No. 15-55432

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL RESH, WILLIAM SCHOENKE, HEROCA HOLDING, B.V., and NINELLA BEHEER, B.V.,
Plaintiffs-Appellants,

v.

CHINA AGRITECH, INC., YU CHANG, YAU-SING TANG, GENE MICHAEL BENNETT, XIAO RONG TENG, MING FANG ZHU, LUN ZHANG DAI, HAI LIN ZHANG, CHARLES LAW, and ZHENG ANNE WANG,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California

The Honorable R. Gary Klausner

District Court Case No. 2:14-cv-05083-RGK-PJW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Defendant-Appellee China Agritech, Inc., hereby certifies that China Agritech, Inc., has no parent corporation. Carlyle Asia Growth Partners IV, L.P., and CAGP IV Co-Investment, L.P., investment funds affiliated with The Carlyle Group, collectively own more than 10% of the stock of China Agritech, Inc.

Dated: November 30, 2015

By: s/ Seth Aronson
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INTRODUCTION

This is the third identical class action against Appellee China Agritech, Inc. ("China Ag"), since 2011. The first failed in 2012, the second in 2013. By the time this case was filed in 2014, the statute of limitations had lapsed—17 months earlier. To salvage their class-based claims, Appellants Michael Resh, William Schoenke, Heroca Holding, B.V., and Ninella Beheer, B.V. (collectively, the "*Resh* Plaintiffs" or just "Plaintiffs") ask this Court to adopt a new rule that would immunize virtually all putative class actions from statutes of limitations. If permitted, Plaintiffs' proposal would incentivize lawyer-driven, serial litigation of class-action denials—an abusive practice under any measure and contrary to the principle that, after a prescribed length of time, a putative defendant should be free to move on with its business and put inadequate class claims behind it.

At multiple points in each of the first two cases, including after each class-certification denial, China Ag shareholders were given notice and an opportunity to intervene under the special notice requirements of the Private Securities Litigation Reform Act (the "PSLRA"). Plaintiffs chose not to get involved. Now, despite ample notice and countless occasions to intervene or bring a class action of their own within the two-year statutory period, the *Resh* Plaintiffs seek to relitigate the prior class-certification denials in a third suit alleging the very same wrongdoing. They are not pursuing relief for themselves—they rebuffed the District Court's

invitation to plead their own claims—but instead seek yet another chance to revive a class that twice failed certification.

The Court should not permit Plaintiffs to sit back and watch a court twice deny class certification before deciding to take their own shot, only after the statute of limitations expires during their spectating. This is the type of abusive, sequential litigation this Court warned of in *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139 (9th Cir. 2000), and it remains contrary to this Court's and the Supreme Court's precedent.

STATEMENT OF ISSUES

1. Whether the District Court correctly concluded that Plaintiffs' class claims are time-barred and not subject to tolling during the pendency of two previous identical class actions in which class certification was denied.

2. Whether the District Court's denial of class certification can be affirmed based on principles of comity.

3. Whether the District Court's denial without prejudice of Plaintiffs' motion for lead-plaintiff appointment is a non-reviewable order outside the scope of appellate review, and if not, whether it constituted harmless error.

4. Whether the District Court's *sua sponte* dismissal without prejudice of Plaintiffs' individual claims constituted harmless error where the District Court

subsequently gave Plaintiffs an opportunity to file an amended complaint to assert individual claims.

All applicable statutes are contained in this Answering Brief or Exhibit B to the Addendum of Plaintiffs-Appellants' Opening Brief.

STATEMENT OF JURISDICTION

a) Because this action arises under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t(a), the lower court had subject-matter jurisdiction under 15 U.S.C. § 78aa and 28 U.S.C. § 1331.

b) The Orders appealed from are not final or otherwise appealable under 28 U.S.C. § 1291. On December 1, 2014, the Honorable R. Gary Klausner of the District Court for the Central District of California granted without leave to amend China Ag's Motion to Dismiss Plaintiffs' Putative Class Action or, in the Alternative, Class Allegations As Barred by the Statute of Limitations. (*See* Plaintiffs-Appellants' Excerpts of Record ("ER") 006–11.) Plaintiffs then filed a Motion for Reconsideration of the December 1, 2014 Order, which the District Court denied on February 23, 2015. (*See* ER 001–04.)

