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Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES)
LITIGATION)

This Document Relates To:)

MARK NEWBY, *et al.*, individually and on)
behalf of all others similarly situated,)

Plaintiffs,)

vs.)

ENRON CORP., *et al.*)

Defendants.)

Civil Action No. H-01-3624
(Consolidated)

THE REGENTS OF THE UNIVERSITY OF)
CALIFORNIA, *et al.*, individually and on)
behalf of all others similarly situated,)

Plaintiffs,)

vs.)

KENNETH L. LAY, *et al.*)

Defendants.)

**THE FINANCIAL INSTITUTION DEFENDANTS'
SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER OPPOSITION
TO LEAD PLAINTIFF'S AMENDED MOTION FOR
CERTIFICATION OF A CLASS BASED ON
CLAIMED VIOLATIONS OF § 12(a)(2) OF THE SECURITIES ACT OF 1933**

2317

TABLE OF CONTENTS

	Page
INTRODUCTION	1
BACKGROUND	2
ARGUMENT	6
I. THE ADDITION OF PLAINTIFFS WITH STANDING AT THIS POINT COULD NOT JUSTIFY CLASS CERTIFICATION OF THE § 12(a)(2) CLAIMS BECAUSE THE STATUTE OF LIMITATIONS BARS ANY POSSIBLE CLAIMS BY SUCH A CLASS.	6
II. <i>AMERICAN PIPE</i> AND ITS PROGENY DO NOT REQUIRE A DIFFERENT RESULT.	7
1. The Three-Year Statute Of Repose Is Not Subject To The <i>American Pipe</i> Tolling Doctrine.	8
2. The Pendency Of A Class Action Does Not Toll The Statute Of Repose For Claims That No Named Plaintiff Has Standing To Assert.	9
3. <i>American Pipe</i> Tolling Does Not Apply to Class Claims.....	10
III. THE DOCTRINE OF RELATION BACK CANNOT SAVE THE UNTIMELY § 12(a)(2) CLAIMS OF THE ABSENT CLASS MEMBERS.....	12
CONCLUSION.....	15

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Adler v. United States District Court</i> , 790 F. Supp. 1235 (S.D.N.Y. 1992).....	12
<i>American Pipe & Construction Co. v. Utah</i> , 414 U.S. 538 (1974).....	7, 8, 9, 10, 11
<i>Andrews v. Orr</i> , 851 F.2d 146 (6th Cir. 1988)	11
<i>Barrow v. Wethersfield Police Department</i> , 66 F.3d 466 (2d Cir. 1995).....	13, 14
<i>In re Bennett Funding Group, Inc. Securities Litigation</i> , 194 F.R.D. 98 (S.D.N.Y. 2000)	12
<i>Brown v. Sibley</i> , 650 F.2d 760 (5th Cir. 1981)	5
<i>Carter v. West Publishing Co.</i> , 225 F.3d 1258 (11th Cir. 2000)	7
<i>In re Colonial Ltd. Partnership Litigation</i> , 854 F. Supp. 64 (D. Conn. 1994).....	9
<i>Crown, Cork & Seal Co. v. Parker</i> , 462 U.S. 345 (1983).....	9
<i>Duckworth v. Brunswick Corp.</i> , No. 700CV120R, 2001 WL 403324 (N.D. Tex. Apr. 17, 2001)	13
<i>In re Elscint, Ltd. Securities Litigation</i> , 674 F. Supp. 374 (D. Mass. 1987)	9, 10
<i>Fleck v. Cablevision VII, Inc.</i> , 799 F. Supp. 187 (D.D.C. 1992)	13
<i>Fleming v. Bank of Boston Corp.</i> , 127 F.R.D. 30 (D. Mass. 1989).....	9, 11
<i>Gabrielsen v. BancTexas Group, Inc.</i> , 675 F. Supp. 367 (N.D. Tex. 1987)	5

