Id. (quoting *Am. Pipe*, 414 U.S. at 555).

"Statutes of repose also encourage plaintiffs to bring actions in a timely manner, and for many of the same reasons." *CTS Corp.*, 134 S. Ct. at 2183. In addition, statutes of repose "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period." *Id*. *American Pipe* is entirely consistent with that purpose because it guarantees that after the limitations period has expired, no liability will be imposed beyond that claimed in lawsuits filed on or before that date.

Of course, litigation over those timely filed claims may well continue long after the period of repose has expired. There is no argument, for example, that the policy of repose is violated when a defendant is held liable to members of a timely filed class action in a case certified after the limitations period has run. But the purpose of a statute of repose is not to provide defendants complete certainty as to the scope of their liability, but instead to fix the *outer limit* of their *potential* liability. *American Pipe* simply informs defendants that this outer limit includes possible liability to members of putative class actions filed within the statute of repose. Whether that liability is resolved through a certified class action or through individual suits by class members is irrelevant as far as the policies underlying the statute of repose are concerned.

Practical Consequences. Congress could not possibly have intended the intolerable results that would arise if *American Pipe* did not apply to Section 13, Section 1658(b)(2), or other statutes of repose.

The Second Circuit has never denied that refusing to apply *American Pipe* to these periods of repose would have exactly the same effects this Court found untenable in *American Pipe* itself. In many cases, a final class certification decision may not take place until years after the limitations period has expired – particularly when suit is filed close to the end of the limitations periods or if class issues are appealed.[6] In light of this reality, under *IndyMac*, "[p]otential class members would be induced to file protective motions to

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[6] A recent study found that that ruling on class certification takes three years or longer in more than one-third of cases. *See* Svetlana Starykh & Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review* 20 (2016), http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf; *see also, e.g.*, *Erica P. John Fund, Inc. v. Halliburton Co*., 309 F.R.D. 251, 255 (N.D. Tex. 2015) (class certification order issued more than ten years after securities issued); *Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 123-24 (S.D.N.Y. 2014) (approximately seven years); *In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig.*, MDL No. 1658 (SRC), 2013 WL 396117, at *1 (D.N.J. Jan. 30, 2013) (approximately nine years); Final Judgment & Order of Dismissal, *In re McKesson HBOC, Inc. Sec. Litig.*, No. 5:99-cv-20743, Dkt. No. 1562, at 2 (N.D. Cal. Apr. 13, 2007) (approximately eight years); Order Granting in Part Lead Plaintiffs' Second Renewed Motion for Class Certification, *In re Xerox Corp. Sec. Litig.*, No. 3:99-cv-2374, Dkt. No. 431, at 2 (AWT) (D. Conn. Sept. 30, 2008) (same).

intervene or to join in the event that a class was later found unsuitable," thereby "breed[ing] needless duplication of motions." *Am. Pipe*, 414 U.S. at 553-54.

The Second Circuit's rule also dramatically augments the cost of class litigation. Each potential opt-out plaintiff incurs the additional expense to retain counsel, file an individual complaint, and then monitor all of the activity in the entire litigation.[7] Defendants must likewise pay their counsel to monitor and respond to the many duplicative pleadings and redundant briefs *IndyMac* prompts. The courts must expend substantial additional effort to manage all the complaints and deal with each party's counsel. And everyone – the courts, plaintiffs, and defendants – must bear the added expense of discovery addressing each of the various claims individually. Finally, if the plaintiffs ultimately prevail, the defendants may bear the cost of all that wasted attorney time under any applicable fee-shifting statute. *See, e.g.*, 15 U.S.C. § 77k(e) (authorizing award of attorney's fees in Section 11 cases).

[7] In this respect, *IndyMac* undermines the design of the Private Securities Litigation Reform Act, which requires securities class actions to be helmed by a single, sophisticated lead plaintiff—as opposed to a collection of plaintiffs advancing a flotilla of complaints. *See* 15 U.S.C. § 78u-4(a)(3). The rule of *IndyMac* predictably balkanizes almost every high profile action, as multiple institutional (and other sophisticated) investors will file their own suits to avoid the prospect that befell the plaintiffs in *IndyMac* and this case.

And all for no conceivable purpose. Under the *IndyMac* rule, sophisticated plaintiffs will file protective individual actions, providing no real benefit to the defendant. At the same time, class members who are less sophisticated or well-resourced predictably will forfeit their claims if class certification is denied. While defendants would benefit from this injustice, they cannot claim that this windfall amounts to a substantive right Congress intended Section 13 or § 1658(b) to bestow.

Constitutional Avoidance. Refusing to apply *American Pipe* to statutes of repose would raise grave constitutional questions.

"In the context of a class action predominantly for money damages," this Court has "held that absence of notice and opt-out violates due process." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (citing *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812 (1985)). But the constitutional right to opt out would be illusory if opting out simply provided an individualized opportunity to have one's claims immediately dismissed as untimely. *See Crown, Cork & Seal Co.*, 462 U.S. at 351-52 (recognizing the need for the opt-out right to remain meaningful even after the limitations period has run); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 & n.13 (1974) (same). Yet, under *IndyMac*, in a great many cases, class members' opt-out rights arise only after a statute of repose has expired. *See supra* 23-24 & n.6. In this common circumstance, *IndyMac* renders the opt-out right meaningless – the only way for class members to have any chance of vindicating their legal rights is to remain members of the class.

The burden on class members' due process opt-out right is even greater in cases involving multiple claims with different limitations periods. Assume, for example, that a class complaint states claims under Section 11 of the Securities Act (subject to Section 13's three-year statute of repose) and also under Section 10(b) of the 1934 Act (subject to Section 1658(b)'s five-year period). As in this case, the class is certified and proceeds toward settlement. If the limitations period has run on the Section 11 claims, but not the Section 10(b) claims, then individual plaintiffs who wish to pursue their Section 10(b) claims on their own are in a predicament because they cannot opt out *in part*. Thus, they can either remain in the class—accepting a settlement of all of their claims and forgoing their right to litigate the Section 10(b) claims as they see fit—or they can opt out, in which case their Section 11 claims will be time-barred under *IndyMac*.

SRM faced a similar choice: the class settlement agreement would have extinguished SRM's swap-based claims in exchange for literally nothing. The opt-out right exists precisely to protect plaintiffs from such inadequate settlements. However, because SRM could not opt out in part, it was forced to either sacrifice its swap claims, or to pursue all of its claims individually. It chose to opt out, but the Second Circuit nevertheless held its claims time-barred, retroactively transforming SRM's constitutionally protected opt-out into litigation suicide.

That result is unconstitutional. The due process right to opt out is based in based in "our deep-rooted historic tradition that everyone should have his own day in court." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quotation marks omitted). A rule that permits class members to opt out but not to pursue their own individual claims does just as much violence to this tradition as simply prohibiting plaintiffs from opting out at all. Accordingly, even if the Rules Enabling Act could be read to prohibit applying *American Pipe* to Section 13 or Section 1658(b)(2), the Act must yield to the superior demands of the Due Process Clause.

II. This Case Presents An Excellent Vehicle To Decide The Question Presented.

This case presents an excellent vehicle to decide whether *American Pipe* tolling applies to the statutes of repose in Section 1658(b) and Section 13. This question was outcome-determinative in the court of appeals—indeed, it was the only issue that the Second Circuit addressed—and all relevant arguments have been preserved.

The facts of case also provide a vivid illustration of the dangers that *IndyMac* poses. SRM was effectively forced to choose between opting out of the class action or sacrificing its swap-based claims, which otherwise would have been released in the class settlement without any compensation. Moreover, at the time SRM made its decision to opt out, *IndyMac* had not even been decided. Instead, the only court of appeals that had addressed the question, the Tenth Circuit, had held in indistinguishable circumstances that *American*

Pipe tolling was available to an opt-out plaintiff. Thus, the due process concerns are at their zenith here, as SRM acted exactly as any rational litigant seeking to preserve its rights would have done, and was punished for it.

There also is no denying the importance of the question presented, which affects the rights of hundreds of plaintiffs pursuing billions of dollars in losses every year. The Second Circuit hears a disproportionate share of securities fraud cases,[8] and it has made clear that it has no intention of revisiting *IndyMac* on its own. Consequently, litigants there must now file a slew of individual actions in order to preserve their rights. Litigants in circuits that have not decided the question, out of an abundance of caution, are well-advised to do the same. The best case scenario is that litigation costs will skyrocket for no good reason. The far more likely scenario is that litigation costs will skyrocket, and some plaintiffs, who fail to file early individual complaints out of either inadvertence or optimism, will nevertheless still lose their claims—also for no good reason.

Finally, although SRM's claims are governed by Section 1658(b), the tolling analysis for the five-year repose period in that statute functions similarly to the analysis for the three-year repose period in Section 13—and that understanding was the basis of the Second Circuit's holding that *IndyMac* applies in this

[8] *See Recent Trends*, *supra*, at 9 (explaining that filings are concentrated in the Second and Ninth Circuits).

case. Pet. App. 7a. Consequently, however the Court decides this case, the result inevitably will apply to cases involving Section 13 as well. Or, if the Court perceives the possibility of a distinction between Section 13 and Section 1658(b), it should grant this petition together with a petition involving Section 13 so that it can consider tolling of both statutes at the same time.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 22, 2016

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2015

(Argued: August 31, 2015 Decided: July 14, 2016)

Docket No. 14-507-cv

SRM Global Master Fund Limited Partnership,

Plaintiff-Appellant

v.

Bear Stearns Companies L.L.C. F/K/A Bear Stearns, Companies Inc., Alan D. Schwartz, Samuel L. Molinaro, Jr., James Cayne, Warren Spector, Deloitte & Touche L.L.P.,

Defendants-Appellees.

Before:

HALL, LIVINGSTON, and LOHIER, *Circuit Judges*

More than five years after the collapse of Bear Stearns Companies Inc. (with its successor, defendant Bear Stearns Companies L.L.C., "Bear") and the filing of a putative class action lawsuit against Bear, plaintiff SRM Global Master Fund Limited Partnership ("SRM") filed its own suit against Bear, Bear's officers, and Bear's auditor, defendant Deloitte & Touche L.L.P. SRM, a registered private investment fund, asserted that the defendants had made material misrepresentations in violation of SEC Rule 10b-5 and Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and had engaged in common law fraud. The United States District Court for the Southern District of New York (Sweet, *J.*) dismissed SRM's complaint. Relying on our decision in *Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), it held that the class action tolling rule set forth in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), does not apply to 28 U.S.C. § 1658(b)(2), the five-year statute of repose that limits the time in which plaintiffs may bring claims under Section 10(b) and Rule 10b-5. It therefore dismissed SRM's Section 10(b) and Rule 10b-5 claims as time-barred and dismissed SRM's Section 20(a) claims for failure to state a primary violation of Section 10(b). The District Court also dismissed SRM's common law fraud claims, holding that New York law does not recognize holder fraud claims and that SRM failed adequately to plead reliance. We **AFFIRM.**

LOHIER, Circuit Judge:

This appeal arises from the collapse of Bear Stearns Companies Inc. (with its successor, defendant Bear Stearns Companies L.L.C., "Bear") and the lawsuit filed by SRM Global Master Fund Limited Partnership ("SRM"), a registered private investment fund, against Bear, Bear's officers, and Bear's auditor, defendant Deloitte & Touche L.L.P. ("Deloitte"). The principal question presented is whether the class action tolling rule set forth in American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), applies to 28 U.S.C. § 1658(b)(2), the five-year statute of repose that limits the time in which plaintiffs may bring claims under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, *see Merck & Co. v. Reynolds*, 559 U.S. 633, 650 (2010). We hold that American Pipe tolling does not apply to § 1658(b)(2). As we explain below, we also conclude that SRM failed adequately to allege that it relied on any misrepresentations in making investment decisions, an element of its common law fraud claims.

