UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-- x

In re:

LEHMAN BROTHERS SECURITIES AND ERISA LITIGATION

09 MD 2017 (LAK)

This document applies to:

In re Lehman Brothers Mortgage-Backed Securities Litigation, No. 08-CV-6762 (LAK)

-- x

INDIVIDUAL DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO THE PLANTIFFS' AND IOWA PUBLIC EMPLOYEES' RETIREMENT SYSTEM'S JOINT MOTION TO INTERVENE

SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017-3954
(212) 455-2000

Attorneys for Defendants Lana Franks Harber, Edward Grieb, Richard McKinney, Kristine Smith, James J. Sullivan, Samir Tabet and Mark L. Zusy

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

ARGUMENT 4

I. THE IPERS' MOTION TO INTERVENE SHOULD BE DENIED FOR THE SAME REASONS AS MISSPERS' MOTION 4

II. IPERS' ADDITIONAL AUTHORITY IS UNAVAILING 6

III. IPERS' MOTION IS UNTIMELY UNDER RULES 24(a) AND 24(b) AND IF GRANTED WOULD PREJUDICE THE INDIVIDUAL DEFENDANTS 7

IV. EVEN IF AMERICAN PIPE TOLLING APPLIES, IPERS' CLAIM BASED ON THE SARM SERIES 2006-4 CERTIFICATES ARE STILL BARRED BY THE STATUTE OF REPOSE 11

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756 (1974)................ passim

Arneil v. Ramsey, 550 F.2d 774 (2d Cir. 1977) 12, 13

CalPERS v. Chubb Corp., Civ. No. 00-4285 (GEB), 2002 WL 33934282 (D.N.J. June 26, 2002) 6

Catanzano by Catanzano v. Wing, 103 F.3d 223 (2d Cir. 1996) 7

Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 103 S. Ct. 2392 (1983) 2, 12

First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862 (4th Cir. 1989) 5

In re Bank of New York Derivative Litig., 320 F.3d 291 (2d Cir. 2003) 8

In re Bausch & Lomb, Inc. Sec. Litig., 941 F. Supp. 1352 (W.D.N.Y. 1996) 13

In re Colonial Ltd. Partnership Litig., 854 F. Supp. 64 (D. Conn. 1994) 2, 6, 7

In re Countrywide Fin. Corp. Sec. Litig., 588 F. Supp. 2d 1132 (C.D. Cal. 2008) 8, 9, 10

In re Crazy Eddie Sec. Litig., 747 F. Supp. 850 (E.D.N.Y. 1990)....................................... 2, 6, 7

In re Elscint, Ltd. Sec. Litig., 674 F. Supp. 374 (D. Mass. 1987) 2, 7

In re Flag Telecom Holdings, Ltd. Sec. Litig., 352 F. Supp. 2d 429 (S.D.N.Y. 2005) 6

In re Lehman Brothers Securities and ERISA Litigation, 684 F. Supp. 2d 485 (S.D.N.Y. 2010) 10

In re Morgan Stanley Mortgage Pass-Through Certificates Litig., No. 09-cv-2137 (LTS) (MHD), slip op. (S.D.N.Y. Aug. 17, 2010)...5, 10, 13

In re National Australia Bank Sec. Litig., 03-cv-6537 (BSJ), 2006 WL 3844463 (S.D.N.Y. Nov. 8. 2006)... 6, 7

In re Wells Fargo Mortgage-Backed Certificates Litig., No. 09-cv-01376, 2010 WL 1661534 (N.D. Cal. Apr. 22, 2010).. 7, 9

In re WorldCom Sec. Litig., 496 F.3d 245 (2d. Cir 2007) 12

King County, Wash. v. IKP Deutsche Industriebank AG, No. 09-cv-8387 (SAS), 2010 WL 2010943 (S.D.N.Y. May 18, 2010)... 7

Korwek v. Hunt, 827 F.2d 874 (2d Cir. 1987) 2, 6, 7

Kruse v. Wells Fargo Home Mortg. Co., No. 02-cv-3089 (ILG), 2006 WL 1212512 (E.D.N.Y. May 3, 2006) 2, 7

McClune v. Shamah, 593 F.2d 482 (3d Cir. 1979) 6

N.J. Carpenters Health Fund, et. al., v. Residential Capital LLC, et. al., No. 08-cv-8781 (HB), 2010 WL 1257528 (S.D.N.Y. Mar. 31, 2010) 9

Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman, 277 B.R. 20 (S.D.N.Y. 2002) 5

Ong v. Sears, Roebuck & Co., 388 F. Supp. 2d 871 (N.D. Ill. 2004) 8, 9

P. Stolz Family Partnership v. Daum, 355 F.3d 92 (2d Cir. 2004) 5

STATUTES

15 U.S.C. § 77m 3

Fed. R. Civ. P. 15 12

Fed. R. Civ. P. 24 .... 4, 7, 11

OTHER AUTHORITIES

Calvin W. Corman, *Limitations of Actions*, § 1.1. (1991) 5

PRELIMINARY STATEMENT

On August 11, 2010, the Iowa Public Employees' Retirement System ("IPERS") and the three named Plaintiffs (together, "Movants"), filed a motion to intervene in this action seeking to assert claims arising out of mortgage-backed securities issued in five offerings. This is the second such motion brought since the Court held six months ago that Plaintiffs lacked standing to bring claims arising out of securities issued pursuant to 85 of the 94 offerings identified in the Consolidated Amended Complaint ("CAC"). On March 18, 2010, the Public Employees' Retirement System of Mississippi ("MissPERS") moved to intervene in order to assert claims arising out of three different offerings.[1] However, the claims of IPERS (and MissPERS) are time-barred. While Movants seek to avail themselves of *American Pipe*[2] tolling, *American Pipe* does not apply to claims asserted by a plaintiff that does not have standing to pursue them. This limitation on *American Pipe* tolling is based on the policy against counsel filing a complaint and only later finding persons with standing to maintain all of the claims asserted. Further, if the Court grants these motions, there no doubt will be a stream of motions to intervene seeking to add claims arising of the 77 offerings that are neither part of this action nor a subject of Movants' and MissPERS' motions.

Movants' argument is based on a misreading of the tolling rule announced in *American Pipe*. The Supreme Court, in a narrow decision, dealt with the filing of a complaint on behalf of a class for which certification was later denied "solely" due to a failure to establish numerosity. The Court held that, in *that* circumstance, the original complaint tolls the statute of limitations for all members of the purported class. *Id.* at 552-3, 94 S. Ct. at 765-6. The Court

[1] Plaintiffs did not join in MissPERS' motion to intervene. MissPERS is represented in this action by different counsel.

[2] *See American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756 (1974).

expressly noted that its holding did *not* extend to instances in which the named plaintiffs lacked standing. *Id* at 553, 94 S. Ct. at 766. Subsequently, in *Crown, Cork & Seal Co. v. Parker*, Justice Powell warned that *American Pipe* tolling "invit[ed] abuse" because it allows lawyers to frame "their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." 462 U.S. 345, 354, 103 S. Ct. 2392, 2397-98 (1983) (Powell, J. concurring) (internal quotations omitted). These same concerns, echoed by the Second Circuit in *Korwek v. Hunt*, apply equally here, particularly where IPERS has slept on its rights despite its long-standing relationship with plaintiffs' counsel.[3] *See* 827 F.2d 874, 878-9 (2d Cir. 1987) (allowing plaintiffs to "piggyback one class action onto another and thus toll the statute of limitations indefinitely" would be "inimical to the purposes behind the statutes of limitations and the class action procedure").

Accordingly, as Judge Cabranes held while in the District Court, "[i]f the original plaintiffs lacked standing to bring their claims in the first place, the filing of a class action complaint does not toll the statute of limitations for other members of the purported class." *In re Colonial Ltd. Partnership Litig.*, 854 F. Supp. 64, 82 (D. Conn. 1994); *see also Kruse v. Wells Fargo Home Mortg. Co.*, No. 02-cv-3089 (ILG), 2006 WL 1212512, at *4-6 (E.D.N.Y. May 3, 2006) (denying intervention where original plaintiffs conceded they never had standing to sue); *In re Crazy Eddie Sec. Litig.*, 747 F. Supp. 850, 856 (E.D.N.Y. 1990) (*Korwek*'s concerns are "perhaps more acute where the dismissal of the first action is for lack of standing"); *In re Elscint, Ltd. Sec. Litig.*, 674 F. Supp. 374, 378 (D. Mass. 1987) ("attempts to circumvent the statute of

