No. 19-3326

In the United States Court of Appeals For the Third Circuit

BAHAA ALY, TINA DAVIS, PHILIP GARLAND, ERINCH OZADA,

Plaintiffs–Appellants,

v.

VALEANT PHARMACEUTICALS INTERNATIONAL, INC., n/k/a BAUSCH HEALTH COMPANIES INC.; J. MICHAEL PEARSON; HOWARD B. SCHILLER; ROBERT L. ROSIELLO; DEBORAH JORN; ARI S. KELLEN; TANYA CARRO,

Defendants–Appellees.

On Appeal from the United States District Court for the District of New Jersey
Case No. 3:18-cv-17393-MAS-LHG, The Hon. Michael A. Shipp (U.S.D.J.)

BRIEF OF PLAINTIFFS-APPELLANTS and JOINT APPENDIX: VOLUME I of II (Pages A1 to A31)

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No(s).

CASES

STATUTES

REGULATIONS

Plaintiffs-Appellants Bahaa Aly, Tina Davis, Philip Garland and Erinch Ozada ("Plaintiffs"), submit this brief in support of their appeal from the September 10, 2019 Order and Memorandum Opinion of the U.S. District Court for the District of New Jersey, granting Defendants-Appellees' ("Defendants")[1] motion to dismiss Plaintiffs' Complaint.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over this action pursuant to Section 27 of the Securities and Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78aa, and pursuant to 28 U.S.C. § 1331 because the claims asserted in this action arise under: (i) Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5; and (ii) Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a).

On September 10, 2019, the District Court entered a final order in this action, granting Defendants' motion to dismiss Plaintiff's Complaint. (A3). Plaintiffs timely filed their notice of appeal on October 9, 2019. (A1).

This Court has jurisdiction over this appeal of the District Court's final decision pursuant to 28 U.S.C. § 1291.

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[1] "Defendants" refer to Defendants-Appellees Valeant Pharmaceuticals International, Inc., n/k/a Bausch Health Companies Inc. ("Valeant"), J. Michael Pearson, Howard B. Schiller, Robert L. Rosiello, Deborah Jorn, Ari S. Kellen, and Tanya Carro.

STATEMENT OF ISSUES

1. Whether the District Court erred as a matter of law in holding that the rule in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) does not apply to individual actions commenced by putative class members before a decision on class certification, even though *American Pipe* states that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of a class." (A10-A11; A19-A23).

2. Whether the District Court erred as a matter of law in finding that the statute of limitations for Plaintiffs' Exchange Act claims began to run on June 24, 2016, when the consolidated complaint in the related class action was filed. (A10; A28-A30).

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case, *Aly v. Valeant*, No. 18-cv-17393, is related to *In re Valeant Pharms. Int'l Inc. Sec. Litig.*, No. 15-cv-7658, an earlier class action filed in the United States District Court for the District of New Jersey ("Class Action"), as well as numerous other "opt-out" actions also filed in the District of New Jersey.[2] Specifically, this case is related to *Northwestern Mut. Life Ins. Co. v. Valeant Pharms. Int'l Inc.*, No.

[2] In an October 12, 2018 Case Management Order, the District Court coordinated the Class Action and the individual suits for pretrial purposes. Any later filed related actions, including this action, were automatically coordinated with the Class Action. (A550).

18-15286, 2019 U.S. Dist. LEXIS 157064 (D.N.J. Sept. 10, 2019) (A13-A24) and *Catalyst Dynamic Alpha Fund v. Valeant Pharms. Int'l, Inc.*, No. 18-12673, 2019 U.S. Dist. LEXIS 91546 (D.N.J. May 30, 2019) (A25-A31).

In *Northwestern* the District Court dismissed the plaintiffs' Section 10(b) and Rule 10b-5 claims as untimely and held that the rule in *American Pipe* does not extend to opt-out actions filed before a decision on class certification. In granting the motion to dismiss the Complaint in this case, the District Court adopted its reasoning as set forth in *Northwestern*. (A10-A11).

In *Catalyst*, the District Court dismissed the Section 10(b) and Rule 10b-5 claims as untimely, and held that the statute of limitations for these claims began to run on June 24, 2016, the date the consolidated complaint was filed in the Class Action ("Class Complaint"). In granting the motion to dismiss the Complaint in this case, the District Court also adopted its reasoning as set forth in *Catalyst*. (A10). The District Court did not address whether the *Catalyst* plaintiffs' claims were timely under the *American Pipe* doctrine, and instead allowed the plaintiffs to replead. *Catalyst*, 2019 U.S. Dist. LEXIS 91546, at *18 (A30). On July 1, 2019, the *Catalyst* plaintiffs filed an amended complaint. (*Catalyst* Dkt. No. 53). The defendants moved to dismiss. On December 16, 2019, the Special Master[3] entered an Order & Opinion

[3] Pursuant to the District Court's September 10, 2019 order, the Hon. Dennis M. Cavanaugh (Ret.) was appointed Special Master who was tasked with, among

recommending that the defendants' motion be granted. The Special Master adopted the District Court's previous opinions in *Catalyst*, *Northwestern* and *Aly*. The District Court's decision as to the Special Master's Order & Opinion is pending.

STATEMENT OF THE CASE

Relevant Background Facts

In this action, Plaintiffs bring direct securities fraud claims arising from Defendants' fraudulent scheme to inflate Valeant's revenues and profits, and Defendants' numerous, materially false and misleading statements concerning Valeant's growth, including the sustainability and success of its acquisition strategy.

At all relevant times, Valeant was a specialty pharmaceutical and medical device company that develops, manufactures and markets a broad range of branded and generic pharmaceuticals, over-the-counter (OTC) products and medical devices. (A49 at ¶ 3). Like most pharmaceutical companies, Valeant's business strategy for revenue growth was, historically, based on investing in research and development (R&D) to develop new or improved products and treatments. However, Valeant was not successful with this traditional business strategy. (A49 at ¶ 4; A58 at ¶ 39).

In 2008 Defendant Pearson became the Company's Chairman and CEO. Under the belief that R&D investment produced low returns and often failed to result

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other things, addressing all motions pursuant to Fed. R. Civ. P. 12 for all of the coordinated actions under *In re Valeant Pharms. Int'l, Inc. Sec. Litig*. (Class Action Dkt. No. 484).

in marketable drugs, Pearson dramatically cut R&D costs at Valeant and focused on acquiring new drugs by acquiring other companies. Pearson claimed that the Company would then be able to market these acquired drugs "more efficiently" – that is, by increasing the sales volume of the acquired drugs, and not just by increasing the prices of the acquired drugs. (A49 at ¶ 5; A58-A59 at ¶¶ 40-41).

Throughout the Relevant Period (January 3, 2013 to March 15, 2016), Valeant and its senior executives repeatedly claimed Valeant's dramatic growth in revenues and profitability was attributable to Valeant's superior marketing, sales teams, and leadership – which resulted in sales volume that was "greater than price in terms of our growth." Defendants further assured investors that the Company maintained "extremely high ethical standard[s]," that compliance was "very, very, important" to the Company, and that there were hard caps on how much Valeant could raise prices. Defendants also informed investors that Valeant had strong internal controls and compliance, and that its accounting complied with Generally Accepted Accounting Practices. (A49-A50 at ¶ 6).

In response to these and other similar representations by Valeant and its top executives, Valeant's stock price soared nearly 350%, from just over $60 at the start of the Relevant Period, to a high of over $260 on August 5, 2015. (A50 at ¶ 8).

In reality, Valeant's non-traditional business model was neither low risk nor sustainable. Instead, unbeknownst to investors, the Company's business model and

financial performance relied on a secret, Valeant-controlled pharmacy network and various deceptive practices that exposed the Company to enormous risks. These deceptive and illegal practices allowed the Company to exorbitantly raise the price of its products, and to ensure that the higher prices would be paid by patients and third party payors ("TPPs"). (A50 at ¶ 9; A60-A61 at ¶¶ 45-56).

The success of Defendants' scheme hinged on its secrecy. Had insurance companies and other TPPs or pharmacy benefit managers ("PBMs") known the truth about Valeant's captive pharmacy network and deceptive practices, they would have denied the claims submitted by pharmacies in the network. To prevent discovery of the scheme, Defendants deliberately misrepresented to regulators the ownership and control of these pharmacies to ensure that Valeant could charge inflated prices for Valeant-branded drugs and to sell Valeant-branded drugs that would otherwise never have been purchased. To maintain the secrecy of the Valeant pharmacy network, Defendants also issued numerous false and misleading statements to investors, TPPs, PBMs and government regulators. (A51-A52 at ¶ 12; A73-A74 at ¶¶ 79-81).

Commencing in September 2015, the truth about Valeant's fraudulent scheme was gradually revealed, through a series of disclosures by the Company, as well as reports by analysts, investigations by government agencies, and private litigation. (A137-A163 at ¶¶ 230-302). Following these revelations, most of the senior Valeant executives and directors responsible for the misconduct were forced out, including

Defendant Schiller (the former CFO), Defendant Pearson (the former CEO) and Defendant Jorn (head of the Company's dermatology division responsible for a substantial portion of the captive pharmacy network's sales). (A52-A53 at ¶ 15; A151-A152 at ¶¶ 273-274). Valeant also withdrew its financial statements and acknowledged them to be false, restated its revenue for fiscal year 2014, drastically reduced its revenue and profitability guidance for 2015 and 2016, and admitted that the Company's disclosure controls and internal controls with respect to financial reporting had been inadequate. (A53 at ¶ 16; A154-A163 at ¶¶ 280-301).

Based on these events, the Company's stock price fell from a Relevant Period high of over $262 per share to less than $25 on August 10, 2016, a decline of more than 90%. In total, the Company's shareholders suffered over $76 billion in market capitalization losses. (A53 at ¶ 17).

The first complaint in the Class Action was filed in the District Court on October 22, 2015 (Class Action Dkt. No. 1) and the consolidated complaint in the Class Action was filed on June 24, 2016 (A243; Class Action Dkt. No. 80). On April 28, 2017, the District Court denied a motion, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the Class Action claims for violations of Section 10(b) and Rule 10b-5, and Section 20(a) against, among others, the same Defendants named in this action. *In re Valeant Pharms. Int'l, Inc. Sec. Litig.*, No. 15-7658, 2017 U.S. Dist. LEXIS 66037, at *31-40 (D.N.J. Apr. 28, 2017) (Class Action Dkt. No. 216).

On December 16, 2019, Valeant announced that the Class Action against all of the named defendants, excluding PricewaterhouseCoopers and including Defendants in this action, was settled for $1.21 billion, subject to court approval.

Procedural History Of This Action

On December 19, 2018, Plaintiffs filed their Complaint in this action, asserting claims for violations of Section 10(b) and Rule 10b-5 against all Defendants (A221-A222 at ¶¶ 466-472), and violations of Section 20(a) against Defendants Valeant, Pearson, Schiller and Rosiello (A222-A224 at ¶¶ 473-479).

On March 4, 2019, Defendants filed their motion, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the Complaint (A37, *Aly* Dkt. No. 29) ("Motion").

On September 10, 2019, the District Court issued its Memorandum and Opinion (A4-A12; A39, *Aly* Dkt. No. 49, "Opinion"), and Order (A3, A39, *Aly* Dkt. No. 50) granting Defendants' Motion on the ground that the Section 10(b) and Rule 10b-5 claims were untimely. The Section 20(a) claims were dismissed because they were dependent on the viability of the Section 10(b)/Rule 10b-5 claims.

The District Court first adopted its rationale in *Northwestern*, and "declin[ed] to extend *American Pipe* tolling to Plaintiffs' untimely Section 10(b) and Rule 10b-5 claims." (A10-A11). The District Court then found that, as in *Catalyst*, the statute of limitations for Plaintiffs' claims began to run on June 24, 2016, when the Class Complaint was filed. (A10). Because Plaintiffs commenced this action on December

19, 2018, the District Court held that the action was barred by the Exchange Act's two-year limitations period. (A9-A10).

The District Court did not address Defendants' argument that the Complaint was also barred by the statute of repose.[4]

SUMMARY OF ARGUMENT

The District Court erred in dismissing Plaintiffs' action as untimely. The applicable statute of limitations for securities fraud claims brought under Section 10(b) of the Exchange Act is the earlier of "(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation." 28 U.S.C. § 1658(b). When a class action is filed, however, the applicable statute of limitations is suspended "***as to all asserted members of the class***." *American Pipe*, 414 U.S. at 554 (emphasis added). The District Court misinterpreted and misapplied *American*

[4] Nevertheless, Plaintiffs' claims are not barred by the five-year statute of repose under 28 U.S.C. § 1658 for Section 10(b) claims. The Supreme Court has held that "statutes of repose begin to run on 'the date as of the last culpable act or omission of the defendant.'" *Cal. Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017) (quoting *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014)). Under this standard, the statute of repose begins to run on the date of the defendant's last alleged misrepresentation. *See, e.g., N. Sound Capital LLC v. Merck & Co.,* No. 13-cv-7240 (FLW) (DEA), 2015 U.S. Dist. LEXIS 113369, at *11 (D.N.J. Aug. 26, 2015), *rev'd on other grounds*, 702 Fed. Appx. 75 (3d Cir. Aug. 2, 2017). The Complaint sufficiently alleges that Defendants made misrepresentations well beyond 2013. (*e.g.*, A90 at ¶ 125; A92 at ¶ 129; A94-A95 at ¶ 133; A97 at ¶ 141). Accordingly, the statute of repose did not begin to run until after December 2013 and thus, Plaintiffs' Complaint is not time-barred.

Pipe by holding that the rule stated therein does not apply to individual lawsuits filed by purported class members before a decision on class certification.

In *American Pipe*, the Supreme Court held that, once a class action is commenced, the statute of limitations is suspended as to all purported class members, whose claims are deemed interposed by the filing of the purported class action. That is, under the rule in *American Pipe*, all purported class members are deemed parties to the class action lawsuit. Because the statute of limitations is suspended as to all purported class members upon the filing of the class action, any purported class member who later files an individual lawsuit (either because the class member opts out of the class action or because the class is not certified) will be able to rely on the timeliness of the class action filing. In this manner, the operative event is the commencement of the purported class action. The rule in *American Pipe* does not depend on or require any further steps such as a class certification decision. Accordingly, the District Court erred in holding that the rule in *American Pipe* did not apply to this action because it was filed before a decision on class certification.

Notably, the District Court's holding would create anomalous results. Specifically, a purported class member could wait until after a decision on class certification and be able to file an individual suit (with the benefit of *American Pipe*) regardless of whether class certification was granted. Yet, a purported class member who chooses to file before a decision on class certification would be deemed

untimely, despite having filed earlier (possibly, years earlier) than the class member who waited for the class certification decision. Such a result is antithetical to the reasoning and express language of *American Pipe*, and is at odds with the goals and policies of *American Pipe*. Additionally, the District Court's concerns of efficiency, notice to defendants and equity are undermined (not furthered) by the court's holding.

The majority of the Circuit Courts that have squarely addressed this issue (*i.e.*, the Second, Ninth and Tenth Circuits) have held that the *American Pipe* doctrine *does* apply to individual actions filed before a class certification decision. Only the Sixth Circuit has held that the rule does not apply, but even that Circuit itself has questioned its previous holding. Although the Third Circuit has not directly addressed the issue, its previous decisions suggest that this Court is aligned with the majority position.

The District Court also erred in holding that, as a matter of law, the statute of limitations began to run on June 24, 2016 because that was when the consolidated Class Complaint was filed, and thus, purportedly the date on which Plaintiffs in this action should have discovered their claims. Under the "discovery" standard set forth by the Supreme Court and applied by this Circuit, it cannot be said that Plaintiffs "discovered," or a reasonably diligent plaintiff would have discovered, facts constituting their claims sufficient to survive a Rule 12(b)(6) motion to dismiss when

the Class Complaint was filed. Rather, the Class Complaint only triggered a reasonably diligent plaintiff's duty to *investigate* its claims. If anything, the District Court's denial of the motion to dismiss the Class Action in April 2017 is the earliest that Plaintiffs "discovered" the facts underlying their claims. Thus, Plaintiffs' Complaint is timely even without the benefit of the *American Pipe* rule.

Accordingly, the District Court's Opinion and Order should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

This Court's review of the District Court's Opinion granting the Motion and dismissing the Complaint as untimely is plenary. *In re Merck & Co., Inc. Sec. Derivative & ERISA Litig.*, 543 F.3d 150, 160 (3d Cir. 2008). *See also Syed v. Hercules Inc.*, 214 F.3d 155, 159 n.2 (3d Cir. 2000) ("We exercise plenary review over the District Court's choice of the applicable statute of limitations.").

This Court also exercises plenary review over a district court's dismissal of a complaint under Fed. R. Civ. P. 12(b)(6) and applies the same standard as the district court. *B.B. v. Delaware College Preparatory Academy*, No. 19-1649, 2020 U.S. App. LEXIS 4198, at *5 n.3 (3d Cir. Feb. 11, 2020) (citations omitted). Thus, this Court must determine "whether the complaint, construed in the light most favorable to the plaintiff, contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (internal quotation marks omitted) (citing

Santomenno ex rel. John Hancock Trust v. John Hancock Life Ins. Co., 768 F.3d 284, 290 (3d Cir. 2014); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

II. THE DISTRICT COURT MISAPPLIED *AMERICAN PIPE*, WHICH IS NOT DEPENDENT ON A CLASS CERTIFICATION DECISION

A. Under The Rule In *American Pipe*, Commencing a Class Action Suspends The Applicable Statute Of Limitations As To All Asserted Class Members, Without The Need For Any Further Steps

Under *American Pipe*, "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class…." 414 U.S. at 554; *see also Leyse v. Bank of Am., N.A.*, 538 Fed. Appx. 156, 161 (3d Cir. 2013) ("it is the '*commencement* of a class action [that] suspends the applicable statute of limitations'") (quoting *American Pipe*, 414 U.S. at 554) (emphasis and alteration in original). And "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983).

