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# 13-1573-cv(L)

13-1677-cv(con), 13-1798-cv(con), 13-1830-cv(con), 13-1853-cv(con)

IN THE

### United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE BANK OF AMERICA CORP. SECURITIES, DERIVATIVE, AND EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) LITIGATION

AMP CAPITAL INVESTORS LIMITED, COLONIAL FIRST STATE INVESTMENTS LTD, H.E.S.T. AUSTRALIA LTD, MICHAEL WASHENIK, ORLOFF FAMILY TRUST DTD 10/3/91, ORLOFF FAMILY TRUST DTD 12/31/01, St. Stephen, Inc., Leonard Masiowski, Maryann Masiowski, Michael J. Rinis, Babette Rinis, Michael J. Rinis, IRA,

Objectors-Appellants,

(Additional Caption on the Reverse and Following Page(s))

On Appeal from the United States District Court for the Southern District of New York (New York City)

REPLY BRIEF FOR OBJECTORS-APPELLANTS AMP CAPITAL INVESTORS LIMITED, COLONIAL FIRST STATE INVESTMENTS LTD AND H.E.S.T. AUSTRALIA LTD

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and H.E.S.T. Australia Ltd

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and

#### CHARLES N. DORNFEST,

Plaintiff-Appellant,

v.

PUBLIC PENSION FUNDS, THE PUBLIC PENSION FUND GROUP, STEVEN J. SKLAR, AS (IRA ACCOUNT BENEFICIARY), ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, RHONDA WILSON, ALMA ALVAREZ, MICHAEL R. BAHNMAIER, MARK ADAMS, ELIZABETH EAGEN, VERNON C. DAILEY, RICHARD ADAME, ARLENE KAHN, PETRA CHATMAN, STICHTING PENSIOENFONDS ABP, GRANT MITCHELL, NEW YORK STATE TEACHERS' RETIREMENT SYSTEM, PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO, STEVE R. GRABER, INDIVIDUALLY, AS ASSIGNEE OF CLAIMS OF THE SRG 2008 TRUST, SCHWAB SP500 INDEX FUND, SCHWAB 1000 INDEX FUND, SCHWAB INSTITUTIONAL SELECT SP500 FUND, SCHWAB DIVIDEND EQUITY FUND, SCHWAB CORE EQUITY FUND, SCHWAB PREMIER EQUITY FUND, SCHWAB FUNDAMENTAL US LARGE COMPANY INDEX FUND, SCHWAB TOTAL STOCK MARKET INDEX FUND, SCHWAB SP500 INDEX PORTFOLIO, SCHWAB MARKETTRACK GROWTH PORTFOLIO, SCHWAB MARKETTRACK BALANCED PORTFOLIO, SCHWAB INVESTMENTS, SCHWAB CAPITAL TRUST, DR. SALOMON MELGEN, FLOR MELGEN, SFM HOLDINGS LIMITED PARTNERSHIP, INTERNATIONAL FUND MANAGEMENT S.A., DEKA INTERNATIONAL S.A. LUXEMBURG, DEKA INVESTMENT GMBH, DI, AARON KATZ, JOEL KATZ, SYLVIA WEISSMANN, PARKER FAMILY INVESTMENTS L.L.C., JEFFREY R. PARKER, THE 1997 JEFFREY R. PARKER FAMILY TRUST, DREW E. PARKER, THE 1994 DREW E. PARKER FAMILY TRUST, KEITH D. PARKER, JULIE M. SORIN, THE 1991 JEFFREY R. PARKER FAMILY TRUST, THE 1994 JULIE P. MANTELL FAMILY TRUST, MICHAEL A. PARKER, MARK D. WENDER, ELLIOT WENDER, PENINA WENDER, STANLEY L. WENDER, RAZELLE M. WENDER, JILL W. GOLDSTEIN, JERRY E. FINGER, AMBASSADOR LIFE INSURANCE COMPANY, SELECT INVESTORS EXCHANGE FUND, L.P., RICHARD FINGER, JEF FAMILY TRUST, 1976 REAL ESTATE TRUST, WALTER FINGER, THE JERRY E. FINGER FAMILY TRUST D/T/D 12/28/1989, THE JERRY E. FINGER FAMILY TRUST, LEO R. JALENAK, PEGGY E. JALENAK, KERS & CO., ROBERT GEGNAS, 198 LOCHA DRIVE, JUPITER, FL 334587752, STEVEN L. SHAPIRO, HARVEY M. MITNICK, NATHAN A. FRIEDMAN, BONNIE FRIEDMAN, KENNETH A. CIULLO, JOANNA CIULLO, THOMAS P. DINAPOLI, COMPTROLLER OF THE STATE OF NEW YORK, AS ADMINISTRATIVE HEAD OF THE NEW YORK STATE AND LOCAL RETIREMENT SYSTEMS AND AS SOLE TRUSTEE OF THE NEW YORK STATE COMMON RETIREMENT FUND, SCHWAB FINANCIAL SERVICES FUND,