[3] IPERS' PSLRA certification lists six class actions in which it has either sought to serve or is currently serving as a class representative. *See* Declaration of Kenneth Rehns in Support of the Joint Motion to Intervene by Plaintiffs and Iowa Public Employees' Retirement System Ex. A ("Rehns Decl."). In five of these actions, its current counsel, Cohen Milstein, served as IPERS' attorneys of record. *See* Declaration of Mary Elizabeth McGarry Ex. A ("McGarry Decl.") (docket reports listing Cohen Milstein as IPERS counsel).

limitation by filing a lawsuit without an appropriate plaintiff and then searching for one who can later intervene . . . is an impermissible use of intervention"). Plaintiffs' reliance on non-binding authority to overcome *Korwek*'s precedent is unavailing.

The securities purchased by IPERS that are the subject of this August 11, 2010 motion were issued pursuant to five offerings that occurred between April 27, 2006 and June 28, 2007 ("Additional Trusts") as shown in Appendix A of this brief. Claims based upon these securities therefore are barred by Section 13's three-year statute of repose. 15 U.S.C. § 77m. They are also barred by § 13's one-year statute of limitations. *Id.* The motion to intervene comes (1) over two years after June 2008 when the first putative class action complaint arising out of Lehman mortgage-backed securities brought by a different plaintiff was filed; (2) over two years after July 2008, when the second putative class action complaint (referred to by Movants as the "Initial Complaint")[4] was filed; and (3) over 18 months after February 2009, when Plaintiffs filed the current Consolidated Class Action Complaint ("CAC"). As a result, even if the claims that Plaintiffs do have standing to pursue were timely filed (which the Individual Defendants dispute), clearly IPERS was on notice of the basis for its claims for well over a year before this motion was filed. Indeed, IPERS seeks to excuse its failure to act earlier on its alleged reliance upon the fact that four of the five Additional Trust certificates it purchased were included in prior

---

[4] Movants' brief refers to the July 23, 2008 complaint in this action as the "Initial Complaint." *See, e.g.*, Movants' Mem. at 2 & 8 n.8. There was, however, a putative class action complaint filed a month earlier arising out of Lehman mortgaged-back securities, *Alaska Elec. Pension Fund v. Lehman Brothers Holdings Inc.*, No. 08/011341 (N.Y. Sup. Ct. June 19, 2008) (removed from New York Supreme Court following filing of complaint on June 19, 2008). *See* McGarry Decl. Ex. C. The Court ordered the two cases consolidated. *See* Pretrial Order No. 1 (January 9, 2009). Even if the June 2008 Alaska Electrical Pension Fund complaint ("Alaska Complaint") were considered the first filing in this consolidated action, it would make no difference to the running of the statutes of limitations and repose.

complaints. Thus, IPERS' claims based on the Additional Trusts are barred by the statute of repose and the statute of limitations, and the motion to intervene should be denied.[5]

ARGUMENT

I. THE IPERS' MOTION TO INTERVENE SHOULD BE DENIED FOR THE SAME REASONS AS MISSPERS' MOTION

Movants repeat the arguments raised in MissPERS' motion to intervene. The Individual Defendants' arguments in opposition to MissPERS' motion apply with equal force here, and thus are summarized only briefly below.

- **NO MANDATORY INTERVENTION**: IPERS does not meet the requirements for mandatory intervention under Rule 24(a) because the Additional Trusts are not the "subject" of the current action such that "disposing of the action may as a practical matter impair or impede [its] ability to protect its interest . . . ." Fed. R. Civ. P. 24(a)(2); *see* MissPERS' Opp. at 3-4. Movants' argument that "IPERS proposes additions to the existing Complaint which essentially reflect IPERS' interests in the action," is circular. Movants' Mem. at 4. A party must have an interest in the subject matter of an action before intervening; it cannot intervene to create the interest it then seeks to protect.

- **NO PERMISSIVE INTERVENTION**: IPERS is not entitled to permissive intervention under Rule 24(b) because it does not have a valid "claim." Fed. R. Civ. P. 24(b)(1)(B); *see* MissPERS' Opp. at 4-5. Any "claim" arising out of securities issued by the Additional Trusts would be time-barred. It would be barred by the statute of repose because these securities were first offered to the public over three years ago. It would also be barred by the statute of limitations because IPERS had notice of the purported misstatements and omissions found in the offering materials since at least the filing of the CAC over 18 months ago, which alleged the same misstatements and omissions and cited many publicly available documents, putting any purchaser on inquiry notice.

