

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term, 2015

5
6 (Argued: August 31, 2015 Decided: July 14, 2016)

7
8 Docket No. 14-507-cv
9

10 _____
11
12 SRM GLOBAL MASTER FUND LIMITED PARTNERSHIP,

13
14 *Plaintiff-Appellant,*

15
16 v.
17

18 BEAR STEARNS COMPANIES L.L.C. F/K/A BEAR STEARNS
19 COMPANIES INC., ALAN D. SCHWARTZ, SAMUEL L. MOLINARO, JR.,
20 JAMES CAYNE, WARREN SPECTOR, DELOITTE & TOUCHE L.L.P.,
21

22 *Defendants-Appellees.*
23
24 _____
25

26 Before:

27
28 HALL, LIVINGSTON, and LOHIER, *Circuit Judges.*
29

30 More than five years after the collapse of Bear Stearns Companies
31 Inc. (with its successor, defendant Bear Stearns Companies L.L.C., "Bear")
32 and the filing of a putative class action lawsuit against Bear, plaintiff SRM
33 Global Master Fund Limited Partnership ("SRM") filed its own suit against
34 Bear, Bear's officers, and Bear's auditor, defendant Deloitte & Touche
35 L.L.P. SRM, a registered private investment fund, asserted that the
36 defendants had made material misrepresentations in violation of SEC Rule
37 10b-5 and Sections 10(b) and 20(a) of the Securities Exchange Act of 1934
38 and had engaged in common law fraud. The United States District Court

1 for the Southern District of New York (Sweet, J.) dismissed SRM's
2 complaint. Relying on our decision in *Police & Fire Retirement System of*
3 *City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), it held that
4 the class action tolling rule set forth in *American Pipe & Construction Co. v.*
5 *Utah*, 414 U.S. 538 (1974), does not apply to 28 U.S.C. § 1658(b)(2), the five-
6 year statute of repose that limits the time in which plaintiffs may bring
7 claims under Section 10(b) and Rule 10b-5. It therefore dismissed SRM's
8 Section 10(b) and Rule 10b-5 claims as time-barred and dismissed SRM's
9 Section 20(a) claims for failure to state a primary violation of Section 10(b).
10 The District Court also dismissed SRM's common law fraud claims,
11 holding that New York law does not recognize holder fraud claims and
12 that SRM failed adequately to plead reliance. We **AFFIRM**.

13
14 PHILIP C. KOROLOGOS, Boies, Schiller & Flexner
15 LLP, New York, NY (Richard B. Drubel, Matthew
16 J. Henken, Boies, Schiller & Flexner LLP,
17 Hanover, NH, *on the brief*), for Plaintiff-Appellant.

18
19 ELIZABETH M. SACKSTEDER (Brad S. Karp, Jessica
20 S. Carey, Jonathan Hurwitz, *on the brief*), Paul,
21 Weiss, Rifkind, Wharton & Garrison LLP, New
22 York, NY, for Defendant-Appellee Bear Stearns
23 Companies L.L.C.

24
25 Susan Saltzstein, Skadden, Arps, Slate, Meagher
26 & Flom LLP, New York, NY, for Defendant-
27 Appellee Alan D. Schwartz.

28
29 Pamela Rogers Chepiga, Allen & Overy LLP,
30 New York, NY, for Defendant-Appellee Samuel L.
31 Molinaro, Jr.

32
33 David S. Frankel, Kramer, Levin, Naftalis &
34 Frankel LLP, New York, NY, for Defendant-
35 Appellee James Cayne.

36
37 David B. Anders, Wachtell, Lipton, Rosen & Katz,
38 New York, NY, for Defendant-Appellee Warren
39 Spector.

40
41 ANTONY L. RYAN (Thomas G. Rafferty, Rachel G.
42 Skaistis, *on the brief*), Cravath, Swaine & Moore

1 LLP, New York, NY, for Defendant-Appellee
2 Deloitte & Touche L.L.P.

3
4 LOHIER, Circuit Judge:

5 This appeal arises from the collapse of Bear Stearns Companies Inc.
6 (with its successor, defendant Bear Stearns Companies L.L.C., "Bear") and
7 the lawsuit filed by SRM Global Master Fund Limited Partnership
8 ("SRM"), a registered private investment fund, against Bear, Bear's
9 officers, and Bear's auditor, defendant Deloitte & Touche L.L.P.
10 ("Deloitte"). The principal question presented is whether the class action
11 tolling rule set forth in American Pipe & Construction Co. v. Utah, 414 U.S.
12 538 (1974), applies to 28 U.S.C. § 1658(b)(2), the five-year statute of repose
13 that limits the time in which plaintiffs may bring claims under Section
14 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC
15 Rule 10b-5, 17 C.F.R. § 240.10b-5, see Merck & Co. v. Reynolds, 559 U.S.
16 633, 650 (2010). We hold that American Pipe tolling does not apply to
17 § 1658(b)(2). As we explain below, we also conclude that SRM failed
18 adequately to allege that it relied on any misrepresentations in making
19 investment decisions, an element of its common law fraud claims.