Plaintiffs-Appellees,

v.

BANK OF AMERICA CORP., GARY A. CARLIN, NELSON CHAI, KENNETH D. LEWIS, JOHN A. THAIN, FRANK P. BRAMBLE, SR., WILLIAM BARNET, III, JOHN T. COLLINS,

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Defendants-Appellees,

and

PETER KRAUS,

Defendant.

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Objectors-Appellants AMP Capital Investors Limited, Colonial First State Investments Ltd and H.E.S.T. Australia Ltd (collectively, the "Australian Investors") respectfully submit this Reply Brief in further support of their appeal from the April 9, 2013 Judgment of the district court.<sup>1</sup>

This appeal turns on a fundamental, yet simple, proposition: that, to effectuate the protections required by the Due Process Clause for Rule 23(b)(3) classes, the rule in American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974) deems the claims of all class members to be timely interposed upon the commencement of the class action. Accordingly, when a class member exercises the right to opt out, any statute of limitations or statute of repose cannot bar the opt-out action, because the opt-out action can simply be severed from the class action, so that it would not be a "new" action, but a continuation of the existing class action. The opt-out plaintiff would continue to assert in the severed opt-out action exactly the same claims against the same defendants before the same judge in the same court. Because the opt-out action would merely be a continuation of the class action, neither "tolling" of limitations periods nor the Rules Enabling Act have any relevance. Put simply, when an opt-out plaintiff severs its action from the class action, a statute of limitations or a statute of repose could no more be

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In this Reply Brief, defined terms have the same meanings as ascribed to them in the Brief and Special Appendix for Objectors-Appellants AMP Capital Investors Limited, Colonial First State Investments Ltd and H.E.S.T. Australia Ltd, filed on July 26, 2013 (the "Opening Brief" or "Opening Br.")

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asserted against the opt-out plaintiff than it could be asserted against any class members who choose to remain in the class.

Here, in its prior decision in Footbridge Limited Trust v. Countrywide Financial Corp., 770 F. Supp. 2d 618 (S.D.N.Y. 2011), the district court had applied a different, incorrect analysis, and concluded that the rule in American Pipe does not "toll" a statute of repose. This decision was not only incorrect, it had profound ramifications for Class members in this Action. Because of the district court's incorrect view as to the scope and operation of American Pipe, when Class members in this Action received notice of class certification and their right to seek exclusion, the statute of repose would have already expired with respect to all Section 14(a) claims (the claims of the vast majority of the Class), and any Class members who opted out would thus have immediately forfeited those claims. Because they could not opt out without forfeiting the very claim they would be asserting in an opt-out lawsuit, Class members were effectively denied any opportunity to opt out, in violation of the Due Process Clause. For this reason alone, the Settlement and the district court's Judgment are void and should be vacated.

Separately and alternatively, the district court abused its discretion in not affording Class members a "second" opportunity to opt out pursuant to Rule 23(e)(4). Here, because of the due process concerns surrounding the "first" opt-out

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opportunity – concerns which prompted the district court to *sua sponte* request briefing on the issue, a second opt-out opportunity was appropriate. Conferring a second opt-out opportunity was especially provident under the circumstances because of two additional significant events which occurred after the "first" opt-out opportunity – specifically, the revelation in a motion for summary judgment of critical evidence underscoring the Defendants' liability, and the announcement of the Settlement itself, which notified Class members that they would recover only a fraction of their asserted losses.