- **NO *AMERICAN PIPE* TOLLING**: Any attempt to rely on the tolling rule announced in *American Pipe* is unavailing because, as several district courts within the Second Circuit and elsewhere have held, *American Pipe* does not toll the statute of limitations for claims that the named plaintiffs in a putative class

[5] In addition, as explained in Individual Defendants' Opposition to MissPERS' motion to intervene, filed on April 5, 2010 ("MissPERS' Opp."), incorporated herein by reference, where a plaintiff lacks standing to pursue the claim, a court lacks subject matter jurisdiction over that claim and as a result cannot toll the statutes of repose and limitations. *See* MissPERS' Opp. at 10-12. Movants' motion should be denied for this reason, as well, along with the additional reasons discussed below.

action lacked standing to assert. *See* MissPERS' Opp. 5-10.[6]

- ***AMERICAN PIPE* DOES NOT APPLY TO THE STATUTE OF REPOSE**: Although neither the Supreme Court nor the Second Circuit has had the opportunity to address the issue, even where *American Pipe* applies and tolls the statute of limitations, it should not toll the statute of repose. *See* MissPERS' Opp. at 6 n.7.[7] As the Court observed in *In re Indy Mac Mortgaged-Backed Sec. Litig.*, *American Pipe* struck a "careful balance . . . between the values underlying statutes of limitations and the economies and efficiencies of the Rule 23 class action procedure . . . .", No. 09-cv-4583 (LAK), 2010 WL 2473243, at *4 (S.D.N.Y. June 21, 2010). The principles underlying statutes of repose are similar to, but even stronger, than those underlying statutes of limitations. These principles explain why the former are generally not tolled even when latter may be subject to tolling in certain circumstances.[8]

- **NO JURISDICTION TO TOLL THE STATUTES OF REPOSE AND LIMITATIONS**: The Court lacked jurisdiction over the CAC's claims based on the Additional Trusts because the Plaintiffs never had standing to assert them, and it is beyond the power of a court to toll the statutes of repose and limitations based on claims asserted by a claimant with no standing. *See* MissPERS' Opp. at 10-12.

---

[6] Judge Swain handed down a decision in a consolidated mortgage-backed securities action after the Individual Defendants filed their Opposition to MissPERS' motion to intervene. *See In re Morgan Stanley Mortgage Pass-Through Certificates Litig.*, No. 09-cv-2137 (LTS) (MHD), slip op. (S.D.N.Y. Aug. 17, 2010). *See* McGarry Decl. Ex. B. The court there dismissed claims arising out of offerings in which the plaintiff that had timely filed its action, "PERS," had not purchased securities, even though those offering had been made pursuant to the same shelf registration statement as the offering in which PERS did make purchases. *Id.* at 11-12. The court also dismissed on statute of limitations grounds claims asserted by another plaintiff, "WVIMB," that had not timely filed its action. *Id.* at 19. Because the securities purchased by WVIMB were not included in the initial PERS complaint and there was no other named plaintiff other than PERS with standing, Judge Swain did not have occasion to address whether *American Pipe* tolling applies to claims asserted in a purported class action by a party with no standing to pursue them.

[7] *But see Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman*, 277 B.R. 20, 31-32 (S.D.N.Y. 2002).

[8] *See P. Stolz Family Partnership v. Daum*, 355 F.3d 92, 102 (2d Cir. 2004) (noting that statutes of limitations is subject to "various forms of tolling" while for statutes of repose "the legislative bar to subsequent action is absolute, subject to legislatively created exceptions") (citing Calvin W. Corman, *Limitations of Actions*, § 1.1. at 4-5 (1991)); *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989) ("as a general rule, a statute of limitations is tolled by a defendant's fraudulent concealment . . . because it would be inequitable to allow a defendant to use a statute intended as a device of fairness to perpetrate a fraud. Conversely, a statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body.").

