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Manuel Farach

California Public Employees' Retirement System v. ANZ Securities, Inc., Case No. 16–373.
The three-year time limit of Section 13 of the Securities Act of 1933 is a statute of repose not subject to equitable tolling, and a party that opts out of a timely filed class action and files an individual action more than three years after accrual is barred from recovery.

Pollitzer v. Gebhardt, Case No. 16-11506 (11th Cir. 2017).
A Chapter 7 bankruptcy case can be dismissed under 11 U.S.C. § 707(b) (granting bankruptcy relief can be denied if doing so would be "abuse" of the bankruptcy code) even if the case was originally filed as a Chapter 13 case.

MP, LLC v. Sterling Holding, LLC, Case No. 3D15-1062 (Fla. 3d DCA 2017).
A bank may be liable in tort to its borrowers.

Bankers Lending Services, Inc. v. Regents Park Investments, LLC, No. 3D17-439 (Fla. 3d DCA 2017).
Certiorari, not Florida Rule of Appellate Procedure 9.130(a)(3)(B), is the proper method to review orders granting or discharging lis pendens and bonds associated therewith.

E-Commerce Coffee Club v. Miga Holdings, Inc., Case No. 4D15-3899 (Fla. 4th DCA 2017).
A contractual provision that states a report is binding on the parties but is contradicted by a later provision stating either party may contest the report is patently ambiguous and subject to parol testimony.

Klebanoff v. Bank of New York Mellon, Case No. 5D16-1637 (Fla. 5th DCA 2017).
The Fifth District distinguishes *Hicks v. Wells Fargo Bank, N.A.*, 178 So. 3d 957 (Fla. 5th DCA 2015), and *Collazo v. HSBC Bank USA, N.A.*, 213 So. 3d 1012 (Fla. 3d DCA 2016), based on their facts, and holds that a complaint alleging a default on a date "and all subsequent payments thereafter" is not barred by the statute of limitations.

Third District Court of Appeal

State of Florida

Opinion filed June 28, 2017.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-439
Lower Tribunal No. 15-18141

Bankers Lending Services, Inc.,
Petitioner,

vs.

Regents Park Investments, LLC,
Respondent.

A Writ of Certiorari to the Circuit Court for Miami-Dade County.

Garbett, Allen & Roza and B. Elizabeth Interthal and David S. Garbett, for petitioner.

Arnaldo Velez, for respondent.

Before SALTER, FERNANDEZ and LUCK, JJ.

SALTER, J.

Bankers Lending Services, Inc. ("Bankers Lending"), seeks a writ of certiorari quashing an order denying Bankers Lending's motion to require a bond

as a condition for reinstatement of a lis pendens. Finding Bankers Lending's petition well taken, we quash the order.

Procedural History

This case originated with Regents' (the buyer's) claim for specific performance of a contract to buy several real estate parcels from Bankers Lending. When the transaction failed to close, Regents filed its lawsuit and a lis pendens encumbering the parcels.[1] The trial court granted Bankers Lending's motion to discharge the lis pendens, but we reversed and remanded the case with an instruction to reinstate the lis pendens. Regents Park Invs. v. Bankers Lending Servs., Inc., 197 So. 3d 617 (Fla. 3d DCA 2016) ("Regents I").

On remand, the trial court granted Regents' motion to reinstate the lis pendens, but denied Bankers Lending's cross-motion for an evidentiary hearing to consider whether a lis pendens bond should be required and, if so, to set the amount of the bond. Bankers Lending's petition for certiorari followed.

Analysis

Regents' response to the petition and its argument to the trial court was that Bankers Lending no longer owned the property and thus could suffer no harm. On that basis, Regents argued that the trial court should exercise its discretion and

[1] As Regents' claim was for specific performance and was not based on a "duly recorded instrument," Regents was required by section 48.23, Florida Statutes (2015) to file a lis pendens if it wished to protect itself against the claims of non-parties.

deny the motion for a lis pendens bond. Between the time the lis pendens was discharged by the trial court in February 2016 and our reversal of that order in July 2016 (Regents I, 197 So. 3d at 622), a non-party lender to Bankers Lending, Infill Development Lenders, LLC ("Infill"), recorded a quitclaim deed to the parcels in dispute. The quitclaim deed, though dated July 1, 2012, was recorded by Infill in April 2016 as part of its mortgage loan and forbearance agreement with Bankers Lending.

Citing Penabad v. A.G. Gladstone Associates, Inc., 823 So. 2d 146 (Fla. 3d DCA 2002), Regents persuaded the trial court that Infill, not Bankers Lending, was the owner and no bond should be required as a condition of reinstating the lis pendens. The trial court thus granted Regents' motion to reinstate the lis pendens as of the date filed in August 2015, but denied Bankers Lending's cross-motion to require a lis pendens bond.

Although we have also reviewed orders granting or discharging a lis pendens, and orders relating to lis pendens bonds, as appealable non-final orders under Florida Rule of Appellate Procedure 9.130(a)(3)(B), we have more recently agreed with the other Florida district courts of appeal "that certiorari is the appropriate procedure for the review of such an order." 100 Lincoln Rd SB, LLC v. Daxan 26 (FL), LLC, 180 So. 3d 134, 136 (Fla. 3d DCA 2015). Applying that standard to the case at hand, we conclude that Bankers Lending had standing to

move for a lis pendens bond and to provide proof at an evidentiary hearing of "potential loss or damage she or he will likely incur if the notice of lis pendens is unjustified." Licea v. Anllo, 691 So. 2d 29, 30 (Fla. 3d DCA 1997); see also, Med. Facilities Dev., Inc., v. Little Arch Creek Props. Inc., 675 So. 2d 915, 917–18 (Fla. 1995) ("We agree with Judge Barkdull's statement that the property-holder defendant's right to a bond should be conditioned upon a demonstration of the potential loss or damage the defendant will likely incur if the notice of lis pendens is unjustified.").

The case law also recognizes, however, that the trial court has the discretion to deny a lis pendens bond in such a circumstance, rejecting "the interpretation that the statutory reference to injunctions [in section 48.23(3), Florida Statutes (1995)] requires the lis-pendens proponent to post a bond in every case." 675 So. 2d at 918. The issue presented here is whether that discretion may be exercised without affording a party an evidentiary hearing after prospective damages have been proffered.

During the period from the filing of the original lis pendens (August 2015) and the recordation of the deed divesting Bankers Lending of title (April 2016), the lis pendens may have caused Bankers Lending to incur loss or damage,[2] as that

[2] Bankers Lending's counsel filed an affidavit in support of its motion for the bond regarding Bankers Lending's legal fees incurred as a result of the allegedly-wrongful lis pendens. Attorney's fees may be considered by a trial court in setting the amount of a lis pendens bond if the court concludes that a bond is appropriate.

was a time when Bankers Lending had "ownership rights in the property." FCD Dev., LLC v. S. Fla. Sports Comm., Inc., 37 So. 3d 905, 909 (Fla. 4th DCA 2010) (citing Penabad, 823 So. 2d at 147). Further, Bankers Lending's original motion recited (and Regents did not dispute the recital) that "[t]he parties have agreed that a separate hearing will determine the amount of the bond." Here, after reinstating the lis pendens, the trial court summarily denied Bankers Lending's motion for a lis pendens bond without affording Bankers Lending an evidentiary hearing to prove its prospective loss or damage resulting from the lis pendens.

Having shown a departure from the essential requirements of law that will cause material injury if the lis pendens is subsequently shown to have been unjustified, and "effectively leaving no adequate remedy on appeal," Bankers Lending is entitled to the issuance of the writ. Martin-Johnson, Inc., v. Savage, 509 So. 2d 1097, 1099 (Fla. 1987).

We grant the petition and quash the order denying Bankers Lending's motion for a lis pendens bond. We express no opinion regarding Bankers Lending's ability to meet its burden to prove at an evidentiary hearing its loss or damage likely to be incurred if Bankers Lending ultimately proves that the lis pendens was unjustified. In the event the trial court finds that a lis pendens bond is

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S&T Builders v. Globe Props., Inc., 944 So. 2d 302 (Fla. 2006); McMillan/Miami, LLC v. Krystal Capital Managers, LLC, 1 So. 3d 312 (Fla. 3d DCA 2009).

appropriate, the court may condition the continued existence and effectiveness of the lis pendens upon the filing of the bond.

Petition granted; order quashed.

Syllabus

SUPREME COURT OF THE UNITED STATES

Syllabus

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM *v.* ANZ SECURITIES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 16–373. Argued April 17, 2017—Decided June 26, 2017

Section 11 of the Securities Act of 1933 gives purchasers of securities "a right of action against an issuer or designated individuals," including securities underwriters, for any material misstatements or omissions in a registration statement. *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Industry Pension Fund*, 575 U. S. ___, ___; see 15 U. S. C. §77k(a). Section 13 provides two time limits for §11 suits. The first sentence states that an action "must be 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 . . . ." The second sentence provides that "[i]n no event shall any such action be brought . . . more than three years after the security was bona fide offered to the public . . . ." §77m.

In 2007 and 2008, Lehman Brothers Holdings Inc. raised capital through several public securities offerings. Petitioner, the largest public pension fund in the country, purchased some of those securities; and it is alleged that respondents, various financial firms, are liable under the Act for their participation as underwriters in the transactions. In 2008, a putative class action was filed against respondents in the Southern District of New York. The complaint raised §11 claims, alleging that the registration statements for certain of Lehman's 2007 and 2008 securities offerings included material misstatements or omissions. Because the complaint was filed on behalf of all persons who purchased the identified securities, petitioner was a member of the putative class.

In February 2011, more than three years after the relevant securities offerings, petitioner filed a separate complaint against respondents in the Northern District of California, alleging violations identi-

cal to those in the class action on petitioner's own behalf. Soon thereafter, a proposed settlement was reached in the putative class action, but petitioner opted out of the class. Respondents then moved to dismiss petitioner's individual suit, alleging that the §11 violations were untimely under the 3-year bar in the second sentence of §13. Petitioner countered that the 3-year period was tolled during the pendency of the class-action filing, relying on *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538. The trial court disagreed, and the Second Circuit affirmed, holding that *American Pipe*'s tolling principle is inapplicable to the 3-year bar. It also rejected petitioner's alternative argument that the timely filing of the class action made petitioner's individual claims timely as well.

Held: Petitioner's untimely filing of its individual complaint more than three years after the relevant securities offering is ground for dismissal. Pp. 4–17.

(a) Section 13's 3-year time limit is a statute of repose not subject to equitable tolling. Pp. 4–14.

(1) The two categories of statutory time bars—statutes of limitations and statutes of repose—each have "a distinct purpose." *CTS Corp.* v. *Waldburger*, 573 U. S. ___, ___. Statutes of limitations are designed to encourage plaintiffs "'to pursue diligent prosecution of known claims,'" *id.,* at ___, while statutes of repose "effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time,'" *id.,* at ___. For this reason, statutes of limitations begin to run "when the cause of action accrues," while statutes of repose begin to run on "the date of the last culpable act or omission of the defendant." *Id.*, at ___.

From the structure of §13, and the language of its second sentence, it is evident that the 3-year bar is a statute of repose. The instruction that "[i]n no event" shall an action be brought more than three years after the relevant securities offering admits of no exception. The statute also runs from the defendant's last culpable act (the securities offering), not from the accrual of the claim (the plaintiff's discovery of the defect).

This view is confirmed by §13's two-sentence structure. The pairing of a shorter statute of limitations and a longer statute of repose is a common feature of statutory time limits. See, *e.g., Gabelli* v. *SEC*, 568 U. S. 442, 453. Section 13's history also supports the classification. The 1933 Securities Act's original 2-year discovery period and 10-year outside limit were shortened a year later. The evident design of the shortened period was to protect defendants' financial security by reducing the open period for potential liability. Pp. 4–7.

(2) The determination that the 3-year period is a statute of repose is critical here, for the question whether a tolling rule applies to

a given statutory time bar is one "of statutory intent." *Lozano* v. *Montoya Alvarez*, 572 U. S. 1, ___. In light of the purpose of a statute of repose, the provision is in general not subject to tolling. Tolling is permissible only where there is a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances. A statute of repose implements a "'legislative decisio[n] that . . . there should be a specific time beyond which a defendant should no longer be subjected to protracted liability.'" *CTS*, 573 U. S., at ___. The unqualified nature of that determination supersedes the courts' residual authority and forecloses the extension of the statutory period based on equitable principles. Thus, the Court repeatedly has stated that statutes of repose are not subject to equitable tolling. See, *e.g., id.,* at ___–___. Pp. 7–8.