For both these reasons, the Australian Investors' appeal should be allowed, and the district court's Judgment should be vacated.

#### **ARGUMENT**

I. THE DUE PROCESS CLAUSE WAS VIOLATED WHEN THE AUSTRALIAN INVESTORS WERE PRECLUDED FROM OPTING OUT OF THE CLASS ACTION.

As set forth in the Australian Investors' Opening Brief (at 13-26), when the Class Notice was disseminated to Class members on March 21, 2012, Class members could not opt out of the Action. Under the district court's prior decision in *Footbridge*, the statute of repose would have already run on the Class's Section 14(a) claim – the claim of the vast majority of Class members. In short, if any Class members had opted out, they would have immediately forfeited the very claim they would be seeking to assert in an opt-out lawsuit. Because Class

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members were not given any meaningful opportunity to opt out, the Settlement and the Judgment approving the Settlement violated the protections afforded by the Due Process Clause to Rule 23(b)(3) classes, and should be vacated.

Defendants-Appellees and the Lead Plaintiffs-Appellees make several arguments to the contrary in their respective briefs. However, as addressed below, none of them has merit.<sup>2</sup>

#### A. IndyMac Was Incorrectly Decided And Should Be Reversed

Both Defendants and the Lead Plaintiffs contend that this appeal is rendered moot by the Second Circuit's decision in *Police & Fire Retirement System of the City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), and that this decision determines the Australian Investors' due process argument because it affirms the correctness of *Footbridge*. Defs.' Br. at 16-18; Lead Pls.' Br. at 38-40. According to Defendants, *IndyMac* is now the law of this Circuit and can only be overruled by an *en banc* panel of the Court or by the Supreme Court. Defs.' Br. at 16-17. Both Defendants and the Lead Plaintiffs are wrong.

Both Defendants and the Lead Plaintiffs repeatedly suggest that the question whether the Judgment comported with due process is to be reviewed under the abuse of discretion standard. See Brief of Defendants-Appellees, dated November 1, 2013 ("Defs.' Br.") at 1, 13; Brief and Supplemental Appendix submitted by the Lead Plaintiffs-Appellees and Grant Mitchell, dated November 1, 2013 ("Lead Pls.' Br."), at 36-47. This is wrong. Conclusions of law are reviewed de novo. See, e.g., City of Pontiac Gen. Employees' Ret. Sys. v. MBIA, Inc., 637 F.3d 169, 173 (2d Cir. 2011). The failure to afford due process renders the Judgment void as a matter of law. Gert v. Elgin Nat. Industries, Inc., 773 F.2d 154, 159 (7th Cir. 1985).

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To begin, the Second Circuit has, in the past, reversed its prior decisions without the need for an *en banc* hearing. For example, in *The Shipping Corporation of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58 (2d Cir. 2009), a unanimous panel of the Second Circuit reversed the prior decision of a differently-constituted panel in *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002). In explaining this decision to "revers[e] a relatively recent case", Judge Cabranes stated that, "[u]pon further consideration, we find *Winter Storm*'s reasons unpersuasive and its consequences untenable." 585 F.3d at 67, 68. As a result, Judge Cabranes wrote, "[w]e now conclude, with the consent of all of the judges of the Court in active service, that *Winter Storm* was erroneously decided and therefore should no longer be binding precedent in our Circuit." *Id.* at 61.

Here, the Second Circuit should reverse *IndyMac* because it incorrectly concluded that application of the rule in *American Pipe* to a statute of repose would contravene the Rules Enabling Act. 28 U.S.C.A. § 2072(b).