<i>Great Rivers Cooperative of Southeastern Iowa v. Farmland Industries, Inc.</i> , 120 F.3d 893 (8th Cir. 1997)	7
<i>Griffin v. Singletary</i> , 17 F.3d 356 (11th Cir. 1994)	11
<i>In re Heritage Bond Litigation</i> , 289 F. Supp. 2d 1132 (C.D. Cal. 2003)	9
<i>Jacobsen v. Osborne</i> , 133 F.3d 315 (5th Cir. 1998)	13
<i>James v. City of Dallas</i> , 254 F.3d 551 (5th Cir. 2001)	5
<i>Korwek v. Hunt</i> , 827 F.2d 874 (2d Cir. 1987).....	11
<i>Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson</i> , 501 U.S. 350 (1991).....	9
<i>Morin v. Trupin</i> , 778 F. Supp. 711 (S.D.N.Y. 1991).....	12
<i>Murray v. U.S. Bank Trust National Association</i> , 365 F.3d 1284 (11th Cir. 2004)	4
<i>Piazza v. Ebsco Industries, Inc.</i> , 273 F.3d 1341 (11th Cir. 2001)	7
<i>Prado-Steiman ex rel. Prado v. Bush</i> , 221 F.3d 1266 (11th Cir. 2000)	5
<i>Robbin v. Fluor Corp.</i> , 835 F.2d 213 (9th Cir. 1987)	11
<i>SMS Financial Ltd. Liability Co. v. ABCO Homes, Inc.</i> , 167 F.3d 235 (5th Cir. 1999)	12
<i>Salazar-Calderon v. Presidio Valley Farmers Association</i> , 765 F.2d 1334 (5th Cir. 1985)	10, 11
<i>Smith v. Flagship International</i> , 609 F. Supp. 58 (N.D. Tex. 1985)	11

<i>Summit Office Park, Inc. v. U.S. Steel Corp.</i> , 639 F.2d 1278 (5th Cir. 1981)	13
<i>In re Taxable Municipal Bond Securities Litigation</i> , 51 F.3d 518 (5th Cir. 1995)	4, 5
<i>Western Contracting Corp. v. Bechtel Corp.</i> , 885 F.2d 1196 (4th Cir. 1989)	14
<i>Williams v. United States</i> , 405 F.2d 234 (5th Cir. 1968)	12
<i>Wilson v. United States Government</i> , 23 F.3d 559 (1st Cir. 1994)	14
<i>Worthington v. Wilson</i> , 8 F.3d 1253 (7th Cir. 1993)	14

STATE CASES

<i>Cunningham v. Insurance Co. of North America</i> , 530 A.2d 407 (Penn. 1987)	10
<i>Hess v. I.R.E. Real Estate Income Fund, Ltd.</i> , 629 N.E.2d 520 (Ill. App. Ct. 1993)	9, 10

FEDERAL STATUTES

15 U.S.C. § 77l(a)(2) (“Section 12(a)(2)”)	<i>passim</i>
15 U.S.C. § 77m (“Section 13”)	2, 6, 7, 8
Fed. R. Civ. P. 15(c)(3)	12, 13

INTRODUCTION

In light of this Court's rulings related to potential §12(a)(2) claims, the defendants against whom the §12(a)(2) claims are alleged (the "Section 12(a)(2) Defendants")¹ submit this brief in further opposition to the certification of a class for those claims.

This lawsuit has been pending for nearly two and a half years. The current operative complaint, the Amended Consolidated Complaint ("ACC"), was filed over a year ago. Yet, there is not now, *nor has there ever been*, any plaintiff in this suit with standing to assert the vast majority of the §12(a)(2) claims asserted in that complaint. Specifically, only intervenor Imperial County Employees Retirement System ("ICERS") bought any of the foreign debt securities that are the subject of the §12(a)(2) claims (the "Foreign Debt Securities"): ICERS bought Marlin Water Trust II Notes in the July 12, 2001 offering. Accordingly, there is no plaintiff who can represent a class for a §12(a)(2) claim based on any Foreign Debt Security *other than* the Marlin Water Trust II Notes, nor is there any plaintiff who can represent a class of purchasers other than those who bought directly from the bank from which ICERS purchased its Notes. This Court has recognized this reality in several of its rulings.