As the Supreme Court has explained, the way the rule in *American Pipe* works is to treat the claims of all class members as interposed upon the timely filing of the class action complaint, so that the claims of all class members are deemed timely brought within the applicable limitations period. *American Pipe*, 414 U.S. at 550 ("Under present Rule 23, … the filing of a timely class action complaint *commences the action for all members of the class as subsequently determined*.") (footnote

omitted) (emphasis added); *id.* at 554 ("We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.") (footnote omitted). In other words, "the claimed members of the class *stood as parties to the suit* until and unless they received notice thereof and chose not to continue" and the "commencement of the [class] action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs." *Id.* at 551 (emphasis added). Given that *American Pipe* deems the absent class members' claims to have been timely interposed, the "application of the *American Pipe* tolling doctrine to cases such as this one does not involve 'tolling' at all." *Joseph v. Wiles*, 223 F.3d 1155, 1168 (10th Cir. 2000).

Because *American Pipe* deems all class members to be parties from the commencement of a purported class action, the rule is not dependent on any step other than the commencement of the class action. Specifically, application of the rule in *American Pipe* is not dependent on the further step of a court issuing a class certification decision. The *American Pipe* court made this clear.

In *American Pipe*, the Supreme Court held that even passive members of a class who were not aware of the commencement of the class action benefit from the

tolling rule. The Supreme Court explained that: "Rule 23 [of the Federal Rules of Civil Procedure] is not designed to afford class action representation only to those who are active participants in or even aware of the proceedings in the suit prior to the order that the suit shall or shall not proceed as a class action. *During the pendency of the District Court's determination in this regard, which is to be made 'as soon as practicable after the commencement of an action,' potential class members are mere passive beneficiaries of the action brought in their behalf*." *American Pipe*, 414 U.S. at 552 (emphasis added). In other words, all class members of a purported class action benefit from the timely filing of the class action, even before (*i.e.*, *"[d]uring the pendency of*") a class certification decision.

The *American Pipe* court also stated that the commencement of a class action suspends the applicable statute of limitations as to "all asserted members of the class *who would have been parties had the suit been permitted to continue as a class action*." *Id*. at 554 (footnote omitted) (emphasis added). The use of the language "would have been parties" is deliberate. The Supreme Court did not require that the class members later *in fact* be permitted to continue as a class action. Rather, the rule in *American Pipe* depends on an *assumption* at the time of the commencement of the class action, that everyone in the class "*would have been*" permitted to continue as a class. Because of this assumption, the rule in *American Pipe* is not contingent on a later decision on class certification.

The above operation of the rule in *American Pipe* is also consistent with the history of Rule 23. Prior to 1966, under the predecessor "spurious" class mechanism, plaintiffs were required to *opt in* to a class. This created the prospect of abuse, because plaintiffs could opt in to the action late, even after the expiration of the limitations period, and claim the benefit of the commencement date of the "spurious" action. As the Supreme Court explained in *American Pipe*, "the difficulties and potential for unfairness" that this created were eliminated by the 1966 amendments. 414 U.S. at 550. Under the new Rule 23(b)(3), which replaced the "spurious" action, class members were automatically placed into the class from the start without their input as to whether or not they wanted to opt in. Thus, it would be a perverse result if the pre-1966 "spurious" action allowed plaintiffs to *opt in* after the expiration of a limitation period and still benefit from the commencement date of the "spurious" action, but the post-1966 rule were to *lock in* Rule 23(b)(3) class members from the outset and *not* give them the benefit of the commencement date of the action for purposes of assessing any limitations periods. Put simply, as a result of the 1966 amendments to Rule 23, "there remain no conceptual or practical obstacles in the path of holding that the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." *Id*. (footnote omitted).

Finally, the application of the rule in *American Pipe* to plaintiffs who file prior to a decision on class certification is consistent with the "functional operation of a statute of limitations." *Id.* at 554. In *American Pipe*, the Supreme Court noted that statutory limitations periods are designed to protect defendants by "preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared" and reflect the "policies of ensuring essential fairness to defendants and of barring a plaintiff who has slept on his rights." *Id.* (citations and internal quotations omitted). As the Supreme Court explained, these protections and policies are observed when "a named plaintiff who is found to be representative of a class *commences a suit* and thereby 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." *Id.* at 554-55 (emphasis added). It is the commencement of the class action – and not any further event such as a decision on class certification – that provides the defendants with the "essential information necessary to determine both the subject matter and size of the prospective litigation," regardless of "whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors." *Id.* at 555 (footnote omitted).

In summary, under the rule in *American Pipe*, the filing of a purported class action is deemed to commence the action on behalf of all purported class members, and suspends the statute of limitations for all purported class members. If the class action was timely filed, any purported class member can then subsequently opt out, and its opt out lawsuit will also be deemed timely. It is irrelevant whether the class member opted out before or after a class certification decision is issued.

B. The District Court Erred By Misunderstanding And Misapplying The Tolling Rule In *American Pipe*

In this case, the District Court erred by misunderstanding and misapplying the rule stated in *American Pipe*. The District Court followed its earlier decision in *Northwestern*. In that decision, the District Court began by stating that "[t]he Supreme Court has not addressed whether a putative class member who commences an individual action prior to a decision on class certification may enjoy the benefits of the *American Pipe* doctrine to save otherwise untimely claims." *Northwestern*, 2019 U.S. Dist. LEXIS 157064, at *21 (A20). The District Court further stated that, "as a result, [the District Court] must determine whether in this instance the *American Pipe* doctrine should be expanded to a putative class member who files an individual action prior any decision on class certification." *Id.* at *23 (A20).

As discussed above, however, the Supreme Court in *American Pipe* held that the tolling rule is triggered upon the commencement of a class action, and benefits all purported class members even before a decision on class certification. Contrary

to the District Court's view, the application of the rule in *American Pipe* to individual lawsuits filed before a decision on class certification is not an "expansion" of the rule at all, but a straightforward application of the rule.

Having misunderstood *American Pipe*, the District Court in *Northwestern* proceeded to consider the history and purpose of the rule to ascertain whether the rule should be expanded. *Id.* at *24 (A20). This reasoning of the District Court was also erroneous. After noting that the source of the rule in *American Pipe* was the court's judicial power to promote equity, the District Court declined to apply that equitable power to the situation where a class member files an individual action prior to a decision on class certification. *Id.*) at *24-28 (A20-A21). The District Court reasoned that the class member, Northwestern Mutual, could have waited until the District Court's class certification decision, whereupon it would have had two ways to litigate an individual claim: "If the Court denied class certification, Northwestern Mutual would have been entitled to assert its claim as timely because the statute of limitations would have been tolled pursuant to *American Pipe*. In the event the Court granted [c]lass [c]ertification, Northwestern Mutual would have had the opportunity to opt-out of the class and assert its timely claims." *Id.* at *26-27 (A21). Because Northwestern Mutual had these two options if it had simply waited until a class certification decision, the District Court declined to exercise its equitable power to

protect Northwestern Mutual in circumstances where it filed an untimely individual action pre-class certification. *Id.* at *27 (A21).

This reasoning was flawed. If a class member wishes to opt out of a Rule 23(b)(3) class and file an individual action, there is nothing "less equitable" in allowing that class member to opt out and file prior to class certification, compared to requiring that class member to wait until a decision on class certification (whether favorable or not) before filing its individual action. *See Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop.*, No. 15-6480, 2019 U.S. Dist. LEXIS 3091, at *26-27 (E.D. Pa. Jan. 8, 2019) ("putative members of a class contemplating opting out and filing their own lawsuits would be ***penalized*** for giving the defendants and the Court earlier notice") (emphasis added). Although the District Court identified several specific considerations relevant to whether the court's equitable power should be exercised under *American Pipe*, these considerations militate in favor of applying the court's equitable power.

First, the district court cited the need to "protect[ ] the interests of putative unnamed class members who ha[ve] not received notice and were unaware of the pending class action." *Northwestern*, 2019 U.S. Dist. LEXIS 157064, at *26 (internal quotation marks and citation omitted) (A21). However, if the goal is to protect absent class members, then allowing a class member to opt out prior to a class certification decision is essential because this protects class members against

the running of a statute of repose. If a class member is required to wait until a decision on class certification, and such a decision occurs after the expiration of a statute of repose, the class member will no longer have the ability to opt out of the class and file an individual action, because the rule in *American Pipe* does not suspend statutes of repose. *ANZ Sec.*, 137 S. Ct. 2042. As the minority stated in *ANZ Sec.*, this risk is real, because "critical stages of securities class actions, including the class-certification decision, often occur years after the filing of a class complaint." *Id.* at 2057 (stating in footnote 2 that "[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") (citation in footnote omitted).

Second, the District Court cited the need to promote "efficiency and economy of litigation." *Northwestern*, 2019 U.S. Dist. LEXIS 157064, at *26 (A21). The District Court held that applying the rule in *American Pipe* would not promote judicial efficiency and economy, because it would "encourage additional individual actions to be brought prior to class-certification." *Id*. at *28 (A21). This is incorrect. Assuming a class member wished to opt out of the class, and *American Pipe* were not available prior to a class certification decision, that class member would presumably wait until after the decision on class certification and still opt out. A court would still face the same number of individual actions. Thus, precluding

application of the rule in *American Pipe* until after a decision on class certification would not disincentivize the filing of individual actions; it would merely defer these filings. As a court in this Circuit explained, "there is little practical purpose in dismissing" a plaintiff's claims before a decision on class certification, because "[i]f class certification is eventually denied, [purported class members] will receive the benefit of *American Pipe* tolling and be able to refile individual claims; if class certification is eventually granted, they will be able to 'opt out' under Rule 23(c)(2)(B) and refile individual claims." *McDavitt v. Powell*, No. 3:09-cv-0286, 2012 U.S. Dist. LEXIS 39323, at *27-28 (M.D. Pa. Mar. 21, 2012).

Third, the District Court reasoned that "allowing Northwestern Mutual to benefit from *American Pipe* may only encourage future plaintiffs to sit back, await developments in the case as the strength of the parties' positions are tested through Rule 12 motion practice, and if there are favorable determinations, file an otherwise untimely individual action that is saved by the *American Pipe* doctrine." *Northwestern*, 2019 U.S. Dist. LEXIS 157064 at *32 (A22-A23). However, that is no different from the result if members of the purported class are required to wait until after the decision on class certification to opt out. These class members, too, would be able to "sit back [and] await developments in the case." *Id.*

C. The District Court's Holding Creates Anomalous Results

The District Court's interpretation of the rule in *American Pipe* would create anomalous results, as starkly demonstrated in this case. Here, Plaintiffs opted out of the Class and filed their Complaint on December 19, 2018 (A34, *Aly* Dkt. No. 1; A40, Complaint), which was held to be untimely because the District Court declined to apply *American Pipe*.

As part of the preliminary approval of the settlement of the Class Action, the Special Master preliminarily certified a class in the Class Action. On February 5, 2020, the District Court adopted the Special Master's preliminary approval order. (Class Action Dkt. No. 515). The preliminary approval order permitted any class members who chose to opt out of the class to do so no later than May 6, 2020.

Thus, under the District Court's holding and reasoning, Plaintiffs' action filed on December 19, 2018 must be dismissed as untimely, yet any class member who files an action ***after*** February 5, 2020 (but before May 6, 2020) benefits from *American Pipe* tolling and its action is considered timely. As explained in Section II.B, *supra*, such an anomalous result – where later filed actions are timely, but earlier filed actions are not – does not serve the interests of the parties or the courts. Nor does this anomalous result further the policies underlying *American Pipe*.

III. THE DISTRICT COURT'S HOLDING THAT *AMERICAN PIPE* DOES NOT APPLY TO PLAINTIFFS' CLAIMS IS CONTRARY TO THE WEIGHT OF LEGAL AUTHORITY

The majority of the Circuit Courts of Appeal that have squarely addressed the issue have held that *American Pipe* applies to all purported class members even if they file individual actions before a decision on class certification. *See In re WorldCom Sec. Litig.*, 496 F.3d 245 (2d Cir. 2007); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986 (9th Cir. 2007); *State Farm Mutual Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223 (10th Cir. 2008). These courts have also emphasized that it is the commencement of the class action that triggers application of *American Pipe* for the benefit of all purported class members.

In *WorldCom*, the Second Circuit held that "the rule of *American Pipe* [ ] provides that the filing of a class action tolls the statute of limitations for ***all members of the asserted class***, regardless of whether they file an individual action before the resolution of the question whether the purported class will be certified." *WorldCom*, 496 F.3d at 247 (emphasis added). In other words, *American Pipe* tolling applies to "members of a class asserted in a class action complaint … until such time as they ceased to be members of the asserted class, notwithstanding that they also filed individual actions prior to the class certification decision." *Id.* at 256 (footnote omitted). In so holding, the Second Circuit explained that "[t]he *American Pipe* tolling doctrine was created to protect class members from being *forced* to file

individual suits in order to preserve their claims. It was not meant to induce class members to forgo their right to sue individually." *Id.* (emphasis in original). The Second Circuit further reasoned that "[i]t would not undermine the purposes of statutes of limitations to give the benefit of tolling to all those who are asserted to be members of the class for as long as the class action purports to assert their claims." *Id.* at 255. This is because "the initiation of a class action puts the defendants on notice of the claims against them" and "[a] defendant is no less on notice when putative class members file individual suits before certification." *Id.*

The Ninth Circuit adopted the Second Court's reasoning and explained that class members "have a right to file at the time of their choosing and denying tolling [to class members who file before certification] would diminish that right." *Hanford Nuclear*, 534 F.3d at 1009. The Ninth Circuit also noted that in *American Pipe*, "the Supreme Court held that the commencement of a class action suspends the applicable statute of limitations as ***to all asserted members of the class*** who would have been parties had the suit been permitted to continue as a class action." *Hanford Nuclear*, 534 F.3d at 1008 (citation omitted) (emphasis added).

Similarly, relying on *WorldCom*, the Tenth Circuit explained that *American Pipe* "'was not meant to induce class members to forgo their right to sue individually.' Thus, the tolling doctrine applies to protect separate suits ***whenever*** they are filed." *State Farm*, 540 F.3d at 1231 (quoting *WorldCom*, 496 F.3d at 256)

(emphasis added). The Tenth Circuit also emphasized that under *American Pipe*, "[t]he commencement of the original class suit tolls the running of the statute of limitations for ***all purported members of the class*** until after the denial of the class certification motion, or until they choose not to continue as a class member." *State Farm*, 496 F.3d at 1228-29 (internal quotation marks and citation omitted) (emphasis added).

Although the Court of Appeals for the Third Circuit has not squarely addressed the issue of whether the *American Pipe* tolling rule applies to class members' claims filed before a decision on class certification, the Third Circuit appears to view the *American Pipe* doctrine consistent with the majority view. For example, it has held that the rule applies to intervenors who move to intervene in a class action prior to class certification. *See Wallach v. Eaton Corp.*, 837 F.3d 356, 373-74 (3d Cir. 2016). In so holding, this Circuit noted that without the *American Pipe* tolling rule, there could be "great inefficiencies and reductions in judicial economy [where a class action] would be dismissed after years of motion practice and discovery, only to be filed anew by plaintiffs who were unable to simply intervene and carry the motion for class certification through to its conclusion." *Id.* at 374. The Third Circuit also pointed out the illogical result of applying the *American Pipe* tolling rule only to certified classes, because "then motions to intervene brought prior to class certification might be deemed untimely, even though

those same motions would be timely if brought years later, after a class was certified." *Id.* This reasoning applies with equal force to class members bringing individual claims before a decision on class certification. *See* Section II.C, *supra*. This Circuit has likewise stated in *dicta* that there is "no good reason why [subsequent claims] should not be tolled where the district court has not yet reached the issue of validity of the class." *McKowan Lowe & Co. v. Jasmine, Ltd.*, 295 F.3d 380, 389 (3d Cir. 2002).

Only the Sixth Circuit has held that actions filed prior to class certification cannot rely on the *American Pipe* tolling doctrine. *Wyser-Pratte Management Co. v. Telxon Corp.*, 413 F.3d 553 (6th Cir. 2005). However, even the Sixth Circuit has subsequently admitted that "*Wyser-Pratte* now represents the minority rule" and that the court "may have doubts about its holding…." *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 789 (6th Cir. 2016); *see also Christianson v. Ocwen Loan Servicing, LLC*, 338 F. Supp. 3d 989 (D. Minn. 2018) (noting that the Sixth Circuit "has cast doubt on its own holding in Wyser-Pratte" and refusing to adopt its rule). In any event, *Wyser-Pratte* is at odds with the Third Circuit's interpretation of *American Pipe*, as set forth above.