II. IPERS' ADDITIONAL AUTHORITY IS UNAVAILING

In an attempt to overcome Second Circuit precedent established in *Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987), and applied in its progeny, Movants devote a portion of their brief to discussing two cases not addressed in the Individuals Defendants' opposition to MissPERS' motion to intervene. *See* Movants' Mem. at 9-12 (citing *CalPERS v. Chubb Corp.*, Civ. No. 00-4285 (GEB), 2002 WL 33934282 (D.N.J. June 26, 2002) and *In re National Australia Bank Sec. Litig.*, 03-cv-6537 (BSJ), 2006 WL 3844463 (S.D.N.Y. Nov. 8. 2006)).[9] Both these cases are distinguishable.

CalPERS is a New Jersey district court ruling, 2002 WL 33934282, and is not the law in this Circuit. It is inconsistent with *In re Colonial* and *In re Crazy Eddie*, both of which, citing *Korwek*, held that claims for which the original plaintiffs lack standing are not tolled under *American Pipe*. *In re Colonial,* 854 F. Supp. at 82; *In re Crazy Eddie,* 747 F. Supp. at 856. Moreover, in *CalPERS* the plaintiff for whom the court tolled the statute of limitations had moved to become a named plaintiff prior to a ruling on a motion to dismiss. 2002 WL 33934282 at *27. Thus, unlike here, the intervention in *CalPERS* did not "breathe life into a nonexistent lawsuit." *See McClune v. Shamah*, 593 F.2d 482, 486 (3d Cir. 1979) (internal quotations omitted).

In *In re National Australia*, the court dismissed the complaint and granted plaintiffs 60 days to substitute a lead plaintiff who could adequately plead damages over defense arguments that the amended pleading would be untimely under the statute of limitations. 2006 WL 3844463 at *1-2. In doing so, the court found it had no reason to believe plaintiffs had slept

[9] Other than *In re National Australia,* the only case from within the Second Circuit relied upon by Movants is *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 352 F. Supp. 2d 429 (S.D.N.Y. 2005). As explained in the Individual Defendants' Opposition to MissPERS' motion, however, *Flag* is readily distinguishable from these facts. *See* MissPERS' Opp. at 9-10.

on their rights but nonetheless pledged to remain "sensitive" to the "potential for abuse" arising from its decision to toll the statute of limitations to allow the amended pleading. *Id.* at *5 n.11. In contrast, Movants and their counsel here did sleep on their rights because they knew, or should have known, of the standing deficiencies in the CAC, as well as in the Alaska and Initial Complaints, at the time of their filing. *See infra* Sec. III. Furthermore, the *In re National Australia* court expressly granted leave to substitute a lead plaintiff when ruling on the motion to dismiss. Here, the Court did not. In any event, even to the extent it may be relevant, *In re National Australia* is not binding on this Court and is contrary to later decisions within the Second Circuit.

In short, none of the authority on which Movants rely meaningfully distinguishes or justifies a departure from *Korwek*, *In re Crazy Eddie, In re Colonial, In re Elscint*, or *Kruse*. Those cases apply here and, accordingly, IPERS' claims are barred by the statutes of repose and limitations.[10]

III. IPERS' MOTION IS UNTIMELY UNDER RULES 24(a) AND 24(b) AND IF GRANTED WOULD PREJUDICE THE INDIVIDUAL DEFENDANTS

Any motion to intervene, whether as of right under Rule 24(a) or permissively under Rule 24(b), must be timely. Fed. R. Civ. P. 24(a), (b); *Catanzano by Catanzano v. Wing*, 103 F.3d 223, 232-34 (2d Cir. 1996). Timeliness is a fact-based determination that turns on a number of considerations, including "(1) how long the applicant had notice of the interest [in the case] before it made the motion to intervene; (2) prejudice to existing parties resulting from any

[10] Movants state that other courts in these circumstances have "allowed additional plaintiffs to be added to cure standing deficiencies." citing *In re Wells Fargo Mortgage-Backed Certificates Litig.*, No. 09-cv-01376, 2010 WL 1661534 (N.D. Cal. Apr. 22, 2010) and *King County, Wash. v. IKP Deutsche Industriebank AG*, No. 09-cv-8387 (SAS), 2010 WL 2010943 (S.D.N.Y. May 18, 2010). Movants' Mem. at 4 n.5. However, neither case addresses the statute of limitations or statute of repose, likely because in both cases there clearly were potential additional plaintiffs for whom statutes would not pose a bar.

delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." *In re Bank of New York Derivative Litig.*, 320 F.3d 291, 300 (2d Cir. 2003). Here, even if the Court holds that *American Pipe* tolls the claims Movants seek to add to this action, the motion should nevertheless be denied on grounds of untimeliness and prejudice.