Given plaintiffs' lack of standing to assert the §12(a)(2) claims, several defendants asked this Court to dismiss those claims outright. But the Court indicated that it would defer a final ruling until it decides the pending motion for class certification. The Court noted, however, that

¹ The Section 12(a)(2) Defendants include Citigroup, Inc., Citigroup Global Markets Inc. (f/k/a Salomon Smith Barney Inc.), Citigroup Global Markets Ltd. (f/k/a Salomon Brothers International Limited) (collectively, the "Citigroup Defendants"), Barclays PLC, Barclays Capital Inc., Canadian Imperial Bank of Commerce, CIBC Inc., CIBC World Markets Corp., CIBC World Markets plc, Deutsche Bank AG, Deutsche Bank Securities Inc., Credit Suisse First Boston (USA) Inc., Credit Suisse First Boston LLC (f/k/a Credit Suisse First Boston Corp.), Pershing LLC (f/k/a Donaldson, Lufkin & Jenrette Securities Corporation), J.P. Morgan Chase & Co., J.P. Morgan Securities Inc., Lehman Brothers Holdings Inc. and Lehman Brothers Inc.

it would dismiss those claims at class certification time unless some named plaintiff with standing to assert them joined the action.

In an apparent effort to avoid dismissal, Lead Plaintiff recently sought approval to send notice of these proceedings to purchasers of Foreign Debt Securities in an attempt to find potential class representatives to pursue the §12(a)(2) claims. But Lead Plaintiff's last-minute maneuvers will not matter. For even if such a purchaser belatedly steps forward, it could do nothing to breathe life into those claims because they are now barred by §13's three-year statute of repose. Moreover, principles of equitable tolling do not apply to the statute of repose, and the claims of a belated intervenor will not relate back to Lead Plaintiff's filing of the ACC.

Since there is no one in this case (other than ICERS) with an extant §12(a)(2) claim around whom a class could be certified, and it is too late to add such a plaintiff now, class certification must be denied for all §12(a)(2) claims other than ICERS' claim involving the Marlin Water Trust II Notes.

BACKGROUND

Plaintiffs filed the ACC on May 15, 2003. In it, plaintiffs included for the first time allegations relating to claims under § 12(a)(2) of the Securities Act of 1933 based on sales of Foreign Debt Securities. See ACC ¶¶641.1-.44, 1016.1-.9. All of the Foreign Debt Securities offerings at issue in the §12(a)(2) claims occurred on or before July 12, 2001:

Date	Issuer
09/23/99	Osprey Trust Osprey I, Inc.
11/15/99	Yosemite Securities Trust I
02/15/00	Yosemite Securities Co. Ltd.
08/17/00	Enron Credit Linked Notes Trust
09/28/00	Osprey Trust

	Osprey I, Inc.
05/17/01	Enron Euro Credit Linked Notes Trust
05/17/01	Enron Sterling Credit Linked Notes Trust II
05/17/01	Enron Sterling Credit Linked Notes Trust
07/12/01	Marlin Water Trust II Marlin Water Capital Corp. II

ACC ¶ 641.2.

In their motion for class certification, plaintiffs ask this Court to certify a single class relating to all claims in the ACC, irrespective of the securities actually purchased by the plaintiffs themselves and irrespective of the standing requirements necessary for any plaintiff to represent any class. *See* #1445. Various defendants have opposed plaintiffs' request for certification of a single, omnibus class for the myriad different securities referred to in the ACC. *See, e.g.,* # 1788 (Financial Institutions' Opposition). Briefing on class certification is complete.

Not one of the named plaintiffs in the ACC alleges any purchase of any of the Foreign Debt Securities that underlie the §12(a)(2) claims, and intervenor ICERS purchased only one Foreign Debt Security, the Marlin Water Trust II Notes in the July 12, 2001 offering. In light of this situation, and in advance of a class certification ruling, this Court properly applied the class certification standing requirements when ICERS sought to intervene as a class representative for all §12(a)(2) claims. *See* #1630 (Motion); #1999 (Opinion). The Court flatly rejected ICERS' request as impermissibly overbroad. Specifically, the Court explained that ICERS could *not* serve as a class representative for persons who: (1) purchased any of the Foreign Debt Securities challenged in plaintiffs' §12(a)(2) claims from a seller other than the seller who sold to ICERS, or (2) purchased any Foreign Debt security other than the one that ICERS purchased (Marlin Water Trust II Notes). *See* #1999 at 97 ("ICERS . . . can *only* serve as a class representative for

other purchasers for claims against[] the entities that successfully sold to ICERS, or successfully solicited ICERS' purchase of, the Marlin Water Trust II notes in the July 12, 2001 offering.”) (emphasis added). Thus, the Court made clear, ICERS must identify a defendant in this action from whom it purchased its notes in order to have standing to pursue a §12(a)(2) claim against that defendant based on those notes. Moreover, that is all that ICERS can do, and absent timely intervention of a plaintiff with standing, no “class or subclass relating to §12(a)(2) claims by purchasers in the other eight offerings of Foreign Debt Securities may be certified in this litigation” *Id.* at 97. And even with respect to the Marlin Water Trust II Notes, the Court made clear that ICERS can represent a class consisting only of those individuals who purchased those notes from the same defendant from whom ICERS made its purchase. *See* # 1999 at 97.