Other district courts sitting within this Circuit have squarely addressed the issue and have been persuaded by the Second Circuit's reasoning in *WorldCom*. For example, in *Winn-Dixie*, the court explained that "[b]ecause putative class members

may rely on class tolling if they opt out after a decision on class certification and subsequently file individual claims, … the same should be true for those who make this same choice prior to a class certification decision." *Winn-Dixie*, 2019 U.S. Dist. LEXIS 3091 at*26. *See also In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-2002, 2012 U.S. Dist. LEXIS 180513, at *24 (E.D. Pa. Dec. 20, 2012) ("[a]fter carefully reviewing the divergent circuit court opinions on this issue, the Court will apply the analysis of the Second, Ninth and Tenth Circuit Courts of Appeal" and holding that tolling individual claims asserted before class certification "comports with both *American Pipe* and the underlying purposes of statutes of limitations"); *McDavitt*, 2012 U.S. Dist. LEXIS 39323, at *26-27 (noting that the Supreme Court "has repeatedly defined the *American Pipe* tolling doctrine broadly by stating that the commencement of a class action suspends the applicable statute of limitations to all asserted members of the class who would have been parties had the suit been permitted to continue as a class" and holding that an individual action filed before class certification was timely under *American Pipe*) (internal quotation marks and citation omitted).

Thus, the majority of courts has clearly held that the *American Pipe* tolling rule applies to class members' claims filed before a decision on class certification.

In *Northwestern*, the District Court relied heavily on *China Agritech*, *Inc. v. Resh*, 138 S. Ct. 1800 (2018). However, *China Agritech* has no bearing on this case.

The specific question addressed by *China Agritech* was whether "[u]pon denial of class certification, may a putative class member, in lieu of promptly joining an existing suit or promptly filing an individual action, commence ***a class action anew*** beyond the time allowed by the applicable statute of limitations." *Id.* at 1804 (emphasis added). The Supreme Court held that the *American Pipe* tolling rule does not apply to ***successive class actions***. *Id.* at 1811. In contrast, this case does not involve the filing of a successive class action, but the filing of an ***opt-out***, individual action.

For this reason, numerous district courts throughout the country have rejected the reading of *China Agritech* advanced by the District Court and Defendants. *See, e.g.*, *Christianson*, 338 F. Supp. 3d at 993 n.2 ("This Court agrees with Plaintiff that [*China Agritech*] is limited to addressing putative classes that spring from class actions already on file. Because Plaintiff brought an individual action, the [*China Agritech*] decision is inapplicable.") (internal citation omitted); *America's Health & Res. Ctr. Ltd. v. Alcon Labs., Inc.*, No. 16 C 4539, 2018 U.S. Dist. LEXIS 189786, at *5 (N.D. Ill. Nov. 6, 2018) (noting that "*China Agritech* has no effect on the suits of individual class members. Those suits are still tolled under *American Pipe*."). Accordingly, the District Court's reliance on *China Agritech* is misplaced.

Here, an initial class action complaint was filed on October 22, 2015 (Class Action Dkt. No. 1) and a consolidated complaint was filed on June 24, 2016 (Class

Action Dkt. No. 80; A243). The Class Action was filed well within the statute of limitations. Since the filing of the Class Action commenced the action on behalf of all purported class members, thereby suspending the statute of limitations, Plaintiffs' Complaint is also timely.

IV. THE DISTRICT COURT ERRED IN FINDING THAT THE STATUTE OF LIMITATIONS FOR PLAINTIFFS' CLAIMS BEGAN TO RUN ON JUNE 24, 2016

Having declined to apply the rule in *American Pipe*, the District Court proceeded to hold that, as a matter of law, the two-year limitations period for Plaintiffs' claims began to run on June 24, 2016, when the consolidated Class Complaint was filed. In so holding, the District Court further erred.

In *Merck & Co. v. Reynolds*, 559 U.S. 633 (2010), the Supreme Court established that the limitations period for a securities fraud action under the Exchange Act "begins to run once plaintiff did discover or a reasonably diligent plaintiff would have 'discovered the facts constituting the violation' – whichever comes first." *Id.* at 653. "But the limitations period does not begin to run until the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered 'the facts constituting the violation,' including scienter – irrespective of whether the actual plaintiff undertook a reasonably diligent investigation." *Id.* In this manner, the Supreme Court adopted a "discovery" standard for assessing when the Exchange Act limitations period begins to run. The Supreme Court rejected the alternative

"inquiry" standard, *i.e.*, that the limitations period begins to run at "the point where the facts would lead a reasonably diligent plaintiff to investigate further." *Id.* at 651. The Supreme Court explained that inquiry notice "is not necessarily the point at which the plaintiff would already have discovered … 'facts constituting the violation.'" *Id.* The Supreme Court further explained that nothing in the text of 28 U.S.C. § 1658(b)(1) "suggests that the limitations period can sometimes begin *before* 'discovery' can take place," such as "when a plaintiff would have *begun* investigating." *Id.* (emphasis in original).

Applying this discovery standard, the Supreme Court rejected the defendants' arguments that the plaintiff discovered the facts underlying his Section 10(b) claims (and in particular, scienter) when: (a) the FDA issued a warning letter that Merck had minimized potentially serious findings related to the heart-attack risks associated with Merck's drug Vioxx; and (b) when pleadings in related products-liability actions were filed. *Id.* at 653. The Supreme Court explained that the FDA warning letter showed "little or nothing about the [ ] relevant scienter" and that the "products-liability complaints' statements about Merck's knowledge show[ed] little more." *Id.* at 653-54. With respect to the products-liability pleadings, the Supreme Court noted that "*without providing any reason to believe that the plaintiffs had special access to information about Merck's state of mind*, the complaints alleged only in general terms that Merck had concealed information about Vioxx and 'purposefully

downplayed and/or understated' the risks associated with Vioxx – the same charge made in the FDA warning letter." *Id.* at 654 (emphasis added).

This Circuit has held that under the *Merck* standard, "a fact is not deemed 'discovered' until a reasonably diligent plaintiff would have sufficient information about that fact to adequately plead it in a complaint … with sufficient detail and particularity to survive a 12(b)(6) motion to dismiss." *Pension Trust Fund for Operating Engr's v. Mortgage Asset Securitization Transactions, Inc.*, 730 F.3d 263, 275 (3d Cir. 2013) (internal quotation marks omitted) (citing *City of Pontiac Gen. Employees' Retirement Sys. v. MBIA, Inc.*, 637 F.3d 169, 175 (2d Cir. 2011)). Applying this standard, the *Pension Trust* court found that the date on which a related amended class action complaint was filed in state court, which asserted substantially the same claims as the subject federal action, was when a reasonably diligent plaintiff would have begun to ***investigate*** (not have discovered) its claims. *Id.* at 277-78.

Here, the District Court erred in holding, as a matter of law, that the statute of limitations for Plaintiffs' Exchange Act claims began to run on June 24, 2016, when the Class Complaint was filed. Although the District Court acknowledged that under *Merck*, "[i]nquiry notice is insufficient to trigger the statute of limitations," the court proceeded to find that "when a complaint is filed alleging substantially similar claims as raised in the instant matter, a reasonably diligent plaintiff would have

sufficient information about the facts necessary to adequately plead the requisite facts" to survive a 12(b)(6) motion to dismiss. *Catalyst*, 2019 U.S. Dist. LEXIS 91546, at *17 (citing *Pension Trust*, 730 F. 3d at 275) (A30). In other words, the District Court held that, because Plaintiffs' Complaint alleged substantially similar facts to the earlier-filed Class Complaint, this meant that, *as a matter of law*, a reasonably diligent plaintiff would have discovered the facts required to plead its Exchange Act claims on the date of filing of the Class Complaint. (A10) (adopting its reasoning in *Catalyst*, 2019 U.S. Dist. LEXIS 91546, at *16). The District Court also noted that in the Class Action, the Section 10(b) claims asserted in the Class Complaint did, in fact, survive a Rule 12(b)(6) motion to dismiss. *Catalyst*, 2019 U.S. Dist. LEXIS 91546, at *17 (A30).

The District Court's reasoning is contrary to *Merck* and *Pension Trust*. When the Class Complaint was filed, it was simply a series of allegations that would have triggered Plaintiffs' duty to *investigate* their Exchange Act claims. However, the filing of the Class Complaint did not constitute the point in time when Plaintiffs "discovered" the facts establishing Plaintiffs' claims and sufficient to survive a Rule 12(b)(6) motion. *See Merck*, 559 U.S. at 654 (finding that the FDA warning letter, related products-liability pleadings and earlier circumstances, "whether viewed separately or together" did not reveal "facts constituting the [alleged] violation"); *Pension Trust*, 730 F.3d at 277-79 (finding that a related complaint triggered a

reasonably diligent plaintiff's duty to investigate and that a reasonably diligent investigation would have taken two months after the filing of the related complaint to discover facts underlying the plaintiff's claims).

Further, simply because the District Court later denied the motion to dismiss the Class Complaint in April 2017, does not establish that Plaintiffs discovered or that a reasonably diligent plaintiff would have discovered "facts constituting the violation" when the Class Complaint was *filed*. By so holding, the District Court introduced a rule of "discovery by hindsight." If anything, the District Court's denial of the motion to dismiss the Class Complaint in April 2017 is the earliest that Plaintiffs "discovered" the facts underlying their securities fraud claims, including facts establishing Defendants' scienter. Calculated from that date, Plaintiffs' Complaint is timely.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court reverse the District Court's order granting Defendants' Motion.

Dated: June 15, 2020

Respectfully submitted,

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CERTIFICATION OF ADMISSION TO BAR

I, JooYun Kim, certify that I am counsel of record and a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: June 15, 2020

/s/ JooYun Kim
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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(g)(1) AND LOCAL RULE 31.1

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 8,349 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Word for Microsoft 365 in 14 point Times New Roman font.

This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and a virus detection program, Windows Defender (Antimalware Client Version: 4.18.2004.6), has been run on this file containing the electronic version of this brief and no virus was detected.

Dated: June 15, 2020

/s/ JooYun Kim
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No. 19-3326
Bahaa Aly, et al. v. Valeant Pharmaceuticals International, Inc., et al.

JOINT APPENDIX

TABLE OF CONTENTS

VOLUME I of II

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: VALEANT PHARMACEUTICALS INTERNATIONAL, INC. SECURITIES LITIGATION	Civil Action No. 3:15-cv-07658-MAS-LHG Judge: Michael A. Shipp
This Document Relates To: BAHAA ALY, TINA DAVIS, PHILIP GARLAND and ERINCH OZADA, Plaintiffs, v. VALEANT PHARMACEUTICALS INTERNATIONAL, INC., n/k/a BAUSCH HEALTH COMPANIES INC.; J. MICHAEL PEARSON; HOWARD B. SCHILLER; ROBERT L. ROSIELLO; DEBORAH JORN; ARI S. KELLEN and TANYA CARRO, Defendants.	No. 18-cv-17393-MAS-LHG **NOTICE OF APPEAL TO THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT**

Notice is hereby given that Plaintiffs Bahaa Aly, Tina Davis, Philip Garland and Erinch Ozada appeal to the United States Court of Appeals for the Third Circuit from the Order of the

United States District Court, District of New Jersey, entered in this action on September 10, 2019, granting Defendants' motion to dismiss.

Dated: October 9, 2019

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BAHAA ALY, *et al.*,

Plaintiffs,

v.

VALEANT PHARMACEUTICALS INTERNATIONAL, INC., *et al.*,

Defendants.

Civil Action No. 18-17393 (MAS) (LHG)

ORDER

This matter comes before the Court upon Defendants Valeant Pharmaceuticals International, Inc., n/k/a Bausch Health Companies Inc. ("Valeant"), J. Michael Pearson, Howard B. Schiller, Robert L. Rosiello, Deborah Jorn, Ari S. Kellen, and Tanya Carro's (collectively, "Defendants") Motion to Dismiss. (ECF No. 29.) Plaintiffs Bahaa Aly, Tina Davis, Philip Garland and Erinch Ozada (collectively, "Plaintiffs") opposed (ECF No. 35), and Defendants replied (ECF No. 36). For the reasons set forth in the accompanying Memorandum Opinion,

IT IS on this 10th day of September, 2019, **ORDERED** that:

1. Defendants' Motion to Dismiss (ECF No. 29) is **GRANTED**.

s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BAHAA ALY, *et al.*,

Plaintiffs,

v.

VALEANT PHARMACEUTICALS INTERNATIONAL, INC., *et al.*,

Defendants.

Civil Action No. 18-17393 (MAS) (LHG)

MEMORANDUM OPINION

SHIPP, District Judge

This matter comes before the Court upon Defendants Valeant Pharmaceuticals International, Inc., n/k/a Bausch Health Companies Inc. ("Valeant"), J. Michael Pearson, Howard B. Schiller, Robert L. Rosiello, Deborah Jorn, Ari S. Kellen, and Tanya Carro's (collectively, "Defendants") Motion to Dismiss. (ECF No. 29.) Plaintiffs Bahaa Aly, Tina Davis, Philip Garland and Erinch Ozada (collectively, "Plaintiffs") opposed (ECF No. 35), and Defendants replied (ECF No. 36). The Court has carefully considered the parties' submissions and decides the matter without oral argument pursuant to Local Civil Rule 78.1. For the reasons set forth below, Defendants' Motion to Dismiss is granted.

I. BACKGROUND[1]

The Court has previously summarized many of the factual allegations at issue in this matter. *See, e.g.*, *In re Valeant Pharm. Int'l, Inc. Sec. Litig.* (*In re Valeant*), No. 15-7658, 2017

[1] For the purpose of deciding the instant motion, the Court accepts all factual allegations in the Complaint as true. *See Phillips v. Cty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008).

WL 1658822 (D.N.J. Apr. 28, 2017), *reconsideration denied*, No. 15-7658, 2017 WL 3880657 (D.N.J. Sept. 5, 2017). The Court assumes the parties' familiarity with those allegations and only recounts the factual background and procedural history necessary to decide the instant motion.

On October 22, 2015, Laura Potter brought a putative class action on "behalf of all persons who purchased or otherwise acquired Valeant stock between February 23, 2015 and October 20, 2015, inclusive . . . , against Valeant and certain of its officers and/or directors for violations of the Securities Exchange Act of 1934." (Compl. ¶ 1, *In re Valeant*, No. 15-7658 (D.N.J.), ECF No. 1.) On May 31, 2016, the Court consolidated Ms. Potter's action with several other actions, and pursuant to the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4, the Court appointed Lead Counsel and a Lead Plaintiff in the consolidated action. (Order 3, *In re Valeant*, ECF No. 67.)

On June 24, 2016, Lead Plaintiff and Named Plaintiff filed a Consolidated Class Complaint. (Class Compl., *In re Valeant*, ECF No. 80.) The Class Complaint was "brought on behalf of purchasers of Valeant equity securities and senior notes between January 4, 2013 and March 15, 2016, . . . to pursue remedies" under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"), Securities Exchange Commission Rule 10b-5, and Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 ("Securities Act"). (*Id.* ¶ 1.) Lead Plaintiff and Named Plaintiff brought nine claims. (*Id.* ¶¶ 538-50, 572-728.)

On September 10, 2019, in *Northwestern Mutual Life Insurance Co. v. Valeant Pharmaceuticals, Inc.*, the Court found that the plaintiffs' Section 10(b) and Rule 10b-5 claims were untimely because they were brought two years and two months after the filing of the Class Complaint in *In re Valeant*. (Mem. Op., *Nw. Mut. Life Ins. Co. v. Valeant Pharm. Inc.* (Nw. Mut.), No. 18-15286 (D.N.J.) ECF No. 52.) The Court declined to extend the tolling doctrine created by

the Supreme Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), to the plaintiffs' Section 10(b) and Rule 10b-5 claims. (*Id.* at 20-23.) The Court, therefore, concluded that the *Northwestern Mutual* plaintiffs' Section 20(a) claims failed because the plaintiffs could not establish the requisite primary violation. (*Id.* at 23-24.)

Here, Plaintiffs are individual investors residing in New York, California, Pennsylvania, and Turkey who purchased Valeant common stock and other securities between January 4, 2013 and March 15, 2016. (Compl. ¶¶ 22-26, ECF No. 1.) Count I—Violations of Section 10(b) of the Exchange Act and SEC Rule 10b-5—is asserted against all Defendants. (*Id.* ¶¶ 466-72.) Count II—Violations of Section 20(a) of the Exchange Act—is brought against Valeant, Pearson, Schiller, and Rosiello. (*Id.* ¶¶ 473-79.) Plaintiffs filed the Complaint on December 19, 2018. (*See generally id.*)

On March 4, 2019, Defendants moved to dismiss both counts of the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"). (Defs.' Mot. to Dismiss, ECF No. 29.) Defendants' arguments are similar to those advanced by the defendants in *Northwestern Mutual*. (*Compare* Defs.' Moving Br., ECF No. 29-1, *with* Valeant Defs.' Moving Br., *Nw. Mut.*, ECF No. 18.) Defendants argue Count I is untimely because (1) the Complaint was filed after the applicable statute of limitations expired; (2) Plaintiffs forfeited the benefit of *American Pipe* tolling by bringing an individual action prior to class certification in *In re Valeant*; and (3) the statute of repose bars Plaintiffs' claims to the extent they are based on statements made prior to December 19, 2013. (*See* Defs.' Moving Br. 3-10.) Defendants insist that Count II fails because Section 20(a) claims require a primary violation of a securities law, and Plaintiffs cannot establish a primary violation. (*Id.* at 10.)