(3) The tolling decision in *American Pipe* derived from equity principles and therefore cannot alter the unconditional language and purpose of the 3-year statute of repose. The source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, not the power to interpret and enforce statutory provisions. Nothing in the decision suggests that its tolling rule was mandated by a statute or federal rule. Moreover, the Court relied on cases that are paradigm applications of equitable tolling principles, see 414 U. S., at 559. Thus, the Court has previously referred to *American Pipe* as "equitable tolling." See, *e.g., Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 96, and n. 3. Pp. 8–11.

(4) Petitioner's counterarguments are unpersuasive. First, petitioner contends that this case is indistinguishable from *American Pipe*, but the statute there was one of limitations, which may be tolled by equitable considerations even where a statute of repose may not. Second, petitioner argues that the timely filing of a class-action complaint fulfills the purposes of a statutory time limit with regard to later filed suits by individual members of the class. But by permitting a class action to splinter into individual suits, the application of *American Pipe* tolling here would threaten to alter and expand a defendant's accountability, contradicting the substance of a statute of repose. Third, petitioner contends that dismissal of its individual suit as untimely would eviscerate its ability to opt out, but it does not follow from any privilege to opt out that an ensuing suit can be filed without regard to mandatory time limits. Fourth, petitioner argues that declining to apply *American Pipe* tolling to statutes of repose will create inefficiencies, but this Court "lack[s] the authority to rewrite" the statute of repose or to ignore its plain import. *Baker Botts L. L. P.* v. *ASARCO LLC*, 576 U. S. ___, ___. And petitioner's practical concerns likely are overstated. Pp. 11–14.

(b) Also unpersuasive is petitioner's alternative argument: that §13's requirement that an "action" be "brought" within three years of the relevant securities offering is met here because the filing of the class-action complaint "brought" petitioner's individual "action" within the statutory time period. This argument presumes that an "action" is "brought" when substantive claims are presented to any court, rather than when a particular complaint is filed in a particular court. The term "action," however, refers to a judicial "proceeding," or perhaps a "suit"—not to the general content of claims. Taken to its logical limit, petitioner's argument would make an individual action timely even if it were filed decades after the original securities offering—provided a class-action complaint had been filed within the initial 3-year period. Congress would not have intended this result. This argument is also inconsistent with the reasoning in *American Pipe* itself. If the filing of a class action made all subsequent actions by putative class members timely, there would be no need for tolling at all. Pp. 14–15.

(c) The final analysis is straightforward. Because §13's 3-year time bar is a statute of repose, it displaces the traditional power of courts to modify statutory time limits in the name of equity. And because the *American Pipe* tolling rule is rooted in those equitable powers, it cannot extend the 3-year period. Petitioner's untimely filing of its individual action is thus ground for dismissal. Pp. 16–17.

655 Fed. Appx. 13, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, and GORSUCH, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 16–373

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, PETITIONER *v.* ANZ SECURITIES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 26, 2017]

JUSTICE KENNEDY delivered the opinion of the Court.

The suit giving rise to the case before the Court was filed by a plaintiff who was a member of a putative class in a class action but who later elected to withdraw and proceed in this separate suit, seeking recovery for the same illegalities that were alleged in the class suit. The class-action suit had been filed within the time permitted by statute. Whether the later, separate suit was also timely is the controlling question.

I

A

The Securities Act of 1933 "protects investors by ensuring that companies issuing securities . . . make a 'full and fair disclosure of information' relevant to a public offering." *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Industry Pension Fund*, 575 U. S. ___, ___ (2015) (slip op., at 1) (quoting *Pinter* v. *Dahl*, 486 U. S. 622, 646 (1988)); see 48 Stat. 74, as amended, 15 U. S. C. §77a *et seq*. Companies may offer securities to the public only after filing a registration statement, which must contain information

about the company and the security for sale. *Omnicare*, 575 U. S., at ___–___ (slip op., at 1–2). Section 11 of the Securities Act "promotes compliance with these disclosure provisions by giving purchasers a right of action against an issuer or designated individuals," including securities underwriters, for any material misstatements or omissions in a registration statement. *Id.,* at ___ (slip op., at 2); see 15 U. S. C. §77k(a).

The Act provides time limits for §11 suits. These time limits are set forth in a two-sentence section of the Act, §13. It provides as follows:

> "No action shall be maintained to enforce any liability created under [§11] 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 . . . . In no event shall any such action be brought to enforce a liability created under [§11] more than three years after the security was bona fide offered to the public . . . ." 15 U. S. C. §77m.

So there are two time bars in the quoted provision; and the second one, the 3-year bar, is central to this case.

B

Lehman Brothers Holdings Inc. formerly was one of the largest investment banks in the United States. In 2007 and 2008, Lehman raised capital through a number of public securities offerings. Petitioner, California Public Employees' Retirement System (sometimes called CalPERS), is the largest public pension fund in the country. Petitioner purchased securities in some of these Lehman offerings; and it is alleged that respondents, various financial firms, are liable under the Act for their participation as underwriters in the transactions. The separate respondents are listed in an appendix to this

opinion.

In September 2008, Lehman filed for bankruptcy. Around the same time, a putative class action concerning Lehman securities was filed against respondents in the United States District Court for the Southern District of New York. The operative complaint raised claims under §11, alleging that the registration statements for certain of Lehman's 2007 and 2008 securities offerings included material misstatements or omissions. The complaint was filed on behalf of all persons who purchased the identified securities, making petitioner a member of the putative class. Petitioner, however, was not one of the named plaintiffs in the suit. The class action was consolidated with other securities suits against Lehman in a single multidistrict litigation.

In February 2011, petitioner filed a separate complaint against respondents in the United States District Court for the Northern District of California. This suit was filed more than three years after the relevant transactions occurred. The complaint alleged identical securities law violations as the class-action complaint, but the claims were on petitioner's own behalf. The suit was transferred and consolidated with the multidistrict litigation in the Southern District of New York. Soon thereafter, a proposed settlement was reached in the putative class action. Petitioner, apparently convinced it could obtain a more favorable recovery in its separate suit, opted out of the class.

Respondents then moved to dismiss petitioner's individual suit alleging §11 violations as untimely under the 3-year bar in the second sentence of §13. Petitioner countered that its individual suit was timely because that 3-year period was tolled during the pendency of the class-action filing. The principal authority cited to support petitioner's argument that the 3-year period was tolled was *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538

(1974).

The District Court disagreed with petitioner's argument, holding that the 3-year bar in §13 is not subject to tolling. The Court of Appeals for the Second Circuit affirmed. In agreement with the District Court, the Court of Appeals held that the tolling principle discussed in *American Pipe* is inapplicable to the 3-year time bar. *In re Lehman Brothers Securities and ERISA Litigation*, 655 Fed. Appx. 13, 15 (2016). As the Court of Appeals noted, there is disagreement about whether the tolling rule of *American Pipe* applies to the 3-year time bar in §13. Compare *Joseph* v. *Wiles*, 223 F. 3d 1155, 1166–1168 (CA10 2000), with *Stein* v. *Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F. 3d 780, 792–795 (CA6 2016), and *Dusek* v. *JPMorgan Chase & Co.*, 832 F. 3d 1243, 1246–1249 (CA11 2016).

The Court of Appeals also rejected petitioner's alternative argument that its individual claims were "essentially 'filed' in the putative class complaint," so that the filing of the class action within three years made the individual claims timely. 655 Fed. Appx., at 15.

This Court granted certiorari. 580 U. S. ___ (2017).

II

The question then is whether §13 permits the filing of an individual complaint more than three years after the relevant securities offering, when a class-action complaint was timely filed, and the plaintiff filing the individual complaint would have been a member of the class but for opting out of it. The answer turns on the nature and purpose of the 3-year bar and of the tolling rule that petitioner seeks to invoke. Each will be addressed in turn.

A

As the Court explained in *CTS Corp.* v. *Waldburger*, 573 U. S. ___ (2014), statutory time bars can be divided into

two categories: statutes of limitations and statutes of repose. Both "are mechanisms used to limit the temporal extent or duration of liability for tortious acts," but "each has a distinct purpose." *Id.,* at ___–___ (slip op., at 5–6).

Statutes of limitations are designed to encourage plaintiffs "to pursue diligent prosecution of known claims." *Id.,* at ___ (slip op., at 6) (internal quotation marks omitted). In accord with that objective, limitations periods begin to run "when the cause of action accrues"—that is, "when the plaintiff can file suit and obtain relief." *Id.,* at ___ (slip op., at 5) (internal quotation marks omitted). In a personal-injury or property-damage action, for example, more often than not this will be "'when the injury occurred or was discovered.'" *Ibid.*

In contrast, statutes of repose are enacted to give more explicit and certain protection to defendants. These statutes "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." *Id.,* at ___–___ (slip op., at 6–7) (internal quotation marks omitted). For this reason, statutes of repose begin to run on "the date of the last culpable act or omission of the defendant." *Id.,* at ___ (slip op., at 6).

The 3-year time bar in §13 reflects the legislative objective to give a defendant a complete defense to any suit after a certain period. From the structure of §13, and the language of its second sentence, it is evident that the 3-year bar is a statute of repose. In fact, this Court has already described the provision as establishing "a period of repose," which "'impose[s] an outside limit'" on temporal liability. *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350, 363 (1991).

The statute provides in clear terms that "[i]n no event" shall an action be brought more than three years after the securities offering on which it is based. 15 U. S. C. §77m. This instruction admits of no exception and on its face creates a fixed bar against future liability. See *CTS*,

supra, at ___–___ (slip op., at 6–7); cf. *United States* v. *Brockamp*, 519 U. S. 347, 350 (1997) (noting that a statute that "sets forth its time limitations in unusually emphatic form . . . cannot easily be read as containing implicit exceptions"). The statute, furthermore, runs from the defendant's last culpable act (the offering of the securities), not from the accrual of the claim (the plaintiff's discovery of the defect in the registration statement). Under *CTS*, this point is close to a dispositive indication that the statute is one of repose.

This view is confirmed by the two-sentence structure of §13. In addition to the 3-year time bar, §13 contains a 1-year statute of limitations. The limitations statute runs from the time when the plaintiff discovers (or should have discovered) the securities-law violation. The pairing of a shorter statute of limitations and a longer statute of repose is a common feature of statutory time limits. See, *e.g., Gabelli* v. *SEC*, 568 U. S. 442, 453 (2013) ("[S]tatutes applying a discovery rule . . . often couple that rule with an absolute provision for repose"). The two periods work together: The discovery rule gives leeway to a plaintiff who has not yet learned of a violation, while the rule of repose protects the defendant from an interminable threat of liability. Cf. *Merck & Co.* v. *Reynolds*, 559 U. S. 633, 650 (2010) (reasoning that 2-year discovery rule would not "subject defendants to liability for acts taken long ago," because the statute also included an "unqualified bar on actions instituted '5 years after such violation'").

The history of the 3-year provision also supports its classification as a statute of repose. It is instructive to note that the statute was not enacted in its current form. The original version of the 1933 Securities Act featured a 2-year discovery period and a 10-year outside limit, see §13, 48 Stat. 84, but Congress changed this framework just one year after its enactment. The discovery period was changed to one year and the outside limit to three

years. See Securities Exchange Act of 1934, §207, 48 Stat. 908. The evident design of the shortened statutory period was to protect defendants' financial security in fast-changing markets by reducing the open period for potential liability.

B

The determination that the 3-year period is a statute of repose is critical in this case, for the question whether a tolling rule applies to a given statutory time bar is one "of statutory intent." *Lozano* v. *Montoya Alvarez*, 572 U. S. 1, ___ (2014) (slip op., at 8). The purpose of a statute of repose is to create "an absolute bar on a defendant's temporal liability," *CTS*, 573 U. S., at ___ (slip op., at 6) (alteration and internal quotation marks omitted); and that purpose informs the assessment of whether, and when, tolling rules may apply.

In light of the purpose of a statute of repose, the provision is in general not subject to tolling. Tolling is permissible only where there is a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances.

For example, if the statute of repose itself contains an express exception, this demonstrates the requisite intent to alter the operation of the statutory period. See 1 C. Corman, Limitation of Actions §1.1, pp. 4–5 (1991) (Corman); see, *e.g.,* 29 U. S. C. §1113 (establishing a 6-year statute of repose, but stipulating that, in case of fraud, the 6-year period runs from the plaintiff's discovery of the violation). In contrast, where the legislature enacts a general tolling rule in a different part of the code—*e.g.,* a rule that suspends time limits until the plaintiff reaches the age of majority—courts must analyze the nature and relation of the legislative purpose of each provision to determine which controls. See 2 Corman §10.2.1, at 108.