BACKGROUND

SRM's complaint alleges the following facts, which we assume to be true and construe in the light most favorable to the plaintiff. *See Cruz v. FXDirectDealer*, LLC, 720 F.3d 115, 118 (2d Cir. 2013).

In the years prior to Bear's collapse in 2008, Bear and its officers made material misstatements and omissions that overstated the value of Bear's assets, the adequacy of Bear's capital reserves and liquidity, and the quality of Bear's risk management and valuation procedures. Deloitte falsely certified that the Form 10-Ks that Bear filed for fiscal years 2006 and 2007 presented fairly, in all material respects, the information set forth therein.

In 2007 and 2008 SRM purchased Bear common stock and entered into swap agreements based on the value of Bear common stock. Two specific allegations in the complaint relate to SRM's decision to purchase or sell stock, or enter into or unwind the swap agreements, in reliance on the defendants' misrepresentations. First, SRM alleges that it read and relied on the misrepresentations in Bear's 2006 Form 10-K "in its analysis of Bear and in deciding whether it should purchase Bear securities." Joint App'x 31. Second, SRM alleges that it read and relied on Deloitte's misrepresentations in Bear's 2006 and 2007 Form 10-Ks "in its analysis of Bear and in deciding whether it should liquidate, retain or increase its investment in Bear." Joint App'x 101. SRM also asserts "holder claims," alleging that it retained its Bear stock and decided not to unwind the swap agreements in reliance on the defendants' misrepresentations.

After Bear collapsed, the defendants were sued in a series of putative class actions that were eventually consolidated and settled. At its request, SRM was excluded from the settlement class. It instead filed this complaint in April 2013, asserting that the defendants had made material misrepresentations in violation of SEC Rule 10b-5 and Sections 10(b) and 20(a) of the Exchange Act and had also committed common law fraud under New York law.[1]

Relying on § 1658(b)(2), the defendants moved to dismiss SRM's complaint as time-barred. SRM responded that the statute of repose in § 1658(b)(2) was tolled by the filing of a putative class action complaint against Bear and the individual defendants

[1] SRM also alleged violations of Section 18 of the Exchange Act but does not appeal the District Court's dismissal of those claims.

in March 2008.[2] The United States District Court for the Southern District of New York (Sweet, J.), rejected SRM's argument based on our decision in *Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013). The District Court held that American Pipe tolling does not apply to § 1658(b)(2), and that SRM's Section 10(b) and Rule 10b-5 claims were therefore time-barred. It dismissed SRM's Section 20(a) claims for failure to state a primary violation of Section 10(b). And it also dismissed SRM's common law fraud claims, holding that New York law does not recognize holder fraud claims and that SRM failed adequately to plead reliance.

This appeal followed.

DISCUSSION

A. <u>SRM's Federal Claims</u>

Under the tolling rule set forth in *American Pipe*, "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. Section 1658(b)(2), however, is not a statute of limitations. It is a statute of repose, which "is not a limitation of a plaintiff's remedy, but rather defines the right involved in terms of the time allowed to bring suit." *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 102, 104 (2d Cir. 2004) (identifying

[2] That complaint was subsequently consolidated with other putative class action complaints. Deloitte was a defendant in the consolidated class action lawsuit.

§ 1658(b)(2) as a statute of repose); *see Merck & Co.*, 559 U.S. at 650 (same).

In *IndyMac*, we held that *American Pipe* tolling does not apply to the statute of repose in Section 13 of the Securities Act of 1933, 15 U.S.C. § 77m, which limits the time in which plaintiffs may bring actions under Sections 11 and 12(a) of that Act. *IndyMac*, 721 F.3d at 112. Noting that Section 13 is a statute of repose, we explained that if viewed as a form of equitable tolling *American Pipe* tolling does not apply to Section 13 because "a statute of repose is subject only to legislatively created exceptions, and not to equitable tolling." *Id*. at 106, 109 (quotation marks omitted). Nor could it apply, we concluded, if American Pipe tolling is legal in nature and based on Rule 23 of the Federal Rules of Civil Procedure. "[S]tatutes of repose create a substantive right in those protected to be free from liability after a legislatively-determined period of time." *Id*. at 106 (quotation marks omitted). "Permitting a plaintiff to file a complaint . . . after the repose period set forth in Section 13 of the Securities Act has run would therefore necessarily enlarge or modify a substantive right and violate the Rules Enabling Act [28 U.S.C. § 2072(b)]," which "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Id*. at 109 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)).

For the reasons we provided in *IndyMac*, we hold that *American Pipe* tolling does not apply to § 1658(b)(2)'s five-year statute of repose. First, as a statute of repose, § 1658(b)(2) is not subject to equitable tolling, *see id*. at 106, 109; and second, it creates a *substantive* right in defendants to be free from liability after five years-a right that American

Pipe tolling cannot modify without running afoul of the Rules Enabling Act, see *id*.

SRM argues that the textual differences between Section 13 and § 1658(b)(2)-in particular, Section 13's "in no event" language-distinguish *IndyMac*.[3] But we did not base our holding in *IndyMac* on Section 13's "in no event" language. There is no reason to think that it is that particular phrase that secures for defendants in actions under Sections 11 and 12(a) of the Act a substantive right to be free from liability after three years. Nor do any other textual differences between Section 13 and § 1658(b)(2) dissuade us from concluding that *IndyMac* applies to § 1658(b)(2).

Because the complaint fails to allege that the defendants made any misrepresentations within five years of the filing of SRM's complaint, SRM's Section 10(b) and Rule 10b-5 claims are time-barred under § 1658(b)(2)'s five-year statute of repose. And because SRM fails to state a claim under Section 10(b), we agree with the District Court that its Section 20(a) claim "must also fail for want of a primary violation." *ECA, Local 134 IBEW Joint Pension Tr. of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187, 207 (2d Cir. 2009).

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[3] Section 13 provides in relevant part, "In no event shall any such action be brought to enforce a liability created under section 77k or 77***l***(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(a)(2) of this title more than three years after the sale." 15 U.S.C. § 77m. Section 1658(b)(2) states that "a private right of action . . . may be brought not later than . . . 5 years after such violation." 28 U.S.C. § 1658(b)(2).

B. SRM's Common Law Fraud Claims

We turn next to SRM's common law fraud claims under New York law, all of which were dismissed by the District Court.

To plead a common law fraud claim under New York law, a "plaintiff must allege facts to support the claim that it justifiably relied on the alleged misrepresentations." *ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 25 N.Y.3d 1043, 1044 (2015). SRM's complaint fails to allege facts sufficient to state a plausible claim that it purchased or sold stock, or entered into or unwound swap agreements, in reliance on the defendants' misrepresentations. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).[4] The complaint's only relevant factual allegations assert that SRM relied on the misrepresentations in Bear's 2006 Form 10-K "in its analysis of Bear and in deciding *whether it should purchase* Bear securities," Joint App'x 31 (emphasis added), and that it relied on Deloitte's misrepresentations in Bear's 2006 and 2007 Form 10-Ks "in its analysis of Bear and in deciding *whether it should liquidate, retain or increase its investment* in Bear," Joint App'x 101 (emphasis added). Neither these allegations nor any others specifically plead, as necessary to SRM's common law fraud claims, that SRM actually *purchased or sold* stock, or actually *entered into or unwound* a swap

[4] Because the complaint fails to meet the *Twombly* pleading standard, we do not consider whether the stricter pleading requirements of Federal Rule of Civil Procedure 9(b) apply to the reliance element of SRM's common law fraud claims.

agreement, in reliance on the defendants' misrepresentations. Without such an allegation, we conclude, SRM's common law fraud claims were properly dismissed.

The same is true of SRM's holder fraud claims. As noted above, the District Court held that New York courts do not recognize holder fraud claims, relying principally on two recent First Department cases. Special App'x 24-25 (citing B*ank Hapoalim B.M. v. WestLB AG*, 121 A.D.3d 531, 995 N.Y.S.2d 7, 11 (1st Dep't 2014) and Starr Found. v. Am. Int'l Grp., Inc., 76 A.D.3d 25, 901 N.Y.S.2d 246, 248-50 (1st Dep't 2010)). We need not decide whether New York law permits holder fraud claims, because even assuming that it does, SRM has failed to point us to any part of its complaint that adequately alleges reliance on any misrepresentations in deciding to hold rather than sell its stock. *See Cont'l Ins. Co. v. Mercadante*, 222 A.D. 181, 225 N.Y.S. 488, 491 (1st Dep't 1927); *see also In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 109, 117 (2d Cir. 2013) ("[I]t is well established that we can affirm the dismissal of a complaint on any basis supported by the record."). Accordingly, we conclude that the District Court properly dismissed SRM's holder fraud claims.

CONCLUSION

We have considered SRM's other arguments, including those made in its letter filed pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, and conclude that they are without merit. For the foregoing reasons, we **AFFIRM** the judgment of the District Court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re Bear Stearns Companies, Inc. Securities, Derivative, and ERISA Litigation

This Document Relates To:
Securities Action, 08 Civ. 2793

SRM Global Master Fund Limited Partnership,
Plaintiff

-against-

The Bear Stearns Companies LLC (F/K/A Bear Stearns Companies Inc.), Alan D. Schwartz, Samuel L. Molinaro, Jr., James Cayne, Warren Spector, and Deloitte & Touche LLP,
Defendants

SWEET, District Judge.

The defendants The Bear Stearns Companies LLC (F/K/A The Bear Stearns Companies Inc.) ("Bear Stearns"), Alan D. Schwartz, Samuel L. Molinaro, James Cayne, and Warren Spector (the "Individual Defendants") (collectively, the "Bear Stearns Defendants") and Deloitte & Touche LLP ("Deloitte") (collectively, with the Bear Stearns Defendants, the "Defendants") have moved pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6) to dismiss the Complaint filed by plaintiff SRM Global Master Fund Limited Partnership ("SRM" or the "Plaintiff"). Based on the conclusions set forth below, Defendants' motions are granted.

I. *Prior Proceedings*

In the immediate wake of Bear Stearns' near-collapse in mid-March 2008, a series of securities fraud putative class actions were filed against Defendants in the Southern District of New York and other jurisdictions by purchasers of Bear Stearns common stock and stock options, and transferred to this Court by the Judicial Panel on Multidistrict Litigation for coordinated or consolidated pretrial proceedings. *See* Transfer Order, *In re Bear Stearns Cos., Inc. Sec., Deriv. & ERISA Litig.,* No. 08 MDL 1963 (J.P.M.L. Aug. 19, 2008). Those actions were consolidated on January 5, 2009 (the "Class Action"). *In re Bear Stearns Cos. Inc. Sec., Deriv. & ERISA Litig.,* 08 M.D.L. No.1963(RWS), 2009 WL 50132 (S.D.N.Y. Jan. 5, 2009). On February 27, 2009, Lead Plaintiff State of Michigan Retirement Systems ("Class Action Lead Plaintiff") filed the Consolidated Class Action Complaint ("Class Action Complaint") asserting claims on behalf of "all persons and entities that, between December 14, 2006 and March 14, 2008 . . . purchased or otherwise acquired the publicly traded common stock or other equity securities, or call options of or guaranteed by Bear Stearns, or sold Bear Stearns put options and were damaged thereby."