On April 1, 2019, Plaintiffs opposed Defendants' Motion to Dismiss. (Pls.' Opp'n Br., ECF No. 35.) Citing to the Court's previous Memorandum Opinion in *Senzar Healthcare Master Fund, LP v. Valeant Pharmaceuticals International, Inc.*, Plaintiffs contend the Court previously held that "for the purposes of statute of limitations, the truth of Defendants' fraud was known, at least in part, on August 10, 2016." (*Id.* at 2 (citing *Senzar Healthcare Master Fund, LP v. Valeant Pharm. Int'l, Inc.*, No. 18-2286, 2018 WL 4401730 (D.N.J. Sept. 14, 2018).)) Thus, per Plaintiffs, because the Class Complaint was timely filed and the *American Pipe* doctrine applies to Plaintiffs' claims, the Court should not dismiss the claims as untimely. (*Id.*)

On the issue of the application of *American Pipe* tolling, Plaintiffs advance arguments similar to those advanced by the *Northwestern Mutual* plaintiffs. (*Compare id.* at 3-9, *with* Pls.' Opp'n Br. 11-16, *Nw. Mut.*, ECF No. 27.) Plaintiffs acknowledge that the Supreme Court and the Third Circuit have not addressed whether *American Pipe* tolling applies to an individual action brought by a putative class member prior to a decision on class certification. (Pl.'s Opp'n Br. 3.) Plaintiffs rely on the Second Circuit's decision in *In re WorldCom Securities Litigation*, 496 F.3d 245 (2d Cir. 2007), and the Third Circuit's decision in *Wallach v. Eaton Corp.*, 837 F.3d 356 (3d Cir. 2016), to argue against a "forfeiture rule." (*Id.* at 4-6.) Citing to *Winn-Dixie Stores, Inc. v. Eastern Mushroom Marketing Cooperative*, No. 15-6480, 2019 WL 130535, at *1 (E.D. Pa. Jan. 8, 2019), Plaintiffs argue courts in this Circuit have rejected the Sixth Circuit's application of a forfeiture rule in *Wyser-Pratte Managment Co. v. Telxon Corp.*, 413 F.3d 553 (6th Cir. 2005). (*Id.* at 6.) In sum, Plaintiffs insist that the filing of the Class Complaint tolled their claims and, as a result, their Complaint was timely. (*Id.* at 9.) Plaintiffs further contend that because the Complaint was timely filed, their Section 20(a) claims are viable. (*Id.* at 12-13.) On March 15, 2019,

Defendants replied, reasserting the primary arguments they made in their moving brief. (*See generally* Defs.' Reply Br., ECF No. 36.)

II. LEGAL STANDARD

District courts must consider a Rule 12(b)(6) motion under a three-part analysis. First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Second, it must accept as true all of a plaintiff's well-pleaded factual allegations and construe the complaint in the light most favorable to the plaintiff, while setting aside conclusory allegations proffered in the complaint. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009). Third, the court must then determine whether the "facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Id.* at 211 (quoting *Iqbal*, 556 U.S. at 679).

"A statute of limitations defense is an affirmative defense that a defendant must usually plead in his [or her] answer." *Stephens v. Clash*, 796 F.3d 281, 288 (3d Cir. 2015). A statute of limitations defense can also be raised via a Rule 12(b)(6) motion "if the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations." *Id.* (*quoting Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014)). The court may grant the instant motion only "if the face of the complaint demonstrates that the plaintiff's claims are untimely." *Id.* (quotations and citations omitted).

Section 10(b) claims must be "brought not later than the earlier of—(1) [two] years after the discovery of the facts constituting the violation; or (2) [five] years after such violation." 28 U.S.C. § 1658(b). The limitations period for Section 10(b) claims "begins to run once the plaintiff did discover or a reasonably diligent plaintiff would have 'discover[ed] the facts constituting the violation'—whichever comes first." *Merck & Co. v. Reynolds*, 559 U.S. 633, 653 (2010) (quoting

28 U.S.C. § 1658(b)(1)). The standard focuses on the "reasonably diligent plaintiff . . . irrespective of whether the actual plaintiff undertook a reasonably diligent investigation." *Id.* "[A] fact is not deemed 'discovered' until a reasonably diligent plaintiff would have sufficient information about that fact to adequately plead it in a complaint . . . with sufficient detail and particularity to survive a [Rule] 12(b)(6) motion to dismiss." *Pension Tr. Fund for Operating Eng'rs v. Mortg. Asset Securitization Transactions, Inc.*, 730 F.3d 263, 275 (3d Cir. 2013) (quoting *City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 175 (2d Cir. 2011)).

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff bringing an action under Section 20(a) must plead: "(1) an underlying primary violation by a controlled person or entity; (2) that [the defendants] exercised control over the primary violator; and (3) that the [d]efendants, as 'controlling persons,' were in some meaningful sense culpable participants in the fraud." *Wilson v. Bernstock*, 195 F. Supp. 2d 619, 642 (D.N.J. 2002). "Liability under Section 20(a) is predicated upon an independent violation of [the Exchange Act] or the rules or regulations thereunder." *Id.* (internal quotation marks omitted) (quoting *In re Party City Sec. Litig.*, 147 F. Supp. 2d 282, 317 (D.N.J. 2001)).

III. DISCUSSION

In *Catalyst Dynamic Alpha Fund v. Valeant Pharmaceuticals International, Inc.*, the Court dismissed as untimely a complaint similar to the instant Complaint. *See Catalyst Dynamic*, No. 18-12673, 2019 WL 2331631, at *7 (D.N.J. May 31, 2019). The Complaint in this matter, the complaint in *Catalyst Dynamic*, and the Class Complaint are similar in that each complaint asserts claims for violations of Section 10(b) and Rule 10b-5 based on the same alleged wrongful conduct. (*Compare* Compl., *with* Compl., *Catalyst Dynamic*, ECF No. 1, *and* Class Complaint, *In re Valeant*, ECF No. 80.) In *Catalyst Dynamic*, due to the similarities between the *Catalyst Dynamic*

complaint and the Class Complaint, the Court concluded that "a reasonably diligent plaintiff would have had enough facts to plead the instant claims with sufficient detail and particularity to survive a motion to dismiss by the time the Class Complaint was filed." *See Catalyst Dynamic*, 2019 WL 2331631, at *7. The Court, as a result, concluded that the federal claims in *Catalyst Dynamic* were untimely.[2]

The Court's analysis in *Catalyst Dynamic* regarding the timeliness of the complaint applies with equal force here. "[W]hen a complaint is filed alleging substantially similar claims as raised in the instant matter, a reasonably diligent plaintiff would have sufficient information about the facts necessary to adequately plead the requisite facts 'with sufficient detail and particularity to survive a 12(b)(6) motion to dismiss.'" *Catalyst Dynamic*, 2019 WL 2331631, at *6 (quoting *Pension Tr. Fund*, 730 F.3d at 275). In light of the similarities between the Complaint and the Class Complaint, the Court finds that a reasonably diligent plaintiff would have had enough facts to plead the instant claims with sufficient detail and particularity to survive a motion to dismiss by June 24, 2016. The Court, accordingly, finds Plaintiffs' claims, filed two years and six months after June 24, 2016, are untimely absent the application of *American Pipe* tolling.

Plaintiffs appear to concede their claims are untimely absent the application of the *American Pipe* doctrine. (*See* Pls.' Opp'n Br. 2 ("Because the class action was timely filed, and because *American Pipe* tolling applies to Plaintiffs' claims, the action should not be dismissed on statute of limitations grounds.").) In *Northwestern Mutual*, the Court concluded that *American Pipe* tolling did not apply to the plaintiffs' claims. (*See* Mem. Op., *Nw. Mut.*) The Court adopts the rationale articulated in *Northwestern Mutual* and reaches the same conclusion here. (*See id.*)

[2] Because the *Catalyst Dynamic* plaintiffs argued that their complaint was timely even without the application of the *American Pipe* tolling doctrine, the Court granted the plaintiffs leave to amend out of an abundance of caution. *Catalyst Dynamic*, 2019 WL 2331631, at *7.

The Court declines to extend *American Pipe* tolling to Plaintiffs' untimely Section 10(b) and Rule 10b-5 claims.

The Court recognizes that Plaintiffs are individual investors and the *Northwestern Mutual* investors are sophisticated institutional investors. Nevertheless, the putative lead plaintiffs in *In re Valeant* published numerous notices alerting putative class members, including Plaintiffs, regarding the claims being asserted on their behalf. (*See* Lead Pl.'s Opp'n Br., Ex. A., *In re Valeant*, ECF No. 323-2 (collecting PSLRA notices related to the appointment of Lead Plaintiff).) Moreover, Plaintiffs allege that numerous news articles detailing Defendants' allegedly wrongful conduct were published in national publications. (*See, e.g.*, Compl. ¶¶ 280, 292-93, 299, 302, 373.) Plaintiffs also allege that on April 27, 2016, a hearing held by the United States Senate Committee on Aging exposed Defendants' allegedly false and misleading statements made to investors. (Compl. ¶¶ 384-93.) Given the significant public attention brought to bear on Defendants' allegedly culpable conduct in this instance, a plaintiff "who commences suit after expiration of the limitation period, . . . can hardly qualify as diligent in asserting claims and pursuing relief." *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1808 (2018).

Plaintiffs' Section 20(a) claims fail. Because the Court concludes that Plaintiffs' Section 10(b) and Rule 10b-5 claims are untimely, Plaintiffs cannot plead the requisite primary violation to support a Section 20(a) claim. *See Wilson*, 195 F. Supp. 2d at 642-43.

IV. CONCLUSION

For the reasons set forth above, the Court finds that Plaintiffs' Section 10(b) and Rule 10b-5 claims are untimely. The Court declines to extend the *American Pipe* doctrine to the same claims.[3]

[3] Because the Court finds that Plaintiffs' claims are untimely, the Court does not reach Defendants' arguments regarding the statute of repose.

As a result, Plaintiffs' Section 20(a) claims also fail. The Court, accordingly, grants Defendants' Motion to Dismiss. An order consistent with this Memorandum Opinion will be entered.

s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

Dated: September 10, 2019

Northwestern Mut. Life Ins. Co. v. Valeant Pharms. Int'l, Inc.

United States District Court for the District of New Jersey

September 10, 2019, Decided; September 10, 2019, Filed

Civil Action No. 18-15286 (MAS) (LHG)

Reporter
2019 U.S. Dist. LEXIS 157064 *; Fed. Sec. L. Rep. (CCH) P100,564; 2019 WL 4278929

NORTHWESTERN MUTUAL LIFE INSURANCE CO., et al., Plaintiffs, v. VALEANT PHARMACEUTICALS INTERNATIONAL, INC., et al., Defendants.

Notice: NOT FOR PUBLICATION

Prior History: *In re Valeant Pharms. Int'l, Inc. Sec. Litig., 2017 U.S. Dist. LEXIS 66037 (D.N.J., Apr. 28, 2017)*

Core Terms

tolling, class action, untimely, motion to dismiss, class certification, individual action, misrepresentation, Reply, Defs, putative class member, state law claim, class member, allegations, intervene, preempted, diligent, omission, notice, federal claim, Exchange Act, consolidated, purchases, join, statute of limitations, federal law claim, equitable, survive, brings, senior, stock

Counsel: **[*1]** For NORTHWESTERN MUTUAL LIFE INSURANCE CO., NORTHWESTERN MUTUAL SERIES FUND, INC. - HIGH YIELD BOND PORTFOLIO, NORTHWESTERN MUTUAL SERIES FUND, INC. - RESEARCH INTERNATIONAL CORE PORTFOLIO, Plaintiffs: STEPHEN WILLIAM TOUNTAS, Kasowitz Benson Torres LLP, Newark, NJ.

For VALEANT PHARMACEUTICALS INTERNATIONAL, INC., n/k/a BAUSCH HEALTH COMPANIES INC, ROBERT L. ROSIELLO, Defendants: RICHARD HERNANDEZ, LEAD ATTORNEY, OMAR ABDUSSELLAM BAREENTTO, MCCARTER & ENGLISH, LLP, NEWARK, NJ.

For J. MICHAEL PEARSON, Defendant: MATTHEW JOSEPH PETROZZIELLO, LEAD ATTORNEY, DEBEVOISE & PLIMPTON LLP, NEW YORK, NY.

Judges: MICHAEL A. SHIPP, UNITED STATES DISTRICT JUDGE.

Opinion by: MICHAEL A. SHIPP

Opinion

MEMORANDUM OPINION

SHIPP, District Judge

This matter comes before the Court upon Defendants Valeant Pharmaceuticals International, Inc., n/k/a Bausch Health Companies Inc. ("Valeant"), J. Michael Pearson ("Pearson"), and Robert L. Rosiello's ("Rosiello") (collectively, "Valeant Defendants") Motion to Dismiss (ECF No. 18); Defendant Howard B. Schiller's ("Schiller") Motion to Dismiss (ECF No. 17); and Defendant Tanya Carro's ("Carro") Motion to Dismiss (ECF No. 19). Plaintiffs Northwestern Mutual Life Insurance Co.; Northwestern Mutual Series **[*2]** Fund. Inc. — High Yield Bond Portfolio; and Northwestern Mutual Series Fund, Inc. — Research

International Core Portfolio (collectively, "Northwestern Mutual") opposed Valeant Defendants', Schiller's, and Carro's (collectively, "Defendants") motions in a single brief. (ECF No. 27.) Defendants replied in separate briefs. (ECF Nos. 36, 37, 38.)

The Court has carefully considered the parties' submissions d decides the matter without oral argument pursuant to *Local Civil Rule 78.1*. For the reasons set forth below, Defendants' Motions to Dismiss are granted.

I. BACKGROUND[1]

The Court has previously summarized many of the factual allegations at issue in memorandum opinions in related matters. *See, e.g.,* *In re Valeant Pharm. Int'l, Inc. Sec. Litig., No. 15-7658, 2017 U.S. Dist. LEXIS 66037, 2017 WL 1658822 (D.N.J. Apr. 28, 2017)*, *reconsideration denied*, *2017 U.S. Dist. LEXIS 143232, 2017 WL 3880657 (D.N.J. Sept. 5, 2017)*. The Court assumes the parties' familiarity with those allegations and only recounts the factual background and procedural history necessary to decide the instant motions.

On October 22, 2015, Laura Potter brought a putative class action on "behalf of all persons who purchased or otherwise acquired Valeant stock between February 23, 2015 and October 20, 2015, inclusive . . . , against Valeant and certain of its officers and/or directors for violations of the Securities Exchange Act of **[*3]** 1934 . . ." *In re Valeant*, No. 15-7658 (D.N.J.), Compl. ¶ 1, ECF No. 1. On May 31, 2016, the Court consolidated Ms. Potter's action with several other actions, and pursuant to the Private Securities Litigation Reform Act ("PSLRA"), *15 U.S.C. § 78u-4*, the Court appointed Lead Counsel and a Lead Plaintiff in the consolidated action. *In re Valeant*, Order 3, ECF No. 67.

On June 24, 2016, Lead Plaintiff and Named Plaintiff filed a Consolidated Class Complaint (the "Class Complaint"). *In re Valeant*, Consol. Compl., ECF No. 80. The Class Complaint was "brought on behalf of purchasers of Valeant equity securities and senior notes between January 4, 2013 and March 15, 2016, inclusive ("Class" and "Class Period") seeking to pursue remedies under *§§ 10(b)* and *20(a) of the Securities Exchange Act of 1934* ("Exchange Act"), [Securities Exchange Commission ("SEC")] *Rule 10b-5* promulgated thereunder (*17 C.F.R. § 240.10b-5*), and *§§ 11*, *12(a)(2)*, and *15 of the Securities Act of 1933* ("Securities Act")." *Id.* ¶ 1. Lead Plaintiff and Named Plaintiff brought nine claims. *Id.* ¶¶ 538-50, 572-728. On April 28, 2017, the Court decided six motions to dismiss filed by various groups of defendants in the *Valeant Class Action. See* *In re Valeant, 2017 U.S. Dist. LEXIS 66037, 2017 WL 1658822, at *1*.

Northwestern Mutual "purchased Valeant securities between **[*4]** January 15, 2013 and April 15, 2016" and alleged that those purchases were "at prices that were materially inflated as a result of [Defendants] misrepresentations, omissions, and other unlawful conduct . . ." (Compl. 1121, ECF No. 1.) Northwestern Mutual filed its complaint on October 24, 2018. (*See generally id.*) Northwestern Mutual brings eight total counts. (*Id.* ¶¶ 391-458.) Northwestern Mutual brings six counts against all defendants: Count 1—Racketeering in Violation of *N.J.S.A. § 2C:41-2(c)*; Count II—Racketeering in Violation of *N.J.S.A. § 2C:41-2(d)*: Count III—Aiding and Abetting Racketeering in Violation of *N.J.S.A. § 2C:41-2(c)*, *(d)*; Count IV—Violations of *Section 10(b) of the Exchange Act* and SEC *Rule 10b-5*; Count VII—Common Law Fraud/Fraudulent Inducement; and Count VIII—Negligent Misrepresentation. (*Id.* ¶¶ 391-423, 441-58.) Northwestern Mutual brings Count V—Violations of *Section 18 of the Exchange Act, 15 U.S.C. § 78r*—against Valeant, Pearson, and Rosiello, and Count VI—Violations of *Section 20(a)* of the Exchange Act, *15 U.S.C. § 78t(a)*—against Pearson, Schiller, and Rosiello. (*Id.* ¶¶ 424-40.) On February 8, 2019, Defendants filed their respective Motions to Dismiss. (Schiller's Mot. to Dismiss, ECF No. 17; Valeant Defs." Mot. to Dismiss, ECF No. 18; Carro's Mot. to Dismiss, ECF No. 19.) Schiller moved for dismissal of Plaintiffs' claims **[*5]** against him in their entirety. (Schiller's Mot. to Dismiss 1.) Valeant Defendants move for dismissal of Counts I, II, III, VII, and VIII in full and Counts IV, V, and VI in part. (Valeant Defs.' Mot. to Dismiss 1.) Carro moved for dismissal of Counts I, II, III, IV, VII, and VIII as to her. (Carro's Mot. to Dismiss 1.)