In keeping with the statute-specific nature of that analysis, courts have reached different conclusions about whether general tolling statutes govern particular periods of repose. *Ibid.*, n. 15.

Of course, not all tolling rules derive from legislative enactments. Some derive from the traditional power of the courts to "'apply the principles . . . of equity jurisprudence.'" *Young* v. *United States*, 535 U. S. 43, 50 (2002) (alteration omitted). The classic example is the doctrine of equitable tolling, which permits a court to pause a statutory time limit "when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Lozano*, 572 U. S., at ___ (slip op., at 7). Tolling rules of that kind often apply to statutes of limitations based on the presumption that Congress "'legislate[s] against a background of common-law adjudicatory principles.'" *Id.,* at ___ (slip op., at 8).

The purpose and effect of a statute of repose, by contrast, is to override customary tolling rules arising from the equitable powers of courts. By establishing a fixed limit, a statute of repose implements a "'legislative decisio[n] that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability.'" *CTS*, 573 U. S., at ___ (slip op., at 7). The unqualified nature of that determination supersedes the courts' residual authority and forecloses the extension of the statutory period based on equitable principles. For this reason, the Court repeatedly has stated in broad terms that statutes of repose are not subject to equitable tolling. See, *e.g., id.,* at ___–___ (slip op., at 7–8); *Lampf, Pleva,* 501 U. S., at 363.

C

Petitioner contends that the 3-year provision is subject to tolling based on the rationale and holding in the Court's decision in *American Pipe*. The language of the 3-year

statute does not refer to or impliedly authorize any exceptions for tolling. If *American Pipe* had itself been grounded in a legislative enactment, perhaps an argument could be made that the enactment expressed a legislative objective to modify the 3-year period. If, however, the tolling decision in *American Pipe* derived from equity principles, it cannot alter the unconditional language and purpose of the 3-year statute of repose.

In *American Pipe*, a timely class-action complaint was filed asserting violations of federal antitrust law. 414 U. S., at 540. Class certification was denied because the class was not large enough, see Fed. Rule Civ. Proc. 23(a)(1), and individuals who otherwise would have been members of the class then filed motions to intervene as individual plaintiffs. The motions were denied on the grounds that the applicable 4-year time bar had expired. See 15 U. S. C. §15b. The Court of Appeals reversed, permitting intervention.

This Court affirmed. It held the individual plaintiffs' motions to intervene were timely because "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class." *American Pipe*, 414 U. S., at 554. The Court reasoned that this result was consistent "both with the procedures of Rule 23 and with the proper function of the limitations statute" at issue. *Id.,* at 555. First, the tolling furthered "the purposes of litigative efficiency and economy" served by Rule 23. *Id.,* at 556. Without the tolling, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable," which would "breed needless duplication of motions." *Id.,* at 553–554. Second, the tolling was in accord with "the functional operation of a statute of limitations." *Id.,* at 554. By filing a class complaint within the statutory period, the named plaintiff "notifie[d] 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 555.

As this discussion indicates, the source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions. Nothing in the *American Pipe* opinion suggests that the tolling rule it created was mandated by the text of a statute or federal rule. Nor could it have. The central text at issue in *American Pipe* was Rule 23, and Rule 23 does not so much as mention the extension or suspension of statutory time bars.

The Court's holding was instead grounded in the traditional equitable powers of the judiciary. The Court described its rule as authorized by the "judicial power to toll statutes of limitations." *Id.*, at 558; see also *id.,* at 555 ("the tolling rule *we establish here*" (emphasis added)). The Court also relied on cases that are paradigm applications of equitable tolling principles, explaining with approval that tolling in one such case was based on "considerations 'deeply rooted in our jurisprudence.'" *Id.*, at 559 (quoting *Glus* v. *Brooklyn Eastern Dist. Terminal*, 359 U. S. 231, 232 (1959); alteration omitted); see also 414 U. S., at 559 (citing *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946)). The Court noted too that "bad faith" was not the cause of the District Court's denial of class certification. 414 U. S., at 553 (internal quotation marks omitted).

Perhaps for these reasons, this Court has referred to *American Pipe* as "equitable tolling." See *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 96, and n. 3 (1990); see also *Young, supra,* at 49; *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U. S. 322, 338, n. (1978) (Burger, C. J., concurring) (using *American Pipe* as an example of "[t]he authority of a federal court, sitting as a chancellor, to toll a statute of limitations on equitable grounds"). It is true, however, that the *American Pipe* Court did not

consider the criteria of the formal doctrine of equitable tolling in any direct manner. It did not analyze, for example, whether the plaintiffs pursued their rights with special care; whether some extraordinary circumstance prevented them from intervening earlier; or whether the defendant engaged in misconduct. See *Holland* v. *Florida*, 560 U. S. 631, 649 (2010) (identifying these considerations); *Young*, 535 U. S., at 50 (same). The balance of the Court's reasoning nonetheless reveals a rule based on traditional equitable powers, designed to modify a statutory time bar where its rigid application would create injustice.

D

This analysis shows that the *American Pipe* tolling rule does not apply to the 3-year bar mandated in §13. As explained above, the 3-year limit is a statute of repose. See *supra,* at 5–7. And the object of a statute of repose, to grant complete peace to defendants, supersedes the application of a tolling rule based in equity. See *supra,* at 7–8. No feature of §13 provides that deviation from its time limit is permissible in a case such as this one. To the contrary, the text, purpose, structure, and history of the statute all disclose the congressional purpose to offer defendants full and final security after three years.

Petitioner raises four counterarguments, but they are not persuasive. First, petitioner contends that this case is indistinguishable from *American Pipe* itself. If the 3-year bar here cannot be tolled, petitioner reasons, then there was no justification for the *American Pipe* Court's contrary decision to suspend the time bar in that case. *American Pipe*, however, is distinguishable. The statute in *American Pipe* was one of limitations, not of repose; it began to run when "'the cause of action accrued.'" 414 U. S., at 541, n. 2 (quoting 15 U. S. C. §15b). The statute in the instant case, however, is a statute of repose. Consistent

with the different purposes embodied in statutes of limitations and statutes of repose, it is reasonable that the former may be tolled by equitable considerations even though the latter in most circumstances may not. See *supra,* at 7–8.

Second, petitioner argues that the filing of a class-action complaint within three years fulfills the purposes of a statutory time limit with regard to later filed suits by individual members of the class. That is because, according to petitioner, the class complaint puts a defendant on notice as to the content of the claims against it and the set of potential plaintiffs who might assert those claims. It is true that the *American Pipe* Court, in permitting tolling, suggested that generic notice satisfied the purposes of the statute of limitations in that case. See 414 U. S., at 554–555. While this was deemed sufficient in balancing the equities to allow tolling under the antitrust statute, it must be noted that here the analysis differs because the purpose of a statute of repose is to give the defendant full protection after a certain time.

If the number and identity of individual suits, where they may be filed, and the litigation strategies they will use are unknown, a defendant cannot calculate its potential liability or set its own plans for litigation with much precision. The initiation of separate individual suits may thus increase a defendant's practical burdens. See, *e.g.,* Cottreau, Note, The Due Process Right To Opt Out of Class Actions, 73 N. Y. U. L. Rev. 480, 486, and n. 29 (1998) ("A defendant's transaction costs are likely to be reduced by having to defend just one action"). The emergence of individual suits, furthermore, may increase a defendant's financial liability; for plaintiffs who opt out have considerable leverage and, as a result, may obtain outsized recoveries. See, *e.g.,* Coffee, Accountability and Competition in Securities Class Actions: Why "Exit" Works Better Than "Voice," 30 Cardozo L. Rev. 407, 417,

432–433 (2008); Perino, Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions, 46 Emory L. J. 85, 97 (1997). These uncertainties can put defendants at added risk in conducting business going forward, causing destabilization in markets which react with sensitivity to these matters. By permitting a class action to splinter into individual suits, the application of *American Pipe* tolling would threaten to alter and expand a defendant's accountability, contradicting the substance of a statute of repose. All this is not to suggest how best to further equity under these circumstances but simply to support the recognition that a statute of repose supersedes a court's equitable balancing powers by setting a fixed time period for claims to end.

Third, petitioner contends that dismissal of its individual suit as untimely would eviscerate its ability to opt out, an ability this Court has indicated should not be disregarded. See *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338, 363 (2011). It does not follow, however, from any privilege to opt out that an ensuing suit can be filed without regard to mandatory time limits set by statute.

Fourth, petitioner argues that declining to apply *American Pipe* tolling to statutes of repose will create inefficiencies. It contends that nonnamed class members will inundate district courts with protective filings. Even if petitioner were correct, of course, this Court "lack[s] the authority to rewrite" the statute of repose or to ignore its plain import. *Baker Botts L. L. P.* v. *ASARCO LLC*, 576 U. S. ___, ___ (2015) (slip op., at 12).

And petitioner's concerns likely are overstated. Petitioner has not offered evidence of any recent influx of protective filings in the Second Circuit, where the rule affirmed here has been the law since 2013. This is not surprising. The very premise of class actions is that "'small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her

rights.'" *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 617 (1997). Many individual class members may have no interest in protecting their right to litigate on an individual basis. Even assuming that they do, the process is unlikely to be as onerous as petitioner claims. A simple motion to intervene or request to be included as a named plaintiff in the class-action complaint may well suffice. See, *e.g.*, Brief for Washington Legal Foundation as *Amicus Curiae* 6–11 (describing procedures); Brief for Securities Industry and Financial Markets Association et al. as *Amici Curiae* 16, 19–20 (same). District courts, furthermore, have ample means and methods to administer their dockets and to ensure that any additional filings proceed in an orderly fashion. Cf. *Dietz* v. *Bouldin*, 579 U. S. ___, ___ (2016) (slip op., at 6) ("[D]istrict courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases").

III

Petitioner makes an alternative argument that does not depend on tolling. Petitioner submits its individual suit was timely in any event. Section 13 provides that an "action" must be "brought" within three years of the relevant securities offering. See 15 U. S. C. §77m. Petitioner argues that requirement is met here because the filing of the class-action complaint "brought" petitioner's individual "action" within the statutory time period.

This argument rests on the premise that an "action" is "brought" when substantive claims are presented to any court, rather than when a particular complaint is filed in a particular court. The term "action," however, refers to a judicial "proceeding," or perhaps to a "suit"—not to the general content of claims. See Black's Law Dictionary 41 (3d ed. 1933) (defining "action" as, *inter alia*, "an ordinary proceeding in a court of justice"); see also *id.,* at 43 ("The

terms 'action' and 'suit' are . . . nearly, if not entirely, synonymous"). Whether or not petitioner's individual complaint alleged the same securities law violations as the class-action complaint, it defies ordinary understanding to suggest that its filing—in a separate forum, on a separate date, by a separate named party—was the same "action," "proceeding," or "suit."

The limitless nature of petitioner's argument, furthermore, reveals its implausibility. It appears that, in petitioner's view, the bringing of the class action would make any subsequent action raising the same claims timely. Taken to its logical limit, an individual action would be timely even if it were filed decades after the original securities offering—provided a class-action complaint had been filed at some point within the initial 3-year period. Congress would not have intended this result.

Petitioner's argument also fails because it is inconsistent with the reasoning in *American Pipe* itself. If the filing of a class action made all subsequent actions by putative class members timely, there would be no need for tolling at all. Yet this Court has described *American Pipe* as creating a tolling rule, necessary to permit the ensuing individual actions to proceed. See, *e.g., American Pipe*, 414 U. S., at 555; *Irwin*, 498 U. S., at 96, n. 3; *Crown, Cork & Seal Co.* v. *Parker*, 462 U. S. 345, 350 (1983). Indeed, the *American Pipe* Court reasoned that the class-action complaint "was filed with 11 days yet to run" in the statutory period, so the motions for intervention were timely only if filed within 11 days after the denial of class certification. 414 U. S., at 561. If the filing of the class action "brought" any included individual actions, it would have sufficed for the Court to note the date on which the class action was filed and deem all subsequent individual actions proper, regardless when filed.

* * *

Tolling may be of great value to allow injured persons to recover for injuries that, through no fault of their own, they did not discover because the injury or the perpetrator was not evident until the limitations period otherwise would have expired. This is of obvious utility in the securities market, where complex transactions and events can be obscure and difficult for a market participant to analyze or apprehend. In a similar way, tolling as allowed in *American Pipe* may protect plaintiffs who anticipated their interests would be protected by a class action but later learned that a class suit could not be maintained for reasons outside their control.