The Court denied Defendants' motions to dismiss the consolidated class action complaint on January 19, 2011. *In re Bear Stearns Cos. Inc. Sec., Deriv. & ERISA Litig.,* 763 F. Supp. 2d 423 (S.D.N.Y. 2011) [hereinafter *Bear Stearns I*]. The parties then spent over fourteen months conducting discovery, resulting in the production of over nine million pages of documents by Defendants. In May 2012, the parties reached a settlement that was approved by the Court in orders and final judgments dated November 28, 2012 ("Class Action Settlement"). (No. 08 MDL 1963, ECF Nos. 337-38, Exs. 10-11.) The Settlement Class was limited to persons who transacted in Bear Stearns common stock, other equity securities, or call or put options (the "Class Action Settlement Class"). (*See id.* ¶ 3.) SRM did not participate in any of the Class Action proceedings.

SRM is a highly sophisticated "multi-billion dollar hedge fund that takes 'a contrarian and long-term investment' approach in 'companies or sectors that have been through periods of stress and are out of favor with the market.'" *SRM Global Fund Ltd. P'ship v. Countrywide Fin. Corp.,* No. 09 Civ. 5064(RMB), 2010 WL 2473595, at *14 (S.D.N.Y. June 17, 2010) (quoting Tom Cahill & Katherine Burton, *Wood's SRM Global Fell 30% in January, Adding to 2007 Losses,* Bloomberg (Feb. 6, 2008), http://www.bloomberg.com/apps/news?pid=21070001&sid=aCPmITS7lZ8k), *aff'd* 448 Fed. Appx. 116 (2d Cir. 2011). SRM is domiciled and registered as a private investment fund in the Cayman Islands, and is based in Monaco. (*See* Complaint ¶ 12, SRM, No. 09 Civ. 5064(RMB) (S.D.N.Y. May 29, 2009), ECF No. 1; Carey Aff., Ex. 3.)

SRM has been represented by its present counsel since at least May 2009, when SRM sued Countrywide Financial seeking recovery for losses that SRM allegedly suffered in the financial crisis because of an investment in Countrywide. (Complaint, SRM, No. 09 Civ. 5064(RMB) (S.D.N.Y. May 29, 2009), ECF No. 1.) SRM submitted a request for exclusion from the Class Action Settlement Class in August 2012. SRM filed its complaint for the instant action on April 24, 2013 ("Complaint" or "Compl.").

The instant motions were heard and marked fully submitted on October 23, 2013.

II. *Allegations of the Complaint*

The Complaint contains many of the same factual allegations as the Class Action Complaint. The facts regarding Bear Stearns' collapse is set forth in detail in this Court's opinion in *Bear Stearns I,* 763 F. Supp. 2d 423. SRM alleges that, from December 14, 2006 through approximately March 12, 2008, the Bear Stearns and Deloitte Defendants "fraudulently overstated": (i) "the value of [Bear Stearns'] mortgages, mortgage-and asset-backed securities and other derivative financial instruments;" (ii) "the adequacy of its liquidity and capital reserves;" and (iii) "the quality of [Bear Stearns'] risk management," (Compl. ¶ 2; *see also id.* ¶¶ 39-237.)

SRM alleges losses of two types. First, SRM alleges that it "owned shares of Bear [Stearns] stock at least as early as March 2007," and "continued to invest in Bear [Stearns]" until its near collapse. (Compl. ¶ 12.) Following Bear Stearns' near-collapse, it sold its "investment in Bear [Stearns]" between April 1, 2008 and June 2, 2008, and thereby "incur [red] losses of more than $200 million." (Compl. ¶ 6.) According to Defendants, SRM's request for exclusion from the Class Action Settlement Class states that SRM had made its last purchase of Bear Stearns common stock on September 24, 2007 and sold all of its Bear Stearns common stock on the same day, before Bear Stearns' stock price decreased significantly. (Def. Bear Stearns Br., at 6; Carey Aff., Ex. 9.)

Second, SRM alleges losses from its "purchase [of] security-based swaps representing approximately 3.5 million shares of Bear Stearns common stock" ("Bear Stearns Swaps") between September 24, 2007 and March 12, 2008 (the "Swap Transactions"). (*Id.* ¶ 13.) SRMpurchased its Bear Stearns Swaps by placing orders with UBS Securities LLC ("UBS") and Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch"). (*Id.* ¶ 14.) SRM's Bear Stearns Swaps were "total return swaps," which are synthetic instruments designed to mimic all aspects (i.e., the "total return") of a stock as though the stock had been purchased itself.

SRM's Bear Stearns Swaps were the functional equivalent of shares of Bear Stearns common stock. (Opp., at 4-5.)[1] SRM alleges that the Bear Stearns Swaps were inflated to precisely the same extent and

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[1] Citations to "Def. Bear Stearns Br." refer to the Bear Stearns Defendants' Memorandum of Law in Support of their Motion to Dismiss, Citations to "Def. Deloitte Br." refer to Deloitte's Memorandum of Law in Support of Its Motion to Dismiss. Citations to "Opp." refer to SRM's Memorandum of Law in Opposition. Citations to "Bear Stearns Reply" and "Deloitte Reply" refer to the Bear Stearns Defendants' and Deloitte's Reply Memorandum of Laws, respectively.

by precisely the same misrepresentations and omissions as Bear Stearns stock itself, and when Bear Stearns' stock price collapsed, so did the value of SRM's Bear Stearns Swaps.

Deloitte was the independent outside auditor for Bear Stearns, and it provided audit, audit-related, tax and other services to Bear Stearns during fiscal years 2006 and 2007. SRM alleges that Deloitte "consented to and caused the incorporation by reference of its unqualified opinions on Bear[Stearns'] financial statements for fiscal years 2006 and 2007" which contained misrepresentations and omissions that caused SRM loss. (Compl. ¶ 23.)

SRM alleges that its losses occurred, in part, due to SRM's reliance on Bear Stearns Defendants' false and misleading representations and omissions regarding Bear Stearns' Value at Risk ("VaR") amounts. (Compl. ¶¶ 59, 66.) SRM alleges that Bear Stearns knew the Securities and Exchange Commission ("SEC") had stated that Bear Stearns' VaR models were seriously flawed and the VaR models were never updated to reflect the housing and subprime mortgage downturn.

From the VaR published in Bear Stearns' SEC filings, SRM concluded that Bear Stearns was subject to substantially less risk than was in fact the case, and SRM purchased and retained Bear Stearns stock and the Bear Stearns Swaps. (*Id.* ¶¶ 73, 177.) According to the Complaint and in conflict with SRM's request for exclusion from the Class Action Settlement Class, between April 1 and June 2, 2008, after Bear Stearns had collapsed, it is alleged that SRM sold its holdings of Bear Stearns stock and the Bear Stearns Swaps, at a significant loss. Plaintiff alleges losses of more than $200 million on its investment. (Compl. ¶ 243.)

Based on its allegations, SRM asserts claims against the Bear Stearns and Deloitte Defendants for alleged violations of: (i) Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder (*id.* ¶¶ 519-23); (ii) Section 18 of the Exchange Act, based on misrepresentations supposedly made in documents filed pursuant to the Exchange Act (*id.* ¶¶ 524-30); and (iii) common law fraud (*id.* ¶¶ 535-48). SRM also asserts a claim against the Individual Defendants for alleged "control person" liability under Section 20(a) of the Exchange Act. (Compl. ¶¶ 531-34.)

III. *Discussion*

a. *The Rule 9(b) and 12(b) Standard*

The Bear Stearns Defendants and Deloitte have moved to dismiss the Complaint pursuant to the Federal Rules of Civil Procedure 9(b) and 12(b)(6). On a motion to dismiss pursuant to Rule 12(b)(6), all factual allegations in the complaint are accepted as true, and all inferences are drawn in favor of the pleader. *Mills v. Polar Molecular Corp.,* 12 F.3d 1170, 1174 (2d Cir. 1993). "'The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. . . .'" *Villager Pond, Inc. v. Town of Darien,* 56 F.3d 375, 378 (2d Cir. 1995) (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974)).

To survive a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S.

662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). Plaintiffs must allege sufficient facts to "nudge[ ] their claims across the line from conceivable to plausible." *Twombly,* 550 U.S. at 570. Though the Court must accept the factual allegations of a complaint as true, it is " 'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Iqbal,* 129 S.Ct. at 1950 (quoting *Twombly,* 550 U.S. at 555).

Rule 9(b) requires that averments of fraud be "state[d] with particularity." Fed. R. Civ. P. 9(b); *see also ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.,* 493 F.3d 87, 99 (2d Cir. 2007). To satisfy this requirement, a plaintiff must: "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Rombach v. Chang,* 355 F.3d 164, 170 (2d Cir. 2004) (internal quotation marks and citation omitted). General, conclusory, or speculative allegations, unsupported by specific facts, are legally insufficient. *Id.* at 176.

b. *SRM's Section 10(b) Claims Are Dismissed*

i. The 10(b) Claims Are Time-Barred

Private actions under Section 10(b) of the Exchange Act are subject to a two-year statute of limitations and a five-year statute of repose. "[A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws [defined to include the Exchange Act] . . . may be brought not later than the earlier of (1) 2 years after the discovery of facts constituting the violation; or (2) 5 years after such violation." 28 U.S.C. § 1658(b). *See P. Stolz Family P'ship L.P. v. Daum,* 355 F.3d 92, 104 (2d Cir. 2004) (interpreting the five-year limit in § 1658(b)(2) as a "statute of repose"); *McCann v. Hy-Vee, Inc.,* 663 F.3d 926, 930-32 (7th Cir. 2011) (same); *Arco Cap. Corp. v. Deutsche Bank AG,* 949 F. Supp. 2d 532, 543 (S.D.N.Y. 2013) ("An action under Section 10(b) . . . is subject to a five-year statute of repose . . . which is independent of a plaintiff's awareness of the violation and is not subject to equitable tolling."); *In re Longtop Fin. Techs. Ltd. Sec. Litig.,* 939 F. Supp. 2d 360, 378 (S.D.N.Y. 2013) ("'[C]ourts in this district have treated Section 1658(b)(2) as a statute of repose and [ ] stated that the five-year period begins to run from the time that the allegedly fraudulent representations were made.'") (quoting *Boudinot v. Shrader,* No. 09 Civ. 10163, 2012 WL 489215, at *4 (S.D.N.Y. Feb. 15, 2012)).

As described in the Complaint, SRM's claims are based on an alleged valuation fraud that revealed itself when Bear Stearns nearly collapsed in mid-March 2008. SRM asserts that Defendants made false and misleading statements about Bear Stearns' risk management and financial condition between December 14, 2006 and March 12, 2008. (Compl. ¶¶ 39-237; *see also id.* ¶¶ 484-515.) Under the five-year statute of repose, any Section 10(b) claims based on even the latest of these statements were required to be brought before March 12, 2013.