As set forth in the Opening Brief, the *IndyMac* Court erred at the outset by implicitly assuming that all opt-out actions will be brought as a "new" action. Opening Br. at 21-24. Under *American Pipe*, the claims of all class members are deemed timely interposed from the commencement of the class action. *American Pipe*, 414 U.S. at 550. Accordingly, when a class member subsequently opts out, the opt-out lawsuit may be *severed* from the class action pursuant to, for example,

The severed opt-out action would then merely be a Fed. R. Civ. P. 21.<sup>3</sup> continuation of the original class action, with the opt-out plaintiff asserting the same claims against the same defendants in the same court before the same judge, and with the opt-out action relating back to the filing date of the class action for purposes of the statute of repose. See DirecTV, Inc. v. Leto, 467 F.3d 842, 845 (3d Cir. 2006) ("[W]hen a court 'severs' a claim against a defendant under Rule 21, the suit simply continues against the severed defendant in another guise. ... The statute of limitations is held in abeyance, and the severed suit can proceed so long as it initially was filed within the limitations period.") (citations omitted); Strandlund v. Hawley, 532 F.3d 741, 746 (8th Cir. 2008) (reversing decision of district court and remanding with instructions to sever the appellants' claims, because "a severance of their claims under Rule 21 would have held the statute of limitations in abeyance and thus permitted them to proceed with individual actions since the lawsuit was initially filed within the statute of limitations period."); Elmore v. Henderson, 227 F.3d 1009, 1012 (7th Cir. 2000) (noting that, if appellant's lawsuit had been severed, the appellant's "separate, severed suit, though separate from the

Rule 21 provides: "On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party." A district court "has broad discretion to sever [] and may do so for a wide variety of reasons." *Erausquin v. Notz, Stucki Management (Bermuda) Ltd.*, 806 F. Supp. 2d 712, 722 (S.D.N.Y. 2011). As the Second Circuit explained in *Wyndham Associates v. Bintliff*, 398 F.2d 614, 618 (2d Cir. 1968), when commenting on the previous version of Rule 21, "We believe that this provision authorizes the severance of any claim, even without a finding of improper joinder, where there are sufficient other reasons for ordering a severance." (Although Rule 21 was amended in 2007, the Advisory Committee notes state that "[the] changes are intended to be stylistic only.")

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original suit for other purposes, would not have affected the tolling of the statute of limitations by the original suit. That is, it would have been a continuation of the original suit so far as he was concerned.").4

Because an opt-out action merely continues the original class action in this manner, there is no basis to accuse the opt-out plaintiff of attempting to "abridge, enlarge or modify any substantive right" in contravention of the Rules Enabling Act. 28 U.S.C.A. § 2072(b). If the opt-out lawsuit is not a new action but is severed from the original class action, the Rules Enabling Act is simply not relevant. The Rules Enabling Act could no more be asserted against the opt-out plaintiff than it could be asserted against the plaintiff if it chose to remain in the class. Thus, by engaging in the inquiry as to whether the Rules Enabling Act was contravened, the *IndyMac* Court erred.

Furthermore, even if the Rules Enabling Act were relevant, the *IndyMac* Court applied an incorrect test when assessing whether that statute was Opening Br. at 23-25. Specifically, the *IndyMac* Court asked contravened. whether the statute of repose in question was "substantive" or "procedural." *IndyMac*, 721 F.3d at 109-10. Concluding that it was "substantive", the *IndyMac* 

complaints nunc pro tunc, so they will relate back to the time of the filing of this original

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See also Graziose v. American Home Products Corp., 202 F.R.D. 638, 641 (D. Nev. 2001) (ordering that the action be severed into six separate cases, the court "dismiss[ed] all but the first named Plaintiffs ... and permit[ted] the remaining Plaintiffs to re-file their

Court proceeded to hold that applying the rule in *American Pipe* would impermissibly enlarge or modify the substantive right in violation of the Rules Enabling Act. *Id.* This substantive versus procedural test, however, is precisely the test rejected by the Supreme Court in *American Pipe*.

As explained in the Opening Brief, under the correct test as stated by the *American Pipe* Court, the Second Circuit should have asked "whether tolling the limitation in a given context is consonant with the legislative scheme." *American Pipe*, 414 U.S. at 557-58. Under that test, it would be entirely consonant with the legislative scheme to apply the rule in *American Pipe* to the statute of repose in the case of a Rule 23(b)(3) class because that would ensure due process and, thus, the *Constitutional validity* of the Rule 23(b)(3) class action device. Opening Br. at 24-25. As such, applying the rule in *American Pipe* to the statute of repose would not contravene the Rules Enabling Act.