The purpose of a statute of repose, on the other hand, is to allow more certainty and reliability. These ends, too, are a necessity in a marketplace where stability and reliance are essential components of valuation and expectation for financial actors. The statute in this case reconciles these different ends by its two-tier structure: a conventional statute of limitations in the first clause and a statute of repose in the second.

The statute of repose transforms the analysis. In a hypothetical case with a different statutory scheme, consisting of a single limitations period without an additional outer limit, a court's equitable power under *American Pipe* in many cases would authorize the relief petitioner seeks. Here, however, the Court need not consider how equitable considerations should be formulated or balanced, for the mandate of the statute of repose takes the case outside the bounds of the *American Pipe* rule.

The final analysis, then, is straightforward. The 3-year time bar in §13 of the Securities Act is a statute of repose. Its purpose and design are to protect defendants against future liability. The statute displaces the traditional power of courts to modify statutory time limits in the name of equity. Because the *American Pipe* tolling rule is

rooted in those equitable powers, it cannot extend the 3-year period. Petitioner's untimely filing of its individual action is ground for dismissal.

The judgment of the Court of Appeals for the Second Circuit is affirmed.

It is so ordered.

APPENDIX

Respondents are the following financial securities firms: ANZ Securities, Inc.; Bankia, S. A.; BBVA Securities Inc.; BMO Capital Markets Corp.; BNP Paribas FS, LLC; BNP Paribas S. A.; BNY Mellon Capital Markets, LLC; CIBC World Markets Corp.; Citigroup Global Markets Inc.; Daiwa Capital Markets Europe Limited; DZ Financial Markets LLC; HSBC Securities (USA) Inc.; HVB Capital Markets, Inc.; ING Financial Markets LLC; Mizuho Securities USA Inc.; M. R. Beal & Company; Muriel Siebert & Co. Inc.; nabSecurities LLC; Natixis Securities Americas LLC; RBC Capital Markets LLC; RBS Securities, Inc.; RBS WCS Holding Company; Santander Investment Securities Inc.; Scotia Capital (USA) Inc.; SG Americas Securities, LLC; Sovereign Securities Corporation LLC; SunTrust Capital Markets, Inc.; Utendahi Capital Partners, L. P.; and Wells Fargo Securities, LLC.

SUPREME COURT OF THE UNITED STATES

No. 16–373

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, PETITIONER *v.* ANZ SECURITIES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 26, 2017]

JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

A class complaint was filed against respondents well within the three-year period of repose set out in §13 of the Securities Act of 1933, 15 U. S. C. §77m. That complaint informed respondents of the substance of the claims asserted against them and the identities of potential claimants. See *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, 554–555 (1974); *Crown, Cork & Seal Co.* v. *Parker*, 462 U. S. 345, 353 (1983). Respondents, in other words, received what §13's repose period was designed to afford them: notice of their potential liability within a fixed time window.

The complaint also "commence[d] the action for all members of the class." *American Pipe*, 414 U. S., at 550. Thus, when petitioner California Public Employees' Retirement System (CalPERS) elected to exercise the right safeguarded by Federal Rule of Civil Procedure 23(c)(2)(B)(v), *i.e.*, the right to opt out of the class and proceed independently, CalPERS' claim remained timely. See *American Pipe*, 414 U. S., at 550 (demanding that class members "individually meet the timeliness requirements . . . is simply inconsistent with Rule 23"). Given the due process underpinning of the opt-out right, see *Wal-*

Mart Stores, Inc. v. *Dukes*, 564 U. S. 338, 363 (2011), I resist rendering the right illusory for CalPERS and similarly situated class members. I would therefore reverse the judgment of the Second Circuit. Accordingly, I dissent from today's decision, under which opting out cuts off any chance for recovery.

I

CalPERS' claim against respondents was timely launched when the class representative filed a complaint pursuant to §11 of the Securities Act, 15 U. S. C. §77k, on behalf of all members of the described class, CalPERS among them. See *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, 550 (1974) (under Federal Rule of Civil Procedure 23, "the filing of a timely class action complaint commences the action for all members of the class"). See also *ante*, at 3 (CalPERS was part of putative class). Filing the class complaint within three years of the date the securities specified in that complaint were offered to the public also satisfied §13's statute of repose. As the Court observes, *ante*, at 5, statutes of repose "effect a legislative judgment that a defendant should be free from [facing] liability after the legislatively determined period of time." *CTS Corp.* v. *Waldburger*, 573 U. S. ___, ___–___ (2014) (slip op., at 6–7) (internal quotation marks omitted). A repose period assures a party who might be drawn into litigation that, if no action is brought within a specified time, he will be off the hook. But whether CalPERS stayed in the class or eventually filed separately, respondents would have known, within the repose period, of their potential liability to all putative class members.

A class complaint "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." *Crown, Cork & Seal Co.* v. *Parker*, 462 U. S. 345, 353 (1983) (quot-

ing *American Pipe*, 414 U. S., at 555). The class complaint filed against respondents provided that very notice: It identified "the essential information necessary to determine both the subject matter and size of the prospective litigation," *id.*, at 555—*i.e.*, the class of plaintiffs, the offering documents, and the alleged untrue statements and misleading omissions in those documents, see App. 50–66. "[A] defendant faced with [such] information about a potential liability to a class cannot be said to have reached a state of repose that should be protected." Developments in the Law: Class Actions, 89 Harv. L. Rev. 1318, 1451 (1976).

When CalPERS elected to pursue individually the claims already stated in the class complaint against the same defendants, it simply took control of the piece of the action that had always belonged to it. CalPERS' statement of the same allegations in an individual complaint could not disturb anyone's repose, for respondents could hardly be at rest once notified of the potential claimants and the precise false or misleading statements alleged to infect the registration statements at issue.[1] CalPERS' decision to opt out did change two things: (1) CalPERS positioned itself to exercise its constitutional right to go it alone, cutting loose from a monetary settlement it deemed insufficient; and (2) respondents had to deal with CalPERS and its attorneys in addition to the named plaintiff and class counsel. Although those changes may affect how litigation subsequently plays out, see *ante*, at 12–13, they do not implicate the concerns that prompted §13's repose period: The class complaint disclosed the same information respondents would have received had each

[1] To rank as a continuation of an action timely brought and serving the purpose of repose, the individual complaint may raise only those claims stated in the class complaint and must be launched while the class suit is still pending.

class member instead filed an individual complaint on the day the class complaint was filed.

II

Today's decision disserves the investing public that §11 was designed to protect. The harshest consequences will fall on those class members, often least sophisticated, who fail to file a protective claim within the repose period. Absent a protective claim filed within that period, those members stand to forfeit their constitutionally shielded right to opt out of the class and thereby control the prosecution of their own claims for damages. See *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338, 363 (2011) ("In the context of a class action predominantly for money damages," the "absence of . . . opt-out violates due process."). Because critical stages of securities class actions, including the class-certification decision, often occur years after the filing of a class complaint,[2] the risk is high that class members failing to file a protective claim will be saddled with inadequate representation or an inadequate judgment.

The majority's ruling will also gum up the works of class litigation. Defendants will have an incentive to slow walk discovery and other precertification proceedings so the clock will run on potential opt outs. Any class member with a material stake in a §11 case, including every fiduciary who must safeguard investor assets, will have strong cause to file a protective claim, in a separate complaint or

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[2] A recent study showed, for example, that the time from the filing of a securities class complaint to the class-certification decision exceeds two years in 66% of cases and exceeds three years in 36% of cases. See S. Boettrich & S. Starykh, NERA Economic Consulting, Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review, p. 23 (2017), available at http://www.nera.com/content/dam/nera/publications/2017/PUB_2016_Securities_Year-End_Trends_Report_0117.pdf (as last visited June 19, 2017).

in a motion to intervene, before the three-year period expires. See Brief for Retired Federal Judges as *Amici Curiae* 9–14. Such filings, by increasing the costs and complexity of the litigation, "substantially burden the courts." *Id.*, at 13.

Today's decision impels courts and class counsel to take on a more active role in protecting class members' opt-out rights. See *id.*, at 11–13. As the repose period nears expiration, it should be incumbent on class counsel, guided by district courts, to notify class members about the consequences of failing to file a timely protective claim. "At minimum, when notice goes out to a class beyond [§13's limitations period], a district court will need to assess whether the notice [should] alert class members that opting out . . . would end [their] chance for recovery." *Id.*, at 20.

* * *

For the reasons stated, I would hold that the filing of the class complaint commenced CalPERS' action under §11 of the Securities Act, thereby satisfying §13's statute of repose. Accordingly, I would reverse the judgment of the Second Circuit.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

E-COMMERCE COFFEE CLUB, a Florida general partnership,
Appellant,

v.

MIGA HOLDINGS, INC., a Delaware corporation, **GLOBAL TRADING & MARKETING, LLC, JASON ELSNER,** individually, **LUCA MINNA,** individually, and **ESPRESSO ITALIANO HOLDING, LLC,** a Florida limited liability company,
Appellees.

No. 4D15-3899

[June 28, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Cynthia G. Imperato, Judge; L.T. Case No. CACE201208168 (21).

Ira Marcus and Sloan A. Carr of Ira Marcus, P.A., Fort Lauderdale, for appellant.

Scott Pestcoe of Pestcoe & Iglesias, a Partnership of P.A.'s, Weston, for appellees Miga Holdings, Inc., Espresso Italiano Holding, LLC, and Luca Minna.

FORST, J.

The complex and convoluted history of the purchase of a business by Appellant E-Commerce Coffee Club from the Appellees involved at least three separate lawsuits and an appeal from judgment in one of those three. The parties attempted to settle these suits through a single agreement ("the Settlement Agreement"). In this action initiated by Appellant to enforce the Settlement Agreement, we hold that the trial court made several significant errors in its handling of evidence below. Therefore, we reverse and remand for a new hearing in all respects.

Background

The proceedings between Appellant and the Appellees involve the sale of a coffee-distribution business from the latter to the former. As part of

the sale process, Appellees hired an accountant named Phil Shechter to create a report valuing the business being sold. Shechter produced a report for Appellees which valued the business at approximately $1.2 million. This report ("Report 1") also stated that the opinions expressed were based on the information available to Shechter at the time and that he reserved the right to update the report should additional information become available.

After Report 1 was created, Appellees filed with the trial court an affidavit created by Jason Elsner, one of the Appellees. This affidavit stated that the business being sold had marketing expenses in 2011 of approximately $662,000.

Following the creation of Report 1 and the filing of the Elsner Affidavit, the parties entered into the Settlement Agreement in an attempt to resolve all four pending actions. Section 6 of the Settlement Agreement states in relevant part:

> The Parties acknowledge that Phil Shechter, Global's valuation expert, is in the process of preparing a Revised Supplemental Valuation Report. ("Supplemental Report or Final Valuation"). . . .
>
> The Parties and specifically, [Buyers] stipulate and agree, that each of them shall be bound by Phil Shechter's Final Valuation, which said Valuation shall be conclusive and binding upon all the Parties. However, both parties reserve the right to verify Phil Schechter's conclusions and contest his findings.

After the Settlement Agreement was drafted, Shechter submitted an "Updated Expert Report" ("Report 2"). In Report 2, Shechter recognized that he had been hired by both Appellant and Appellees, rather than by Appellees alone as he was for Report 1. Report 2 concluded that the business being sold was valued at either $527,000 or $821,000 depending on whether certain sales should be considered. Report 2 did not take into account any overhead costs or marketing expenses.

The same day as Report 2 was issued, Appellees moved the court to compel settlement under the agreement. In the meantime, Appellant took issue with Report 2's failure to include overhead and marketing expenses and contacted Shechter. Realizing that the parties disagreed on the nature of the service he was to provide, Shechter agreed to issue a new report which included the items desired by Appellant.

Shechter's final report, "Report 3," valued the sold business at $190,000. This report considered the $662,000 in marketing expenses described in the Elsner Affidavit. Appellant moved the court to recognize Report 3 as the "Revised Supplemental Valuation Report" ("RSVR") described in Section 6 of the Settlement Agreement and to enforce that agreement.

At the hearing on the enforcement of the Settlement Agreement, Appellant sought to introduce evidence of Report 1 and other pre-agreement documentation to show the intent of the parties regarding the term "RSVR." The trial court largely agreed with Appellees that pre-agreement evidence, including Report 1, was inadmissible.