SRM has contended that the pendency of the Class Action tolled the statute of repose for its Section 10(b) claims pursuant to *American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1974). However, the Second Circuit recently issued *Police & Fire Ret., Sys. of*

Detroit v. IndyMac MBS, Inc., 721 F.3d 95 (2d Cir. 2013), relating to the statute of repose under Section 13 of the Securities Act of 1933 ("Securities Act"). The Second Circuit held that the statute of repose was not tolled because although a statute of limitations may be tolled, a statute of repose cannot be. *Id.,* 721 F.3d at 109-10.

> Statutes of limitations limit the availability of remedies and, accordingly, may be subject to equitable considerations, such as tolling, or a discovery rule. In contrast, statutes of repose affect the underlying right, not just the remedy, and thus they run without interruption once the necessary triggering event has occurred, even if equitable considerations would warrant tolling or even if the plaintiff has not yet, or could not yet have, discovered that she has a cause of action.

Id. at 106 (quoting *Fed. Hous. Fin. Agency v. UBS Ams. Inc.,* 712 F.3d 136, 140 (2d Cir. 2013)).

Thus, "in contrast to statutes of limitations, statutes of repose 'create a substantive right in those protected to be free from liability after a legislatively-determined period of time.'" *Id.* (citation omitted). The Second Circuit stated that "[t]his conceptual distinction carries significant practical consequences . . . as most important here, a statute of repose is 'subject only to legislatively created exceptions' and not to equitable tolling." *Id.* (quoting *Stolz,* 355 F.3d at 102); *see also IndyMac*, 721 F.3d at 107 ("[A] statute of repose . . . is said to be 'absolute.'").

Like Section 13, Section 10(b) is subject to two time periods: a two-year statute of limitations, which is subject to tolling or extension based on the plaintiff's lack of knowledge, and a five-year statute of repose, which is not. Here, the second time period of Section 10(b), the statute of repose, states that "[A] private right of action . . . may be brought not later than . . . 5 years after such violation."[2] 28 U.S.C. § 1658(b).

SRM has contended that *IndyMac's* holding is confined to the Section 13 statute of repose, because that was the only statute directly at issue. (Opp., at 12-17.) However, the Second Circuit's reasoning in *IndyMac* was based on general principles applicable to all statutes of repose. The Second Circuit reasoned that "in contrast to statutes of limitations, statutes of repose create a substantive right in those protected to be free from liability" that are "subject only to legislatively created exceptions." *IndyMac,* 721 F.3d at 106 (quotation marks omitted). Because *American Pipe* tolling is not such a legislatively created exception, the court concluded that it did not apply to statutes of repose. *Id.* at 106-110.

SRM has also contended that "there is nothing in Section 1658(b)(2) creating a 'substantive' right different in kind from the right created by [Section 1658](b)(1)." (Opp., at 16.) But courts have repeatedly found that Section 1658(b)(2) is a statute of repose, *see Stolz,* 355 F.3d at 104; *McCann,* 663 F.3d at 930-32; *Arco Cap. Corp.,* 949 F. Supp. 2d at 543-44; *In re*

[2] SRM concedes that an "action under section 10(b) . . . is subject to a five-year statute of repose," and that its claim was filed outside the five-year statute of repose period. (Opp., at 10–11.)

Longtop, 939 F. Supp. 2d at 378-79, which, according to *IndyMac,* does create a substantive right, and that Section 1658(b)(1) is merely a statute of limitations. *See IndyMac,* 721 F.3d at 106 ("[t]his conceptual distinction carries significant practical consequences.").

SRM has contended that the Second Circuit "emphasize[d]" the particular language in Section 13 in deciding whether the statute of repose could be tolled. (Opp., at 12.). However, the Court cited the specific language of the statute only in explaining why the statute was one of repose rather than of limitations. *See IndyMac* 721 F.3d at 100 n. 1, 107. The Second Circuit then reached its conclusion that *American Pipe* tolling did not apply based on reasoning applicable to all statutes of repose: that they create a substantive right to absolve from liability those protected after a period of time.[3] *Id.* at 106. Thus, the difference in language between the statute of repose in

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[3] The Second Circuit did not find it necessary to resolve whether American Pipe tolling was "equitable" or "legal." The Court reasoned that if the *American Pipe* tolling rule is "properly classified as 'equitable,' " then application of tolling is barred by *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), which held that "equitable 'toiling principles do not apply to [statute of repose] period.' " *IndyMac*, 721 F.3d at 109 (quoting *Lampf*, 501 U.S. at 363). On the other hand, if A*merican Pipe* tolling is a "legal" rule, then tolling is barred from enlarging or modifying a substantive right by the Rules Enabling Act, 28 U.S.C. § 2072, which "provides the Supreme Court 'the power to prescribe general rules of practice and procedure,' *id*. § 2072(a), including the Federal Rules of Civil Procedure, which 'shall not abridge, enlarge or modify any substantive right,' *id*. § 2072(b)." *IndyMac*, 721 F.3d at 109.

Section 1658(b)(2) and Section 13 is immaterial as both create a substantive right.

SRM also has relied on a statement in *American Pipe* suggesting that the application of tolling should turn "not [on] whether a time limitation is 'substantive' or 'procedural' but whether tolling the limitation in a given context is consonant with the legislative scheme," and argues that tolling would be consonant with the statutory scheme applicable to Section 10(b) claims. (Opp. 16 (quoting *American Pipe,* 414 U.S. at 557-58).) The Second Circuit rejected this argument in *IndyMac* on the ground that tolling is never consonant with a statute of repose. *See IndyMac,* 721 F.3d at 109 n. 17 (referencing same statement from *American Pipe* and stating "[t]he *American Pipe* Court, however, noted the procedural nature of the statutory provision there at issue . . . before concluding 'that a judicial tolling of the statute of limitations does not abridge or modify a substantive right afforded by the antitrust acts.' *American Pipe,* 414 U.S. at 558 n. 29. It did not consider whether procedural rules authorize tolling of a statute of repose defining a substantive right." (certain citations omitted)). SRM's policy arguments about the supposed benefits of tolling a statute of repose likewise were considered and rejected by the Second Circuit. *IndyMac,* 721 F.3d at 109-10.

SRM also has contended that *American Pipe* tolling was "statutorily enacted into the Exchange Act's limitations period" as part of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"), Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 and 18 U.S.C.). According to SRM, Congress did "not [ ] make any substantive change" to the "basic standards of the law on a statute of limitation" except increasing the time in which plaintiffs could assert Section 10(b) claims. (Opp., at 12, 15.) However, if Sarbanes-Oxley did not change the statute of repose, aside from lengthening it, then it did not codify *American Pipe* tolling, as SRM suggests. Moreover, the statute of repose in Section 13 of the Securities Act was amended around the same time as Section 10(b)'s statute of repose, also by a statute that made no substantive changes but merely updated certain references. *See* Securities Litigation Uniform Standards Act of 1998, § 301, 112 Stat. 3227 (1998). Yet, as *IndyMac* holds, *American Pipe* tolling does not apply to Section 13.

The cases SRM has cited stand for the proposition that, in some circumstances, Congress is presumed to be aware of and adopt existing statutory interpretations when it legislates, but "that presumption applies only to 'settled judicial constructions.'" *In re Century Brass Prods., Inc.,* 22 F.3d 37, 40 (2d Cir. 1994) (citation omitted) (refusing to hold that Congress adopted existing interpretations because "[w]e cannot conclude that such . . . decisions as had been rendered prior to the Code amendments sufficed to settle the law"). Here, there was no such settled judicial determination that *American Pipe* tolling applied to Section 10(b)'s statute of repose. One of the three district court cases SRM has cited expressly notes that "the availability of [*American Pipe* tolling] might be questionable," but adopted tolling "[a]bsent guidance from the Fifth Circuit" (*Prieto v. John Hancock Mut. Life Ins. Co.,* 132 F. Supp. 2d 506, 519 (N.D.Tex.2001)); the second case only addressed the timeliness of plaintiff's claims, an issue raised for the first time in a surreply, in a footnote (*In re*

Discovery Zone Sec. Litig., 181 F.R.D. 582, 600 n. 11 (N.D. Ill. 1998)); and the third is from a district court outside of this circuit (*Salkind v. Wang,* Civ. A. No. 93-10912-WGY, 1995 WL 170122, at *3 (D. Mass. Mar. 30, 1995)). SRM has asserted that, after Sarbanes-Oxley's passage, "virtually all lower courts continued to hold that *American Pipe* tolling applied to the statute of repose in Section 1658(b)(2)," citing various cases from other circuits and a single case from this circuit. (Opp. 14 n. 7.) The law in this circuit differs. *See, e.g., In re Longtop,* 939 F. Supp. 2d at 379-81 (*American Pipe* tolling did not apply to § 1658, because although "[s]ome courts have held that the tolling rule of *American Pipe* . . . applies even to statutes of repose . . . [t]he trend in this District . . . is to hold a period of repose inviolable unless specifically modified by statute."); *Plumbers, Pipefitters & MES v. Fairfax Holds.,* 886 F. Supp. 2d 328, 334-35 (S.D.N.Y. 2012) (holding that "[§ 1658's] plain language and legislative intent behind statutes of repose as well as Supreme Court and Second Circuit precedent" all indicated that statutes of repose were not subject to *American Pipe* tolling). *In re Smith Barney Transfer Agent Litig.,* 884 F. Supp. 2d 152 (S.D.N.Y. 2012), cited by SRM, recognized that "[c]ourts in this district are divided . . . as to whether the filing of a class action complaint similarly tolls the applicable statute of repose." *Id.* at 159 (comparing *Int'l Fund Mgmt. S.A. v. Citigroup Inc.,* 822 F. Supp. 2d 368, 380 (S.D.N.Y. 2011) (*American Pipe* tolling applies), and *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.,* 810 F. Supp. 2d 650, 667 (S.D.N.Y. 2011) (same), with *In re Lehman Bros. Sec. & Erisa Litig.,* 799 F. Supp. 2d 258, 310 (S.D.N.Y. 2011) (*American Pipe* tolling does not apply), and *Footbridge Ltd. Trust v. Countrywide Fin. Corp.,* 770 F. Supp. 2d 618, 624 (S.D.N.Y. 2011) (same)). The tension between these cases shows that there was no settled judicial construction of *American Pipe* tolling on Section 10(b)'s statute of repose when Sarbanes-Oxley was enacted or subsequent to its enactment, and the authorities cited by SRM do not establish "settled judicial construction." *See, e.g., United States v. Powell,* 379 U.S. 48, 55 n. 13 (1964) (two district and two circuit court cases, contradicted by one earlier district court case, "represent[ed] neither a settled judicial construction, nor one which we should be justified in presuming Congress, by its silence, impliedly approved" (citation omitted)).