Pursuant to *Federal Rule of Civil Procedure 12(b)(6)* ("*Rule 12(b)(6)*"), Valeant Defendants argue Northwestern Mutual's state law claims are preempted by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") and a portion of Northwestern Mutual's

[1] For the purpose of deciding the instant motion, the Court accepts all factual allegations in the Complaint as true. *See* *Phillips v. Cty. of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008)*.

federal claims are untimely.[2] (*See generally* Valeant Defs.' Moving Br., ECF No. 18-1.) On the issue of timeliness, Valeant Defendants assert: (1) Northwestern Mutual's federal claims are barred by the applicable statute of limitations; (2) by filing an individual action prior to class certification, Northwestern Mutual forfeited any tolling of its *Section 10(b)* and *Rule 10b-5* claims that would have been available pursuant to *American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*; (3) there is no basis to toll Northwestern Mutual's *Section 18* claims because similar claims were not filed in *In re Valeant;* and (4) a portion of Northwestern Mutual's claims are barred by the applicable statute of repose. (*Id.* at 9-18.) Schiller and Carro join, as applicable, Valeant Defendants' **[*6]** arguments.[3] (Schiller's Moving Br. 1; Carro's Moving Br. 1, ECF No. 19-1.) Schiller and Carro are not parties to the tolling agreement between Valeant Defendants and Northwestern Mutual and move to dismiss all of Northwestern Mutual's federal claims as untimely. (Schiller's Moving Br. 1; Carro's Moving Br. 1.)

On March 8, 2019, Northwestern Mutual opposed Defendants' motions in an omnibus brief. (Pls.' Opp'n Br., ECF No. 27.) Northwestern Mutual maintains that its state law claims are not preempted by SLUSA because (1) the securities at issue are not "covered securities" as defined in the statute, and (2) the Third Circuit's holding in *Taksir v. The Vanguard Group, 903 F.3d 95 (3d Cir. 2018)*, narrowed the applicable test. (*Id.* at 2-11.) Northwestern Mutual asserts that *American Pipe* tolling applies to its federal claims. (*Id.* at 11-16.)

On March 29, 2019, Valeant Defendants, Schiller, and Carro replied to Northwestern Mutual's Opposition. (Valeant Defs.' Reply Br., ECF No. 37; Schiller's Reply Br., ECF No. 36; Carro's Reply Br., ECF No. 38.) Schiller and Carro advance the same rebuttal arguments as Valeant Defendants. (*Compare* Valeant Defs.' Reply Br., *with* Schiller's Reply Br., *and* Carro's Reply Br.)

II. LEGAL STANDARD [*7]

District courts must consider a *Rule 12(b)(6)* motion under a three-part analysis. First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." *Ashcroft v. Iqbal, 556 U.S. 662, 675, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Second, it must accept as true all of a plaintiffs well-pleaded factual allegations and construe the complaint in the light most favorable to the plaintiff, while setting aside conclusory allegations proffered in the complaint. *Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009)*. Third, the court "must then determine whether the 'facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Id. at 211* (quoting *Iqbal, 556 U.S. at 679*).

III. DISCUSSION

The Court, first, addresses whether Northwestern Mutual's state law claims are preempted by SLUSA. The Court then addresses whether Northwestern Mutual's federal securities claims are timely.

A. Northwestern Mutual's Claims are Preempted by SLUSA

SLUSA provides, in relevant part:

> *No covered class action* based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—
>
> (A) a misrepresentation or omission of a material fact *in connection with* the purchase or sale of a *covered security*; or
>
> (B) that the defendant used or employed any **[*8]** manipulative or deceptive device or contrivance in connection with the purchase or sale of a *covered security*.

15 U.S.C. § 78bb(f)(1) (emphasis added). As relevant here, a "covered class action" is:

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[2] Valeant Defendants state that there is a tolling agreement between Valeant Defendants and Northwestern Mutual. (*See* Valeant Defs.' Moving Br. 1, ECF No. 18-1.) The tolling "agreement covered only claims related to purchases of Valeant securities prior to March 16, 2016." (*Id.*) Valeant Defendants, accordingly, seek dismissal of only those claims not covered by the tolling agreement (*e.g.* those claims based on purchases of Valeant securities from March 16, 2016 through April 15, 2016). (*Id.*)

[3] Schiller and Camp join in Valeant Defendants' arguments and do not advance any independent arguments. (*Compare* Valeant Defs.' Moving Br., *with* Schiller's Moving Br., ECF No. 17-1, *and* Carro's Moving Br. 1, ECF No. 19-1.) The Court, accordingly, cites to the Valeant Defendants' brief when addressing Defendants' arguments.

> [A]ny group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—(I) damages are sought on behalf of more than 50 persons; and (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

15 U.S.C. § 78bb(f)(5)(B)(ii). A "covered security" is:

> [A] security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) of the Securities Act of 1933, at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under the Securities Act of 1933 pursuant to rules issued by the Commission under section 4[(a)](2)[4] of that Act.

15 U.S.C. § 78bb(f)(5)(E). Paragraph (1) of Section 18(b) of the Securities Act defines a "covered security" as "(A) a security designated as qualified for trading in the national market system. . . or authorized for listing, on a national securities exchange (or tier or segment thereof); or (B) a security of the same issuer that is **[*9]** equal in seniority or that is a senior security to a security described in subparagraph (A)." 15 U.S.C. § 77r(b).

On multiple occasions, the Court has determined that the same claims Northwestern Mutual brings here are preempted by SLUSA. *See e.g.,* Catalyst Dynamic Alpha Fund v. Valeant Pharm. Int'l, Inc., No. 18-12673, 2019 U.S. Dist. LEXIS 91546, 2019 WL 2331631, at *4 (D.N.J. May 31, 2019); 2012 Dynasty UC LLC v. Valeant Pharm. Int'l, Inc., No. 18-08595, 2018 U.S. Dist. LEXIS 208111, 2018 WL 6492764, at *3 (D.N.J. Dec. 10, 2018); Lord Abbett Inv. Tr.-Lord Abbett Short Duration Income Fund v. Valeant Pharms. Int'l, Inc., No. 17-6365, 2018 U.S. Dist. LEXIS 129282, 2018 WL 3637514, at *10 (D.N.J. July 31, 2018). In *Lord Abbett*, the plaintiffs argued that the securities at issue were not "covered securities" and, as a result, SLUSA preemption did not apply.[5] Lord Abbett, 2018 U.S. Dist. LEXIS 129282, 2018 WL 3637514, at *9. The Court found that allowing the *Lord Abbett* plaintiffs to "proceed on their state law negligent misrepresentation and fraud claims. . . . would directly contravene Congress's intent behind [SLUS] preemption provision as interpreted by the Supreme Court in" Merrill Lynch, Pierce, Fenner & Smith Inc. V. Dabit, 547 U.S. 71, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006).[6] 2018 U.S. Dist. LEXIS 129282, [WL] at *10.

Here, Defendants urge the Court to reach the same conclusion it reached in *Lord Abbett*, and find that Northwestern Mutual's state law claims are preempted by SLUSA. (Valeant Defs.' Moving Br. 6-9.) Defendants argue that Valeant notes and stock are "covered securities" under SLUSA and even if they are not, the alleged "underlying fraud involved a 'covered security', namely, common stock, which subsequently impacted the price of the notes at issue." (*Id.* at 7-8 (alterations omitted).)

Northwestern Mutual contends the notes purchased by Northwestern Mutual **[*10]** Life Insurance Co. and Northwestern Mutual Series Fund, Inc. — High Yield Bond Portfolio (collectively, "Notes Plaintiffs"), and Valeant's unregistered 144A debt securities ("Valeant Notes"), are not "covered securities" under SLUSA.[7] (Pls.' Opp Br. 2-11.) Notes Plaintiffs state that in *Lord Abbett* the Court did not determine that Valeant's Senior Notes are "covered securities." (*Id.* at 2.) Notes Plaintiffs declare that the definition of a "covered security" excludes securities exempt from registration pursuant to rules issued by the Securities Exchange Commission ("SEC") under Section 4(a)(2) of the Exchange Act. (*Id.* at 4.) Notes Plaintiffs aver that Valeant relied on Section 4(a)(2) of the Exchange Act "because that is the statutory foundation for registration exemptions available to issuers." (*Id.*)

Notes Plaintiffs' arguments that Valeant Notes are not "covered securities" are unpersuasive. First, the rulemaking history of Rule 144A makes clear that the statutory basis for the rule is Section 4(a)(1) of the

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[4] Section 4(2) was re-designated Section 4(a)(2) by the JOBS Act. *See* ***Pub.L. 112-106, Title II, § 201(b)(1)***, (c)(1), Apr. 5, 2012, 126 Stat. 314.

[5] The Court notes that the same counsel represents Northwestern Mutual and the plaintiffs in the three cited cases.

[6] Northwestern Mutual does not argue that this matter is not a "covered class action." The Court, accordingly, finds that this matter is a "covered class action" for the reasons articulated in Catalyst Dynamic, 2019 U.S. Dist. LEXIS 91546, 2019 WL 2331631, at *3-4, and 2012 *Dynasty*, 2018 6492764, at *3-4.

[7] Northwestern Mutual Series Fund, Inc. — Research International ore Portfolio (-Northwestern Research") only purchased Valeant common stock and concedes the Court's prior rulings preclude its state law claims. (Pls.' Opp'n Br. 2 n.1.) The Court, accordingly, finds Northwestern Research's state law claims are preempted by SLUSA.

Exchange Act, not Section 4(a)(2). Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145, 55 Fed. Reg. 17,933, 17,943 (Apr. 23, 1990) ("Rule 144A is being adopted by the Commission and Rules 144 and 145 are being amended **[*11]** by the Commission pursuant to Sections 2(11), 4(1), 4(3), and 19(a) of the Securities Act of 1933.") Second, as explained in one commentary, the legislative history of the definition of "covered securities" suggests that the exclusion in the definition "does not appear to be applicable to Rule 144A private offerings." 3C Harold S. Blumenthal & Samuel Wolff, *Securities & Federal Corporate Law* § 16:195 (2d ed. 2019). According to the same commentary, the "senior securities of a company with nationally traded securities are also covered securities." *Id.* The Court, therefore, finds that the Valeant Senior Notes are "covered securities" under SLUSA.[8]

Notes Plaintiffs also argue that *Taksir*, which post-dates the Court's decision in *Lord Abbett*, narrowed the test for "in connection with." (Pls.' Opp'n Br. 6-11.) They assert that "*Taksir* definitively held that broadly coinciding with a transaction in covered securities is not enough." (*Id.* at 7.) Notes Plaintiffs derive a two-part test from *Taksir*: first, the Court should "identify the transaction the plaintiff alleges was induced by the fraud, and second, determine whether *that* transaction was in a covered security." (*Id.* at 8 (emphasis in original).) Notes Plaintiffs urge the Court "to **[*12]** apply the *Taksir* test here, and evaluate whether *their transactions* in the Valeant Notes were in a covered security . . . ." (*Id.* at 9 (emphasis in original).) Notes Plaintiffs aver that their transactions in Valeant Notes were not in connection with covered securities and "not connected to [Valeant] common stock, directly or indirectly[,]" and "[t]herefore, under *Taksir*, . . . SLUSA does not preclude the Note[s] Plaintiffs' state law claims." (*Id.* at 11.)

Defendants disagree with Notes Plaintiffs' interpretation of *Taksir*. (Valeant Defs.' Reply Br. 4-7.) Defendants contend that "[t]he Third Circuit explicitly distinguished" the claims asserted in *Taksir* from claims like those asserted by Notes Plaintiffs. (*Id.* at 5.) Defendants state that the "transaction-based test" Notes Plaintiffs extrapolate from *Taksir* is not located in the "opinion or in any other case interpreting *Taksir*." (*Id.*) Defendants argue that the *Taksir* court did not reject the "coincide test"; rather the "[Third Circuit] approvingly cited the 'coincide test' and emphasized that the Supreme Court 'was not modifying [it]' when it decided Chadbourne & Parke LLP v. Troice, 571 U.S. 377, 134 S. Ct. 1058, 188 L. Ed. 2d 88 (2014)." (*Id.* (quoting Taksir, 903 F.3d at 98).) Defendants point out that Northwestern Mutual's Opposition Brief is the first time that **[*13]** Northwestern Mutual distinguishes between the securities purchased by the individual plaintiffs. (*Id.* at 6 n.6.)

Notes Plaintiffs' interpretation of Taksir is flawed. At issue in *Taksir* was whether alleged overcharges on sales commissions for stock trades were in connection with the purchase or sale of a covered security. Taksir, 903 F.3d at 97. The Third Circuit noted that "the facts of [*Taksir*] are in plain contrast to: . . . the fraudulent manipulation of stock prices in *Dabit*." Id. at 100. The Third Circuit did not narrow the test for "in connection with." Rather, it explicitly relied on the Supreme Court's decisions in *Dabit* and *Troice* after staling that the Supreme Court in *Dabit* "embraced a seemingly broad interpretation of the phrase[,]" and noted that under Supreme Court precedent, "it is enough that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or by someone else." Id. at 97 (quoting Dabit, 547 U.S. at 85). The Third Circuit further noted that the *Troice* majority addressed and rejected the *Troice* dissent's views that the holding altered *Dabit*. *Id.* Thus, *Troice* "clarifies—rather than modifies—Dabit." *Id.*

The Court finds that Northwestern Mutual alleges a misrepresentation or omission of a material fact in connection **[*14]** with the purchase of Valeant Notes. For each state law claim, Northwestern Mutual alleges that Defendants made a false representation that had a direct impact on Northwestern Mutual's decision to purchase the Valeant Notes. (*See, e.g., Compl.* ¶ 397 ("Defendants knowingly, willfully, and unlawfully made misrepresentations or omissions of material fact for the purpose of improperly inflating the price of Valeant securities by misleading Plaintiffs and the investing public . . . . Plaintiffs []reasonably relied [on Defendants' statements] in electing to purchase and own Valeant securities, which they would not have done but for Defendants' fraudulent conduct."); *id.* ¶¶ 444, 447 ("The

[8] The Court's previous dismissal of claims brought pursuant to Section 12(a)(2) of the Securities Act does not command a different result. In *In re Valeant*, the specific issue before the Court was "whether Rule 144A registration requires dismissal of Securities Act Section 12 claims of liability." In re Valeant, 2017 U.S. Dist. LEXIS 66037, 2017 WL 1658822, at Because only applies to public offerings, the impact of a Rule 144A registration was determinative of whether the Section 12 claim could proceed. Here, whether the offering was public or private does not resolve the issue of whether Valeant Senior Notes are a "covered security."

material representations set forth above were fraudulent, and Defendants' representations fraudulently omitted material statements of fact. . . . Plaintiffs justifiably relied on the Defendants' false representations and misleading omissions in purchasing Valeant Notes.); *id.* ¶ 456 ("Plaintiffs reasonably relied on the information Defendants provided and were damaged as a result of these misrepresentations and omissions. Plaintiffs would not have purchased Valeant Notes at all, or at the inflated prices they **[*15]** paid, had they known the true facts . . .").)

Northwestern Mutual's Complaint makes clear that the alleged false statements and misrepresentations did not just "coincide" with Notes Plaintiffs' purchase of Valeant Notes. Notes Plaintiffs allege the statements were the "but-for" cause of their purchases or they reasonably relied on the statements when making the purchases. (*See id.* ¶¶ 397, 446, 447, 456.) The Court, accordingly, concludes that Northwestern Mutual alleges a misrepresentation or omission of a material fact in connection with the purchase of Valeant Notes, a covered security, and as a result, Notes Plaintiffs' state law claims are preempted by SLUSA.

B. Northwestern Mutual's Federal Claims are Untimely

Section 10(b) claims must be "brought not later than the earlier of—(1) [two] years after the discovery of the facts constituting the violation; or (2) [five] years after such violation."[9] 28 U.S.C. § 1658(b). The limitations period for Section 10(b) claims "begins to run once the plaintiff did discover or a reasonably diligent plaintiff would have discover[ed] the facts constituting the violation'—whichever comes first." Merck & Co. v. Reynolds, 559 U.S. 633, 653, 130 S. Ct. 1784, 176 L. Ed. 2d 582 (2010) (quoting 28 U.S.C. § 1658(b)(1)). The standard focuses on the "reasonably diligent plaintiff . . . irrespective of whether **[*16]** the actual plaintiff undertook a reasonably diligent investigation." *Id.* "A fact is not deemed 'discovered' until a reasonably diligent plaintiff would have sufficient information about that fact to adequately plead it in a complaint. . . with sufficient detail and particularity to survive a 12(b)(6) motion to dismiss." Pension Tr. Fund for Operating Eng'rs v. Mortg. Asset Securitization Transactions, Inc., 730 F.3d 263, 275 (3d Cir. 2013) (quoting Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc., 637 F.3d 169, 175 (2d Cir. 2011)).

"A statute of limitations defense is an affirmative defense that a defendant must usually plead in his [or her] answer." Stephens v. Clash, 796 F.3d 281, 288 (3d Cir. 2015). A statute of limitations defense can also be raised via a Rule 12(b)(6) motion "if the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations." *Id.* (quoting Schmidt v. Skolas, 770 F.3d 241, 249 (3d Cir. 2014)). The Court may grant the instant motion only "if the face of the complaint demonstrates that [Plaintiffs'] claims are untimely." *Id.* (quotations and citations omitted).