1 **BACKGROUND**

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

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

12 In 2007 and 2008 SRM purchased Bear common stock and entered
13 into swap agreements based on the value of Bear common stock. Two
14 specific allegations in the complaint relate to SRM's decision to purchase
15 or sell stock, or enter into or unwind the swap agreements, in reliance on
16 the defendants' misrepresentations. First, SRM alleges that it read and
17 relied on the misrepresentations in Bear's 2006 Form 10-K "in its analysis
18 of Bear and in deciding whether it should purchase Bear securities." Joint

1 App'x 31. Second, SRM alleges that it read and relied on Deloitte's
2 misrepresentations in Bear's 2006 and 2007 Form 10-Ks "in its analysis of
3 Bear and in deciding whether it should liquidate, retain or increase its
4 investment in Bear." Joint App'x 101. SRM also asserts "holder claims,"
5 alleging that it retained its Bear stock and decided not to unwind the swap
6 agreements in reliance on the defendants' misrepresentations.

7 After Bear collapsed, the defendants were sued in a series of
8 putative class actions that were eventually consolidated and settled. At its
9 request, SRM was excluded from the settlement class. It instead filed this
10 complaint in April 2013, asserting that the defendants had made material
11 misrepresentations in violation of SEC Rule 10b-5 and Sections 10(b) and
12 20(a) of the Exchange Act and had also committed common law fraud
13 under New York law.¹

14 Relying on § 1658(b)(2), the defendants moved to dismiss SRM's
15 complaint as time-barred. SRM responded that the statute of repose in
16 § 1658(b)(2) was tolled by the filing of a putative class action complaint

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

1 against Bear and the individual defendants in March 2008.² The United
2 States District Court for the Southern District of New York (Sweet, L),
3 rejected SRM's argument based on our decision in Police & Fire Retirement
4 System of City of Detroit v. IndyMac MBS, Inc., 721 F.3d 95 (2d Cir. 2013).
5 The District Court held that American Pipe tolling does not apply to
6 § 1658(b)(2), and that SRM's Section 10(b) and Rule 10b-5 claims were
7 therefore time-barred. It dismissed SRM's Section 20(a) claims for failure
8 to state a primary violation of Section 10(b). And it also dismissed SRM's
9 common law fraud claims, holding that New York law does not recognize
10 holder fraud claims and that SRM failed adequately to plead reliance.

11 This appeal followed.

12 DISCUSSION

13 A. SRM's Federal Claims

14 Under the tolling rule set forth in American Pipe, "the
15 commencement of a class action suspends the applicable statute of
16 limitations as to all asserted members of the class who would have been

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

1 parties had the suit been permitted to continue as a class action.” 414 U.S.
2 at 554. Section 1658(b)(2), however, is not a statute of limitations. It is a
3 statute of repose, which “is not a limitation of a plaintiff’s remedy, but
4 rather defines the right involved in terms of the time allowed to bring
5 suit.” P. Stolz Family P’ship L.P. v. Daum, 355 F.3d 92, 102, 104 (2d Cir.
6 2004) (identifying § 1658(b)(2) as a statute of repose); see Merck & Co., 559
7 U.S. 650 (same).

8 In IndyMac, we held that American Pipe tolling does not apply to
9 the statute of repose in Section 13 of the Securities Act of 1933, 15 U.S.C.
10 § 77m, which limits the time in which plaintiffs may bring actions under
11 Sections 11 and 12(a) of that Act. IndyMac, 721 F.3d at 112. Noting that
12 Section 13 is a statute of repose, we explained that if viewed as a form of
13 equitable tolling American Pipe tolling does not apply to Section 13
14 because “a statute of repose is subject only to legislatively created
15 exceptions, and not to equitable tolling.” Id. at 106, 109 (quotation marks
16 omitted). Nor could it apply, we concluded, if American Pipe tolling is
17 legal in nature and based on Rule 23 of the Federal Rules of Civil
18 Procedure. “[S]tatutes of repose create a substantive right in those

1 protected to be free from liability after a legislatively-determined period of
2 time.” Id. at 106 (quotation marks omitted). “Permitting a plaintiff to file a
3 complaint . . . after the repose period set forth in Section 13 of the
4 Securities Act has run would therefore necessarily enlarge or modify a
5 substantive right and violate the Rules Enabling Act [28 U.S.C. § 2072(b)],”
6 which “forbids interpreting Rule 23 to ‘abridge, enlarge or modify any
7 substantive right.’” Id. at 109 (quoting Wal-Mart Stores, Inc. v. Dukes, 131
8 S. Ct. 2541, 2561 (2011)).