This Court's ruling on ICERS' intervention motion recognized clearly the standing requirements for a plaintiff to represent a class for the §12(a)(2) claims, a ruling the Court confirmed in connection with certain defendants' motions to dismiss. *See, e.g.,* #2043 at 5. And it underscored that there is no plaintiff in this action with standing to represent a class for the §12(a)(2) claims (with the possible exception of ICERS), a ruling the Court confirmed in connection with the Lehman and J.P. Morgan Chase defendants' motions to dismiss. *See* # 2043 at 5; # 2052 at 10-11.

The standing requirements to assert a claim under §12(a)(2), and the requirements to represent a class asserting such claims, are well established.² These legal constraints on

² No class can be certified for the § 12(a)(2) claims unless some plaintiff who bought the Foreign Debt Securities from the defendants at which those claims are directed timely asserts its claim and identifies the class it seeks to represent. For “just as a plaintiff cannot pursue an individual claim unless he proves standing, a plaintiff cannot represent a class unless he has standing to raise the claims of the class he seeks to represent.” *Murray v. U.S. Bank Trust Nat'l Ass'n*, 365 F.3d 1284, 1288 n.7 (11th Cir. 2004); *see also In re Taxable Mun. Bond Sec. Litig.*,

class certification, and the fact that none of the plaintiffs has standing to assert the §12(a)(2) claims, are circumstances that have existed since this litigation was commenced and the ACC was filed. Without a plaintiff with standing to assert them, the §12(a)(2) claims in the ACC are invalid. This Court recognized as much, but when it was asked to dismiss the claims, it deferred ruling in order to afford Lead Plaintiff an opportunity to find someone with actual standing. *See* #1999 at 65-66. The Court ruled further that, if at the time it addresses class certification, no plaintiff with standing has joined this action, it will deny class certification on the §12(a)(2) claims. *Id.* at 72-74; *see also id.* at 97 (“Whether a class . . . relating to the [§12(a)(2) claims] may be certified in this litigation will depend upon whether any eligible and willing class members . . . move to intervene and to be named a class representative.”).³

(continued...)

51 F.3d 518, 522 (5th Cir. 1995) (“It is well-established that to have standing to sue as a class representative it is essential that a plaintiff must be part of that class”) (internal quotation marks and citation omitted). Nor is it “enough that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to one of many claims he wishes to assert. Rather, each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim.” *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1280 (11th Cir. 2000) (internal quotation marks omitted); *see also James v. City of Dallas*, 254 F.3d 551, 563 (5th Cir. 2001) (explaining that “[b]oth standing and class certification must be addressed on a claim-by-claim basis,” and “at least one named Plaintiff must have standing” with respect to “each of the claims”) (collecting cases).

³ The Section 12(a)(2) Defendants respectfully disagree with the Court’s decision to postpone dismissal for lack of standing until after class certification. *See, e.g., Gabrielsen v. BancTexas Group, Inc.*, 675 F. Supp. 367, 371 n.3 (N.D. Tex. 1987) (“If [a] court concludes that the proposed class representative lacks individual standing, the proper procedure is to dismiss the complaint, rather than . . . to allow other class representatives to step forward.”); *see also Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. 1981) (stating that the “constitutional threshold [of standing] must be met *before* any consideration of the typicality of claims or commonality of issues required for procedural reasons by Fed. R. Civ. P. 23”) (emphasis added); *Prado-Steiman*, 221 F.3d at 1280 (“[I]t is *well-settled* that prior to the certification of a class, and technically speaking before undertaking any formal typicality or commonality review, the district court must determine that at least one named class representative has Article III standing to raise *each class subclaim.*”) (emphasis added) (citing, *inter alia*, *Brown*).

There is no reason to defer any longer because the period for *timely* intervention has expired, and any §12(a)(2) claim by a new would-be plaintiff with standing is now completely and finally time-barred. Accordingly, class certification for the §12(a)(2) claims should be denied.