Even if there was a settled judicial construction that *American Pipe* tolling applied to Section 10(b)'s statute of repose, there is no evidence that Congress intended to adopt that construction in Sarbanes-Oxley, or indeed to make any substantive changes to the statute. To the contrary, as SRM accepts, the legislative history shows that Congress was "not suggesting changing the basic standards of the law on a statute of limitation" and intended only to extend the length of that statute. (Opp., at 15 (citing 148 Cong. Rec. S6524, S6535 (daily ed. July 10, 2002)).) Nothing in the text or legislative history of this unrelated and intentionally narrow amendment suggests that Congress intended to make a dramatic substantive change by extending *American Pipe* tolling to the statute of repose. *See Century Brass,* 22 F.3d at 40 (declining to find that Congress adopted lower court decisions by enacting an unrelated amendment because "we have seen no indication in the legislative history that Congress focused at all on the question");

cf. Lorillard v. Pons, 434 U.S. 575, 581 (1978) (holding that Congress enacted an existing judicial interpretation of certain provisions because it "exhibited both a detailed knowledge of the . . . provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation").

SRM also has referenced a Judiciary Committee Report for Sarbanes-Oxley, which, it claims, states that Section 10(b)'s statute of repose "was not subject to equitable tolling, but made no such statement regarding legal tolling, *e.g.* under *American Pipe*." (Opp., at 15.) However, the report made clear that no tolling applied, whether legal or equitable. S. Rep. No. 107-146, at 29 (2002) ("Where there is a bifurcated limitations period, with an inner limit running from the time when the fraud was or should have been discovered, the inner limit 'by its terms, begins after discovery of the facts constituting the violation, making tolling unnecessary. The [outer limit] is a period of repose inconsistent with tolling.'" (citing *Lampf,* 501 U.S. at 363 (1991))). As *IndyMac* makes clear, applying *American Pipe* to a statute of repose would violate a defendant's substantive rights, and there is no reason to believe that Congress intended to abrogate such rights, without any consideration or explanation, by passing an unrelated amendment that was intentionally limited to a different issue.

Moreover, *American Pipe* tolling can apply to a statute of limitations only when the earlier-filed class action "involved exactly the same cause of action subsequently asserted". *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 467 (1975). Here, there can be no tolling of the five-year statute of limitations for

SRM's Section 10(b) claims, *see* 28 U.S.C. § 1658(b)(2), based on the Bear Stearns Swaps because the Class Action did not involve swap claims. Claims based on unregistered derivative transactions, such as SRM's Bear Stearns Swaps, are fundamentally different from the claims asserted in the Class Action for common stock traded on the New York Stock Exchange. *See, e.g., In re New Oriental Educ. & Tech. Grp. Sec. Litig.,* 293 F.R.D. 483, 487 (S.D.N.Y. 2013) (because class action only asserted claims for purchases of stock, not stock options, "the statute of limitations for options holders is running"). There is no way the Bear Stearns Defendants and Deloitte could have anticipated based on the pleadings in the Class Action that years after the Class Action a class member such as SRM (which is a class member by virtue of its losses on Bear Stearns common stock) would file an individual action and add separate swap claims.

Cullen v. Margiotta, 811 F.2d 698 (2d Cir. 1987), and *Benfield v. Mocatta Metals Corp.,* 26 F.3d 19 (2d Cir. 1994), do not invite a contrary conclusion. In *Cullen,* tolling was granted for a civil RICO action after a state court class action was dismissed. 811 F.2d at 721. In *Benfield,* a class action's claims under the Commodities Exchange Act and for common law fraud tolled subsequent civil RICO claims. 26 F.3d at 23. But unlike *Cullen* and *Benfield,* SRM's claims regarding the Swap Transactions involved different financial instruments than those in the Class Action for Bear Stearns' common stock. Defendants did not receive the requisite fair notice "not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs" for claims based on swap transactions. *American Pipe,* 414

U.S. at 554; *cf. Camotex, S.R.L. v. Hunt,* 741 F. Supp. 1086, 1091 (S.D.N.Y. 1990) (declining to toll claims based on action alleging class of "all those who purchased or held silver futures, silver bullion, or refined silver in commercial quantities," because it did not sufficiently inform defendants of "the number and generic identity of potential plaintiffs in the action"). Thus, although the June 25, 2012 Class Notice purported to release, against all Defendants, claims "that relate to the purchase of the publicly traded common stock or other equity securities . . . of Bear Stearns during the Class Period," *American Pipe* tolling can only apply where the same cause of action is asserted. *Johnson,* 421 U.S. at 467. Given such, SRM's cross claim did not toll its claims for damages arising out of the Swap Transactions.

Given such reasoning, *American Pipe* tolling does not apply to SRM's 10(b) claims, and SRM's claims are time-barred.

ii. There Is No Private Right of Action Under Section 10(b) For The Swap Transactions

Prior to the enactment of the Commodity Futures Modernization Act of 2000 ("CFMA"), Pub. L. No. 106-554, 114 Stat. 2763 (2000) (codified in scattered sections of 7, 11, 12, and 15 U.S. Code), the anti-fraud provisions in the federal securities laws, including Section 10(b), did not regulate conduct in connection with swap transactions. *Caiola v. Citibank, N.A.,* 137 F. Supp. 2d 362, 371 (S.D.N.Y. 2001) ("[T]he authority to pursue fraud in connection with security-based swaps did not exist prior to the CFMA."), *rev'd on other grounds,* 295 F.3d 312 (2d Cir. 2002). The CFMA changed that position by extending Section 10(b) to proscribe conduct in connection with "security-based swap agreements," in addition to securities. In making that change, however, the CFMA drew a distinction between swap agreements and securities. *See* 15 U.S.C. § 78j(b) (prohibiting the use or employment of manipulative or deceptive devices "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any security-based swap agreement"). The CFMA made clear that swap agreements were not considered securities. *See* 15 U.S.C. § 78c-1(b)(1) ("The definition of 'security' . . . does not include any security-based swap agreement."); *CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP,* 654 F.3d 276, 307 (2d Cir. 2011) (Winter, J., concurring) (stating that the CFMA demonstrated "Congress's then perception of a lack of an equivalence between swaps and ownership of the underlying securities"). Ten years later, in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in various sections of 7, 12 and 15 U.S.C), Congress amended the rules to include security-based swaps in the Exchange Act's definition of a security. *See* 15 U.S.C. § 78c(10) (now defining "security" as including any "security-based swap").

To apply the Dodd-Frank's definition of security to Plaintiff's swaps claims would be to apply the definition retroactively to create liability under Section 10(b) that did not exist when the conduct at issue allegedly took place (in this case, between 2006 and 2008), *See Caiola*, 295 F.3d at 327 (noting that plaintiff faced a "substantial burden" in arguing that the CFMA's changes to Section 10(b) applied retroactively, because it contravened "[e]lementary considerations of fairness" and courts should "apply th[e] time-honored presumption against retroactive legislation unless Congress has clearly manifested its intent to the contrary." (citation omitted)). There is no indication in Dodd-Frank that its new definition of "security" should apply retroactively. Dodd-Frank states that the definition "shall take effect . . . 360 days after the date of the enactment of this subtitle." *See* Pub. L. No. 111-203 §§ 774, 761(a)(2), 124 Stat. 1376, 1754-55, 1802 (2010).

By expressly excluding swaps from the definition of "securities" in the CFMA, Congress also excluded conduct in connection with swaps from the private right of action under Section 10(b), which was for some time recognized as being limited to conduct in connection with the purchase and sale of securities. *See Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 731-32 (1975) (agreeing with "virtually all lower federal courts facing the issue in the hundreds of reported cases presenting this question over the past quarter century [which] have reaffirmed [the] conclusion that the plaintiff class for purposes of 10(b) and Rule 10b-5 private damage actions is limited to purchasers and sellers of securities"). The CFMA gave the SEC enforcement authority over conduct relating to swaps by expanding the scope of conduct prohibited by Section 10(b) to cover "security-based swap agreements," *see* 15 U.S.C. § 78j(b), but it did not alter the scope of the existing, well-defined private right of action relating to securities. If Congress had wanted to equate securities with swaps such that the implied private right of action would apply to both, or to otherwise make clear that parties to swap agreements could bring a private right of action, it did not do so explicitly. *See CSX,* 654 F.3d at 293 (Winter, J., concurring) ("Congress has been well aware of legal issues involving swaps for years and has repeatedly passed legislation regarding them.").

The Supreme Court has cautioned that, when interpreting the private right of action under Section 10(b), courts "must give 'narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law.'" *Janus Capital Grp., Inc. v. First Deriv. Traders,* --- U.S. ----, 131 S. Ct. 2296, 2302, (2011) (quoting *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,* 552 U.S. 148, 167 (2008)) (alteration in original); *see also Stoneridge,* 552 U.S. at 165 ("Concerns with the judicial creation of a private cause of action caution against its expansion . . . the § 10(b) private right should not be extended beyond its present boundaries."). In the absence of any express statutory language indicating that the limited private right of action under Section 10(b) extended to swap transactions, such an extension will not be implied.

Even if a private right of action for parties to swap transactions under Section 10(b) were implied, that action should be narrowly circumscribed to apply only against persons directly involved in swap transactions, as in *Caiola,* where a customer alleged that the defendant bank defrauded him in the representations it made about its hedging strategy for the swaps the customer entered into with the bank. *See Caiola,* 295 F.3d at 315-19. Issuers such as Bear Stearns and auditors such as Deloitte have no relationship or knowledge of the activities of swap parties on a traditional security which are necessarily limited by the issuer's market capitalization and arise out of market transactions. There is no limit on claims based on swap transactions referencing a security, which could involve amounts many times that of capitalization. *Cf. Blue Chip Stamps,* 421 U.S. at 739 (expressing the concern that Rule 10b-5 claims could "lead to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers." (citation omitted)). Because registration of security-based swap agreements was not required during the relevant time period, the issuer of the underlying securities (and others uninvolved in the swap transactions) would have no ability to determine the number of swap transactions in existence, let alone the identity of parties to the swap transactions or the amounts involved in their transactions. The Swap Transactions were private transactions, not registered on any exchange, not disclosed to any regulator, third party, Bear Stearns or Deloitte.

SRM has not disputed that prior to the CFMA "virtually all lower federal courts . . . in the hundreds of reported cases . . . over the past quarter century have reaffirmed . . . that . . . 10(b) and Rule 10b-5 private damage actions [are] limited to purchasers and sellers of securities." *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 731-32 (1975). SRM also has not contested the principle that courts must "give narrow dimensions" to a 10(b) implied right of action and that the right "should not be extended beyond its present boundaries." (Def. Bear Stearns Br. 11-12.)

The cases that SRM has cited are inapposite. One case, *United States v. O'Hagan,* 521 U.S. 642 (1997), noted that "only actual purchasers or sellers of securities may maintain a private civil action under § 10(b)" because of "a longstanding limitation on private § 10(b) suits." *Id.,* 521 U.S. at 664 (citing *Blue Chip Stamps,* 421 U.S. 723); (*see* Opp., at 3, 22). SRM also refers to dictum in *Caiola,* 295 F.3d at 327, suggesting that swap transactions "clearly would . . . be covered under Rule 10b-5" after the CFMA, *id.,* but *Caiola* involved a claim against a counterparty directly involved in a swap transaction, rather than a claim against a third party issuer and the issuer's auditor, as SRM seeks to assert here.