In *Catalyst Dynamic*, the Court dismissed as untimely a complaint similar to, and at times verbatim to, the Complaint in this matter. (*See* Catalyst Dynamic, 2019 U.S. Dist. LEXIS 91546, 2019 WL 2331631, at *7. *Compare* Compl., *with* Compl., *Catalyst Dynamic Alpha Fund v. Valeant Pharm. Int'l, Inc.*, No. 18-12673 (D.N.J.), ECF No. 1.) Because of the similarities between the *Catalyst Dynamic* complaint and the **[*17]** Class Complaint, the Court concluded that "a reasonably diligent plaintiff would have had enough facts to plead the instant claims with sufficient detail and particularity to survive a motion to dismiss by the time the Class Complaint was filed." *See* Catalyst Dynamic, 2019 U.S. Dist. LEXIS 91546, 2019 WL 2331631, at *6. The Court, as a result, concluded that the federal claims in *Catalyst Dynamic* were untimely .[10] *Id.*

The Court's analysis in *Catalyst Dynamic* regarding timeliness of the complaint applies with equal force here: "[W]hen a complaint is filed alleging substantially similar claims as raised in the instant matter, a reasonably diligent plaintiff would have sufficient information about the facts necessary to adequately plead the requisite facts 'with sufficient detail and

[9] In *Lord Abbett*, the Court concluded the rationale in Dekalb County Pension Fund v. Transocean Ltd., 817 F.3d 393 (2d Cir. 2016), *as amended* (Apr. 29, 2016), persuasive and found that the two-year statute of limitations and five-year statute of repose in the Sarbanes-Oxley Act of 2002 applied to Section 18 claims. Lord Abbett, 2018 U.S. Dist. LEXIS 129282, 2018 WL 3637514, at *8. The Court adopts that finding in this matter.

[10] Because the *Catalyst Dynamic* plaintiffs argued that their complaint was timely even without the application of the *American Pipe* tolling doctrine, the Court granted the plaintiffs leave to amend out of an abundance of caution. Catalyst Dynamic, 2019 U.S. Dist. LEXIS 91546, 2019 WL 2331631, at *7.

particularity to survive a 12(b)(6) motion to dismiss!" *Catalyst Dynamic, 2019 U.S. Dist. LEXIS 91546, 2019 WL 2331631, at *6* (quoting *Pension Tr. Fund, 730 F.3d at 275*.). In light of the similarities between the Complaint and the Class Complaint, the Court finds that a reasonably diligent plaintiff would have had enough facts to plead the instant claims with sufficient detail and particularity to survive a motion to dismiss by June 24, 2016, the date Class Complaint was filed. The Court, accordingly, finds Plaintiffs' federal law claims are untimely, **[*18]** absent the application of *American Pipe* tolling.

Perhaps in anticipation of the Court's finding, Northwestern Mutual appears to concede that the federal claims are untimely absent the application of the *American Pipe* doctrine. (*See* Pls.' Opp'n Br. 11 ("[A]ll of Plaintiffs' claims are timely, not just those tolled by agreement with the Valeant Defendants. The *American Pipe* doctrine has tolled e running of the statute of limitations on Plaintiffs' federal law claims . . . .").)

Defendants contend that by opting out of the class action in *In re Valeant* prior to a decision on class certification, Plaintiffs have forfeited *American Pipe* tolling. (Valeant Defs.' Moving Br. 12.) Defendants claim that courts in this district unanimously hole that a plaintiff that files an individual action prior to class certification may not avail itself of *American Pipe* tolling. (*Id.* (citing *Thomas v. Corr. Med. Servs., Inc., No. 04-3358, 2009 U.S. Dist. LEXIS 21762, 2009 WL 737105, at *3 (D.N.J. Mar. 17, 2009)*).) Defendants state that "[t]hese decisions are in accord with the rule in other circuits[,]" but acknowledge that there is a circuit split on this issue. (*Id.* at 12-13 n.10.) Defendants state that the Supreme Court's holding in *China Agritech, Inc. v. Resh, 138 S. Ct. 1800, 201 L. Ed. 2d 123 (2018)*, supports the rationale of decisions denying *American Pipe* tolling to such actions. (*Id.* at 14.) Specifically, Defendants **[*19]** argue that "permitting tolling in such circumstances would reduce, rather than enhance, judicial economy." (*Id.*)

Northwestern Mutual frames Defendants' position as requesting the Court to "adopt a punitive rule" that is "incompatible with the purpose and history of *American Pipe*" tolling. (Pls.' Opp'n Br. 12.) Northwestern Mutual compares Defendants' position to the arguments the Third Circuit rejected in *Wallach v. Eaton Corp., 837 F.3d 356 (3d Cir. 2016)*. Specifically, Northwestern Mutual suggests that "implementing a forfeiture rule would undermine the *American Pipe* doctrine because class members 'would be compelled to intervene in *every* class action' in case the class representative was later found to be inadequate after a motion to intervene became untimely, creating even *more* inefficiencies." (*Id.* (quoting *Wallach, 837 F.3d at 374*).)

Northwestern Mutual also argues that "[i]f courts imposed a forfeiture rule, class members would rightly be concerned that the statute of repose might run on their claims before a decision on class certification," and, as a result, "the only logical move we would be to forego reliance on *American Pipe* altogether and file preemptive individual actions before the statute of limitations has run." (*Id.* at 13.) Northwestern Mutual criticizes **[*20]** Defendants reliance on District of New Jersey cases applying a forfeiture rule and state that "the majority of circuit courts to consider the forfeiture doctrine have rejected it, and it is increasingly disfavored even in courts where it was once enforced." (*Id.* at 13-14 (citing *In re WorldCom Sec. Litig., 496 F.3d 245 (2d Cir. 2007)*; *State Farm Mut. Auto. Ins. Co. v. Boellstorff 540 F.3d 1223 (10th Cir. 2008)*; *Hanford Nuclear Reservation Litig. v. E.I. DuPont de Nemours & Co. (In re Hanford Nuclear Reservation Litig.), 534 F.3d 986 (9th Cir. 2008)*).) Northwestern Mutual asserts that *China Agritech* does not support Defendants' forfeiture argument because the specific issue presented here was not before the Supreme Court. (*Id.* at 14-15.)

In *American Pipe*, the Supreme Court held:

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

Am. Pipe, 414 U.S. at 552-53. The Supreme Court later clarified that *American Pipe* tolling "is not dependent on intervening in or joining an existing suit; it applies as well to putative class members who, after denial of class certification, 'prefer to bring an individual suit rather than intervene. . . once the economies of a class action [are] **[*21]** no longer available." *China Agritech, 138 S. Ct. at 1804* (quoting *Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)*). Thus, the contemporary understanding of the holding of *American Pipe* and its progeny is that:

> [T]he timely filing of a class action tolls the applicable statute of limitations for all persons encompassed by the class complaint. Where class-action status has been denied, . . . members of the

> failed class [may] timely intervene as individual plaintiffs in the still-pending action, shorn of its class character.

Id.

In *China Agritech*, the Supreme Court was presented with the question of whether after "denial of class certification, may a putative class member, in lieu of promptly joining an existing suit or promptly filing an individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations?" *Id.* The Supreme Court's answer was "[in the negative] . . . . *American Pipe* does not permit the maintenance of a follow-on class action past expiration of the statute of limitations." *Id.*

The Supreme Court has not addressed whether a putative class member who commences an individual action prior to a decision on class certification may enjoy the benefits of the *American Pipe* doctrine to save otherwise untimely claims. The **[*22]** Third Circuit has not addressed this issue either. *See* Blake v. JP Morgan Chase Bank NA, 927 F.3d 701, 710 (3d Cir. 2019) ("We also do not reach whether tolling applies to [the plaintiffs] claims for individual relief even though they were filed before [the class action] ended, as [plaintiffs] offer no reason for their individual claims to survive other than those we reject above."); *see also* Weitzner v. Sanofi Pasteur Inc., 909 F.3d 604, 612 (3d Cir. 2018). Prior to the Supreme Court's decision in *China Agritech*, the Second, Tenth, and Ninth Circuits each held that a putative class member who brings an individual action prior to class certification would receive the benefit of *American Pipe* tolling. *See* In re WorldCom, 496 F.3d at 256 ("We hold that because Appellants were members of a class asserted in a class action complaint, their limitations period was tolled under the doctrine of *American Pipe* until such time as they ceased to be members of the asserted class, notwithstanding that they also filed individual actions prior to the class certification decision."); Boellstorff, 540 F.3d at 1228 ("We anticipate that the Colorado Supreme Court would, as do we, find persuasive the reasoning of *In re WorldCom* . . . . We therefore hold that Colorado would apply the *American Pipe* doctrine to toll the statute of limitations for otherwise-stale individual claims files before **[*23]** the class certification decision."); *Hanford Nuclear Reservation Litig. v. E.I. DuPont de Nemours & Co. (In re Hanford Nuclear Reservation Litig.), 534 F.3d 986, 1009 (9th Cir. 2008)* ("We therefore conclude that members of the plaintiff-class who have filed individual suits are entitled to the benefits of *American Pipe* tolling."). The Sixth Circuit, on the other hand, held that a putative class member who brings an individual action prior to class certification "may not rely [on the] . . . class action to suspend the limitations period on its fraud claims against [the def ndant]." Wyser-Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553, 569 (6th Cir. 2005). Since the Supreme Court's holding in *China Agritech*, no Court of Appeals has ruled on the issue before the Court.

The issue before the Court is not whether Northwestern Mutual has "forfeited" *American Pipe* tolling. Framing the issue in this manner assumes Northwestern Mutual is entitled to the benefit of *American Pipe* tolling.[11] The parties' briefs make clear, and the Court agrees, there is no binding precedent establishing that Northwestern Mutual is entitled to *American Pipe* tolling. The Court, as a result, must determine whether in this instance the *American Pipe* doctrine should be expanded to a putative class member who files an individual action prior any decision on class certification. To resolve this issue, the Court considers the history and **[*24]** purpose of the *American Pipe* doctrine and the context in which Northwestern Mutual requests the Court to apply the doctrine.

In *California Public Employees' Retirement System v. ANZ Securities, Inc.*, the Supreme Court examined the source of the *American Pipe* doctrine. 137 S. Ct. 2042, 2051-52, 198 L. Ed. 2d 584 (2017). The *ANZ Securities* Court stated that "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." Id. at 2051. The holding in *American Pipe* was "grounded in the traditional equitable powers of the judiciary[,]" with the Supreme Court describing its ruling "as authorized by the 'judicial power to toll statutes of

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[11] There is, perhaps, an argument that the broad language of the holding in *American Pipe*— which encompasses "all purported members of the class"—entitles Northwestern Mutual to *American Pipe* tolling. This argument, however, is significantly undermined by the result in *China Agritech*. In brief, the *China Agritech* Court described the respondent's putative class action as "untimely unless saved by *American Pipe's* equitable-tolling exception to statutes of limitations." China Agritech, 138 S. Ct. at 1809. The *China Agritech* Court declined to extend the *American Pipe* tolling doctrine to a putative class action brought by an individual who was a member of a previous timely-filed class action, which was denied class certification. Id. at 1811. Thus, despite the broad language of the *American Pipe* holding, the Supreme Court declined to expand the doctrine.

limitations.'" *Id. at 2052* (quoting *Am. Pipe, 414 U.S. at 558*). While "the *American Pipe* Court did not consider the criteria of the formal doctrine of equitable tolling in any direct manner. . . . [t]he 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." *Id.*

In *China Agritech*, the Supreme Court stated that "[t]he 'efficiency **[*25]** and economy of litigation' that support tolling of individual claims, [ ] do not support maintenance of untimely successive class actions . . . ." *China Agritech, 138 S. Ct. at 1802* (quoting *Am. Pipe, 414 U.S. at 553*). "Economy of litigation favors delaying individual claims until after a class-certification denial." *Id.* The *China Agritech* Court also considered *Federal Rule of Civil Procedure 23* ("*Rule 23*") and described it as "evinc[ing] a preference for preclusion of untimely successive class actions by instructing that class certification should be resolved early on." *Id.* Moreover, the PSLRA, "evinces a similar preference . . . embodied in legislation, for grouping class-representative filings at the outset of litigation." *Id.* Ultimately, the Supreme Court concluded, "[t]he watchwords of *American Pipe* are efficiency and economy of litigation, a principal purpose of *Rule 23* as well. Extending *American Pipe* tolling to successive class actions does not serve that purpose." *Id. at 1811*. Thus, the *China Agritech* Court adopted a rule that would encourage "putative class representatives to file suit well within the limitation period and seek certification promptly." *Id.*

The Third Circuit has identified "two primary purposes underlying the Supreme Court's holding in *American Pipe."* *Weitzner, 909 F.3d at 611*. First, the *American* ***[*26]*** *Pipe* doctrine encourages "efficiency and economy of litigation" because without the doctrine "potential class members would be induced to file protective motions to intervene or join." *Id.* (quoting *American Pipe, 414 U.S. at 553*). Second, the *American Pipe* doctrine "protect[s] the interests of putative unnamed class members who ha[ve] not received notice and were unaware of the pending class action." *Id.* Such class members have "no obligation to 'take note of the suit or to exercise any responsibility with respect to it' until the existence of the class has been established." *Id.* (quoting *American Pipe, 414 U.S. at 552*).

Here, Northwestern Mutual requests the Court to apply its equitable power to a situation where, if the Court declines to do so, there would be no injustice. Northwestern Mutual chose to file its complaint more than two years and four months after the Class Complaint. If Northwestern Mutual had waited until the Court's decision on class certification, Northwestern Mutual would have had two ways to bring its claims. If the Court denied class certification, Northwestern Mutual would have been entitled to assert its claim as timely because the statute of limitations would have been tolled pursuant to *American Pipe*. In the event **[*27]** the Court granted Class Certification, Northwestern Mutual would have had the opportunity to opt-out of the class and assert its timely claims. *See Fed. R. Civ. P. 23(c)(2)(B)(v)* (requiring notice to class members "that the court will exclude from the class any member who requests exclusion"). By filing an untimely pre-class certification individual action, Northwestern Mutual must rely on an expansion of the *American Pipe* doctrine to encompass its claims. Although application of the *American Pipe* doctrine is not subject to the traditional analysis for whether the Court should grant equitable tolling, the Court notes that equitable tolling is applied "sparingly." *Glover v. F.D.I.C., 698 F.3d 139, 151 (3d Cir. 2012)*. Given that Northwestern Mutual's claims would be timely if Northwestern Mutual had pursued a different course of action, the Court cannot conclude that failing to expand *American Pipe* in this instance would result in an injustice.

On these facts, the Court finds that the expansion of the *American Pipe* doctrine here would not promote "efficiency and economy of litigation," one of the purposes of the *American Pipe* doctrine. As the Supreme Court stated, "Economy of litigation favors delaying individual claims until after a class-certification denial." *China Agritech, 138 S. Ct. at 1802*. **[*28]** Allowing Northwestern Mutual to bring its untimely claims prior to class-certification may encourage additional individual actions to be brought prior to class-certification. As demonstrated by the course of litigation in this matter and the matters consolidated in *In re Valeant*, in such a scenario, the Court will likely have to deal with diapositive motions rehashing legal and factual issues the Court previously addressed. Such a turn of events is neither efficient, nor a wise use of limited judicial resources.[12]

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[12] For these same reasons, the Court finds the holding in *In re Worldcom* unpersuasive. The Second Circuit did not have the benefit of *China Agritech* and the Supreme Court's articulation of the purpose of the *American Pipe* doctrine. Moreover, some of the statements in *In re Worldcom* regarding the purpose of *American Pipe* appear to be in tension with the *China Agritech* Court's articulation of the purpose of the *American Pipe*

The Court disagrees with Northwestern Mutual's suggestion that failing to extend the *American Pipe* doctrine would encourage additional preemptive individual actions before the statute of limitations has run. (*See* Pl.'s Opp'n at 13.) Such putative - plaintiffs would face a choice: wait until the results of class-certification are known and proceed accordingly with timely claims pursuant to *American Pipe*, or file prior to class certification and rely on the application of *American Pipe*. Automatically extending the *American Pipe* doctrine to untimely pre-class certification actions will **[*29]** not discourage such filings. Rather, it will encourage Plaintiffs to "wait[] out the statute of limitations to piggyback on an earlier, timely filed class action." *China Agritech, 138 S. Ct. at 1806*. The *China Agritech* Court recognized that a "rule, allowing no tolling for out-of-time class actions, will propel putative class representatives to file suit well within the limitation period and seek certification promptly." *Id. at 1811*. The same logic applies to the Court's decision to not apply the *American Pipe* doctrine in this instance. A rule encouraging putative class members to file their individual actions within the applicable statute of limitations period allows the Court to use the "ample tools at [its] disposal to manage the suits, including the ability to stay, consolidate, or transfer proceedings."[13] *Id.*

Northwestern Mutual is not a putative unnamed class member who never received notice of this action and must rely on the protection of the *American Pipe* doctrine. *See Weitzner, 909 F.3d at 611*. As Justice Sotomayor suggested in *China Agritech*, the PSLRA may change the analysis of the application of the *American Pipe* doctrine because it imposes "significant procedural requirements on securities class actions **[*30]** that do not apply to individual or traditionally joined securities claims." *China Agritech, 138 S. Ct. at 1812* (Sotomayor, J., concurring). "Under the PSLRA, the named plaintiff in a putative class action must publish within 20 days of filing the complaint a nationwide notice alerting putative class members to the filing of the suit . . . ." *Id.*

In *In re Valeant*, numerous notices were published alerting putative class members, including Northwestern Mutual, regarding the claims being asserted on their behalf. (*See* Lead Pl.'s Opp'n Br., Ex. A., *In re Valeant*, ECF No. 323-2 (collecting PSLRA notices related to the appointment of Lead Plaintiff)). Because Northwestern Mutual does not seek to represent a class, it had no obligation to act to preserve its claims under the *America Pipe* tolling doctrine. At the same time, because of the notice provisions of the PSLRA, by waiting more than two years after the filing of the Consolidated Class Action Complaint and three years after notice under the PSLRA was given, Northwestern Mutual "can hardly qualify as diligent in asserting claims and pursuing relief." *China Agritech, 138 S. Ct. at 1808*.