ARGUMENT

I. THE ADDITION OF PLAINTIFFS WITH STANDING AT THIS POINT COULD NOT JUSTIFY CLASS CERTIFICATION OF THE § 12(a)(2) CLAIMS BECAUSE THE STATUTE OF LIMITATIONS BARS ANY POSSIBLE CLAIMS BY SUCH A CLASS.

In a last-gasp attempt to forestall dismissal of the § 12(a)(2) claims, Lead Plaintiff sought leave of this Court to send notification to purported §12(a)(2) class members, in an attempt to find a willing plaintiff with standing to pursue these claims. *See* #2180. Even assuming that Lead Plaintiff succeeds in this quest, however, it will not save the §12(a)(2) claims because those claims are now untimely as a matter of law.

The three-year statute of repose found in 15 U.S.C. § 77m (§ 13 of the Securities Act of 1933) bars any possible §12(a)(2) claims raised at this late date. That provision states:

No action shall be maintained to enforce any liability created under section [11] or [12(a)(2)] of this title unless brought within one year after the discovery of the untrue statement or the omission, In no event shall any such action be brought to enforce a liability created . . . under section [12(a)(2)] of this title more than three years after the sale [of the security].

This Court has already ruled that, based on the deemed filing date of the ACC of January 14, 2003, any §12(a)(2) claim involving the Osprey I Notes offering of September 23, 1999 is time-barred because that claim accrued over three years before even that deemed filing date. *See* # 2044 at 6-7. By similar logic, any §12(a)(2) claim based on the Yosemite Securities Trust I Notes offering of November 15, 1999 is also barred, based on nothing more than reference to the deemed filing date of the ACC.

Even though the ACC was deemed filed before the statute of repose ran on the remaining §12(a)(2) claims, moreover, those claims are now similarly barred. For even the most recent of the offerings at issue occurred on July 12, 2001 -- over three years ago. *Id.* Thus, §13's statute of repose expired with respect to the §12(a)(2) claims, at the latest, on July 12, 2004. Yet, no one with standing (except for ICERS) brought a §12(a)(2) claim by that date. Accordingly, any such potential claims have now lapsed, and class certification must be denied with respect to all §12(a)(2) claims other than ICERS' claim. *See, e.g., Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1347 (11th Cir. 2001) ("It is by now clear that a class representative whose claim is time-barred cannot assert the claim on behalf of the class."); *id.* at 1349 (holding, "since [the named plaintiff's] claim against [the defendant] is time-barred," that "the district court abused its discretion in finding [the named plaintiff] to be an adequate class representative," and "revers[ing] the certification of the class"); *Carter v. West Publ'g Co.*, 225 F.3d 1258, 1267 (11th Cir. 2000) (reversing class certification because the named plaintiff, whose claim was time-barred, lacked standing to assert the claim); *Great Rivers Coop. of S.E. Iowa v. Farmland Indus., Inc.*, 120 F.3d 893, 899 (8th Cir. 1997) ("Here, Tacey is not and cannot be a class member because his claim is time barred; consequently, he cannot represent the class. Because Tacey is the only named representative in Count 4, the putative class lacks a representative on that count. Without a class representative, the putative class cannot be certified and its claims cannot survive.") (citations omitted).

II. AMERICAN PIPE AND ITS PROGENY DO NOT REQUIRE A DIFFERENT RESULT.

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the U.S. Supreme Court created an equitable tolling rule for certain claims brought in a class action. The Court announced that:

[A]t least where class action status has been denied solely because of failure to demonstrate that “the class is so numerous that joinder of all members is impracticable,” the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.

414 U.S. at 552-53.

The doctrine of *American Pipe*, however, does nothing to revive the expired §12(a)(2) claims for three reasons. *First*, statutes of repose are not subject to equitable tolling. *Second*, the *American Pipe* doctrine does not apply where no named plaintiff in a purported class action has standing. And *third*, even if *American Pipe* somehow applied here, it could not support a successive class based on the expired §12(a)(2) claims built up around a yet-to-be-found named plaintiff.