Toward the end of the hearing, evidence was introduced which indicated that the Elsner Affidavit, which Appellant argues induced it into entering the Settlement Agreement in the first place, was fraudulent in both its contents and in the fact that it was not properly executed. The trial court struck not only the affidavit but also all evidence and testimony regarding Report 3 because that report was based, in part, upon the affidavit. Appellant attempted to introduce other evidence at the hearing which would support Report 3's consideration of $662,000 in marketing expenses, but the trial court abruptly cut off the parties, asked for proposed final orders, and stated "I'm done."

The trial court subsequently entered an order enforcing the Settlement Agreement and finding Report 2 to be the RSVR contemplated by the agreement. This appeal followed.

Analysis

The appeal raises a wide range of issues to this Court, but we need not and do not address them all. Each stem from a single underlying error which our reversal should resolve—the trial court's failure to admit relevant evidence and its cutting off Appellant's attempts to present further evidence.

Trial court determinations of the relevancy of evidence are reviewed for an abuse of discretion. *Thigpen v. United Parcel Servs., Inc.*, 990 So. 2d 639, 645 (Fla. 4th DCA 2008). Whether a contract is ambiguous is reviewed de novo. *Bd. of Trs. of the Internal Improvement Tr. Fund v. Lost Tree Vill. Corp.*, 805 So. 2d 22, 26 (Fla. 4th DCA 2001).

Here, Appellant attempted to introduce evidence that the term "RSVR," as used in the Settlement Agreement, was ambiguous. We agree that the term was ambiguous as defined in Section 6 of the Settlement Agreement. The second paragraph of Section 6 states that the RSVR "shall be conclusive and binding upon all the Parties." The very next sentence, however, states that "both parties reserve the right to verify Phil Shechter's conclusions and contest his findings."

"A patent ambiguity is intrinsically apparent on the face of the document due to 'the use of defective, obscure, or insensible language.'" *Nationstar Mortg. Co. v. Levine*, 42 Fla. L. Weekly D824 (Fla. 4th DCA Apr. 12, 2017) (quoting *Emergency Assocs. of Tampa, P.A. v. Sassano*, 664 So. 2d 1000, 1002 (Fla. 2d DCA 1995)). An internal contradiction can constitute a patent ambiguity. *Id.* Here, there is a clear internal contradiction in stating that the RSVR "shall be conclusive and binding upon all the Parties" but then providing that "both parties reserve the right to verify Phil Shechter's conclusions and contest his findings." Thus, the intent of the parties with respect to the finality of the in-the-works Shechter report's findings and conclusions is unclear from the face of the document.

On remand, the court should consider the relevant evidence going to the meaning of the term "Revised Supplemental Valuation Report" in determining which, if either, of Reports 2 and 3 was the "RSVR" contemplated by the parties via the Settlement Agreement. The court should also allow Appellant to present evidence beyond the Elsner Affidavit which might support the conclusions in Report 3. *See Elmore v. Enterprise Developers, Inc.*, 418 So. 2d 1078, 1079 (Fla. 4th DCA 1982) ("Where the language of a contract is ambiguous or uncertain in meaning, the court may receive evidence extrinsic to the contract for the purpose of determining the intent of the parties at the time they executed the contract.").

Additionally, "[t]he constitutional guarantee of due process dictates a full and fair opportunity to be heard in judicial proceedings. The failure to give a party the chance to present witnesses or testify violates this fundamental right." *Cole v. Cole*, 159 So. 3d 124, 125 (Fla. 3d DCA 2013); *see also Julia v. Julia*, 146 So. 3d 516, 520-21 (Fla. 4th DCA 2014) (describing a due process violation when a party was not allowed to present her full case or give closing arguments). Here, Appellant was in the middle of its case when it was revealed that the Elsner Affidavit, filed by Appellees, was fraudulent. The court therefore struck the affidavit and all testimony based upon it, including testimony regarding Report 3 which relied on the affidavit. This itself does not appear improper. But when Appellant

attempted to introduce further evidence of the truth of the matter asserted in the affidavit so that Report 3 and the related testimony could be rehabilitated, the court abruptly asked the parties for proposed final orders. Appellant expressed confusion, with counsel saying that he was "not understanding" the court and that he "didn't know Your Honor was going to cut us off." Counsel then requested to read part of a deposition into the record, and the court said "I'm done." No further evidence was taken. The trial court's actions constitute a clear violation of Appellant's right to procedural due process. *See Cole*, 159 So. 3d at 125; *Julia*, 146 So. 3d at 520-21. Appellant never rested its case and clearly intended to introduce more evidence, which the trial court summarily excluded as a whole. This was error and requires reversal.

Conclusion

Because the trial court erred in failing to admit evidence which would have, at the very least, gone to resolving the ambiguity raised by Appellant, as well as erred by essentially walking off the bench mid-hearing, we reverse the order on the motion to enforce the Settlement Agreement and remand for a new hearing. At the new hearing, the court will consider the relevant evidence going to the meaning of the term "Revised Supplemental Valuation Report" in determining which, if either, of Reports 2 and 3 was the "RSVR" contemplated by the parties via the Settlement Agreement. The court should also allow Appellant to present evidence beyond the Elsner Affidavit which might support the conclusions in Report 3. We offer no opinion on whether such evidence will be sufficient, and no opinion on which, if either, report should be recognized as the report contemplated by the Settlement Agreement.

Reversed and remanded for a new hearing.

DAMOORGIAN and GERBER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

GREG H. KLEBANOFF AND THUY
KLEBANOFF,

Appellants,

v. Case No. 5D16-1637

BANK OF NEW YORK MELLON, F/K/A
THE BANK OF NEW YORK, AS
TRUSTEE FOR THE
CERTIFICATEHOLDERS OF CWALT
INC., ALTERNATIVE LOAN TRUST
2006-HY11, MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2006-HY11, ET AL,

Appellees.

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Opinion filed June 30, 2017

Appeal from the Circuit Court
for Flagler County,
Scott C. Dupont, Judge.

Tanner Andrews, of Tanner Andrews, P.A.,
Deland, for Appellants.

A. Donald Scott, Jr., of Clarfield, Okon,
Salomone & Pincus, P.L., West Palm
Beach, for Appellees.

EVANDER, J.

Greg Klebanoff and Thuy Klebanoff ("the Klebanoffs") appeal the trial court's final judgment of foreclosure in favor of the Bank of New York Mellon, f/k/a The Bank of New

York, as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2006-HY11, Mortgage Pass-Through Certificates, Series 2006-HY11 ("the Bank"). On appeal, the Klebanoffs argue that this court should reverse the final judgment of foreclosure because the Bank's action was barred by the applicable statute of limitations. We affirm.

On June 26, 2014, the Bank filed a mortgage foreclosure complaint against the Klebanoffs, alleging that "[t]here [was] a default under the terms of the Note and Mortgage for the March 1, 2009 payment and all subsequent payments due thereafter." The complaint further alleged that the Bank was "declar[ing] the full amount payable under the Note and Mortgage." The Klebanoffs filed an answer generally denying the allegations of the complaint and raising the statute of limitations as an affirmative defense. At trial, the Bank presented evidence reflecting that the Klebanoffs had failed to make the March 1, 2009 payment and any payment thereafter. The trial court entered a final judgment in favor of the Bank, and this appeal followed.

The Klebanoffs argue that pursuant to our decision in *Hicks v. Wells Fargo Bank, N.A.*, 178 So. 3d 957 (Fla. 5th DCA 2015), the trial court was constrained to dismiss the Bank's action based on the applicable five-year statute of limitations in section 95.11(2)(c), Florida Statutes (2014). Contrary to the Klebanoffs' contention, *Hicks* is distinguishable. In *Hicks*, although the complaint alleged that the mortgagors were in a continuing state of default, the parties proceeded to trial on stipulated facts that referenced only the initial default. 178 So. 3d at 958. Specifically, the bank's counsel stated:

> There was a default on the loan that occurred in 2006. The prior holder of the note, U.S. Bank, filed a foreclosure action against defendants in 2006. That action was voluntarily dismissed in 2008.

> In 2011, Wells Fargo, who is the current holder of the note and mortgage, sent a notice of intent to accelerate to the defendants, and then filed a new foreclosure action in 2013.

Id. (footnote omitted). We reversed the final judgment of foreclosure, concluding that the foreclosure action should have been dismissed because it was based on a default that occurred outside of the five-year statute of limitations. *Id*. at 959.

> The dispositive facts in this appeal are not in dispute. Because the earlier voluntary dismissal was not an adjudication on the merits, Bank was entitled to bring a later suit to foreclose on the note and mortgage. However, the suit must still be based on an act of default within the five-year statute of limitations period. Here, Bank's complaint was filed in 2013, based on an alleged default occurring on June 1, 2006. Because trial counsel for the parties stipulated to the court that the facts were undisputed, with Bank's counsel additionally confirming that the sole determinative issue to resolve at trial was one of law, the court erred when it failed to dismiss the foreclosure complaint with prejudice based on a default that occurred outside of the five-year statute of limitations period.

Id. (citations and footnote omitted).

Hicks is consistent with the Third District Court of Appeal's later opinion in *Collazo v. HSBC Bank USA, N.A.*, 213 So. 3d 1012 (Fla. 3d DCA 2016). In *Collazo*, our sister court similarly reversed a final judgment of foreclosure because the complaint was filed more than five years after the alleged payment default. 213 So. 3d at 1012. Notably, in his concurring opinion, Judge Shepherd emphasized that the bank had proceeded at trial only as to the initial default:

> [T]he foreclosure action in the case before us was commenced on January 24, 2014, based on a default in payment alleged to have occurred on April 1, 2008. Counsel for HSBC insisted on trying the case on the basis of that default. After hearing the evidence, the trial court entered final

> judgment and calculated all amounts due and payable based upon that default date over borrowers' objections and involuntary dismissal motions. In short, unlike counsel for the lenders in both the [*U.S. Bank National Association v. Bartram*, 140 So. 3d 1007 (Fla. 5th DCA), *review granted*, 160 So. 3d 892 (Fla. 2014) and *Deutsche Bank Trust Company Americas v. Beauvais*, 188 So. 3d 938 (Fla. 3d DCA 2016), *proceeding stayed*, No. SC16-732 (Fla. May 31, 2017)] cases, who circumvented the statute of limitations in those cases by alleging a default within the five-year limitation period, counsel for HSBC, when challenged, doubled down on a stale default outside the limitation period.

Id. at 1013-14 (Shepherd, J., concurring).

By contrast, in the instant case, the Bank both alleged and proved that the Klebanoffs had defaulted on each and every mortgage payment from March 1, 2009, and onward. Because the Bank alleged and proved missed payments within the five years prior to the filing of its complaint, its action was not barred by the statute of limitations. *See Bollettieri Resort Villas Condo. Ass'n v. Bank of N.Y. Mellon*, 198 So. 3d 1140, 1142-43 (Fla. 2d DCA 2016), *review granted*, No. SC16-1680 (Fla. Nov. 2, 2016) (holding that although mortgagor's initial default occurred more than five years prior to bank's foreclosure complaint, bank's allegation that mortgage was currently in default and that no payments had been made since initial default was sufficient to establish that foreclosure could be based on any of missed payments since initial breach, and was therefore not barred by applicable five-year statute of limitations);[1] *see also Dorta v. Wilmington Tr. Nat'l Ass'n*, 25 Fla. L. Weekly Fed. D267 (M.D. Fla. Mar. 24, 2014) ("While [mortgagee] may be barred from seeking foreclosure based on defaults more than five years old, it is not barred from seeking foreclosure or from invoking its right to accelerate

[1] Although *Bollettieri* certified conflict with *Hicks*, for the reasons indicated above, we believe that those two cases are not in conflict.

the entire indebtedness based on more recent defaults . . . ."); *Bartram v. U.S. Bank Nat'l Ass'n*, 211 So. 3d 1009, 1011 (Fla. 2016) ("Once there were future defaults, however, the Bank had the right to file a subsequent foreclosure action—and to seek acceleration of all sums due under the note—so long as the foreclosure action was based on a subsequent default, and the statute of limitations had not run on that particular default.").

Because the Bank alleged and proved that the subject mortgage was in a continuous state of default, which included defaults within the five-year statute of limitations, its action was not barred, even if the initial default was alleged to have occurred more than five years prior to the filing of the complaint.

AFFIRMED.

COHEN, C.J. and EDWARDS, J., concur.

Third District Court of Appeal

State of Florida

Opinion filed June 28, 2017.