For all these reasons, *IndyMac* was incorrectly decided and should be reversed.

## B. Alternatively, The Second Circuit Should Construe *IndyMac* To Be Limited To Its Very Specific Facts

Alternatively, *IndyMac* does not moot this appeal because it is distinguishable and should be strictly construed as limited to its very specific facts.

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Contrary to both Defendants' and the Lead Plaintiffs' arguments,<sup>5</sup> *IndyMac* is distinguishable because it did not involve an attempt by class members to *opt out* of an existing class action and assert claims that had already been timely interposed. Instead, *IndyMac* involved an attempt by certain intervenors, members of a class, to assert *new* claims that had not previously been asserted by the court-appointed lead plaintiffs for that class. Therefore, while the Rules Enabling Act may arguably have been implicated in *IndyMac*, the Rules Enabling Act would certainly not be implicated in this case.

In *IndyMac*, the Wyoming State Treasurer and the Wyoming Retirement System (jointly, "Wyoming") were the sole lead plaintiffs appointed by the court in a consolidated class action asserting claims with respect to certain mortgage pass-through certificates offered by IndyMac MBS, Inc. *IndyMac*, 721 F.3d at 102. The district court then dismissed for lack of standing all claims arising from offerings in which Wyoming had not specifically purchased securities. *Id.* at 103. Five members of the putative class subsequently moved to intervene in the action, pursuant to Fed. R. Civ. P. 24, to assert claims with respect to offerings that those entities had purchased, but which the lead plaintiffs Wyoming had not purchased. *Id.* By this time, however, the three-year period of repose had run on the intervenors' proposed claims with respect to the additional offerings. Accordingly,

<sup>&</sup>lt;sup>5</sup> See Defs.' Br. at 16-18; Lead Pls.' Br. at 39-40.

the intervenors invoked the tolling rule set forth in *American Pipe*. *Id*. After the district court denied the motion to intervene, the intervenors appealed to the Second Circuit.

In dismissing the intervenors' appeal, the *IndyMac* Court rested its decision on the critical fact that the intervenors would be bringing a *new* action to assert new claims not previously asserted by the sole court-appointed lead plaintiffs, Wyoming, in the class action. Thus, when rejecting the intervenors' argument based on American Pipe tolling, the Second Circuit held that "the statute of repose in Section 13 ordinarily bars the commencement of any new suits after the threeyear period has expired." Id. at 110 (emphasis added). As the Second Circuit further clarified when rejecting the intervenors' alternative argument based upon the "relation back" doctrine under Fed. R. Civ. P. 15(c), the intervenors' proposed claims would be "newly asserted claims." *Id.* at 101, 111, 112. Specifically, because Wyoming were the sole lead plaintiffs and "no named plaintiff in the suit had constitutional standing to bring the claims that the proposed intervenors later sought to assert", the district court lacked jurisdiction over these claims from the outset and therefore these claims had never been validly asserted, a "defect [that] may not be cured by later intervention." *Id.* at 111.

Because the *IndyMac* intervenors were seeking to bring new claims in a new action, the decision of the Second Circuit to examine the Rules Enabling Act can

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be explained on that limited basis, and the holding in *IndyMac* therefore should be strictly construed in that manner. In contrast to *IndyMac*, the Australian Investors here, if permitted to opt out, could sever their opt-out action from the existing consolidated Action, so that they would still be asserting the same claims before the same judge in the same court. The opt-out action would not be a "new" action but a continuation of the prior Action, with the claims asserted in the opt-out action already having been timely interposed for purposes of the statute of repose. As discussed above, under these circumstances, the Rules Enabling Act would have no application.