1. The Three-Year Statute Of Repose Is Not Subject To The *American Pipe* Tolling Doctrine.

Statutes of repose, such as §13, are not subject to equitable tolling. Indeed, this Court acknowledged in ruling on ICERS’ motion to intervene that *American Pipe* tolling is inappropriate for the § 12(a)(2) claims here. *See* #1999 at 58 & n.44 (“Courts have . . . held that equitable tolling . . . does not apply . . . to the three-year statute of repose in §13 for claims under [§] . . . 12(a)(2) of the 1933 Act,” and “[t]he three-year period for claims under §12(a)(2) begins to run at the time of the sale, when the investor executes a subscription agreement and tenders his payment.”); *id.* at 59 (“Section 13 is not only a statute of limitations but also operates as a statute of repose. There is an *absolute maximum* of three years to prevent stale claims. Actions brought under section 12(a)(2) must be brought within three years of the sale forming the basis for the alleged violation.”) (quoting Thomas Lee Hazen, 1 *Law of Sec. Reg.* §7.10[4] (2d ed. 2004 Supp.) (emphasis added); *cf.* #2044 at 7 (“Once triggered, a statute of repose runs without interruption even if equitable concerns might suggest tolling”). Indeed, “the equitable

tolling doctrine is fundamentally inconsistent with the 1- and 3-year structure [of the statute of limitations]. . . . The 3-year limit is a period of repose inconsistent with tolling. . . . Because the purpose of the 3-year limitation is clearly to serve as a cutoff, . . . tolling principles do not apply to that period.” *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363-64 (1991); *see also In re Heritage Bond Litig.*, 289 F. Supp. 2d 1132, 1149-50 (C.D. Cal. 2003).

Accordingly, the statute of limitations on the §12(a)(2) claims has continued to run notwithstanding the pendency of this lawsuit, and the claims of any new would-be plaintiff are now time-barred.

2. The Pendency Of A Class Action Does Not Toll The Statute Of Repose For Claims That No Named Plaintiff Has Standing To Assert.

In a follow-on case to *American Pipe*, Justice Powell warned in a concurrence that “[t]he tolling rule of *American Pipe* is a generous one, inviting abuse.” *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983). Heeding this admonition, many courts have acted to limit *American Pipe*’s potentially expansive sweep. Specifically, they have held the rule inapplicable to putative class actions where no named plaintiff has standing: “[I]f the original plaintiffs lack 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. P’ship Litig.*, 854 F. Supp. 64, 82 (D. Conn. 1994) (emphasis added); *see Fleming v. Bank of Boston Corp.*, 127 F.R.D. 30, 37 (D. Mass. 1989) (“[I]f intervention were now allowed, not only would the original plaintiff . . . not be able to serve as a class representative, he would not even be a member of the putative class. Thus, to allow [a plaintiff with standing] to intervene would be to sanction and encourage abuse of the class action provisions of federal law.”); *In re Elscint, Ltd. Sec. Litig.*, 674 F. Supp. 374, 378 (D. Mass. 1987); *Hess v. I.R.E. Real Estate Income Fund, Ltd.*,

629 N.E.2d 520, 534 (Ill. App. Ct. 1993); *Cunningham v. Ins. Co. of N. Am.*, 530 A.2d 407, 409 (Penn. 1987).

Indeed, the *Elscint* court expressly recognized that *American Pipe* tolling must not be allowed to sanction an end-run around the statute of repose. The *Elscint* court expressed its profound concern that the extension of *American Pipe* to cases where no named plaintiff had standing in the first place “may condone or encourage attempts to circumvent the statute of limitation by filing a lawsuit without an appropriate plaintiff and then searching for one who can later intervene with the benefit of the tolling rule.” 674 F. Supp. at 378. And the court sharply rebuked any such effort: “[I]t would be improper to allow the filing of a class action by nominal plaintiffs who are wholly inadequate to represent the asserted class to have the effect of tolling limitation to permit the otherwise untimely intervention of proper class representatives.” *Id.*

In short, the addition of a named plaintiff at this late juncture could not revive the lifeless §12(a)(2) claims asserted in the ACC. No class can be certified for these expired claims.