IPERS should have known from the outset of the need to protect its interest in this case because it was clear from Plaintiffs' PSLRA certificates publicly filed with the CAC that none of the Plaintiffs had purchased Additional Trust securities.[11] That IPERS has an ongoing relationship with Plaintiffs' counsel here, *see* n.3, *supra*, renders its inaction even more unreasonable. Compounding their delay, Plaintiffs and IPERS inexplicably waited to seek intervention for six months from the time this Court issued its ruling on standing in February (and five months after MissPERS sought to intervene in March).

Movants nonetheless contend that they filed this motion "promptly." Movants' Mem. at 3. They argue that it was reasonable for them to rely on *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132 (C.D. Cal. 2008), in failing to seek to add IPERS as a plaintiff until after this Court held that Plaintiffs lacked Article III standing to maintain claims arising out of 85 of the 94 offerings. Movants' Mem. at 3, 12-13. That argument lacks merit.

First, *Countrywide* was not even handed down until December 1, 2008, five months after the Alaska Complaint and four months after the Initial Complaint were filed. Second, *Countrywide* was not the first decision to address this issue. *Ong v. Sears, Roebuck & Co.*, the reasoning of which was rejected in *Countrywide*, found that a plaintiff did not have

---

[11] Neither the Alaska Complaint nor the Initial Complaint – both filed over two years ago –even asserted claims arising out of one of the Additional Trusts, SARM Series 2006-4. *See* McGarry Decl. Exs. C and D. At a minimum, IPERS should have known that its interests with respect to those securities were not protected by the either of those complaints.

standing to assert claims if it had not purchased securities issued in an offering, even if it had purchased securities issued in another offering under the same registration statement. 388 F. Supp. 2d 871, 876, 892 (N.D. Ill. 2004). If IPERS was relying upon the authority in existence when this action was commenced, based on *Ong*, it should have sought to be added as a plaintiff immediately to ensure that claims arising out of the Additional Trusts would be included in the action.[12] Third, IPERS alleges that the Additional Trust securities it purchased had an aggregate value of $4.56 billion, *see* Movants' Mem. at 2, and Movants argue that the state of the law on this issue was unclear until this Court issued its ruling in February 2010. One would think that with billions of dollars at stake and the ends of the limitations and repose periods rapidly approaching, a reasonable plaintiff would take steps to protect itself in the face of the supposed uncertainty in the law on this issue, rather than simply wait and see how the law further developed. Contrary to their argument, Movants were not "more than justified in relying on th[e] theory of standing [espoused in *Countrywide*] in not intervening before the February 17 Order." *See* Movants' Mem. At 13.

Finally, *Countrywide* is a California decision that was limited in its holding and inapplicable to the CAC. The court there found standing for a putative class representative who alleged misrepresentations and omissions common to a shelf registration statement and not for

[12] Movants argue that "in *virtually* every other MBS class action commenced in the period between 2008 and 2009, the lead plaintiffs *presumed* that a purchaser who acquired securities pursuant to the common registration statement had standing to represent all purchasers on all of the offerings emanating from that registration statement." Movants' Mem. at 10 n.12 (emphasis added). The "presumption" of mortgage-backed securities plaintiffs in 2008 and 2009 does not furnish a sufficient excuse for delay, particularly in light of the *Ong* decision. It should be mentioned that in both of the cases Movants cite in support of their proposition, Plaintiffs' counsel here also served as plaintiffs' counsel. *See N.J. Carpenters Health Fund, et. al., v. Residential Capital LLC, et. al.*, No. 08-cv-8781 (HB), 2010 WL 1257528 (S.D.N.Y. Mar. 31, 2010) (amended complaint by Cohen Milstein) and *In re Wells Fargo Mortgage-Backed Certificates Litig*., No. 09-cv-01376, 2010 WL 1661534 (N.D. Cal. Apr. 22, 2010) (listing Cohen Milstein as counsel for named Plaintiff Policeman's Annuity & Benefit Fund of the City of Chicago).