9 For the reasons we provided in IndyMac, we hold that American
10 Pipe tolling does not apply to § 1658(b)(2)’s five-year statute of repose.
11 First, as a statute of repose, § 1658(b)(2) is not subject to equitable tolling,
12 see id. at 106, 109; and second, it creates a substantive right in defendants
13 to be free from liability after five years — a right that American Pipe
14 tolling cannot modify without running afoul of the Rules Enabling Act, see
15 id.

16 SRM argues that the textual differences between Section 13 and
17 § 1658(b)(2) — in particular, Section 13’s “in no event” language —

1 distinguish IndyMac.³ But we did not base our holding in IndyMac on
2 Section 13's "in no event" language. There is no reason to think that it is
3 that particular phrase that secures for defendants in actions under Sections
4 11 and 12(a) of the Act a substantive right to be free from liability after
5 three years. Nor do any other textual differences between Section 13 and
6 § 1658(b)(2) dissuade us from concluding that IndyMac applies to
7 § 1658(b)(2).

8 Because the complaint fails to allege that the defendants made any
9 misrepresentations within five years of the filing of SRM's complaint,
10 SRM's Section 10(b) and Rule 10b-5 claims are time-barred under
11 § 1658(b)(2)'s five-year statute of repose. And because SRM fails to state a
12 claim under Section 10(b), we agree with the District Court that its Section
13 20(a) claim "must also fail for want of a primary violation." ECA, Local

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 77l(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).

1 134 IBEW Joint Pension Tr. of Chi. v. JP Morgan Chase Co., 553 F.3d 187,
2 207 (2d Cir. 2009).

3 B. SRM's Common Law Fraud Claims

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

6 To plead a common law fraud claim under New York law, a
7 "plaintiff must allege facts to support the claim that it justifiably relied on
8 the alleged misrepresentations." ACA Fin. Guar. Corp. v. Goldman, Sachs
9 & Co., 25 N.Y.3d 1043, 1044 (2015). SRM's complaint fails to allege facts
10 sufficient to state a plausible claim that it purchased or sold stock, or
11 entered into or unwound swap agreements, in reliance on the defendants'
12 misrepresentations. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570
13 (2007).⁴ The complaint's only relevant factual allegations assert that SRM
14 relied on the misrepresentations in Bear's 2006 Form 10-K "in its analysis
15 of Bear and in deciding whether it should purchase Bear securities," Joint
16 App'x 31 (emphasis added), and that it relied on Deloitte's

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.

1 misrepresentations in Bear's 2006 and 2007 Form 10-Ks "in its analysis of
2 Bear and in deciding whether it should liquidate, retain or increase its
3 investment in Bear," Joint App'x 101 (emphasis added). Neither these
4 allegations nor any others specifically plead, as necessary to SRM's
5 common law fraud claims, that SRM actually purchased or sold stock, or
6 actually entered into or unwound a swap agreement, in reliance on the
7 defendants' misrepresentations. Without such an allegation, we conclude,
8 SRM's common law fraud claims were properly dismissed.

9 The same is true of SRM's holder fraud claims. As noted above, the
10 District Court held that New York courts do not recognize holder fraud
11 claims, relying principally on two recent First Department cases. Special
12 App'x 24-25 (citing Bank Hapoalim B.M. v. WestLB AG, 995 N.Y.S.2d 7, 11
13 (1st Dep't 2014) and Starr Found. v. Am. Int'l Grp., Inc., 901 N.Y.S.2d 246,
14 248-50 (1st Dep't 2010)). We need not decide whether New York law
15 permits holder fraud claims, because even assuming that it does, SRM has
16 failed to point us to any part of its complaint that adequately alleges
17 reliance on any misrepresentations in deciding to hold rather than sell its
18 stock. See Cont'l Ins. Co. v. Mercadante, 225 N.Y.S. 488, 491 (1st Dep't

1 1927); see also In re Terrorist Attacks on Sept. 11, 2001, 714 F.3d 109, 117
2 (2d Cir. 2013) (“[I]t is well established that we can affirm the dismissal of a
3 complaint on any basis supported by the record.”). Accordingly, we
4 conclude that the District Court properly dismissed SRM’s holder fraud
5 claims.

6 CONCLUSION

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