Neither Defendants nor the Lead Plaintiffs can counter the basic proposition that an opt-out action which is severed from a class action is really a continuation of the class action, and therefore should benefit from the commencement date of that original class action. Instead, Defendants focus on the supposedly drastic consequences of such a conclusion, arguing that if "severed' claims were deemed to relate back to the Class Action filing date for statute of repose purposes ... it would completely undermine this Court's holding in *IndyMac*." Defs.' Br. at 26. However, Defendants unwittingly touch on precisely the critical point: if an opt-out action were simply to be severed from the Action, it would not be a new action

asserting new claims, and both the Rules Enabling Act and the decision in *IndyMac* which relies on the Rules Enabling Act would have no application.<sup>6</sup>

#### C. Class Members Were Not Afforded A Meaningful Opportunity To Opt Out Consistent With Due Process

As an alternative argument, both Defendants and the Lead Plaintiffs argue that Class members were afforded due process because they *were* given an opportunity to opt out when the Class Notice was disseminated, even if that opportunity was utterly meaningless. Defs.' Br. at 18-25; Lead Pls.' Br. at 43. This argument, which elevates form over substance, should be rejected.

Defendants' and the Lead Plaintiffs' argument ignores the central role that due process plays in the Rule 23(b)(3) class action procedure, and threatens to make a mockery of that important protection. As discussed in the Opening Brief, Rule 23(b)(3) represents a delicate compromise. When creating a class procedure that bound *in absentia* class members for *practical* reasons and that automatically locked in class members from the start, the drafters of Rule 23(b)(3) sought to counterbalance these harsh consequences by ensuring that the rule comported with

Defendants appear, in addition, to completely misunderstand the Australian Investors' argument. Defs.' Br. at 25-27. Contrary to Defendants' argument, the Australian Investors are not suggesting that they should be allowed to sever their opt-out action from the Action regardless of the district court's Judgment. The Australian Investors argue that, if the Judgment is vacated for violating the Due Process Clause and if Class members are afforded a renewed opportunity to opt out, Class members can opt out by having their opt-out action severed from the Action, so that they would continue to assert the same claims before the same judge in the same court. Under these circumstances, neither the Rules Enabling Act nor *IndyMac* would pose any hurdle. Opening Br. at 18-25.

the requirements of the Due Process Clause. Opening Br. at 14-17; *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011) (Rule 23(b)(3) "allows class certification in a much wider set of circumstances but with greater procedural protections.").

Given the importance of due process to Rule 23(b)(3), it is difficult to see how due process is satisfied when it is observed through mere lip service. As the Supreme Court stated in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985), "due process requires *at a minimum* that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court" (emphasis added). Thus, when members of a Rule 23(b)(3) class are called upon to elect whether or not to opt out but, due to the expiration of a statute of repose, opting out would cause those class members to forfeit the very claims they would be seeking to assert by opting out, there is no due process.

Defendants and the Lead Plaintiffs make several arguments to suggest that the opt-out opportunity afforded to the Class members was nevertheless sufficient, but none of them is availing.

First, both Defendants and the Lead Plaintiffs contend that, under Rule 23(b)(3), class members must expect that the statute of repose may have expired if they fail to take affirmative steps to preserve those claims against any applicable

time bars during the pendency of the class action. Defs.' Br. at 20-21; Lead Pls.' Br. at 41-43. According to Defendants, that is because class members "may [not] neglect to file their own claims irrespective of any applicable statutes of repose." Defs.' Br. at 21. However, this argument is foreclosed by the Supreme Court's decision in *American Pipe*.

In *American Pipe*, the question presented was whether certain towns, municipalities and water districts in the State of Utah could intervene as plaintiffs after the putative class in which these entities purportedly belonged was denied certification by the district court. 414 U.S. at 543-44. Against this background, the Supreme Court held that "[n]ot until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case." 414 U.S. at 552 (emphasis added). As the Supreme Court further explained, until the district court determines whether or not an action shall proceed as a class action, "potential class members are mere *passive* beneficiaries of the action brought in their behalf." *Id*. (emphasis added).

Second, Defendants seek to qualify the holding in *American Pipe*, arguing that the Supreme Court merely held that Rule 23(b)(3) class members may remain passive and not exercise any responsibility *only* if they want to "*profit from' the*"

outcome of the [c]lass action" – that is, if they want to remain in the class action. Defs.' Br. at 21 (emphasis added). This argument makes no sense, and misses the entire point of American Pipe. In American Pipe, the Utah entities in question were not trying to remain in the putative class action, but were trying to commence an action outside the putative class action, because the court had denied class certification. 414 U.S. at 544. Indeed, immediately before stating its holding, the Supreme Court explicitly observed that the "participation" sought by the Utah entities was "not membership in the class, but rather the privilege of intervening in an individual suit pursuant to Rule 24(b)(2)." Id. at 552. "[I]n this posture", the Supreme Court held, "the commencement of the original class suit tolls the running of the statute for all purported members of the class." Id. at 552-53.