Further, SRM has not identified text or legislative history of the CFMA indicating that Congress intended, when it amended Section 10(b), to extend the private right of action against a securities issuer or auditor to parties of security-based swap agreements. Instead, Congress expressly distinguished between the two. SRM has quoted statements in the CFMA indicating that rules and judicial precedents decided under Section 10(b) "that prohibit fraud . . . shall apply to security-based swap agreement to the same extent as they apply to securities," 15 U.S.C. § 78j(b); (Opp., at 22), but this language refers to the scope of the conduct "prohibit[ed]" by Section 10(b), not the enforcement of that prohibition through an implied right of action.

SRM has contended that Dodd-Frank "was a mere clarification of what was already in CFMA," and that it should apply retroactively. (Opp., at 24); *see also Leshinsky v. Telvent GIT, S.A.,* 873 F. Supp. 2d 582, 590-91 (S.D.N.Y. 2012) (noting that there is a presumption that "a new statute does not apply retroactively" but that "when an amendment merely clarifies existing law, rather than effecting a substantive change to the law, then retroactivity concerns do not come into play"). However, Dodd-Frank was the first time swaps were included in the definition of securities. Numerous sections of Dodd-Frank are expressly described as "clarification[s]," *see, e.g.,* Dodd-Frank §§ 406, 912, 919, 928, 1045, 124 Stat. at 1574, 1824, 1837, 1852, 2017, but the section introducing swap agreements into the definition of securities is not described as such, *id.* § 761, 124 Stat. at 1754-55. Moreover, as noted above, swap parties were not entitled to assert a private action, including actions against an issuer, until Dodd-Frank amended the definition "securities" under the Exchange Act. Dodd-Frank thus introduced a substantive change to the existing rights and liabilities and was not a mere clarification. The *Caiola* Court addressed an analogous argument, whether the CFMA could be applied retroactively, and found that the argument faced "a substantial burden." 295 F.3d at 327. Plaintiff has not met that burden here.

SRM has cited *Leshinsky* for the proposition that Dodd-Frank merely clarifies the CFMA. However, *Leshinsky* involved an unrelated issue concerning Dodd-Frank's whistleblower protection provisions and stated that "[t]he Court today does not express any view about the retroactive application of Dodd-Frank in general, or of any other specific provisions of Dodd-Frank." 873 F. Supp. 2d at 601. Accordingly, under all the reasoning given above, SRM does not have a private right of action against the Defendants for its Section 10(b) claims arising from the Swap Transactions.

iii. The Section 10(b) Elements

To state a claim under Section 10(b) of the Exchange Act, plaintiffs must plead that defendants " '(1) made misstatements or omissions of material fact; (2) with scienter; (3) in connection with the purchase or sale of securities; (4) upon which plaintiffs relied; and (5) that plaintiffs' reliance was the proximate cause of their injury.'" *Lentell v. Merrill Lynch & Co., Inc.,* 396 F.3d 161, 172 (2d Cir. 2005) (quoting *In re IBM Sec. Litig.,* 163 F.3d 102, 106 (2d Cir. 1998)). Such claims are subject to the heightened pleading requirements of the Federal Rule of Civil Procedure 9(b) and the PSLRA. *See GE Investors v. General Elec. Co.,* 447 Fed. Appx. 229, 230 (2d Cir. 2011).

As previously noted, SRM's Section 10(b) claims are time-barred and SRM does not have a private right of action against Defendants for the Swap Transactions. The court declines to opine on whether SRM would have otherwise met the 10(b) elements against the Defendants at this time.

c. *SRM's Section 18 Claims Are Dismissed*

i. The Section 18 Claims Are Time-Barred

Section 18 provides that "[n]o action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued." 15 U.S.C. § 78r(c). The one-year limitations period begins when "plaintiff is put on either actual notice or constructive notice, also known as inquiry notice, of the facts giving rise to his claim." *In re Alstom SA Sec. Litig.,* 406 F. Supp. 2d 402, 421 (S.D.N.Y. 2005); *see also In re Fed. Nat'l Mortgage*

Assoc. Sec., Deriv. & ERISA Litig., 503 F. Supp. 2d 25, 35 (D.D.C.2007). Section 18 applies only to Exchange Act filings. *See* 15 U.S.C. § 78r(a).

As previously noted, SRM's claims accrued more than three years prior to the filing of the Complaint. The last Exchange Act filing cited by SRM is Bear Stearns' 2007 10-K, filed on January 29, 2008. (Compl. ¶¶ 211-212.) The last of SRM's Section 18 claims therefore accrued at that time, and became time-barred on January 29, 2011. Even if SRM's claims accrued when it made its last purchase of Bear Stearns stock (September 24, 2007) or entered into its last Swap Transaction (March 12, 2008), those claims are still time-barred, because the three-year period expired, at the latest, on June 2, 2011.

Regarding the one-year limitations period, the Complaint shows that it had such knowledge since at least March 2008: SRM alleges that there was a series of "partial corrective disclosures" from June 2007 to March 2008 that purportedly revealed to the market Defendants' alleged fraud, (Compl. ¶¶ 482-515), and SRM alleges that the last of these disclosures took place on March 16, 2008. (*Id.* ¶ 513.)

American Pipe tolling does not save SRM's Section 18 claims. Section 18's three-year post-accrual time period is a statute of repose, *see Fujisawa Pharm. Co. v. Kapoor,* 115 F.3d 1332, 1336 (7th Cir. 1997); *Oaktree Cap. Mgmt., L.P. v. KPMG,* 963 F. Supp. 2d 1064, 1082 n. 14, 2013 WL 4006437, at *15 n. 14 (D.Nev.2013) ("15 U.S.C. § 78r(c) contains a three-year statute of repose for § 18 claims."); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.,* 540 F. Supp. 2d 800, 820 (S.D.Tex.2007) ("The § 18 claims are subject to a one-year limitations period and a three-year period of repose."), and a statute of repose cannot be tolled by the pendency of a class action in this Circuit. *See supra.* Class Action Lead Plaintiff also did not assert Section 18 claims in the Class Action, they asserted claims under Sections 10(b) and 20(a), and, as discussed above, only the claims asserted in a class action are tolled under *American Pipe.* Swap transaction claims were also never asserted in the Class Action.

SRM has not disputed that its Section 18 claim is subject to a three-year subject of repose and that its claim was filed well after the repose period expired. (Opp., at 26.) *IndyMac's* reasoning applies with equal force to Section 18's statute of repose as Section 10(b)'s, and SRM's Section 18 claims are time-barred for the same reason.

ii. There Are No Section 18 Claims For The Swap Transactions

"The Section 18 cause of action requires plaintiffs to plead 'that (1) a false or misleading statement was contained in a document filed pursuant to the Exchange Act (or any rule or regulation thereunder); (2) defendant made or caused to be made the false or misleading statement; (3) plaintiff relied on the false statement; and (4) the reliance caused loss to the plaintiff.'" *Int'l Fund,* 822 F. Supp. 2d at 385 (quoting *In re Alstom SA Sec. Litig.,* 406 F. Supp. 2d 433, 478 (S.D.N.Y. 2005)); *see also Ross v. A.H. Robins Co.,* 607 F.2d 545, 556 (2d Cir. 1979). A plaintiff must also plead that he or she "purchased or sold a security" based on that reliance. 15 U.S.C. § 78r(a). The CFMA did not amend Section 18 to cover security-based swap agreements and, as discussed above, expressly excluded them from the definition of a "security." *See* 15 U.S.C. § 78c-1(b)(1).

As contended by the Defendants, at all relevant times, Section 18 provided a right of action only where a plaintiff had "purchased or sold a security," not a security-based swap agreement. (Def. Bear Stearns Br., at 19.) SRM has not responded to this contention. Accordingly, for the same reasons applicable to SRM's Section 10(b) claims, SRM does not have a private right of action for its Section 18 claims for the Swap Transactions.

iii. SRM Has Failed To Adequately Plead Reliance For Its Section 18 Claims

The reliance alleged in a Section 18 claim must be "actual reliance, i.e., 'that [it] actually read and relied on the filed document. Constructive reliance is not sufficient.'" *Int'l Fund Mgmt.,* 822 F. Supp. 2d at 385; *see also* 15 U.S.C. § 78r(a); *In re Marsh & Mclennan Cos., Inc. Sec. Litig.,* 501 F. Supp. 2d 452, 493 (S.D.N.Y. 2006) ("Unlike Section 10(b)'s relaxed standard for pleading reliance . . . Section 18 requires that plaintiffs allege actual reliance on specific statements in covered Exchange Act filings."). SRM's Section 18 claims, which sound in fraud, are subject to the more stringent pleading requirements of Fed R. Civ. P. 9(b). *Alstom,* 406 F. Supp. 2d at 483 n. 45 ("[C]ourts in this Circuit have without hesitation applied Rule 9(b)'s heightened pleading requirements to Section 18 claims.").

SRM's Section 18 claim fails to plead reliance with the specificity required. Although "SRM expressly disavow[ed] any claim of fraudulent or intentional conduct in connection with its Section 18 claim, (Opp., at 26), Rule 9(b) applies whenever "the wording and imputations" of a claim involves fraud, and the rule "is not limited to allegations styled or denominated as fraud." *Rombach,* 355 F.3d at 171-72. SRM's Complaint makes no attempt to distinguish the factual allegations supporting its Section 18 claim from its Section 10(b) and common law fraud claims (*see* Compl. ¶ 524), and all three claims are predicated on exactly the same allegations of a "valuation fraud" that defendants supposedly committed with an "intent of deceiving the investing public," (Compl. ¶¶ 2, 5.) Those claims sounding fraud are subject to Rule 9(b). SRM has not cited a case from this circuit to the contrary, and "courts in this circuit have without hesitation applied Rule 9(b)'s heightened pleading requirements to Section 18 claims." *Alstom,* 406 F. Supp. 2d at 483 n. 45.

The Complaint contains the most particularized allegation in its discussion of SRM's reliance on alleged misrepresentations in the Bear Stearns 2006 Form 10-K. (Compl. ¶ 73.) SRM alleges that it "read" and "relied" on the alleged misrepresentations in the 2006 10-K "in deciding whether it should purchase Bear Securities," (*id.*), which it admits occurred over a year-long period from March 2007 through March 2008, (Opp., at 4-5, 9 n. 5). SRM does not link its review of any particular statements in that document or any other document to any actual purchases of Bear Stearns securities and does not identify a particular transaction that it allegedly made in reliance on the document or any other document. SRM's generic response that "every SRM purchase of Bear securities was in reliance on the specific misrepresentations and omissions identified in the Complaint," (Opp., at 29), is not sufficiently particularized.[4] Given the Complaint's inadequate pleadings regarding reliance, SRM has failed to adequately state Section 18 claims against the Defendants.

d. SRM's Common Law Fraud Claims Are Dismissed

i. The Common Law Fraud Claims Are Time-Barred

Under New York law, the statute of limitations for common law fraud is six years from accrual or two years from actual or imputed discovery. N.Y. C.P.L.R. § 213(8) (McKinney 2013). The six-year period runs from "the commission of the fraud". *Piedra v. Vanover,* 174 A.D.2d 191, 579 N.Y.S.2d 675, 677 (2d Dep't 1992). SRM's common law fraud claims are time-barred to the extent they are based on alleged misstatements before April 23, 2007 as SRM's complaint was filed on

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[4] SRM also alleges that Deloitte provided "unqualified opinions" on the quarterly financial statements included in Bear Stearns' Forms 10-Q. (Compl. ¶ 346.) Deloitte's reports in the 10-Qs stated that Deloitte's review was "substantially less in scope than an audit" and expressly disclaimed "the expression of an opinion regarding [Bear Stearns'] financial statements taken as a whole." (Bear Stearns 10-Q dated April 9, 2007, 08 M.D.L. No.1963(RWS), ECF No. 69-19, at 32; see also 08 M.D.L. No.1963(RWS), ECF Nos. 69-20 and 69-21.) Moreover, Bear Stearns' 10-Qs did not contain an opinion by Deloitte on Bear Stearns' quarterly financial statements. Quarterly review reports with this language "by definition cannot be considered as either an unqualified opinion or as a qualified opinion and cannot have been relied on by the Plaintiffs." *In re Integrated Res. Real Estate Ltd. P'ships Sec. Litig.*, 815 F. Supp. 620, 669 (S.D.N.Y.1993).