In *American Pipe*, the Supreme Court identified "[a] recurrent source of abuse" under a previous version of *Rule 23*, and extending **[*31]** *American Pipe* on facts like the instant matter invites such abuse. *414 U.S. at 547*. Under the pre-1966 version of *Rule 23*, members of a putative class "could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests." *Id.* Thus, "[i]f the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment." *Id.* "The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments." *Id.*

Here, Northwestern Mutual was able to wait on the sidelines of the litigation and observe two years of motion practice and determine whether its claims were viable. While Northwestern Mutual concedes certain portions of the Court's prior decisions control in this matter, Northwestern Mutual also contends other decisions do not. **[*32]** Thus, allowing Northwestern Mutual to benefit from *American Pipe* may only encourage future plaintiffs to sit back, await

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doctrine.

[13] The Court notes that Northwestern Mutual's argument regarding an influx of protective filings by individual plaintiffs concerned with their claims being untimely in light of the statute of repose appears to be undermined by the Supreme Court's holding in *ANZ Securities*. In that matter, the Supreme Court held that the *American Pipe* doctrine did not apply to the three-year statute of repose for violations of *Section 13* of the Securities Act. Assuming that principle applies to claims under the Exchange Act, it may be inevitable that the Court faces a tide of such individual actions attempting to avoid the applicable statute of repose. Moreover, an increase of protective filings related to the statute of repose is not necessarily a consequence of the Court not applying the *American Pipe* doctrine to Northwestern Mutual's claims, which are barred by the applicable statute of limitations.

developments in the case as the strength of the parties' positions are tested through Rule 12 motion practice, and if there are favorable determinations, file an otherwise untimely individual action that is saved by the *American Pipe* doctrine. Such a result does not support the "efficiency and economy of litigation." American Pipe, 414 U.S., at 553.

In sum, the Court concludes that application of the *American Pipe* doctrine to Northwestern Mutual's federal law claims would not further the purposes of the doctrine. Weitzner, 909 F.3d at 609 ("[T]he tolling rule need not be applied mechanically. And it should not be applied where doing so would result in an abuse of *American Pipe*."). The Court, accordingly, denies Northwestern Mutual's request to apply the doctrine to its federal law claims. The Court, therefore, finds Northwestern Mutual's federal law claims to be untimely under the applicable statute of limitations.

C. Northwestern Mutual's *Section 20(a)* Claims

To survive a motion to dismiss, a plaintiff bringing an action under Section 20(a) must plead: "(1) an underlying primary violation by a controlled person or entity; (2) that [the defendants] exercised **[*33]** control over the primary violator; and (3) that the [d]efendants, as 'controlling persons,' were in some meaningful sense culpable participants in the fraud." Wilson v. Bernstock, 195 F. Supp. 2d 619, 642 (D.N.J. 2002). "Liability under Section 20(a) is predicated upon an independent violation of [the Exchange Act] or the rules or regulations thereunder." *Id.* (internal quotation marks omitted) (quoting In re Party City Secs. Litig., 147 F. Supp. 2d 282, 317 (D.N.J. 2001)).

Here, Northwestern Mutual's Section 20(a) claims fail as to certain defendants based on the Court's finding that Northwestern Mutual's Section 10(b) and Section 18 claims are untimely. Count VI is brought against Pearson, Rosiello, and Schiller for violations of Section 20(a) of the Exchange Act. (Compl. PP 434-40.) Pearson and Rosiello aver that their tolling agreement with Plaintiffs "covered only claims related to purchases of Valeant securities prior to March 16, 2016." (Valeant Defs.' Moving Br. 1.) The Court's finding that Northwestern's Mutual's Section 10(b) and Section 18 claims are untimely results in Northwestern Mutual being unable to plead an underlying primary violation against Pearson and Rosiello for purchases made from March 16, 2016 through April 15, 2016. As to Schiller, because Schiller does not have a tolling agreement with Northwestern Mutual, Northwestern Mutual's Section 20(a) claims against Schiller fail entirely. **[*34]**

IV. CONCLUSION

For the reasons set forth above, the Court finds that Northwestern Mutual's state law claims are preempted by SLUSA. The Court further finds that Northweststern Mutual's federal law claims are untimely. Because the Court finds that Northwestern Mutual's claims are not subject to *American Pipe* tolling, the Court does not reach Defendants' argument that the claims are barred by the statute of repose. The Court, accordingly, grants Defendants' respective Motions to Dismiss. An order consistent with this Memorandum Opinion will be entered.

/s/ Michael A. Shipp

MICHAEL A. SHIPP

UNITED STATES DISTRICT JUDGE

Dated: September 10, 2019

ORDER

This matter comes before the Court upon Defendants Valeant Pharmaceuticals International, Inc., n/k/a Bausch Health Companies Inc., J. Michael Pearson, and Robert L. Rosiello's (collectively, "Valeant Defendants") Motion to Dismiss (ECF No. 18); Defendant Howard B. Schiller's ("Schiller") Motion to Dismiss (ECF No. 17); and Defendant Tanya Carro's ("Carro") Motion to Dismiss (ECF No. 19). Plaintiffs Northwestern Mutual Life Insurance Co.; Northwestern Mutual Series Fund, Inc. — High Yield Bond Portfolio; and Northwestern Mutual Series Fund, Inc. **[*35]** — Research International Core Portfolio opposed Valeant Defendants', Schiller's, and Carro's motions in a single brief. (ECF No. 27.) Valeant Defendants, Schiller, and Carro replied in separate briefs. (ECF Nos. 36, 37, 38.) For the reasons set forth in the accompanying Memorandum Opinion,

IT IS on this 10th day of September, 2019, **ORDERED** that:

1. Valeant Defendants' Motion to Dismiss (ECF No. 18) is **GRANTED**.

2. Schiller's Motion to Dismiss (ECF No. 17) is **GRANTED**.

3. Carro's Motion to Dismiss (ECF No. 19) is **GRANTED**.

4. This action shall be coordinated with *In re Valeant Pharmaceuticals International, Inc. Securities Litigation*, No. 15-7658 (D.N.J.), pursuant to Case Management Order No. 1, *In re Valeant*, ECF No. 369.[1]

/s/ Michael A. Shipp

MICHAEL A. SHIPP

UNITED STATES DISTRICT JUDGE

End of Document

[1] The Court's disposition of the present motions does not dispose of the entire matter.

Catalyst Dynamic Alpha Fund v. Valeant Pharms. Int'l

United States District Court for the District of New Jersey

May 30, 2019, Decided; May 31, 2019, Filed

No. 18-12673 (MAS) (LHG)

Reporter
2019 U.S. Dist. LEXIS 91546 *; 2019 WL 2331631

Catalyst Dynamic Alpha Fund, et al. v. Valeant Pharmaceuticals International, Inc., et al.,

Notice: NOT FOR PUBLICATION

Prior History: *In re Valeant Pharms. Int'l, Inc. Sec. Litig., 2017 U.S. Dist. LEXIS 66037 (D.N.J., Apr. 28, 2017)*

Core Terms

Plaintiffs', class action, statute of limitations, diligent, allegations, motion to dismiss, Defendants', Exchange Act, trigger, consolidated, instant matter, violations, omissions, untimely, preempted

Counsel: **[*1]** For CATALYST DYNAMIC ALPHA FUND, CATALYST INSIDER BUYING FUND, CATALYST INSIDER LONG/SHORT FUND, Plaintiffs: STEPHEN WILLIAM TOUNTAS, Kasowitz Benson Torres LLP, Newark, NJ.

For VALEANT PHARMACEUTICALS INTERNATIONAL, INC., n/k/a BAUSCH HEALTH COMPANIES INC., ROBERT L. ROSIELLO, TANYA CARRO, Defendants: RICHARD HERNANDEZ, LEAD ATTORNEY, MCCARTER & ENGLISH, LLP, NEWARK, NJ; OMAR ABDUSSELLAM BAREENTTO, MCCARTER & ENGLISH LLP, NEWARK, NJ.

For J. MICHAEL PEARSON, Defendant: MATTHEW JOSEPH PETROZZIELLO, LEAD ATTORNEY, DEBEVOISE & PLIMPTON LLP, NEW YORK, NY.

For HOWARD B. SCHILLER, Defendant: JAMES S. RICHTER, LEAD ATTORNEY, WINSTON & STRAWN, LLP, New York, NY.

Judges: MICHAEL A. SHIPP, UNITED STATES DISTRICT JUDGE.

Opinion by: MICHAEL A. SHIPP

Opinion

LETTER OPINION & ORDER

This matter comes before the Court upon Defendants Valeant Pharmaceuticals International, Inc., n/k/a Bausch Health Companies Inc. ("Valeant"), J. Michael Pearson, Howard B. Schiller, Robert L. Rosiello and Tanya Carro's (collectively, "Individual Defendants")[1] Motion to Dismiss Plaintiffs' complaint. (ECF No. 26.) Plaintiffs Catalyst Dynamic Alpha Fund, Catalyst Insider Buying Fund and Catalyst Insider Long/Short Fund (collectively, "Plaintiffs") opposed **[*2]** (ECF No. 30), and Defendants replied (ECF No. 31). The Court has carefully considered the parties' submissions and decides the motion without oral argument pursuant to

[1] The Court refers to Valeant and Individual Defendants collectively as "Defendants".

Local Civil Rule 78.1. For the reasons set forth below, Defendants' Motion to Dismiss is granted.

I. BACKGROUND[2]

In memorandum opinions issued in other matters, the Court previously summarized many of the factual allegations at issue in this matter and the Court assumes the parties' familiarity with those allegations. *See e.g.*, *In re Valeant Pharm. Int'l, Inc. Sec. Litig. (In re Valeant), No. 15-7658, 2017 U.S. Dist. LEXIS 66037, 2017 WL 1658822 (D.N.J. Apr. 28, 2017)*, *reconsideration denied*, *No. 15-7658, 2017 U.S. Dist. LEXIS 143232, 2017 WL 3880657 (D.N.J. Sept. 5, 2017)*. The Court, accordingly, only recounts the factual background and procedural history necessary to decide the instant motion.

On October 22, 2015, Laura Potter brought a putative class action on "behalf of all persons who purchased or otherwise acquired Valeant stock between February 23, 2015 and October 20, 2015, inclusive . . . , against Valeant and certain of its officers and/or directors for violations of the Securities Exchange Act of 1934 . . . ." *In re Valeant Pharmaceuticals International, Inc. Securities Litigation (Valeant Class Action)*, No. 15-7658 (D.N.J.), Compl. ¶ 1, ECF No. 1. On May 31, 2016, the Court consolidated Ms. Potter's action with several other actions, and pursuant to **[*3]** the *Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4*, the Court appointed Lead Counsel and a Lead Plaintiff in the consolidated action. *Valeant Class Action*, Order 3, ECF No. 67. The Court also ordered that any subsequent actions "filed in, or transferred to, this District shall be consolidated into this action[,]" even if the Court did not issue an order to the same effect. *Id.*

On June 24, 2016, Lead Plaintiff and Named Plaintiff filed a Consolidated Class Complaint (the "Class Complaint"). *Valeant Class Action*, Consol. Compl., ECF No. 80. On April 28, 2017, the Court decided six motions to dismiss filed by various groups of defendants in the *Valeant Class Action. See In re Valeant, 2017 U.S. Dist. LEXIS 143232, 2017 WL 1658822, at *1*. On September 9, 2018, Lead Plaintiff and Lead Counsel filed the First Amended Class Complaint ("FAC") naming additional defendants and bringing additional claims. *Valeant Class Action*, First Am. Consolidated Compl., ECF No. 352.

In the instant matter, Plaintiffs are funds offered by Mutual Fund Series Trust, an open-end management investment company. (Compl. ¶ 18, ECF No. 1.) Plaintiffs purchased Valeant common stock between August 14, 2013 and July 2015. (*Id.* ¶ 19.) Plaintiffs allege "a massive, fraudulent scheme perpetrated **[*4]** by Valeant, its senior executives and those working in concert with them to artificially inflate the price of Valeant's securities through a clandestine pharmacy network, deceptive pricing and reimbursement, and fictitious accounting." (*Id.* ¶ 1.)

Plaintiffs filed the instant action on August 10, 2018. (*See id.*) Plaintiffs' Complaint is similar to the Class Complaint in that it alleges the same scheme and similar causes of action. Notably, Plaintiffs identify the same material misrepresentations and omissions identified in the Class Complaint. (*Compare* Compl. ¶¶ 130-270, *with Class Compl*. ¶¶ 133-228.) Plaintiff brings four counts against all Defendants: Count I — Racketeering in Violation of *N.J.S.A. 2C:41-2(c)*; Count II — Racketeering in Violation of *N.J.S.A. 2C:41-2(d)*; Count III — Aiding and Abetting Racketeering in Violation of *N.J.S.A. 2C:41-2(c)*, *(d)*; Count IV — Violations of *Section 10(b) of the Securities Exchange Act of 1934* (the "Exchange Act") and *Rule 10(b)(5)*. Count V - Violations of *Section 20(a)* — is asserted only against the Individual Defendants.

On October 22, 2018, Defendants moved pursuant to *Federal Rule of Civil Procedure 12(b)(6)* to dismiss all of Plaintiffs' claims with prejudice.[3] (Defs.' Mot. to Dismiss, ECF No. 26.) On December 4, 2018, Plaintiffs opposed. (Pls.' Opp'n Br., ECF No. 30.) On December **[*5]** 21, 2018, Defendants replied. (Defs.' Reply Br., ECF No. 31.)

II. LEGAL STANDARD

A district court must conduct a three-part analysis when considering a motion to dismiss pursuant to *Rule 12(b)(6)*. *See Malleus v. George, 641 F.3d 560, 563 (3d Cir. 2011)*. The Court must take note of the elements a plaintiff must plead to state a claim; review the complaint to strike conclusory allegations; and accept as true all of the plaintiff's well-pled factual allegations while

[2] For the purpose of deciding the instant motion, the Court accepts all factual allegations in the Complaint as true. See *Phillips v. Cty. of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008)*.

[3] All subsequent references to a Rule herein are references to a Federal Rule of Civil Procedure.

"constru[ing] the complaint in the light most favorable to the plaintiff." *Id.*;*Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009)* (citation omitted). The Court must determine "whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Id.*;*Fowler, 578 F.3d at 211* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009))*. A facially plausible claim "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. at 210* (quoting *Iqbal, 556 U.S. at 678*).

When considering a *Rule 12(b)(6)* motion, the Court is generally "not permitted to go beyond the facts alleged in the complaint and the documents on which the claims made therein were based." *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1424-25 (3d Cir. 1997)* (alterations omitted). The Court, however, may consider "a document integral to or explicitly relied upon in the complaint," and the Court may consider "items subject to judicial notice, matters of public record, **[*6]** orders, [and] items appearing in the record of the case." *Id. at 1426* (internal citations, quotations, and emphasis omitted); *Buck v. Hampton Twp. Sch. Dist., 452 F.3d 256, 260 (3d Cir. 2006)* (citation omitted).

III. DISCUSSION

Defendants move to dismiss primarily arguing (1) that Counts I, II, and III are preempted by the *Securities Litigation Uniform Securities Act ("SLUSA"), 15 U.S.C. § 78bb*, and (2) Count IV is untimely pursuant to *Section 10(b)*'s two-year statute of limitations. Defendants argue that Plaintiffs' Exchange Act claims are untimely because (1) the claims were filed after the applicable statute of limitations period ended and (2) Plaintiff forfeited any tolling of the statute of limitations period that was available pursuant to *American Pipe & Construction Co. v. Utah (American Pipe), 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*. (Defs.' Moving Br. 1, ECF No. 26-1.) The Court discusses each of these arguments in turn.

A. Plaintiffs' NJ RICO Claims are Preempted by SLUSA

SLUSA provides:

> No *covered class action* based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—
>
> (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection **[*7]** with the purchase or sale of a covered security.

15 U.S.C. § 78bb(f)(1) (emphasis added). As relevant here, a "covered class action" is:

> [A]ny group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—(I) damages are sought on behalf of more than 50 persons; and (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

15 U.S.C. § 78bb(f)(5)(B)(ii).

Defendants argue that the instant action is a "covered class action" in which "Plaintiffs' state law claims allege a misrepresentation or deceptive device in connection with a securities trade and [thus,] are preempted by SLUSA." (Defs.' Moving Br. 4-6.) Defendants aver that the Court has come to the previous conclusion regarding claims of violations of New Jersey's Racketeering statute ("NJ RICO") and the same result should apply here. *Id.* at 4 (citing *Hound Partners Offshore Fund, LP v. Valeant Pharm. Int'l, Inc., No. 18-8705, 2018 U.S. Dist. LEXIS 157328, 2018 WL 4401731 (D.N.J. Sept. 14, 2018)*; *Discovery Glob. Citizens Master Fund, Ltd. v. Valeant Pharm. Int'l, Inc. (Discovery Global), No. 16-7321, 2018 U.S. Dist. LEXIS 6219, 2018 WL 406046 (D.N.J. Jan. 12, 2018))*.

