

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re:

LEHMAN BROTHERS SECURITIES AND  
ERISA LITIGATION

09 MD 2017 (LAK)

This document applies to:

*State Compensation Ins. Fund v. Fuld*, 11 Civ. 3892 (LAK)  
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**PRETRIAL ORDER NO. 50**  
(Bank Defendants' Motion to Dismiss)

LEWIS A. KAPLAN, *District Judge*.

This action was commenced in the Northern District of California in May 2011 and transferred to this district by the Multidistrict Panel pursuant to 28 U.S.C. § 1407. The amended complaint, filed in November 2011, contains eleven counts, only three of which are asserted against the Bank Defendants.<sup>1</sup> All three relate to alleged purchases of Lehman securities in two offerings, the later of which occurred on or about January 15, 2008, which antedated the filing of this action by more than three years.<sup>2</sup> The three counts against the Bank Defendants assert claims under Sections 11 and 12(a)(2) of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. §§ 77k, 77l(a)(2) (Counts III and IV, respectively), and Sections 25401 and 25501 of the California Corporations Code (Count VII). The matter is before the Court on the Bank Defendants' motion to dismiss the amended complaint as against them.

1. Section 13 of the Securities Act provides:

"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, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77l(a)(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action

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The "Bank Defendants" are listed in their memorandum (MDL Dkt. 572) at 1 n.1.

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The two offerings are among those included in the class action claims asserted in *In re Equity/Debt Sec. Litig.*, 08 Civ. 5523 (LAK) (the "*Equity/Debt Class Action*"). Settlement classes have been certified there and the case settled as to almost all defendants. (MDL Dkt. 894) Although the Court has not been so informed, the Court assumes for purposes of this decision that plaintiff in this case, which was a member of the class in *Equity/Debt Class Action*, opted out of the settlement.

be brought to enforce a liability created under section [11] or [12(a)(1) of this title more than three years after the security was bona fide offered to the public, or under [12](a)(2) of this title more than three years after the sale.”

It is undisputed that this action was commenced more than three years after the securities at issue were *bona fide* offered to the public and more than three years after their sale to the plaintiff. Accordingly, the Securities Act claims are facially untimely.

Plaintiff nevertheless argues that its Securities Act claims are timely because “the securities [it] purchased . . . are at issue in the Lehman Holdings class action”<sup>3</sup> and that the running of the period of repose therefore was tolled under *American Pipe & Constr. Co v. Utah* during the pendency of that class action at least to the point plaintiff opted out.<sup>4</sup> That question appears to be presented in *International Fund Management v. Citigroup Inc.*, No., 12-1903 (“*IFM*”, which is *sub judice* in the Court of Appeals. The Court concludes that the prudent course is to defer ruling on this issue pending a decision in that case. Accordingly, the Court declines to reach plaintiffs’ other arguments with respect to the federal claims, as these may be mooted by the ultimate outcome of the timeliness issue.


2. The Bank Defendants’ final argument is that all of plaintiff’s state law claims are precluded by The Securities Litigation Uniform Standards Act (“SLUSA”).<sup>5</sup> For reasons set forth in a memorandum opinion of even date, the Court agrees.

*Conclusion*

For the foregoing reasons, the Bank Defendants’ motion to dismiss the amended complaint (MDL Dkt. 570) is granted to the extent that the state law claims are dismissed and denied in all other respects without prejudice to renewal after the disposition of the *IFM* case.

SO ORDERED.

Dated: December 17, 2012

  
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Lewis A. Kaplan  
United States District Judge

<sup>3</sup>

*I.e.*, the *Equity/Debt Class Action*.

<sup>4</sup>

414 U.S. 538 (1974).

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15 U.S.C. § 78bb(f).