April 24, 2013. Its fraud claims therefore must have accrued after April 23, 2007 in order to be timely.

All of SRM's claims against the Defendants in this action accrued prior to April 23, 2007. SRM's claims are premised almost exclusively on alleged statements and supposed wrongdoing prior to April 23, 2007. (*See, e.g.,* Compl. ¶¶ 24-34, 39-108, 134-38, 199, 263, 279-81, 309-10, 317, 327, 330, 337, 419-20, 430-31, 445-46, 455, 461-62, 470.) SRM relies heavily on statements in the report indicating that the SEC questioned Bear Stearns' mortgage and VaR models. (*See, e.g.,* Compl. ¶¶ 49, 50, 70, 419-20, 430-31, 445-46, 455, 461-62, 470.) But, as the report notes, those criticisms were only made on two occasions, in 2005 and 2006. (*See* Compl., Ex. A at 20-21, ECF No. 1-3.)

SRM has identified alleged misrepresentations made by the Defendants after April 23, 2007 in its Complaint, (*see* Compl. ¶¶ 171, 172, 174, 176, 193, 195, 197, 202, 203, 210, 211, 345, 346), and contends that its common law fraud claims are timely if it alleged "any misrepresentations or omissions on or after April 24, 2007." (Opp., at 31.) However, SRM cites no case supporting its position, and there are authorities to the contrary. *See, e.g., Fromer v. Yogel,* 50 F. Supp. 2d 227, 245 (S.D.N.Y. 1999) ("To the extent [common law fraud] allegations in the Complaint rely on statements made prior to the six-year statute of limitations applicable under New York law, *see* C.P.L.R. § 213, the motions to dismiss the claim for common law fraud, as to those statements, are granted"); *Bastys v. Rothschild,* No. 97 Civ. 5154 CMGAY, 2000 WL 1810107, at *46 (S.D.N.Y., Nov. 21, 2000) (finding that plaintiff's claims that relied on alleged misrepresentations made prior to the six-year limitations period time-barred). The only document that SRM specifically alleges it relied on in deciding to purchase securities or the Bear Stearns Swaps is the Bear Stearns 2006 Form 10-K, (Compl. ¶ 73), which was filed on February 13, 2007, more than six years prior to the filing of the Complaint. SRM also has not sufficiently pled that it "discovered" the alleged fraud within two-years prior of the Complaint's filing, and it cannot avail itself of the two-year discovery rule.

Similarly, SRM's common law fraud claims against Deloitte can only rely on Deloitte's opinion in Bear Stearns' 2006 Form 10-K, filed on February 13, 2007, and Deloitte's opinion in Bear Stearns' 2007 Form 10-K, filed on January 29, 2008. (Compl. ¶¶ 345-346.) For claims against auditors, the New York Court of Appeals has held that each year's audit is a separate engagement, and the cause of action accrues on the date each year's audit opinion is issued. *See Williamson v. PricewaterhouseCoopers LLP,* 9 N.Y.3d 1, 840 N.Y.S.2d 730, 872 N.E.2d 842, 845 (2007) (accrual for malpractice under N.Y. C.P.L.R. § 214(6)). Thus, for the common law fraud claims against Deloitte based on the 2006 audit opinion, the six-year period began to run on February 13, 2007, and SRM was required to commence the action by February 13, 2013, more than two months before SRM filed its Complaint. The statute of limitations thus bars SRM from bringing common law fraud claims against Deloitte based on the purchase of Bear Stearns stock as a result of the 2006 audit opinion.

For the 2007 audit opinion, the six-year period began to run on January 29, 2008, and the six-year limitations period will run out on January 30, 2014. To the extent SRM's common law fraud claims against

Deloitte are based on the 2007 audit opinion, they are timely.[5]

SRM fares no better for its claims based on the 2006 audit opinion with the alternative limitations period, which is two years from when the plaintiff "discovered the fraud, or could with reasonable diligence have discovered it." N.Y. C.P.L.R. § 213(8). Here, a reasonably diligent plaintiff could have discovered the alleged fraud in 2008, when Bear Stearns nearly collapsed, or by February 27, 2009, when the Class Action Lead Plaintiff added a federal securities fraud claim against Deloitte in the Class Action. (08 M.D.L. No.1963(RWS), ECF No. 61.) Under the two-year discovery rule, SRM's claims based on the 2006 audit are untimely.

SRM's common law fraud claims are not tolled by the pendency of the Class Action as a matter of New York law. *American Pipe* tolling does not apply to SRM's state claims because it only applies to federal law causes of action. *See Casey v. Merck & Co.,* 653 F.3d 95, 100 (2d Cir. 2011) ("[A] federal court evaluating the timeliness of state law claims must look to the law of the relevant state to determine whether, and to what extent, the statute of limitations should be tolled by the filing of a putative class action in another jurisdiction.").

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[5] SRM last purchased Bear Stearns common stock in September 2007, (*see* Carey Decl., Ex. 9), before the 2007 audit opinion. Given such, SRM cannot bring claims regarding its purchase of Bear Stearns common stock by asserting reliance on the 2007 audit opinion unless under "holder" claim liability, discussed below.

In certain circumstances, a New York statute of limitations may be tolled by the pendency of a class action, but New York currently does not recognized tolling where that class action is filed outside New York state court (so-called "cross-jurisdictional tolling"). *See Soward v. Deutsche Bank AG,* 814 F. Supp. 2d 272, 281-82 (S.D.N.Y. 2011) (refusing to toll state law fraud claims because of earlier class action filed in the S.D.N.Y., as the court "cannot say that New York would adopt cross-jurisdictional tolling and [therefore] declin[ing] to import the doctrine into New York's law"); *see also In re Fosamax Prods. Liab. Litig.,* 694 F. Supp. 2d 253, 258 (S.D.N.Y. 2010), *aff'd, Casey v. Merck & Co.,* 678 F.3d 134 (2d Cir. 2012). (refusing to recognize cross-jurisdictional tolling under Virginia law because "federal courts generally have been disinclined to import cross-jurisdictional tolling into the law of a state that has not ruled on the issue" and "few states . . . currently recognize cross-jurisdictional class action tolling"); *Vincent v. Money Store,* 915 F. Supp. 2d 553, 569-70 (S.D.N.Y. 2013) (quoting *Fosamax* in a case involving California law).[6] Cross-jurisdictional tolling is at issue whenever a court considers the timeliness of state law claims originally filed outside that state's courts. *See Centaur Classical*

[6] *Primavera Familienstifung v. Askin Cap. Mgmt., L.P.*, 130 F. Supp. 2d 450 (S.D.N.Y. 2001) recognized cross-jurisdictional tolling by directly applying *American Pipe* to a state statute of limitations, but was decided before *Casey* and the Second Circuit's clarification that the tolling of state statutes of limitation is not governed by *American Pipe*. *See Casey*, 653 F.3d at 100 (expressly departing from *Primavera*); *Soward*, 814 F. Supp. 2d at 281-82 (distinguishing *Primavera* as having been superseded by *Casey*).

Convertible Arbitrage Fund Ltd. v. Countrywide Fin. Corp., 878 F. Supp. 2d 1009, 1017 (C.D.Cal.2011) (holding that cross-jurisdictional tolling applies even where the class action and subsequent action were both filed in the same federal court, because cross-jurisdictional tolling "includes all situations where a class action is filed outside the . . . state court system").

Judges in this district have declined to recognize cross-jurisdictional tolling under state law, because such tolling can be applied only if it is clearly recognized by authoritative state court decisions. In *Vincent v. Money Store,* for example, the Honorable John Koeltl refused to recognize cross-jurisdictional tolling under California law, citing compelling policy reasons against such tolling:

> [U]nless all states simultaneously adopt the rule of cross-jurisdictional class action tolling, any state which independently does so will invite into its courts a disproportionate share of suits which the federal courts have refused to certify as class actions after the statute of limitations has run.

915 F. Supp. 2d at 569-70 (quoting *Hatfield v. Halifax PLC,* 564 F.3d 1177, 1187 (9th Cir. 2009)); *see also In re Fosamax,* 694 F. Supp. 2d at 258. Other federal courts have taken the same approach. *See, e.g., Wade v. Danek Med., Inc.,* 182 F.3d 281, 287-88 (4th Cir. 1999) (refusing to recognize cross-jurisdictional tolling in the absence of clear guidance from the Virginia Supreme Court, because of forum-shopping concerns); *Patterson v. Novartis Pharm. Corp.,* 909 F. Supp. 2d 116, 123 (D.R.I.2012) ("Without a 'well-plotted' path

showing an 'avenue of relief' that the Massachusetts Supreme Judicial Court would take on cross jurisdictional class-action tolling, and with no apparent consensus among the few states that have addressed the question, this Court . . . refuses to embark into an 'unexplored frontier' and import cross jurisdictional class-action tolling into Massachusetts state law.").

SRM has not distinguished the cases cited by the Bear Stearns Defendants and Deloitte. (Def. Bear Stearns Br., at 23-24; Opp., at 30-31.) As established by those authorities, "most [federal courts] have refused to extend the doctrine into a state that has yet to consider it." *Soward,* 814 F. Supp. 2d at 281-82. Moreover, SRM has conceded that New York courts "have not yet spoken authoritatively on this issue." (Opp., at 30.) Given such, the Court declines to find that SRM's common law fraud claims were tolled by the Class Action, and SRM's common law fraud claims are time-barred against the Bear Stearns Defendants and Deloitte to the extent they rely on any alleged misrepresentations made before April 24, 2007.

ii. SRM Has Failed To Adequately Plead Reliance

To plead common law fraud, a plaintiff must allege with particularity that it actually relied upon the supposed misstatements. *SeeBanque Arabe Et Internationale D'Investissement v. Maryland Nat'l Bank,* 850 F. Supp. 1199, 1221 (S.D.N.Y. 1994) (holding that applying a presumption of reliance would "improperly . . . incorporate the standards for Rule 10b-5 into a common law fraud claim"); *Turtur v. Rothschild Registry, Int'l, Inc.,* No. 92 Civ. 8710(RPP), 1993 WL 338205, at *6 (S.D.N.Y. Aug. 27, 1993) ("[O]n Rule 9(b) motion . . . plaintiff must establish that it or its agent 'in fact read and relied on the [misrepresentation] . . . .'" (alteration in original) (quoting *Devaney v. Chester,* 709 F. Supp. 1255, 1264 (S.D.N.Y. 1989))). SRM's common law fraud claims are subject to the Rule 9(b) pleading requirements.