Plaintiffs oppose dismissal relying, in part, on briefing submitted in *2012 Dynasty UC LLC v. Valeant Pharmaceuticals International, Inc., No. 18-08595, 2018 U.S. Dist. LEXIS 208111 (D.N.J. Dec. 10, 2018)*. (Pls.' Opp'n Br. 14.) Plaintiffs also argue that this matter and the *Valeant Class Action* "are quickly diverging . . . and are clearly no longer 'premised on the same factual and **[*8]** legal theories.'" (*Id.* (citing *Discovery Glob., 2018 U.S. Dist. LEXIS 6219, 2018 WL 406046, at * 6)*.) Plaintiffs argue that they are pursuing claims against a smaller number of defendants—five defendants in this matter as opposed to twenty-two defendants in the *Valeant Class Action*. *Id.* at 15.) Plaintiffs also argue that the matters involve different claims—plaintiffs in the *Valeant Class Action* assert claims under *Section 11*, *12(a)(2)*, and *15* of the Securities Act of 1933, and do

not assert claims under Section 20A of the Exchange Act as Plaintiffs do in the instant matter. (*Id.*)

The Court finds that the instant matter is a covered class action and Plaintiffs' NJ RICO claims are preempted by SLUSA. As a threshold matter, to the extent Plaintiffs rely on the briefing in *2012 Dynasty*, the Court rejects those arguments for the same reasons articulated in the Court's Memorandum Opinion in that matter. *See* 2012 Dynasty UC LLC v. Valeant Pharmaceuticals International, Inc. (2012 Dynasty), No. 18-08595, 2018 U.S. Dist. LEXIS 208111, 2018 WL 6492764, at *3 (D.N.J. Dec. 10, 2018) (stating "The Court disagrees with Plaintiffs' interpretation of SLUSA's state-law class-action bar, the definition of a covered class action, and the import of [Cyan, Inc. v. Beaver County Employees Retirement Fund, 138 S. Ct. 1061, 200 L. Ed. 2d 332 (2018)].).

Plaintiffs' attempts to distinguish the instant matter from the *Valeant Class Action* are unpersuasive. Plaintiffs fail to acknowledge that the plaintiffs in the *Valeant Class Action* **[*9]** assert Section 10(b) claims against Valeant and the Individual Defendants for the same material omissions and statements at issue in this matter. (*Compare* Compl. ¶¶ 130-274, 141-394, 401-407, *with* FAC ¶¶ 133-228, 547-552.) Moreover, Plaintiffs have failed to offer any legal authority or substantive argument to show why, in a SLUSA analysis, the fact that Class Plaintiffs are pursuing more claims against a larger set of defendants is material, especially when Plaintiffs' claims so significantly overlap with the core of Class Plaintiffs' claims. As Defendants argue, Plaintiffs have already stipulated to the "substantial factual overlap between the allegations in this Action and the Class Action[.]" (Stipulation 2, ECF No. 23-1.) The Court, accordingly, concludes that the instant action is a covered class action that triggers SLUSA preemption.

B. Plaintiffs' Complaint is Untimely

"A statute of limitations defense is an affirmative defense that a defendant must usually plead in his [or her] answer." Stephens v. Clash, 796 F.3d 281, 288 (3d Cir. 2015). A statute of limitations defense can also be raised via a Rule 12(b)(6) motion "if the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations." *Id.* (quoting Schmidt v. Skolas, 770 F.3d 241, 249 (3d Cir. 2014). The Court may only grant the instant motion "if the face of the complaint demonstrates that the plaintiff's claims are untimely." *Id.* (quotations and **[*10]** citations omitted). The Court may not shift the burden to the plaintiff "to plead, in a complaint, facts sufficient to overcome an affirmative defense." *Id.*

Section 10(b)(5) claims must be "brought not later than the earlier of—(1) [two] years after the discovery of the facts constituting the violation; or (2) [five] years after such violation." 28 U.S.C. § 1658(b). The limitations period for Section 10(b)(5) claims "begins to run once the plaintiff did discover or a reasonably diligent plaintiff would have discover[ed] the facts constituting the violation'—whichever comes first." Merck & Co. v. Reynolds, 559 U.S. 633, 653, 130 S. Ct. 1784, 176 L. Ed. 2d 582 (2010) (quoting 28 U.S.C. § 1658(b)(1)). The standard focuses on the "reasonably diligent plaintiff' . . . irrespective of whether the actual plaintiff undertook a reasonably diligent investigation." *Id.* "A fact is not deemed 'discovered' until a reasonably diligent plaintiff would have sufficient information about that fact to adequately plead it in a complaint . . . with sufficient detail and particularity to survive a 12(b)(6) motion to dismiss." Pension Trust Fund for Operating Eng'rs v. Mortgage Asset Securitization Transactions, Inc., 730 F.3d 263, 275 (3d Cir. 2013) (quoting Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc., 637 F.3d 169, 175 (2d Cir. 2011)).

Defendants argue that the statute of limitations period on Plaintiffs' Exchange Act claims began to run on October 22, 2015, when the first complaint in the *Valeant Class Action* was filed, or not later than the filing of the Class **[*11]** Complaint, on June 24, 2016. (Defs.' Moving Br. 7-9.) Defendants also argue that "[a]s a matter of law, reasonably diligent plaintiffs are aware of the filing of a class action bringing substantially similar claims to those they might bring . . . ." (*Id.* aat 7 (citing Pension Tr. Fund, 730 F.3d at 275).) Defendants next argue that Plaintiffs would have discovered their claims by June 24, 2016, the day the Class Complaint was filed, because "even where earlier complaints brought claims based on purchases of different securities, they demonstrated that a reasonable plaintiff would have 'knowledge sufficient to draft a complaint . . . because a reasonable investor would read them and learn information about statements' violating securities laws." (*See id.* (quoting F.D.I.C. v. Countrywide Fin. Corp., No. 12-4354, 2012 U.S. Dist. LEXIS 167696, 2012 WL 5900973, at *1 (C.D. Cal. Nov. 21, 2012)).) Defendants aver that Plaintiffs' post-August 10, 2016 allegations do not change the trigger date for the statute of limitations. (*Id.* at 8.)

Plaintiffs oppose Defendants' statute of limitations

argument on several fronts. (Pls.' Opp'n Br. 3-6.) First, Plaintiffs argue that the Court's previous rulings in three related matters establish that "for the purpose of calculating the statute of limitations, the complaints adequately plead that Defendants' massive fraudulent scheme **[*12]** was discovered, at least in part, on August 10, 2016, when the [Wall Street Journal ("WSJ")] partially revealed a criminal investigation into Valeant." (*Id.* at 4.) Next, Plaintiffs argue that "as a legal matter . . . . none of the public disclosures prior to the WSJ's August 10, 2016 article [(the "August 10 WSJ Article")] triggered the statute of limitations for Plaintiffs' fraud claims[,]" because after the publication of the article "the market learned the truth about Valeant . . ." (*Id.* at 5 (citing Compl. ¶ 14.)

Plaintiffs parenthetically cite *Alaska Electrical Pension Fund v. Pharmacia Corp., No. 03-1519, 2012 U.S. Dist. LEXIS 67266, 2012 WL 1680097, at *1 (D.N.J. May 14, 2012)*, to ostensibly argue that it was not until August 10, 2016 and the publishing of the WSJ article that Plaintiffs had sufficient facts to plead the required scienter. (*Id.*) Plaintiffs also advance several arguments via footnote, including: (1) it would be inconsistent to apply one trigger date to Plaintiffs after applying another to other plaintiffs, especially in light of Defendants' SLUSA arguments, (2) in another related matter, the Court "explicitly refused to determine the date on which truth was revealed as a matter of law at the pleading stage[,]"; (3) there are several dates after August 10, 2016 which could be trigger dates; and (4) the filing of the Class **[*13]** Complaint on June 24, 2016 is not the trigger date because "[a] complaint can be filed early for any number of reasons unrelated to the substantive value of the claims." (*Id.* at 4-5 n.4-6, 8.)

Plaintiffs mischaracterize the Court's previous rulings. In *Lord Abbett Investment Trust-Lord Abbett Short Duration Income Fund v. Valeant Pharmaceuticals International, Inc. (Lord Abbett), No. 17-6365, 2018 U.S. Dist. LEXIS 129282, 2018 WL 3637514 (D.N.J. July 31, 2018)*, the Court determined that the two-year statute of limitations and five-year statute of limitations for certain causes of action provided for by the Sarbanes-Oxley Act of 2002 ("SOX") applied to violations of the Exchange Act. The Court denied the defendants' motions regarding timeliness of the plaintiffs' *Section 18* claims. *Lord Abbett, 2018 U.S. Dist. LEXIS 129282, 2018 WL 3637514, at *9*. The Court applied this same reasoning in *Pentwater Equity Opportunities Master Fund Ltd. v. Valeant Pharmaceuticals International, Inc. (Pentwater), No. 17-7552, 2018 U.S. Dist. LEXIS 157340, 2018 WL 4401722 (D.N.J. Sept. 14, 2018)*; *Blackrock Global Allocation Fund, Inc. v. Valeant Pharmaceuticals International, Inc. (Blackrock), No. 18-0343, 2018 U.S. Dist. LEXIS 157320, 2018 WL 4401727 (D.N.J. Sept. 14, 2018)*; and *Senzar Healthcare Master Fund, LP v. Valeant Pharmaceuticals International, Inc. (Senzar), No. 18-2286, 2018 U.S. Dist. LEXIS 157326, 2018 WL 4401730 (D.N.J. Sept. 14, 2018)*. As Defendants point out, in *Lord Abbett, Pentwater, Blackrock*, and *Senzar*, the Court did not resolve when the statute of limitations began to run on the plaintiffs' *Section 18* claims because the issue before the Court was whether the extended statute of limitations provided by SOX applied to the plaintiffs' claims. (Defs.' Reply Br. 3.) As stated in *Senzar*, the Court "assum[ed] all *Section 18* claims accrued on or before August 10, 2016, [and concluded] the claims are timely under the SOX extended limitations period because they were filed on February 16, 2018." *Senzar, 2018 U.S. Dist. LEXIS 157326, 2018 WL 4401730, at *3*. Thus, Plaintiffs' arguments regarding (1) **[*14]** the Court's previous ruling and, (2) potential inconsistences between the Court presently ruling on the trigger date for Plaintiffs claims in this matter are inapposite.

Plaintiffs' arguments regarding the August 10 WSJ Article fail. The Complaint does not disclose what information the article contained that Plaintiffs did not already know prior to the articles' publication other than that "Valeant was under criminal investigation by the DOJ regarding whether it defrauded insurers by concealing its relationship to Philidor and for a variety of other deceptive business practices[,]" and that Valeant "ha[d] been cooperating and continues to cooperate with the ongoing Southern District of New York investigation." (Compl. ¶ 282.) While Plaintiffs argue that the August 10 WSJ Article contributed facts that allowed Plaintiffs to plead the requisite scienter, this argument is undermined by the fact that the portion of the Complaint dedicated to pleading Defendants' Scienter contains no specific reference to the August 10 WSJ Article and the information contained therein. (*See id.* ¶¶ 291-354. *But see id.* ¶ 290 (incorporating Plaintiffs' pleading regarding the August 10 WSJ Article into the Scienter section of Plaintiffs' complaint by reference).) **[*15]**

In *Pension Trust Fund*, the Third Circuit considered whether a plaintiff's Securities Act claims were untimely given certain "storm warnings." *Pension Tr. Fund, 730 F.3d at 277*. The Third Circuit concluded that by the date a class action complaint was filed asserting claims "substantially similar" to the claims the *Pension Trust Funds* plaintiffs were asserting, a reasonably diligent plaintiff would have begun investigating. *Id.*

The Third Circuit then considered when a reasonably diligent plaintiff would have discovered the "untrue statements or the omissions" giving rise to the plaintiffs' complaint if that same reasonable plaintiff began investigating at the same time the class action complaint was filed. *Id.at 278*. The Third Circuit concluded that a reasonably diligent plaintiff would have taken two months to discover the untrue statements and omissions because two months was the same amount of time required for the *Pension Trust Fund* plaintiffs' consultant to complete his or her analysis. *Id. at 279*. The Third Circuit noted that at the time the class action complaint was filed the consultant would have had access to information and databases that would have allowed the consultant to discover the facts underlying the plaintiffs' claims. **[*16]** *Id.* The Third Circuit, accordingly, concluded that a reasonably diligent plaintiff would have discovered the untrue statements or omissions in November 2008. *Id.* Thus, the *Pension Trust Fund* plaintiffs' claims were untimely because the complaint was filed in February 2010 and the applicable statute of limitation was one year. *Id.*

Here, the allegations set forth in Plaintiffs' Complaint suggest that by June 24, 2016, the day the Class Action Complaint was filed, a reasonably diligent plaintiff would have discovered the facts required to plead the Exchange Act claims Plaintiffs bring. On the whole, the Complaint mirrors the allegations set forth in the Class Action Complaint and at times copies the Class Action Complaint verbatim. More substantively, the Complaint alleges no fact absent from the Class Action Complaint that is required for Plaintiffs to plead their claims in the instant matter. Instead, the Complaint is replete with allegations regarding numerous news articles, press releases, public filings, and public statements that would have put a reasonably diligent Plaintiff on notice to start an investigation regarding the potential claims against Defendants. (Compl. ¶¶ 130-270.) **[*17]**

Inquiry notice is insufficient to trigger the statute of limitations for Securities Act claims. *Merck & Co., 559 U.S. at 653*. However, when a complaint is filed alleging substantially similar claims as raised in the instant matter, a reasonably diligent plaintiff would have sufficient information about the facts necessary to adequately plead the requisite facts "with sufficient detail and particularity to survive a 12(b)(6) motion to dismiss." *Pension Tr. Fund, 730 F.3d at 275*. Here, the Court notes that the *Section 10(b)* claims asserted in the Class Action Complaint survived a motion to dismiss pursuant to *Rule 12(b)(6)*. *See In re Valeant, 2017 U.S. Dist. LEXIS 66037, 2017 WL 1658822, at *1*. At bottom, the face of Plaintiffs' Complaint suggests that a reasonably diligent plaintiff would have had enough facts to plead the instant claims with sufficient detail and particularity to survive a motion to dismiss by the time the Class Complaint was filed.

Defendants argue that by filing the instant action, Plaintiffs forfeited the tolling of the statute of limitations period that Plaintiffs might have otherwise benefitted from pursuant to *American Pipe*. (Defs.' Moving Br. 9.) Plaintiffs argue that the statute of limitations was tolled on October 22, 2015 pursuant to *American Pipe* and its progeny. (Pls.' Opp'n Br. 6.) The Court's assessment **[*18]** of the application of the statute of limitations to Plaintiffs' Exchange Act claims is limited to the facts alleged on the face of the Complaint. Out of an abundance of caution and recognition that Plaintiffs allege a complicated multi-year scheme with an abundance of facts and public statements by the defendants, the Court will allow Plaintiff to replead. The Court, accordingly, will not decide whether Plaintiffs may enjoy the benefits of *American Pipe* at this time.

The Court does not reach Defendants' remaining arguments. For the Court to consider Defendants' statute of repose arguments at this time, the Court must assume Plaintiffs Complaint was timely. The Court will not make such an assumption. Defendants' final argument is that Count V should be dismissed because Plaintiffs must prove a primary violation of the securities law and have not done so. (Defs.' Moving Br. 13, ECF No. 26-1.) Because this argument relies on the Court dismissing Plaintiffs' Exchange Act claims, and the Court does not do so at this time, the Court does not reach this argument.

IV. CONCLUSION

For the reasons set forth above, the Court dismisses Counts I, II, and III as preempted by SLUSA. Based on the facts **[*19]** alleged in the Complaint, the Court finds that the trigger date for the statute of limitations on Plaintiffs' Exchange Act claims was June 24, 2016. Plaintiffs Complaint, consequently, was filed after the two-year of statute of limitations expired. The Court grants Plaintiffs the opportunity to replead.

V. ORDER

Based on the foregoing, and for other good cause shown,

IT IS on this 30th day of May, 2019 **ORDERED** that:

1. Defendants' Motion to Dismiss (ECF No. 26) is **GRANTED**.

2. By **July 1, 2019**, Plaintiff may file an amended complaint.

3. The Clerk of Court shall consolidate this matter into *In re Valeant Pharmaceuticals International, Inc. Securities Litigation*, Docket No. 15-7658.[4]

/s/ Michael A. Shipp

MICHAEL A. SHIPP

UNITED STATES DISTRICT JUDGE

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[4] As the parties are aware, the Court will be appointing a Special Master in *In re Valeant Pharmaceuticals International, Inc. Securities Litigation*, Docket No. 15-7658. If Plaintiffs file an amended complaint and Defendants move to dismiss, the Special Master will review the motion in the first instance and issue a Report and Recommendation for the Court's consideration.

CERTIFICATE OF FILING AND SERVICE

I, JooYun Kim, hereby certify pursuant to Fed. R. App. P. 25(d) that on June 15, 2020, the foregoing Volume II of the Joint Appendix for Plaintiffs-Appellants was filed through the CM/ECF system and served electronically. Unless otherwise noted, copies have been sent to the Court on the same date as above for filing via Federal Express.

/s/ JooYun Kim
JooYun Kim
Attorney for Appellants