In short, *American Pipe* makes unmistakably clear that its holding was intended to apply to all members of a Rule 23(b)(3) class, regardless of whether those class members ultimately "participate" by *remaining* in the class, or by *opting out* of the class. Until notice of class certification, Rule 23(b)(3) class members are not required to take affirmative steps to protect themselves against any applicable time bars, including any applicable statute of repose, because the timely commencement of the class action already interposes those claims on behalf of all class members.

Third, Defendants argue that the "policy implications" of such a holding would be "far-reaching and unworkable" because "every class would have to be certified, and notice and an opportunity to opt out provided, prior to the expiration of the repose period for any claim held by any individual member." Defs.' Br. at 22. Again, Defendants miss the point. If the claims of class members are deemed by the rule in *American Pipe* to be interposed from the commencement of the putative class action, there would be no possibility of the statute of repose running with respect to any timely interposed claim, and the notice about which Defendants are so concerned would not be required.

Finally, both Defendants and the Lead Plaintiffs argue that, even if there were "uncertainties" concerning the statute of repose, the "uncertainties" did not excuse the Australian Investors from failing to opt out because "uncertainties" exist "in so many different areas under Section 14(a), the elements of a claim, damages, causation." Defs.' Br. at 24 (quoting Judge Castel); Lead Pls.' Br. at 43-46 (due process does not entitle Class members to a "risk-free opt-out decision."). Here, however, Class members were not confronted merely with "uncertainties" as to the substantive elements of the Class's Section 14(a) claim. Instead, the uncertainties related to something more fundamental – specifically, the functioning of Rule 23(b)(3) itself, and how the commencement of a Rule 23(b)(3) class action affects the ability of individual class members to opt out. If due

process requires that Rule 23(b)(3) class members be afforded the opportunity to opt out, but there is uncertainty as to how that rule properly functions and whether the act of opting out extinguishes the claims of opt-out litigants, the opt-out procedure is essentially converted into a game of legal Russian roulette. Under those circumstances, one could hardly contend that due process has been afforded.

# II. THE DISTRICT COURT ABUSED ITS DISCRETION UNDER RULE 23(e)(4) BY NOT REQUIRING A SECOND OPT-OUT OPPORTUNITY.

Independently of the due process violations, the Judgment should be set aside because the district court failed to require a "second" opportunity to opt out under Rule 23(e)(4).

As Defendants acknowledge, when the parties first informed the district court at a hearing on September 28, 2012 that they had agreed in principle to settle the Action, the district court was sufficiently concerned about the due process concerns raised by the "first" opt-out opportunity that it *sua sponte* requested briefing on whether the Settlement should provide a "second" opt-out opportunity. Defs.' Br. at 8; A929-30. Importantly, however, the district court did not receive briefing from any parties except the Lead Plaintiffs and the Defendants. Yet these were the parties who, under the Settlement, had already "agree[d] to request that

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the Court not permit a second opportunity for Class Members to request exclusion from the Class." A485,  $\P3.^7$ 

Furthermore, two developments occurred after the "first" opt-out opportunity that materially affected the decision of Class members whether or not to opt out. On June 3, 2012, after the Class Notice was disseminated and the "first" opt-out opportunity had already expired, Lead Plaintiffs filed a partial summary judgment motion, the SJ Motion, which referenced for the first time numerous BoA internal documents evidencing liability that had been uncovered by the Lead Plaintiffs only during discovery. Opening Br. at 31-35. Then, on September 28, 2012, Lead Plaintiffs announced they had settled the Action for \$2.43 billion, an amount that constituted just a fraction of the losses alleged by the Lead Plaintiffs in the Action. *Id.* at 35.