THIS OPINION IS NOT FINAL UNTIL DISPOSITION OF ANY FURTHER MOTION FOR REHEARING AND/OR MOTION FOR REHEARING EN BANC. ANY PREVIOUSLY-FILED MOTION FOR REHEARING EN BANC IS DEEMED MOOT.

No. 3D15-1062
Lower Tribunal No. 14-3721

MP, LLC,
Appellant,

vs.

Sterling Holding, LLC, etc., et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Jennifer D. Bailey, Judge.

Joel S. Perwin, P.A., and Joel S. Perwin; Heller Waldman, P.L., and Glen H. Waldman and Jason Gordon, for appellant.

Duane Morris LLP, and Harvey W. Gurland, Jr., for appellee TD Bank, N.A.

Before ROTHENBERG, FERNANDEZ,* and SCALES, JJ.

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* Judge Fernandez did not participate in oral arguments.

ON MOTION FOR REHEARING

ROTHENBERG, J.

We grant the appellant's motion for rehearing, withdraw our opinion filed on December 21, 2016, and substitute the following opinion in its place.[1]

The trial court granted TD Bank, N.A.'s ("TD") motion to dismiss MP, LLC's ("MP") claims against TD based on the conclusion that the complaint fails to allege sufficient facts to support MP's claims against TD. Because the facts alleged are more than sufficient to withstand dismissal, we reverse.

Although MP has sued multiple defendants, its claims against TD are contained in Counts II and VII for civil conspiracy; Count IV for violation of Florida's RICO Act statute; and Count X for aiding and abetting another defendant's breach of its fiduciary duties to MP. Before addressing the allegations, it is important to note that TD is the successor in interest to Mercantile Bank ("Mercantile"), and because they represent one entity, they will be referred to either as "the Bank" or, when appropriate, the specific bank will be identified.

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[1] The appellant, MP, LLC, filed a motion for rehearing en banc of the original panel opinion. Pursuant to this Court's Internal Operating Procedures, when a motion for rehearing en banc is unaccompanied by a motion for rehearing, the motion for rehearing en banc is treated as including a motion for rehearing which must be ruled upon by the panel. Wade v. State, 57 So.3d 993, 994 (Fla. 3d DCA 2011); see also Romero v. State, 870 So. 2d 816, 818 (Fla. 2004) ("By treating motions for rehearing en banc as including motions for rehearing, the Third District adheres to the spirit of Florida Rule of Appellate Procedure 9.040(d), which is to 'disregard any procedural error or defect that does not adversely affect the substantial rights of the parties.'").

The operative complaint alleges as follows. While Mercantile was negotiating its takeover by TD, Mercantile realized that it needed to shore up its portfolio of non-performing loans in order to maximize the sales price and to avoid governmental scrutiny. Thus, the complaint alleges that Mercantile conspired with the four majority members ("the Majority Members") of Sterling Holding, LLC ("Sterling") and other entities owned by the Majority Members of Sterling ("the Non-Sterling Entities") without the knowledge and to the detriment of the plaintiff, MP, which was a Minority Member of Sterling.

At the time of the alleged conspiracy, the breakdown of Sterling's membership interests was as follows: Arriaga Enterprises owned a 25% interest; Howard Family Partners owned a 25% interest; Raffaele Williams owned a 25% interest; Scott Weinberg owned a 12.5% interest (combined, "the Majority Members of Sterling"); and MP owned a 12.5% interest. MP claims that in early 2010, when Mercantile was being sold to TD, the Non-Sterling Entities were in financial trouble or in default of their loans with Mercantile and that these loans were the largest non-performing loans in Mercantile's portfolio. Thus, MP claims that Mercantile conspired with the Non-Sterling Entities and the Majority Members of Sterling (who all had membership interests in the Non-Sterling Entities) to cross-collateralize these non-performing loans with solvent property owned by Sterling.

To consummate the transaction, MP's signature was required. However, because the Majority Members of Sterling and Mercantile believed that MP would never agree to the dilution of Sterling's interest to benefit the Bank and the Non-Sterling Entities, which MP had no interest in, and that MP would most likely move to enjoin the transaction and draw unwanted attention and scrutiny, MP was not told about the transaction, which closed in April 2010. In addition to not informing MP about the transaction, the complaint alleges that the Sterling defendants created fraudulent documents omitting MP as a member of Sterling, and the Bank, **which had full knowledge of MP's membership interest in Sterling**, accepted these fraudulent documents and consummated the cross-collateralization.

MP further alleges that in January 2014, the Bank declared a technical default of its loans to Sterling and the Non-Sterling Entities for failure to obtain the requisite insurance and to escrow two months of property taxes. Because Sterling's loan could not be carved out from the properties owned by the Non-Sterling Entities due to the cross-collateralization, a short sale was conducted and MP's 12.5% interest in Sterling was rendered worthless.

The trial court dismissed with prejudice MP's fifth amended complaint based on: (1) MP's failure "to narrow its legal theories to those most likely to sustain legal analysis under the facts"; (2) the trial court's inability to "identify in

this repeated effort at pleading, any duty to MP which TD Bank breached"; (3) MP's failure to plead any facts demonstrating the Bank's actual knowledge that the documents it relied on, and which failed to reflect MP's existence, were false; (4) MP's failure to plead the elements of conspiracy as to the Bank; and (5) MP's failure to allege any facts demonstrating any action taken by the Bank to defraud MP. The trial court essentially found that if any fraud, conspiracy, or wrongdoing took place, it was without the Bank's knowledge and participation. As will be demonstrated below, the complaint clearly and repeatedly alleged the Bank's actual knowledge and participation in the alleged wrongdoing.

The dissent agrees with the trial court that the Bank's alleged wrongdoing is not actionable in tort. While we agree that generally the relationship between a lender and a borrower is contractual and thus does not normally extend the duties past what are contractually required, in this case, MP has alleged that the Bank conspired with the Sterling defendants to commit tortious acts against MP, and that the Bank itself committed tortious acts against MP for its own benefit. While we recognize that the allegations are just that – allegations, they are sufficiently pled to withstand dismissal for failure to state a cause of action.

STANDARD OF REVIEW

Because the trial court was ruling on a motion to dismiss the complaint, rather than on a motion for summary judgment, the trial court was "required to

'treat the factual allegations of the complaint as true and to consider those allegations in the light most favorable to the plaintiffs.'" Siegle v. Progressive Consumers Ins. Co., 819 So. 2d 732, 734-35 (Fla. 2002) (quoting Hollywood Lakes Section Civil Ass'n v. City of Hollywood, 676 So. 2d 500, 501 (Fla. 4th DCA 1996)). Whether the allegations in the complaint are sufficient to state a cause of action is an issue of law, which we review de novo. Siegle, 819 So. 2d at 734.

THE ALLEGATIONS

I. Counts II and VII, Civil Conspiracy

The elements of a claim for civil conspiracy are: "(a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy." Raimi v. Furlong, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1997). There is no requirement that each co-conspirator commit acts in furtherance of the conspiracy; it is sufficient if each conspirator knows of the scheme and assists in some way. Charles v. Fla. Foreclosure Placement Ctr., LLC, 988 So. 2d 1157, 1160 (Fla. 3d DCA 2008).

The trial court found that the complaint failed to allege that the Bank was a part of the conspiracy, caused any harm, or had an independent duty to MP. Instead, the trial court found that the allegations in the complaint only show that

the Bank was a passive and unknowing conduit for the alleged wrongdoings of the Non-Sterling Entities and the Majority Members of Sterling. Based on the following allegations taken from the operative complaint, the trial court's findings are clearly incorrect. The complaint clearly alleges that the Bank had actual knowledge as to each conspiracy

A. <u>The general allegations related to the conspiracy alleged in Count II</u>

Paragraph 47 of the complaint alleges that prior to the April 2010 loan closing, a Credit Approval Request Memo was prepared. Paragraph 48 alleges that under the "Ownership/Management Composition" section of this memo, a breakdown of the ownership of each Sterling entity was provided, and in this breakdown, MP was listed as holding a 12.5% membership interest. Paragraph 49 states that "[a]s a consequence of the 2010 Memo, which was prepared prior to the execution of the April 2010 transaction, **the Bank was without question aware of MP's interest in Sterling and purposefully colluded to ram through the transaction to MP's significant detriment without its otherwise required signature.**" (emphasis added).

Besides purposefully keeping MP out of the loop, paragraph 51 alleges:

> To further the scheme of reducing the loan ratios, Mercantile failed to include certain insurance required by the mortgage covenants in the mortgage payment for the loans. By doing so, Mercantile was able to make it further appear that the debt to income ratios of Sterling and the Non-Sterling Entities were within an acceptable range so that regulators would not require additional reserves, and Mercantile could

> give the appearance that one of its largest loan portfolios was performing so that TD would proceed with the acquisition of Mercantile.

The next several paragraphs explain that to effectuate the cross-collateralization, Mercantile required that each of Sterling's members sign off on the new obligation. The complaint then details the scheme that was allegedly orchestrated to hide MP's membership interest by falsifying the documents. Paragraph 60 specifically alleges that at the closing of the loan modification, sworn representations were made omitting MP's membership interest in Sterling, and states: "Of course, not only did Arriaga, Howard, Weinberg and Williams [the Majority Members of Sterling] know this was false, but **so did** . . . **the Bank** . . . ." (emphasis added).

Paragraphs 71 and 72 also specifically allege the Bank's knowledge:

> 71. As for Mercantile's knowledge of the fraud, beyond that which is evident by the 2009 [loan modification review] and the 2010 Memo, MP's managing member met Nachman with Lozano [the Bank's loan officer] a short time prior to the loan modification which closed on April 2010. **Lozano was well-aware, as the loan officer who processed the loan modification of the loan on Palmetto Gardens, that MP was in fact a member of Sterling and held a 12.5% membership interest in Sterling**.
>
> 72. . . . Notwithstanding that knowledge, Lozano on behalf of the Bank, participated in and manipulated matters on Mercantile's side to make sure that the closing went through to the benefit of among others, Mercantile.

(emphasis added).

B. <u>The specific allegations related to the conspiracy alleged in Count II</u>

Count II realleges paragraphs 1 through 123 and then specifically lays out the allegations regarding the alleged scheme by the Bank and others to falsify the documents and omit MP's interests as a member of Sterling in order to preclude MP from objecting to the loan modification, cross-collateralization, and other actions for the benefit of the co-conspirators. Paragraphs 135 and 136 allege that there was an agreement by the Majority Members of Sterling (who also had membership interests in the Non-Sterling Entities) to omit MP as an owner of Sterling from the documents required by the Bank for the loan modification and cross-collateralization. **Paragraph 137 specifically alleges that the Bank and the Bank's loan officer, Lozano, were part of the agreement to remove MP's name as an owner of Sterling from these documents "while knowing that MP was in fact an owner of Sterling."** Further, paragraph 141 alleges:

> TD, as successor in interest to Mercantile, took actions in furtherance of the conspiracy through Lozano, who was an employee of Mercantile, by facilitating the refinancing and/or modification of the loan for Palmetto Gardens **with knowingly fraudulent documents excluding MP's existence, despite having direct knowledge that MP was a member of Sterling, and by accepting loan documents that intentionally omitted MP as a member of Sterling and falsely stated the membership interest of Sterling, in order to bring the loans back into balance so the sale to TD could close.**

(emphasis added).

As this recitation of the allegations clearly demonstrates, Count II of the

operative complaint sets forth more than sufficient allegations to satisfy the pleading requirements of civil conspiracy as it relates to the Bank. Contrary to the trial court's order, MP has sufficiently alleged that the Bank actually knew that the documents it relied on, and which failed to reflect MP's existence, were false. The complaint alleges that the Bank was not merely a passive conduit to the conspiracy and fraud allegedly committed by the Majority Members of Sterling; rather, the Bank was a willing and active participant in the scheme to keep MP in the dark in order to maximize the sales price of Mercantile to TD by shoring up Mercantile's portfolio.

C. <u>The general allegations related to the conspiracy alleged in Count VII</u>

The conspiracy alleged in Count VII involves the short sale of Palmetto Gardens Industrial Park ("Palmetto Gardens"), which was purchased by Sterling in 2005 with approximately $10.5 million in loans. Paragraph 22 alleges that this was a successful venture that produced a positive yearly cash flow. On or about June 29, 2009, Sterling entered into a promissory note, mortgage, and security agreement with the Bank in the amount of $14.4 million (Paragraph 24). The operative complaint further alleges that to consummate the refinancing, the Majority Members of Sterling entered into a cross-collateralization of the Palmetto Gardens property with other obligations in which the Majority Members of

Sterling had an interest, without MP's knowledge or consent, thereby encumbering MP's sole interest in Sterling.