3. American Pipe Tolling Does Not Apply to Class Claims.

Even if *American Pipe* could, somehow, permit some as-yet-identified individual to bring a §12(a)(2) claim now, it could not support a class action created around such an individual. By its own terms, where *American Pipe* applies, it tolls the statute of limitations only for the *individual* claims of putative class members. *See* 414 U.S. at 553 (filing of class action tolls limitations period “for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status”). It does not pertain to class action claims. *See, e.g., Salazar-Calderon v. Presidio Valley Farmers Ass’n*, 765 F.2d 1334, 1351 (5th Cir. 1985) (“Plaintiffs have no authority for their contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations

indefinitely, nor have we found any.”); *Smith v. Flagship Int’l*, 609 F. Supp. 58, 64 (N.D. Tex. 1985) (noting with disapproval that under a contrary rule an “attorney would be able to bring a potentially endless succession of class actions, each tolling the [limitations period] for its successor”); *see also Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994); *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988); *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987); *Korwek v. Hunt*, 827 F.2d 874, 878 (2d Cir. 1987) (“[T]he *American Pipe* tolling rule does not apply to permit putative class members to file a subsequent class action.”) (collecting cases); *Fleming*, 127 F.R.D. at 36.

Accordingly, even if *American Pipe* could toll a statute of repose, and even if it could do so for claims for which no plaintiff in the putative class action has standing, the addition of a plaintiff at this late juncture could not justify class certification for the now time-barred §12(a)(2) claims. Again, no class can be certified for these expired claims.⁴

⁴ Plaintiffs in *Conseco Annuity Assurance Co., et al. v. Citigroup, Inc., et al.*, No. 03 CV 2240, have asserted claims against the Citigroup Defendants on behalf of a putative class of purchasers of a subset of the Foreign Debt Securities (the “Conseco Securities”), but the pendency of that case does not change the conclusion that the § 12(a)(2) claims are time-barred as to the Citigroup Defendants as well as the other Section 12(a)(2) Defendants, for several reasons. *First*, the filing of the Conseco action does not toll the statute of limitations with respect to the § 12(a)(2) claims asserted in *Newby* for the reasons set forth in Parts II.B.1. and II.B.3. herein. *Second*, in any event, the named plaintiff in Conseco alleges that it purchased only three of the Conseco Securities (Yosemite I, ECLN I, and ECLN II); thus, for the reasons set out above in the text (pp. 3-4), it lacks standing to sue as to the remaining Conseco Securities. And *third*, Conseco did not file its complaint until March 5, 2003, and it did not even move to be appointed lead counsel until November 27, 2002. Thus, as discussed above (p. 6), its claims with respect to the Yosemite I offering, which was offered for sale on November 15, 1999, more than three years earlier, are time-barred under this Court’s prior ruling with respect to the Osprey I offering.

III. THE DOCTRINE OF RELATION BACK CANNOT SAVE THE UNTIMELY § 12(a)(2) CLAIMS OF THE ABSENT CLASS MEMBERS.

Finally, although the doctrine of relation back sometimes operates to allow a new party to peg its claims to the filing date of an original party, it does nothing to revive the expired §12(a)(2) claims at issue here.

The general rule is that “relation back will not apply to an amendment that substitutes or adds a new party for those named initially in the earlier timely pleadings.” *Williams v. United States*, 405 F.2d 234 (5th Cir. 1968). Federal Rule of Civil Procedure 15(c)(3) narrowly circumscribes the exceptions to this rule. More specifically, it provides that relation back is not permitted unless the failure to include the new plaintiff originally was actually a “mistake.” Fed. R. Civ. P. 15(c)(3)(B); see *SMS Fin. Ltd. Liab. Co. v. ABCO Homes, Inc.*, 167 F.3d 235, 245 (5th Cir. 1999) (explaining that the requirements of Rule 15(c)(3) apply when new plaintiffs seek relation back); *In re Bennett Funding Group, Inc. Sec. Litig.*, 194 F.R.D. 98, 100 (S.D.N.Y. 2000) (“[W]ell-established case law and the clear dictates of Rule 15(c) require that plaintiffs invoking the relation back doctrine demonstrate that their failure to add new plaintiffs was the product of some mistake”) (collecting cases); *Adler v. United States Dist. Court*, 790 F. Supp. 1235, 1239 (S.D.N.Y. 1992) (rejecting relation back despite adequate notice where there was “no suggestion” that “the additional plaintiff would have been included in the original complaint ‘but for’ a mistake of identity”); *Morin v. Trupin*, 778 F. Supp. 711, 735 (S.D.N.Y. 1991) (“Rule 15(c) does not exist merely to keep the door open for any tardy plaintiff of whom a defendant may be aware. Rather, Rule 15(c) stands as a remedial device for adding or

substituting a party who ‘but for a mistake concerning the identity of the proper party’ would have been named originally.”⁵