alleged misrepresentation and omissions found in the completely different prospectus supplements issued pursuant to that shelf registration. *Countrywide*, 588 F. Supp. at 1165. The decision acknowledged that its holding would not necessarily apply where the alleged misstatements and omissions were found in the individual prospectus supplements. *Id.* at 1167 ("The Court emphasizes the narrow application of the above analysis . . . . [I]t is possible that later issuances could incorporate very different alleged violations and have in common only a minor common misrepresentation or omission. The differences could be significant enough to lead a Court to deny standing for class plaintiffs on a motion to dismiss."). The CAC, in contrast, relied almost exclusively on the prospectus supplements and not on the shelf registrations themselves, as this Court found. *In re Lehman Brothers Securities and ERISA Litigation*, 684 F. Supp. 2d 485, 490 n.17 (S.D.N.Y. 2010); *see also In re Morgan Stanley Mortgage Pass-Through Certificates Lit.*, No. 09-cv-2137 (LTS) (MHD), slip op. at 8-10 nn. 5-6 (distinguishing *Countrywide* due to allegations of faulty prospectus supplements and allegations concerning particular mortgage originators).

Movants also ignore the prejudice that likely would result if their motion is granted. If this Court finds that claims arising out of the 85 dismissed offerings are not time-barred, no doubt numerous other purchasers of these securities will seek to intervene on behalf of themselves and a class of other purchasers and expand the scope of the action exponentially. It will impede defense or resolution of the case if the scope of the Individual Defendants' total liability, the offerings at issue and the identity of the named plaintiffs remain a moving target. Similarly, the potential flood of intervention motions could delay discovery as the Court determines which offerings will be at issue in the litigation.

For these reasons, the motion to intervene should be denied as untimely and prejudicial under Rules 24(a) and 24(b).

IV. EVEN IF *AMERICAN PIPE* TOLLING APPLIES, IPERS' CLAIM BASED ON THE SARM SERIES 2006-4 CERTIFICATES ARE STILL BARRED BY THE STATUTE OF REPOSE

Even if the Court holds that *American Pipe* tolling applies to claims arising out of the five Additional Trusts and to the statute of repose as well as statute of limitations, neither tolling period is long enough to revive claims based on one of those Trusts. The SARM Series 2006-4 certificates were first offered to the public in April 2006, well over four years before Movants filed the instant motion. *See* McGarry Decl. Ex. E (SEC filing showing date of offering). These certificates were *not* the subject of claims asserted in either of the complaints preceding the CAC. Instead, they first appeared in the CAC. At best, *American Pipe* would only toll the statutes of repose and limitations for the 12 months between the filing of the CAC in February 2009 and the Court's order dismissing the CAC's claims related to the SARM Series 2006-4 offering in February 2010. Even with the benefit of a one-year tolling period, more than three years has passed since this security was first offered to the public.[13] Claims based on SARM Series 2006-4 are therefore barred by the three-year statute of repose.

Movants apparently are aware of their statute of repose problem with respect to the SARM Series 2006-4 securities even with the benefit of *American Pipe* tolling, because they make a passing but otherwise irrelevant reference to the "relation back" doctrine, arguing that

---

[13] Approximately two years and nine months elapsed between April 2006, when the SARM Series 2006-4 was first offered to the public, and the filing of the CAC in February 2009. Assuming for purposes of argument that claims alleged in the CAC by Plaintiffs who lacked standing are entitled to the benefit of *American Pipe* tolling, after tolling was lifted by this Court's February 2010 Order, any purchaser of SARM Series 2006-4 certificates had only three months in which to act before the statute of repose ran. IPERS sat on the sidelines for approximately six months, however.

claims based upon all of the Additional Trusts relate back to the filing of the Initial Complaint. *See* Movants' Mem. at p. 8 n.8. However, the relation back doctrine is inapplicable.

In order for an amendment to a pleading to relate back to the original pleading, Fed. R. Civ. P. 15(c)(1)(B) requires that the new claims it proposes to assert arise out of the "conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." The purpose of Rule 15(c) is to prevent defendants from "taking unjust advantage of otherwise inconsequential pleading errors . . . ." Fed. R. Civ. P. 15 advisory committee note (1991).

Movants do not assert that the SARM Series 2006-4 securities – which none of the current named Plaintiffs purchased – were absent from the Initial Complaint (and Alaska Complaint) due to a mere "error." This surely is not a situation in which a plaintiff "set out—or attempted to set out" a claim arising out of a particular transaction but failed, as the transaction of the SARM Series 2006-4 offering is nowhere mentioned in the Initial Complaint's precise enumeration of the securities it concerns.