As previously noted, SRM's Complaint makes no attempt to distinguish the factual allegations supporting its Section 18 claim from its Section 10(b) and common law fraud claims. (*See* Compl. ¶ 524.) And as noted above, SRM has not sufficiently pled reliance in its Complaint. Only one document, Bear Stearns' 2006 Form 10-K, has been pled with particularity by SRM as a document upon which it relied in deciding whether it should purchase Bear Stearns securities. (Compl. ¶ 73.) Moreover, SRM does not allege that it actually purchased any particular Bear Stearns securities on any particular date in reliance on any particular alleged misstatements in the 2006 Form 10-K. Such pleadings are not adequate for SRM's common law fraud claims. *See Int'l Fund,* 822 F. Supp. 2d at 386(holding that allegations of reliance were defective because they were "incredibly broad" and "lack[ed] supporting factual matter indicating how plaintiffs relied on the alleged misrepresentations.").

SRM has contended that Rule 9(b) does not apply to the reliance element of its common law fraud claim, because reliance is a "condition[ ] of a person's mind" that may be alleged generally. (Opp., at 27.) SRM has cited to no case from this district supporting this argument, and has conceded that "[a]dmittedly, scattered decisions (including decisions of this Court) have suggested that 9(b)'s particularity requirement applies to allegations of reliance." (Opp., at 27 n. 16.) Courts in this district have consistently held that reliance does not simply involve a state of mind; it involves specific action or inaction, and therefore must be pleaded with particularity. *See, e.g., Granite Partners, L.P. v. Bear, Stearns & Co.,* 58 F. Supp. 2d 228, 258 (S.D.N.Y. 1999) (plaintiffs must plead "facts [that] underlie . . . reliance"); *Int'l Fund,* 822 F. Supp. 2d at 386-87 (S.D.N.Y. 2011) (dismissing Section 18 and common law fraud claims because plaintiffs' reliance allegations were "too conclusory to state a claim to relief").[7] Given SRM's insufficient pleadings, SRM has not sufficiently pled reliance in its common law fraud claims.

iii. SRM Cannot Bring A Common Law Fraud Claim Against Deloitte For The Swap Transactions

An auditor who consents to the filing of its audit opinion with the SEC is exposed to potential liability for fraud to prospective investors in registered securities. However, extension of that liability to

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[7] SRM also has argued that its pleadings of reliance are sufficient under the test applied in cases considering "transaction causation." (Opp. 28.) All of those cases concern claims under Section 10(b) and Rule 10b-5, which are subject to a presumption of reliance. *See ATSI Commc'ns*, 493 F.3d 87; *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 172 (2d Cir. 2005); *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 197 (2d Cir. 2003) (applying the "transaction causation" standard to federal Section 10(b) claims). SRM's Section 18 and common law fraud claims are not subject to that presumption, and actual reliance therefore must be pleaded with the particularly required by Rule 9(b).

purchasers of unregistered swaps whose existence the auditor did not expect and had no reason to expect inappropriately stretches that liability: an auditor's liability for common law fraud is limited to the "the persons or class of persons" to whom the auditor intends to communicate its representations. *Ultramares Corp. v. Touche,* 255 N.Y. 170, 174 N.E. 441, 446-47 (1931) (Cardozo, J.); *see also* Restatement (Second) of Torts § 531 (liability for fraud limited to class of persons engaging "in the type of transaction in which [the defendant] intends or has reason to expect their conduct to be influenced"). An auditor can be liable in negligence to parties only with a party whom the auditor is in privity, or a relationship "so close as to approach that of privity". *Ultramares,* 174 N.E. at 446.

Deloitte did not expect, and did not have any reason to expect, reliance by parties engaging in swap transactions, and the Complaint has not averred any such expectation. As previously explained, swaps are different from purchases of common stock, and the Swap Transactions were a fundamentally different type of transaction from the sale and purchase of common stock and other registered securities Deloitte anticipated when it consented to the inclusion of its audit opinions in Bear Stearns' SEC filings. Liability cannot arise from such an unanticipated transaction. *See, e.g., Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.,* 51 S.W.3d 573, 578-80, 583 (Tex. 2001) (holding that an auditor who consented to inclusion of its audit opinion in the Form 10-K filed by its client, company A, had no "reason to expect" reliance on that audit opinion by purchasers of notes issued by company B (the plaintiff purchased the notes after B merged into

A, when A had become obligated on the notes) because "the transaction sued upon" (the purchase of notes issued by B) was not "the type the defendant contemplated" in auditing company A's financial statements).

SRM contends that the passage of the CFMA put Deloitte on notice of the potential reliance by third parties on Deloitte's audit reports for swap transactions. (Opp. at 35.) However, as previously noted, the CFMA did not create a private right of action for swap transactions against issuers of the underlying securities or its auditors, and Deloitte cannot be put on notice by a statute that did not apply. Indeed, the CFMA prohibited the SEC from imposing on swaps the registration and reporting requirements applicable to securities. *See* CFMA § 302(a), 114 Stat. at 2763A-451 to-452 (codified at 15 U.S.C. § 77b-1).

Given that the Swap Transactions could not have been foreseen by Deloitte as a transaction in which parties would have relied on its audit reports, Deloitte is not liable to SRM for the Swap Transactions based on any representations it made in its Bear Stearns audit reports. In addition, the only trades SRM states that it made after the issuance of Deloitte's 2007 audit opinion are the Swap Transactions. (Carey Aff., Ex. 9.) Given the expiration of the statute of limitations on any common law fraud claim based on Deloitte's 2006 audit opinion, *see supra,* SRM has failed to state a claim against Deloitte for its Bear Stearns securities and the Swap Transactions under common law fraud and the claims are dismissed.

iv. Defendants' Motions To Dismiss The Holder Claims Are Granted

SRM contends, for purposes of its common law fraud claims, that it was defrauded into making its initial investment in Bear Stearns and also in retaining its investment. (*See, e.g.,* Compl. ¶¶ 541-42, 543, 546.) However, New York may have barred all "holder" claims, a claim "in which the plaintiffs allege that material misrepresentations or omissions caused them to retain ownership of securities that they acquired prior to the alleged wrongdoing." *In re WorldCom, Inc. Sec. Litig.,* 336 F. Supp. 2d 310, 318-23 (S.D.N.Y. 2004). *Starr Foundation v. Am. Int'l Group, Inc.,* 76 A.D.3d 25, 901 N.Y.S.2d 246, 250 (2010), suggests that New York does not recognize such claims. *See, e.g., id.* at 261 (Moskowitz, J., dissenting) ("Under the majority's reasoning, holder claims could never be viable."); *see also Tradex Global Master Fund SPC Ltd. v. Titan Capital Group III, LP,* 95 A.D.3d 586, 944 N.Y.S.2d 527, 529 (2012) ("[U]nder New York law, such a 'holder claim' would be precluded under the out-of-pocket rule."); *Irvin v. Jones,* 38 Misc.3d 1203(A), 966 N.Y.S.2d 346 (N.Y.Sup.Ct.2012) ("[T]o the extent that such cause of action may be read as asserting 'holder' claims, i.e., that the plaintiffs were wrongfully induced by the defendants to hold rather than sell . . . such claims are not actionable under New York law."). In *Starr Foundation,* the First Department held that a fraud claim asserting that plaintiff would have disposed of an investment before it decreased in value, had defendant disclosed certain facts, failed "as a matter of law" because it was "virtually the paradigm of the kind of claim" barred by "New York's longstanding out-of-pocket rule," which precludes recovery of "undeterminable and speculative" losses. 901 N.Y.S.2d at 248-49 ("[Plaintiff] seeks to recover the value it might have realized from selling its shares during a period when it chose to hold, under hypothetical market conditions (assuming disclosures different from those actually made) that never existed. A lost bargain more 'undeterminable and speculative' than this is difficult to imagine."). The New York Court of Appeals has not resolved whether New York law recognizes such a theory of fraud. *See Matana v. Merkin,* 957 F. Supp. 2d 473, 490-91 (S.D.N.Y. 2013).

SRM has asserted that "New York law has long recognized holder fraud claims," (Opp., at 33), but has not cited an authority from the New York Court of Appeals recognizing such a claim. SRM has characterized *Matana,* 957 F. Supp. 2d 473, the only post-*Starr* case it cites, as holding that *Starr* only barred "a holder claim seeking to recover lost profits." *Id.* at 490-91. However, *Matana* recognized that "[t]he decision in *Starr* may be read . . . as precluding holder claims regardless of whether they seek to recover lost profits or simply losses." *Matana* dismissed plaintiff's claim because, "even assuming that New York law would permit a satisfactorily pled holder claim," plaintiff's claim failed for unrelated reasons. *Id.* at 490-92. SRM has also cited *Prime Mover Capital Partners, L.P. v. Elixir Gaming Tech., Inc.,* 793 F. Supp. 2d 651, 672 n. 108 (S.D.N.Y. 2011) suggesting that a holder claim may have been viable, but as the *Prime Mover* Court made clear, the issue was not relevant because plaintiffs had "neither argued nor pleaded such a 'holder' claim"; moreover, the *Prime Mover* Court did not mention the recent decision in

Starr. SRM has sought to distinguish *Tradex,* 944 N.Y.S.2d 527, by noting that plaintiffs in *Tradex* were "seeking to recover lost profits." (Opp., at 35 n. 22.) However, plaintiffs in *Tradex,* like SRM, sought losses that they allegedly suffered by retaining an investment because of supposedly misleading statements. (*See* Complaint ¶ 37, No. 652127/2010 (N.Y. Sup. Ct. Dec. 8, 2010).) Similarly, SRM also characterizes *Irvin,* 2012 WL 6634476, as involving lost profits, but in *Irvin* plaintiffs' entire holder claim, i.e., "[d]amages for all losses associated with alleged imprudent investments" allegedly caused by defendants' misconduct, including an initial $200,000 investment, was barred by Starr. *Id.* at *2, *11.

Given the uncertainty of the New York law with respect to holder claims, Judge Moskowitz's views in his dissent in *Starr* on the current state of holder claims in New York is most persuasive, and SRM's holder claims are dismissed.

e. *The Section 20 Control Person Claims Are Dismissed*

SRM has asserted a claim against the Individual Defendants for "control person" liability under Section 20(a) of the Exchange Act. To state a claim under Section 20(a), SRM must plead, inter alia, a timely predicate violation of the Exchange Act. *ATSI Commc'ns,* 493 F.3d at 108; *Dodds v. Cigna Secs., Inc.,* 12 F.3d 346, 350 n. 2 (2d Cir. 1993). As noted above, SRM has not pled a timely, viable primary violation of the Exchange Act; as such, SRM's claim under Section 20(a) fails. *See ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co.,* 553 F.3d 187, 207 (2d Cir. 2009) (granting defendant's motion to dismiss under Section 20(a) for failure to adequately allege a primary violation of the Exchange Act).

IV. *Conclusion*

Based on the conclusions set forth above, Defendants' motions to dismiss are granted.

It is so ordered.