



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

LEHMAN BROTHERS SECURITIES AND
ERISA LITIGATION

This document applies to:

09 MD 2017 (LAK)

*The California Public Employees' Retirement System v.
Richard S. Fuld, Jr., et al*, 11 Civ. 1281 (LAK)

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PRETRIAL ORDER No. 39
(HVB Motion to Dismiss)

LEWIS A. KAPLAN, *District Judge.*

Plaintiff California Public Retirement System (“CalPERS”), in its second amended complaint (“SAC”),¹ asserts a single claim against HVB Capital Markets Inc. (“HVB”) under Section 11 of the Securities Act of 1933 (the “Securities Act”). HVB moves to dismiss the claim,² arguing that it is (1) time-barred, and (2) premised on allegations previously dismissed by the Court in its opinion dismissing in part the related class action complaint in *In re Lehman Brothers Equity/Debt Securities Litigation* (“*E/D Class Action*”).³

Plaintiff’s Section 11 claim against HVB is based on HVB’s alleged participation in two offerings, dated July 12, 2007, and December 17, 2007.⁴ CalPERS filed its original complaint on February 25, 2011.⁵ Plaintiff’s Section 11 claim against HVB is thus barred by the Securities

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DI 551.

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DI 598, at 3.

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In Re Lehman Brothers Sec. and ERISA Litig., 799 F. Supp.2d 258 (S.D.N.Y. 2011) (hereinafter “*E/D Class Action I*”).

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¶ 38; DI 705, at 5.

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DI 1 in 11 Civ. 1281.

Act's three-year statute of repose.⁶

Plaintiff argues that the filing of the amended complaint in the *E/D Class Action* on October 27, 2008 tolled the statute of repose under *American Pipe & Construction Co. v. Utah*.⁷ It claims that its Section 11 claim against HVB therefore is timely. Plaintiff is incorrect.

This Court previously has held that *American Pipe* tolling does not apply to the statute of repose set forth in Section 13 of the Securities Act,⁸ which clearly states that “[i]n no event shall any . . . action be brought to enforce a liability created under [Section 11] more than three years after the security was bona fide offered to the public.”⁹ Plaintiff attempts to distinguish this Court’s prior rulings by pointing out that they involved cases in which proposed intervenors attempted to cure standing defects of named plaintiffs.¹⁰ By contrast, in this action, CalPERS – at one time a member of the putative class that had standing to sue – later opted out of the class action. This distinction, plaintiff argues, renders the Court’s prior determination that *American Pipe* tolling does not apply to Section 13’s statute of repose inapplicable here.

Plaintiff’s argument merits little discussion. “[N]either *American Pipe* nor any other form of tolling may be invoked to avoid the three year statute of repose set forth in Section 13 of the Securities Act.”¹¹ Section 13 “states quite clearly that ‘[i]n no event’ shall . . . claims be asserted ‘more than three years after’ the pertinent offerings. That language is absolute.”¹² Nowhere in the statute is there an exception for claims brought by a plaintiff who has opted out of a class action.¹³

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15 U.S.C. § 77m.

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414 U.S. 538.

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In re Lehman Bros. Sec. & Erisa Litig., 800 F. Supp. 2d 477, 482 (S.D.N.Y. 2011); *In re IndyMac Mortgage-Backed Sec. Litig.*, 793 F. Supp. 2d 637, 643 (S.D.N.Y. 2011).

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15 U.S.C. § 77m.

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DI 705, at 6-7.

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E/D Class Action I, 799 F. Supp.2d at 310.

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In re Lehman, 800 F. Supp. 2d at 477 (quoting 15 U.S.C. § 77m).

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Moreover, despite plaintiff’s contention to the contrary, the fact that the named plaintiffs in the Court’s prior decisions on this issue lacked standing had no bearing on the Court’s analysis in those cases. The Court simply applied the statute as written and found that it is not subject to *American Pipe* tolling. See *In re Lehman*, 800 F. Supp. 2d at 482-83;

And, given the frequency with which opt-out actions are filed in situations such as this one, such an exception would seriously undermine the statute and threaten to swallow the rule. The Court declines so to limit its prior rulings on this issue.

Because plaintiff brought its Section 11 claim against HVB more than three years after the securities over which it sues were offered to the public, its claim is untimely and must be dismissed.¹⁴

Conclusion

HVB's motion to dismiss [DI 596] – to the extent it is asserted against the SAC in this case – is granted. This ruling, however, disposes only of HVB's motion to dismiss CaLPERS' complaint as against it.

SO ORDERED.

Dated: October 15, 2012



Lewis A. Kaplan
United States District Judge

In re IndyMac, 793 F. Supp. 2d at 643.