The Court may hear appeals from final decisions of a district court. *See* 28 U.S.C. § 1291. "A final decision is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 870 (9th Cir. 2004)

(internal quotation marks omitted). The District Court's Orders granting China Ag's Motion to Dismiss and denying Plaintiffs' Motion for Reconsideration do not constitute final, appealable decisions because they permitted Plaintiffs to file an amended complaint asserting just their individual claims. (*See* ER 002, 005.) This is true even though the case was administratively closed on January 7, 2015. *See Dees v. Billy*, 394 F.3d 1290, 1294 (9th Cir. 2005) (administrative closure does not constitute a final judgment). The Federal Rules of Appellate Procedure therefore required 150 days to pass before Plaintiffs filed their notice of appeal. *See* Fed. R. App. P. 4(a)(7)(ii).

c) On March 19, 2015, Plaintiffs filed a Notice of Appeal under Federal Rule of Appellate Procedure 4(a)(1)(A) and 4(a)(2). The District Court had not entered a final judgment, and 150 days had not passed since either the District Court's December 1, 2014 Order or its February 23, 2015 Order. This Court therefore lacks subject-matter jurisdiction under 28 U.S.C. § 1291 because Plaintiffs' Notice of Appeal was premature.

STANDARD OF REVIEW

A district court's decision on a motion to dismiss is reviewed *de novo*. *S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 782 (9th Cir. 2008). Denial of leave to amend a pleading is subject to review for abuse of discretion. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). The Court "can affirm

the district court on any basis supported by the record." *Wood v. City of San Diego*, 678 F.3d 1075, 1086 (9th Cir. 2012). Orders by a district court that are not material to the final judgment are not reviewable. *See Nat'l Am. Ins. Co. of Cal. v. Certain Underwriters at Lloyd's London*, 93 F.3d 529, 540 (9th Cir. 1996).

Regardless of the applicable standard, "judicial error alone does not mandate reversal." *Obrey v. Johnson*, 400 F.3d 691, 699 (9th Cir. 2005). Instead, the Court must affirm lower court orders that "do not affect the substantial rights of the parties." 28 U.S.C. § 2111. In light of *Shinseki v. Sanders*, 556 U.S. 396 (2009), "[t]he burden is on the party claiming error to demonstrate not only the error, but also that it affected his 'substantial rights.'" *Ludwig v. Astrue*, 681 F.3d 1047, 1053 (9th Cir. 2012).

STATEMENT OF THE CASE

A. China Ag fell victim to a campaign of public attacks, causing its stock price to fall.

China Ag manufactured and sold organic fertilizers, distributing its products to farmers in 28 Chinese provinces as well as neighboring countries. (*See* Defendant-Appellee's Supplemental Excerpts of Record ("SER") 118.) In 2005, after completing a reverse merger with a U.S.-based entity, China Ag began listing its shares on Nasdaq. (*See* ER 055.) The company prospered in the years that followed, with reported revenues tripling from $25 million in 2005 to $76 million in 2009. (*See* SER 119, 122.) Seeking to capitalize on China's supercharged

economy, U.S. investors saw the potential for even more growth. In 2009, after performing its own due diligence, Carlyle Asia Growth Partners IV, L.P.—a division of The Carlyle Group, one of the world's largest and most successful investment firms—invested $15 million in China Ag. (*See* SER 120.) The following year, Glickenhaus & Co., the longtime, multigenerational New York-based investment firm, bought $4 million worth of China Ag stock. (*See* SER 123.)