Under all these circumstances, and especially given the significant due process concerns raised by the "first" opportunity to opt out, the district court should have exercised its discretion under Rule 23(e)(4) to require, as a condition of approval, that the Settlement afford a second opportunity to opt out. Opening Br. at 29-35.

Thus, when the district court ruled in its preliminary approval order that a second opt-out opportunity was not warranted "[i] light of the extensive notice program undertaken in connection with class certification and the ample opportunity provided to Class Members to request exclusion from the Class at that time", this was language adopted from the proposed order submitted by the Lead Plaintiffs themselves. A622-23.

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In opposition, Defendants and the Lead Plaintiffs make several arguments, all of which should be rejected.

First, Defendants argue that they cannot find "a single case in which an appellate court has found that a district court's failure to provide a second opt-out opportunity constituted an abuse of discretion." Defs.' Br. at 30. However, no case has ever been appealed to this Court which sought a second opt-out opportunity and presented the same types of circumstances as this case – specifically, a situation where, at the time of the "first" opportunity to opt out, class members could not effectively opt out without forfeiting their claims. Indeed, if the circumstances present in this case do not warrant a second opt-out opportunity, one may as well read out Rule 23(e)(2) entirely, because it would be difficult to conceive of *any* circumstance where a second opt-out opportunity would be appropriate.

Second, both Defendants and the Lead Plaintiffs attempt to downplay the significance of the information revealed by the Lead Plaintiffs' SJ Motion – in particular, information which demonstrated Defendants' many statements concerning the purported accretive/dilutive effects of the Merger were patently false. For example, Defendants contend that "this allegation was *not* one of Lead Plaintiffs' principal claims" (Defs.' Br. at 32) (emphasis in original) and the Lead Plaintiffs backpedal by pointing out that the motion was "vigorously opposed."

Lead Pls.' Br. at 47. However, these arguments are much too late. In seeking final approval for the Settlement and an award of attorneys' fees, Lead Plaintiffs themselves emphasized the critical significance of the SJ Motion, asserting that: "As set forth in Lead Plaintiffs' summary judgment papers, Lead Plaintiffs uncovered significant facts concerning the impact of Merrill's losses on its financial condition *that were not alleged by any regulator*. ... Lead Plaintiffs also developed *unique evidence* concerning BoA's statements regarding the accretive/dilutive impact of the Merger." A693-94 (emphasis added).

Third, the Lead Plaintiffs dispute the significance of the announcement of the terms of the Settlement itself, appearing to suggest that any announcement of a settlement after a first opt-out opportunity would be irrelevant as a matter of law. Lead Pls.' Br. at 47-48. The Lead Plaintiffs are wrong. While the mere announcement of a settlement after a first opt-out opportunity would not by itself mandate a second opt-out opportunity, it is a highly significant factor when the district court weighs its discretion under Rule 23(e)(4). That is because, as the Advisory Committee explained, the "decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known." Rule 23(e)(4) was therefore specifically intended to "provide[] added assurances that the settlement terms are fair by giving class members an

Advisory Committee notes to 2003 amendments to Rule 23(e)(3). (When enacted, what is now Rule 23(e)(4) was then Rule 23(e)(3).)

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opportunity to examine them and decide for themselves whether to accept them."9

The Lead Plaintiffs' argument is therefore wrong, because there would be no role

for Rule 23(e)(4) if the terms of a settlement were an irrelevant item of information

as a matter of law.

Accordingly, under the circumstances of this case, the district court abused

its discretion under Rule 23(e)(4) by not requiring a "second" opt-out opportunity.

**CONCLUSION** 

For the reasons set forth in this Reply Brief and the Australian Investors'

Opening Brief, the Judgment of the district court should be vacated, and/or

modified to provide a further opportunity for Class members to request exclusion.

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Judicial Conference, Report of the Judicial Conference of the United States on Class Action Settlements, at 3 (February 2006).

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#### **CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)**

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the attached brief is proportionally spaced, has a typeface (Times New Roman) of 14 points, and contains 5,218 words (excluding, as permitted by Fed. R. App. P. 32(a)(7)(B), the corporate disclosure statement, table of contents, table of authorities, and certificate of compliance), as counted by the Microsoft Word processing system used to produce this brief.

Dated: November 15, 2013

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