Even if the omission of the SARM Series 2006-4 securities were purely inadvertent (which clearly it was not) rather than the result of a considered strategic decision, the omission of a $1.82 billion offering is not "inconsequential" to the Individual Defendants.

In *Arneil v. Ramsey*,[14] plaintiffs argued that the statute of limitations applicable to their class claims had been tolled by the filing of another class action, "*Carr*," despite the fact that the class defined in the original complaint in *Carr* did not encompass plaintiffs and those plaintiffs were only added to *Carr* in a later amended complaint. 550 F.2d at 782-3. In rejecting this argument, the Second Circuit explained one of the rationales of *American Pipe*:

---

[14] 550 F.2d 774 (2d Cir. 1977) (*overruled on other grounds by Crown Cork*, 462 U.S. 345, 103 S. Ct. 2392 and *In re WorldCom Sec. Litig.*, 496 F.3d 245 (2d. Cir 2007)).

"commencement of the class action adequately 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." *Id.* at 782. The Court held that commencement of *Carr* did not notify the parties that were defendants in both actions of the generic identities of the *Arneil* plaintiffs or of their particular claims because the *Arneil* plaintiffs were not members of the initial class in *Carr*. As a result, the newly brought *Arneil* claims did not relate back to the initial *Carr* complaint and the statute of limitations on those claims was not tolled as of the initial *Carr* complaint. *Id.* at 782-83. Similarly, the Initial Complaint in this action did not notify the Individual Defendants of the generic identity of the purchasers of SARM Series 2006-4 certificates. It also did not notify them of the substantive claims with respect to the alleged misstatements and omissions of the offering materials for these certificates. In short, there is absolutely no basis for relating the Movants' claims based on SARM Series 2006-4 back to a complaint that that never included the certificates in the first place, no matter how similar the allegations. *See also In re Morgan Stanley Mortgage Pass-Through Certificates Litig.*, No. 09-cv-2137 (LTS) (MHD), slip op. at 18-19 (S.D.N.Y. Aug. 17, 2010) (no relation back for untimely complaint in one action to timely complaint in another action, even though both complaints arose out of same shelf registration statement); *In re Bausch & Lomb, Inc. Sec. Litig.*, 941 F. Supp. 1352, 1364 (W.D.N.Y. 1996) ("The spirit and letter of the statute of limitations require the Court to recognize defendant's interest in foreclosing claims by additional plaintiffs arising out of identical but separate acts.").

Because claims based on the SARM Series 2006-4 were first raised in the February 2009 CAC and do not related back to the July 2008 Initial Complaint as Movants suggest (or the Alaska Complaint that similarly did not include those securities), even with a

tolling of the period between the time the securities were added to and then dismissed from the action, Movants' attempt to assert these claims runs afoul of the three-year statute of repose. Any claims based on this offering should therefore be dismissed for this additional reason.

CONCLUSION

For all the foregoing reasons, the Individual Defendants respectfully request that the Court deny the Motion to Intervene.

Dated: New York, New York
August 24, 2010

SIMPSON THACHER & BARTLETT LLP

By /s/ Michael J. Chepiga

Michael J. Chepiga (mchepiga@stblaw.com)
Mary Elizabeth McGarry (mmcgarry@stblaw.com)
Nicholas F. Cohen (ncohen@stblaw.com)
Ihsan Dogramaci (idogramaci@stblaw.com)

425 Lexington Avenue
New York, New York 10017-3954
Telephone: (212) 455-2000
Facsimile: (212) 455-2502

Attorneys for Defendants Lana Franks Harber, Edward Grieb, Richard McKinney, Kristine Smith, James J. Sullivan, Samir Tabet and Mark L. Zusy

Appendix A

Offering	Date Offered to Public	Date of Intervention	Approximate Time Elapsed Between Offering and Intervention
SARM Series 2006-4	April 27, 2006	August 11, 2010	4 years 3 months
SASCMLT Series 2007-BC1	January 25, 2007	August 11, 2010	3 years 7 months
SASCMLT Series 2007 EQ1	April 20, 2007	August 11, 2010	3 years 4 months
SASCMLT Series 2007-OSI	May 25, 2007	August 11, 2010	3 years 3 months
SARM Series 2007-6	June 28, 2007	August 11, 2010	3 years 1 month