Paragraph 203 of Count VII alleges that SAA, the management company for Sterling, and the Non-Sterling Entities

> entered into an agreement whereby SAA would not pay insurance premiums or pay the escrowed property taxes to TD in order to trigger a default of the loan documents, and would fail to cure the default, for among other reasons, to trigger the cross collateralization of Palmetto Gardens, which was cash flow positive, and could be utilized to get the members of Sterling other than MP out from under the debt on the Non-Sterling Entities.

Paragraph 204 alleges that in January 2014, TD declared the anticipated technical default of the Palmetto Gardens loans.

Count VII further alleges that when MP learned of the Bank's declaration of default, it filed a lawsuit against the alleged conspirators, which, at that point, did not include the Bank. Shortly thereafter, the alleged conspirators and the Bank conspired to sell Palmetto Gardens at a short sale at a greatly reduced price, allowed two of the Majority Members of Sterling (Arriaga and Howard) to retain an under- the-table interest in Palmetto Gardens, and ensured that SAA be retained by the new owner to act as the management company for the property. Paragraphs 212 alleges that as part of the conspiracy, the Bank agreed to release all of the guarantors from millions of dollars in guarantees, even though the properties were sold at a discount, without requiring the guarantors to produce financial statements

in order to determine their ability to cover the loans or cure the defaults.

Paragraph 217 alleges that the Bank entered into this agreement with the other alleged conspirators to avoid the allegations of wrongdoing against it in this lawsuit and to eliminate the bad debt it was carrying. And, as already articulated, the complaint alleges that the Bank was able to commit this conspiracy by knowingly accepting falsified documents omitting MP's membership interest so that the cross-collateralization could be accomplished in the first place.

As these allegations are more than sufficient to withstand dismissal for failing to satisfy the pleading requirements of civil conspiracy as it relates to the Bank, the trial court erred by dismissing Counts II and VII of the fifth amended complaint.

II. Count IV, Violation of the Florida Racketeer Influenced and Corrupt Organization Act

To survive a motion to dismiss Count IV, alleging a violation of the Florida Racketeer Influenced and Corrupt Organization Act ("RICO"), MP was required to plead the following elements:

> (1) the existence of an enterprise, which [the Bank] was employed by or associated with in committing the crimes, (2) a pattern of racketeering activity, and (3) at least two 'incidents' of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission, or that are otherwise interrelated by distinguishing characteristics and are not isolated incidents.

Shimek v. State, 610 So. 2d 632, 634-35 (Fla. 1st DCA 1992) (citing Boyd v.

State, 578 So. 2d 718 (Fla. 3d DCA 1991)).

In dismissing the operative complaint, the trial court concluded that the complaint failed to sufficiently allege the Bank's knowledge that the documents it was relying on, when it cross-collateralized the Non-Sterling Entities non-performing loans with solvent property owned by Sterling, were fraudulent. As already addressed in detail, the complaint clearly and unequivocally has alleged that the Bank was a knowing and willing conspirator with full knowledge of the falsity of the documents it relied on to accomplish the cross-collateralization, and the benefits it expected as a result of its participation in the alleged conspiracy. We, therefore, turn to the elements MP was required to plead in support of its RICO claim.

A. The existence of an enterprise which the Bank was employed by or associated with in committing the crimes

As previously addressed, the operative complaint alleges that the Bank conspired with the Majority Members of Sterling and the Non-Sterling Entities to cross-collateralize the largest non-performing loans, and in some cases, loans which were in default, in Mercantile's portfolio prior to the sale of Mercantile to TD. To accomplish this goal, it is alleged that Mercantile conspired with the Majority Members of Sterling to allow the Bank to cross-collateralize Sterling's healthy and profitable properties with other defaulting and non-performing loans owed by the Non-Sterling Entities, in which the Majority Members of Sterling

each had a financial interest. And to accomplish this cross-collateralization without drawing any attention, it is alleged that, with the Bank's knowledge and consent, fraudulent documents omitting MP's interest in Sterling were prepared by Sterling's Majority Members and were used by the Bank. This was done because MP, which held no interest in the Non-Sterling Entities, surely would have objected to and would have attempted to block the transaction, which would have drawn attention to the weaknesses in Mercantile's portfolio. Thus, the complaint sufficiently alleged the existence of and the Bank's participation in the RICO enterprise.

B. A pattern of racketeering activity

To establish a "pattern of racketeering activity," MP was required to plead facts establishing a continuing course of conduct or a "series of related predicates extending over a substantial period of time," State v. Lucas, 600 So. 2d 1093, 1094 (Fla. 1992) (quoting H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 241-43 (1989)), which is commonly referred to as "continuity." Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1265 (11th Cir. 2004). In Lucas, the Florida Supreme Court held that predicate events occurring over a six-month period were sufficient to prove continuity. Lucas, 600 So. 2d at 1093.

MP has alleged that the wrongful predicate acts took place over a period of many months. The complaint alleges that the conspiracy, including the

falsification and the acceptance of the falsified documents, took place in April 2010, and the refinancing was effectuated shortly thereafter. In January 2014, the Bank declared a technical default of the loans for Palmetto Gardens (the property owned by Sterling) and the Non-Sterling properties due to the failure to maintain insurance and escrow property taxes. (Paragraph 109). After the default was filed, MP filed the instant lawsuit against the alleged conspirators, except for the Bank, and put the Bank on notice that it might be added to the lawsuit. The complaint alleges that, thereafter, the Majority Members of Sterling, the Bank, and SAA, the management company, "entered into an agreement to use the excuse of the technical default to enter into a contract for a short sale to a buyer who was all too familiar with Arriaga and Howard" (Paragraph 112); sold the properties at a reduced price (Paragraph 118); and released the guarantors from their personal guarantees for the Palmetto Gardens property without even attempting to determine if the guarantors had sufficient assets to satisfy the loan deficiency (Paragraph 121). The purpose of this agreement was to allow the Bank and the Majority Members of Sterling to eliminate the debt on the Non-Sterling properties and to hopefully avoid allegations of wrongdoing by MP (Paragraph 122). Therefore, because the alleged predicate acts spanned not just months, but years, the continuity or pattern of racketeering activity requirement was adequately pled.

C. <u>The final element—The existence of at least two incidents of racketeering conduct</u>

The third and final element which must be pled when alleging a RICO violation is the existence of "at least two 'incidents' of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission, or that are otherwise interrelated by distinguishing characteristics and are not isolated incidents." Shimek, 610 So. 2d at 635. For the sake of brevity, we will not repeat the allegations already articulated, which include at least two acts: (1) the falsification and use of falsified documents to facilitate the plan to cross-collateralize Sterling's healthy property with underperforming loans owed by the Non-Sterling Entities, in which the Majority Members of Sterling each held a financial interest; and (2) the creation of a technical default on the Sterling and Non-Sterling properties, which enabled the Bank to sell the properties and eliminate the bad debt associated with the non-performing Non-Sterling Entities loans.

The intent of the co-conspirators was the same: financial gain. The purpose, result, and method of commission were all interrelated: to keep MP out of the loop in order to facilitate the cross-collateralization without drawing any attention, and to subsequently use the healthy Sterling properties to allow the Majority Members of Sterling to eliminate their bad debts with the Bank and to allow the Bank to remove these bad debts from its books.

Because the elements of RICO were all pled in the operative complaint, the

trial court erred by dismissing Count IV based on MP's failure to sufficiently plead a cause of action.

III. Count X, Aiding and Abetting Another Defendant's Breach of its Fiduciary Duty to MP

The trial court's order failed to articulate the grounds upon which it dismissed Count X. We will, therefore, state the elements of aiding and abetting the breach of another's fiduciary duty, which admittedly is an uncommon, and yet not an unheard of cause of action, see Pearlman v. Alexis, No. 09-20865-CIV, 2009 WL 3161830, *5 (S.D. Fla. Sept. 25, 2009) (noting that Florida law recognizes the tort of aiding and abetting a breach of another's fiduciary duty); Williamson v. Answer Phone of Jacksonville, Inc., 118 So. 2d 248, 250 (Fla. 1st DCA 1960) (reversing the trial court's order dismissing Williamson's complaint, in which she alleged that the telephone company had changed a classification title "*for the purpose of aiding and abetting [the other] defendants—in the accomplishment of their intention and purpose to defraud the public and injure the plaintiff*."), and then examine the allegations contained in the operative complaint to determine whether MP satisfied the pleading requirements.

To establish a cause of action for aiding and abetting another defendant's breach of its fiduciary duty to the plaintiff, the plaintiff must allege: "(1) a fiduciary duty on the part of the wrongdoer; (2) a breach of fiduciary duty; (3)

knowledge of the breach by the alleged aider and abettor; and (4) the aider and abettor's substantial assistance or encouragement of the wrongdoing." S&B/BIBB Hines PB 3 Joint Venture v. Progress Energy Fla., Inc., 365 Fed. Appx. 202, 207 (11th Cir. 2010) (applying Florida law); Pearlman, 2009 WL 3161830 at *5. The Eleventh Circuit Court of Appeal, interpreting Florida law in Perlman v. Wells Fargo Bank, N.A., 559 Fed. Appx. 988, 993 (11th Cir. 2014), and Lawrence v. Bank of Am. N.A., 455 Fed. Appx. 904, 907 (11th Cir. 2012), specifically held that when a claim of aiding and abetting is asserted against a bank, the knowledge element can only be satisfied if the plaintiff pleads facts demonstrating that the bank had actual knowledge of the underlying wrongs committed. See also Wiand v. Wells Fargo Bank, N.A., 938 F. Supp. 2d 1238, 1244 (M.D. Fla. 2013).

Count I specifically alleges that as the managing member of Sterling, Arriaga owed a fiduciary duty to each of the members of Sterling, including MP, and paragraph 127 lists eleven ways in which Arriaga breached his fiduciary duty to MP. Paragraph 129 also alleges that Howard Law Offices, the firm that represented Sterling in the 2010 loan modification and cross-collateralization, and Howard individually, owed a fiduciary duty to Sterling, including MP, and that Howard Law Offices and Howard breached that duty by preparing documents omitting MP's membership interest in Sterling and misrepresenting Sterling's membership interests. Thus, the first two elements were clearly alleged in the

operative complaint. The third and fourth elements: the Bank's knowledge of the breach of fiduciary duties owed to MP by Arriaga, Howard Law Offices, and Howard, and the Bank's substantial assistance or encouragement of their wrongdoings, were also painstakingly pled in MP's complaint. It was, therefore, error for the trial court to dismiss Count X of MP's complaint.

CONCLUSION

The trial court's dismissal of MP's complaint was based on its inaccurate reading of the operative complaint and consideration of the elements relevant to each cause of action. Although the trial court's dismissal was based primarily on MP's failure to allege knowledge on the part of the Bank, the operative complaint clearly and repeatedly alleged the Bank's actual knowledge of and willing participation in the alleged wrongdoing. The trial court therefore erred by dismissing MP's complaint.

Reversed; remanded.

FERNANDEZ, J., concurs.

MP, LLC v. Sterling Holding, LLC, etc., et al.

3D15-1062

SCALES, J. dissenting.

I respectfully dissent and would not grant MP, LLC's motion for rehearing in this case. While the majority opinion is compelling, and contains an excellent outline of the facts and causes of action alleged by MP, LLC, I would affirm the trial court's dismissal of MP, LLC's claims against TD Bank, N.A. because I am not persuaded that a commercial lender owes the alleged underlying duties to a minority member of one of the lender's borrowers.

Indeed, if true, the alleged actions of TD's predecessor, Mercantile Bank, might border on the unethical; but I agree with the trial court that such actions are

simply not actionable in tort. In my view, the duties Mercantile, a commercial lender, owed to participants in the commercial transaction with Mercantile's borrower, Sterling Holding, LLC, are specified in the parties' written loan documents. See generally Silver v. Countrywide Home Loans, Inc., 760 F. Supp. 2d 1330, 1339 (S.D. Fla. 2011) ("[T]here is no tort duty to process loans competently. The relationship [between bank and borrower] is contractual; there is either a breach of that contract or not.") In my view, under the facts of this case, Mercantile owed no common law tort duties to its borrower, Sterling, much less to MP, LLC, a minority member of Sterling. See, e.g., Watkins v. NCNB Nat'l Bank of Fla., 622 So. 2d 1063 (Fla. 3d DCA 1993).