Lead Plaintiff cannot seriously argue that the lack of a single plaintiff in the ACC with standing on the §12(a)(2) claims was somehow a mistake. The complaint in this case has been amended twice. The most recent version, the ACC, first incorporated the §12(a)(2) claims. Lead Plaintiff assembled the ACC in conjunction with the other named plaintiffs. It must have known when it filed the ACC that neither it nor any of those other plaintiffs had standing to raise the § 12(a)(2) claims. There was no “mistake.” And it is well-recognized that the “goal of Rule 15(c)(3) is to allow parties to correct their mistakes, not to allow them an indefinite amount of time in which to discover who the proper parties actually are” *Duckworth v. Brunswick Corp.*, No. 700CV120R, 2001 WL 403324, at *2 (N.D. Tex. Apr. 17, 2001); *cf. Jacobsen v. Osborne*, 133 F.3d 315 (5th Cir. 1998) (no relation back where “there was no ‘mistake’ in identifying the correct defendant; rather, the problem was not being able to identify that defendant”); *Barrow v. Wethersfield Police Dep’t*, 66 F.3d 466, 470 (2d Cir. 1995) (“[T]he failure to identify individual defendants when the plaintiff knows that such defendants must be

⁵ In addition, the Section 12(a)(2) Defendants must have had notice that those claims were operative “within the period provided by Rule 4(m)” – *i.e.*, within 120 days after the filing of the ACC. Fed. R. Civ. P. 15(c)(3)(A). That did not occur. Indeed, to this day, the Section 12(a)(2) Defendants have had no reason to believe that the § 12(a)(2) claims in this case (except for ICERS’ claim) are operative; no plaintiff has standing to raise them as no named plaintiff actually purchased any of the Foreign Debt Securities. *Cf. Fleck v. Cablevision VII, Inc.*, 799 F. Supp. 187, 191 (D.D.C. 1992) (“A defendant has notice of the claims of an additional plaintiff if it is aware of the existence of the new plaintiff’s claims *and of the involvement of the new plaintiff* in the original action.”) (emphasis added) (citing *Leachman v. Beech Aircraft Corp.*, 694 F.2d 1301, 1308 (D.C. Cir. 1982)); *Summit Office Park, Inc. v. U.S. Steel Corp.*, 639 F.2d 1278, 1282 (5th Cir. 1981) (“[W]here a plaintiff never had standing to assert a claim against the defendants, it does not have standing to amend the complaint and control the litigation by substituting new plaintiffs” or “a new class” to the case.).

named cannot be characterized as a mistake.”); *Wilson v. United States Gov’t*, 23 F.3d 559, 563 (1st Cir. 1994); *Worthington v. Wilson*, 8 F.3d 1253, 1257 (7th Cir. 1993); *W. Contracting Corp. v. Bechtel Corp.*, 885 F.2d 1196, 1201 (4th Cir. 1989).

A fortiori, relation back cannot save § 12(a)(2) claims based on the Osprey I Notes offering of September 23, 1999, or the Yosemite Securities Trust I Notes offering of November 15, 1999. Both of those offerings occurred more than three years before the deemed filing date of the ACC, the first pleading to raise the § 12(a)(2) claims. *See supra* at 6. Accordingly, even “relation back” of the new plaintiff’s claims to the ACC would not save claims based on those to offerings.

Not even the doctrine of relation back, then, can save the expired § 12(a)(2) claims. Again, no class can be certified for these claims.

CONCLUSION

For the foregoing reasons, as well as those expressed in the Financial Institutions' Opposition (#1788), this Court should deny class certification for the §12(a)(2) claims.

Dated: August 6, 2004

Respectfully submitted,



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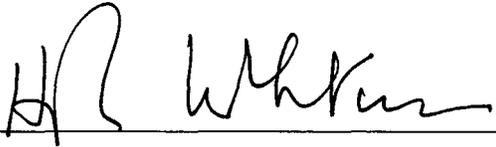
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorneys of record for all parties to the above cause through es13624.com in accordance with the Court's order regarding website service on the 6th day of August, 2004.



A handwritten signature in black ink, appearing to read "H. R. Whitman", is written above a horizontal line.