I am particularly concerned that the majority opinion imposes previously unrecognized obligations on commercial lenders to police the internal corporate governance of their borrowers. From a practical perspective, the majority's reversal seems to entangle lenders in borrowers' internal disputes. Not only might such entanglements deter lenders from making otherwise prudent loans, but to impose such duties on lenders might encourage an uncomfortable level of bank-meddling into the strictly internal affairs of borrowers.

I would deny rehearing.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-11506

D.C. Docket Nos. 1:15-cv-20376-JEM; 11-bkc-16703-LMI

STRATTON C. POLLITZER,

Plaintiff-Appellant,

versus

GUY G. GEBHARDT,
Acting United States Trustee,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(June 27, 2017)

Before ED CARNES, Chief Judge, ANDERSON, and PARKER,* Circuit Judges.

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* Honorable Barrington D. Parker, Jr., United States Circuit Judge for the Second Circuit, sitting by designation.

PARKER, Circuit Judge:

Section 707(b) of the Bankruptcy Code allows a bankruptcy court to dismiss a petition filed under Chapter 7 if it determines that relief would be an "abuse" within the meaning of that section. 11 U.S.C. § 707(b). In this appeal from a judgment of the United States District Court for the Southern District of Florida (Martinez, *J.*), we consider whether § 707(b) applies to a petition that was initially filed under Chapter 13 but later converted to a petition under Chapter 7. We conclude that the provision applies and therefore we affirm the district court.

I.

In March 2011, Stratton Pollitzer filed for bankruptcy relief under Chapter 13 of the Code. Under Chapter 13, a debtor such as Pollitzer who aims to restructure his debts may retain his assets but must submit a plan to repay his debts over a three- to five-year period. The payments are generally made from the debtor's future earnings or income. *See Harris v. Viegelahn*, 135 S. Ct. 1829, 1835 (2015). Pollitzer submitted a Chapter 13 repayment plan and made the required payments for more than two years but then exercised his right under § 1307 of the Code to convert his case to Chapter 7. 11 U.S.C. § 1307.

In contrast to Chapter 13, Chapter 7 requires a debtor to transfer nearly all of his prepetition assets to the bankruptcy court for distribution to creditors, but

allows the debtor to shield from creditors postpetition income and assets. In sum, unlike Chapter 13 claimants, individuals who file under Chapter 7 liquidate their nonexempt assets rather than dedicate their future income to repay creditors. *See Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 65 n.1 (2011). Consequently, while a Chapter 7 debtor must forfeit virtually all his prepetition property, he is able to make a "fresh start" by shielding his postpetition earnings from creditors. *Harris*, 135 S. Ct. at 1835. An important distinction between Chapters 7 and 13 is that Chapter 7 was not designed for debtors with repayment ability: *i.e.*, those with sufficient income to repay their debts over time.

Congress believed that debtors who could make such payments were abusing the Code by filing under Chapter 7 which extinguished debts they could otherwise pay from postpetition income. To help insure this did not occur, Congress passed § 707(b) specifically to emphasize the responsibility of courts to dismiss Chapter 7 cases filed by debtors with repayment ability.

Section 707(b)(1) provides that:

> After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, . . . may dismiss a case filed by an individual debtor under this chapter. . . if it finds that the granting of relief would be an abuse of the provisions of this chapter.

11 U.S.C. § 707(b)(1). To determine whether relief would be an abuse of Chapter 7, the statute creates a means-test codified at 11 U.S.C. § 707(b)(2)(A)(i). The means-test, if met, requires the court to presume the petition to be abusive.

After Pollitzer converted his petition, the U.S. Trustee moved to dismiss it as abusive under § 707(b). The Trustee contended that Pollitzer's disposable income, which far exceeded the means-test, would allow for a significant dividend to unsecured creditors. Pollitzer opposed the motion on the sole ground that § 707(b) does not apply to petitions initially filed under Chapter 13 and later converted to Chapter 7. Pollitzer concedes that his petition fails to satisfy the means-test and that his petition would be subject to dismissal as an abusive petition if § 707(b) applied.[1] The bankruptcy court concluded that § 707(b) applied to converted cases and dismissed the petition. The district court affirmed and this appeal followed. Interpretations of the Code are questions of law that we review *de novo*. *In re Tanner Family, LLC*, 556 F.3d 1194, 1195–96 (11th Cir. 2009).

Pollitzer's argument is textual. He points to the language of § 707(b) limiting it to "a case filed by an individual debtor under this chapter" and reads the phrase "under this chapter" as modifying the phrase "a case filed." Because, he

[1] Currently, § 707(b)(2)(A)(i)'s formula provides that a presumption of abuse never arises where a debtor's disposable monthly income is less than $128.33; that it always arises if such income is more than $214.17; and, if such income is within the range of $128.33–$214.17, the presumption arises only if the debtor's non-priority unsecured debt exceeds a specific sum. *See* Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 Am. Bankr. L. J. 231, 241–42 (2005). Pollitzer had a disposable monthly income of at least $1,500. *See* U.S. Trustee App'x at 4, 13; Pollitzer App'x at 68.

argues, his was not a "case filed . . . under this chapter [Chapter 7]," but rather was filed under Chapter 13, § 707(b) does not apply. The U.S. Trustee also makes a textual argument. He contends that "under this chapter" modifies the phrase to which it is immediately adjacent, "an individual debtor." And, the argument goes, because Pollitzer is an "individual debtor under [Chapter 7]," § 707(b) applies.

A.

From the standpoint of text and grammar, both parties' readings of § 707(b) are defensible. Nevertheless, we are required to avoid an interpretation of that provision that would lead to consequences that are inconsistent with the statutory scheme under review. *See In re Welzel*, 275 F.3d 1308, 1314 (11th Cir. 2001). Because there are unmistakable indications in the Code that Congress intended § 707(b) to apply to converted cases, we reject Pollitzer's arguments.

We begin with the "textual evolution of § 707." *In re Witcher*, 702 F.3d 619, 622 (11th Cir. 2012). Congress initially passed § 707(b) as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("the 1984 Act"). *See In re Piazza*, 719 F.3d 1253, 1269 (11th Cir. 2013). Although bankruptcy courts always had the option of dismissing petitions "for cause," the 1984 Act for the first time allowed courts specifically to dismiss Chapter 7 petitions if it found them "substantially abusive." 11 U.S.C. § 707(b) (1984). Congress added this provision because it believed that the bankruptcy courts were insufficiently

invoking the "for cause" provision to dismiss petitions filed by a growing number of Chapter 7 debtors that had income sufficient to pay their creditors. *In re Piazza*, 719 F.3d at 1269. Specifically addressing this point, we concluded that Congress passed the "substantial abuse" provision "in response to . . . judicial abdication of authority." *Id.* We reasoned that "although courts dismissed cases 'for cause' under the original § 707 based on prepetition bad faith, they were not doing so as readily as Congress would have preferred in the context of consumer debts." *Id.* One commentator has noted that Congress's ultimate goal was clear: following widespread and documented abuses of Chapter 7 by consumer debtors with significant ability to repay their debts, Congress specifically intended § 707(b) to be a "limitation of access to chapter 7 by debtors with a substantial debt repayment capacity." Irving A. Breitowitz, *New Developments in Consumer Bankruptcy: Chapter 7 Dismissal on the Basis of "Substantial Abuse"*, 59 Amer. Bankr. L. J. 327 (1985).

Nevertheless, two decades after passage of the 1984 Act, Congress was of the view that the "substantial abuse" provision did not go far enough in limiting the number of Chapter 7 petitions filed by debtors with repayment ability. *See In re Witcher*, 702 F.3d at 622. Consequently, Congress significantly strengthened § 707(b) in 2005 through the Bankruptcy Abuse Prevention and Consumer

Protection Act ("BAPCPA"), which made it even easier for bankruptcy courts to dismiss abusive petitions. As we have stated, the

> current version of § 707 is largely a product of [BAPCPA, which] . . . made it harder to obtain chapter 7 relief by eliminating the 'presumption in favor of granting the relief requested by the debtor that had existed in the previous version of § 707(b), adding a means test that created a presumption of abuse, and lowering the standard from 'substantial abuse' to 'abuse.'

Id.

This history and statutory evolution demonstrates that Congress intended the current version of § 707(b) to be a potent tool for bankruptcy courts to expeditiously dismiss Chapter 7 petitions filed by debtors with income sufficient to pay their creditors. This goal would be eviscerated were we to adopt Pollitzer's interpretation under which a debtor could file a Chapter 13 petition and, the following day, convert it to a Chapter 7 petition and thereby avoid the abuse review Congress incorporated into § 707(b).[2] *See* 11 U.S.C. § 1307. We find it unlikely—indeed inconceivable—that Congress contemplated, much less authorized, such a result.

[2] The Supreme Court has made clear that Congress intended conversion from Chapter 13 to Chapter 7 to be easy and widely available (largely because many debtors "fail to complete a Chapter 13 plan successfully"). *Harris*, 135 S. Ct. at 1836. "Recognizing that reality, Congress accorded debtors a nonwaivable right to convert a Chapter 13 case to one under Chapter 7 'at any time.' § 1307(a). To effectuate a conversion, a debtor need only file a notice with the bankruptcy court. No motion or court order is needed to render the conversion effective." *Id.* at 1835–36 (internal citation omitted).

Pollitzer offers nothing that convinces us that the removal of converted cases from the review for abuse of § 707(b) is a sound or reasonable application of the Code. His sole response is that removal of converted cases from § 707(b) is not problematic because there are other ways to deal with bad-faith debtors, such as 11 U.S.C. § 105(a). *See In re Layton*, 480 B.R. 392, 397 (Bankr. M.D. Fla. 2012). That provision allows a court to dismiss a bankruptcy case "to prevent an abuse of process." 11 U.S.C. § 105(a). We are not convinced. As discussed, Congress passed § 707(b) precisely because the "for cause" basis for dismissal under the original § 707 did not work as readily as Congress would have preferred. And, BAPCPA was specifically directed at what Congress viewed as the bankruptcy courts' continued reluctance to dismiss petitions filed by debtors with repayment ability. Excluding converted cases from § 707(b) would, in effect, read this important remedial provision out of the Code, and we reject interpretations of the Code that would produce such absurd results. *See In re Lehman*, 205 F.3d 1255, 1255–56 (11th Cir. 2000); *see also Durr v. Shinseki*, 638 F.3d 1342, 1349 (11th Cir. 2011).

B.

Moreover, when interpreting statutory provisions, we do not, as Pollitzer would have us do, review language in isolation. Rather, we consider the language, the specific context in which that language is used, and the broader context of the

statute as a whole. *Warshauer v. Solis*, 577 F.3d 1330, 1335 (11th Cir. 2009). For several reasons, this approach reinforces our conclusion.

First, Congress expressly excluded converted cases from the reach of other sections of the Code, but not from § 707(b). Chapter 12, for example, provides that "[o]n request of the debtor at any time, *if the case has not been converted under section 706 or 1112 of this title*, the court shall dismiss a case under this chapter." 11 U.S.C. § 1208(b) (emphasis added); *see also* 11 U.S.C. § 1307(b). We have been clear that when, as with § 1208(b), Congress includes particular language in one section of a statute but omits it in another section of the same act, it is presumed that Congress did so intentionally. *See U.S. v. Alabama*, 778 F.3d 926, 933 (11th Cir. 2015).

Second, Congress knew how to exclude certain categories of cases from provisions within § 707(b) but did not do so with converted cases. Specifically, certain petitions filed by disabled veterans or those recently released from active duty are expressly exempted from § 707(b)(2)'s means-test. *See* 11 U.S.C. § 707(2)(D). Given that Congress took care to craft specific exclusions for certain debtors from § 707(b)'s means-testing, we are loath to infer the wholesale exclusion of converted petitions. *See Toibb v. Radloff*, 501 U.S. 157, 160–161 (1991).

Finally, we find it persuasive that when Congress passed BAPCPA, it left unaffected Federal Rule of Bankruptcy Procedure 1019(2)(A), which sets a new time period for filing a motion under § 707(b) in a case that has been converted from Chapter 13 to Chapter 7.[3] Congress, we must presume, was aware of Bankruptcy Rule 1019(2)(A) when it legislated, and the Rule would be unintelligible if § 707(b) did not apply to converted cases. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). As the Supreme Court has explained, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Id.*; *see also Hamilton v. Lanning*, 560 U.S. 505, 516 (2010) ("Pre-BAPCPA bankruptcy practice is telling because we will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure").

CONCLUSION

The judgment of the district court is AFFIRMED.

[3] "When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case . . . [a] new time period for filing a motion under §707(b) . . . shall commence." Fed. R. Bankr. 1019(2).