In 2011, everything changed. That year, some two dozen Chinese reverse-merger companies fell victim to short-seller attacks, fueled by online, often anonymous, "exposés" designed to create shareholder panic and drive stock prices down. China Ag was not immune. On February 3, 2011, a "Lucas McGee" struck first, posting a report, "China Agritech: A Scam" ("LM Report"), on a crowd-sourced website. (*See* SER 128–43.) In the LM Report, "McGee" made a litany of unsubstantiated accusations, from China Ag being a shell company to China Ag allegedly overstating its revenue and concealing related-party transactions. (*See id.*) Another short seller, Bronte Capital, soon joined the assault, making similarly unsupported allegations. (*See* SER 144–46.) By shorting China Ag's stock, both McGee and Bronte Capital stood to benefit sizably if their disparaging claims caused China Ag's stock price to drop. (*See* SER 128, 147.) Unsurprisingly, China Ag's stock price plummeted in the wake of these attacks.

B. China Ag began a years-long legal battle.

The accusations instantly engulfed China Ag in a firestorm of litigation and media coverage. Copying the short-seller reports almost verbatim, plaintiffs' lawyers seized the chance to file suit against China Ag and its current and former officers and directors, including Appellee Charles Law. Many public statements followed—plaintiffs' lawyers announcing the lawsuits, China Ag vowing to investigate the allegations—totaling more than 20 press releases in all. (*See, e.g.*, SER 148–49, 151–52.) The SEC also launched its own investigation. (*See* SER 100–03.) Soon, China Ag's troubles caught the attention of national media outlets like Bloomberg and NBC News, which described the litigation to an audience of millions. (*See* SER 123–27, 150.)

The first of the many lawsuits to be filed was *Dean v. China Agritech, Inc., et al.*, Case No. 2:11-cv-01331-RGK-PJW ("*Dean*"), which was litigated in the United States District Court for the Central District of California before the Honorable R. Gary Klausner. On February 11, 2011, eight days after the LM Report's release, shareholder Theodore Dean filed the putative securities class action against China Ag and various officers and directors. (*See* ER 271.) On that same day and again on February 18, 2011, Dean's counsel notified China Ag shareholders of the class action through global media platforms Business Wire (reaching more than 89,000 media outlets in 162 countries) and GlobeNewswire

(reaching 1,000,000 financial desktops), inviting shareholders to come forward and serve as lead plaintiffs. (*See* SER 151–54.) Unlike the rules applicable to other types of putative class actions, the PSLRA requires a securities class action plaintiff to provide notice "of the pendency of the action, the claims asserted therein, and the purported class period" in "a widely circulated national business-oriented publication or wire service." 15 U.S.C. § 78u–4(a)(3)(A)(i).

Numerous shareholders responded. For example, shareholders Deborah Pepperdine and Eduardo Calcagno filed their own class actions (*see* SER 155–62), while Thomas Gearing chose to bring an individual action on behalf of himself and his family trusts (*see* SER 104–08). Ultimately, before the statute of limitations ran two years later, 21 shareholders had named China Ag in lawsuits across the country. None of the *Resh* Plaintiffs was among them.

As other China Ag shareholders sold their stock and geared up for litigation, Plaintiff Michael Resh had the opposite reaction. A self-proclaimed "internationally recognized Advisor[] in the field of Securities Fraud Litigation" and founder of ReshFitzgerald—a company "committed to monitoring through our investigative team of professional's [*sic*] potential securities fraud class actions [*sic*] cases"—Resh did not own any China Ag stock when the LM Report appeared. (*See* SER 109–10.) His job, though, was to closely track the stock market for potential fraud, so that he could alert plaintiffs' lawyers about "the opportunity to

represent the shareholder interest and initiate litigation." (*See* SER 110.) And on February 22, 2011, less than three weeks after the LM Report was posted and presumably while "actively" monitoring the stock market and investor news for his attorney clients, Resh purchased 1,000 shares of China Ag stock at a price 50% below its trading price at the end of 2010. (*See* ER 112.)

C. The District Court denied class certification in *Dean*.

For the next year and a half, the parties vigorously litigated *Dean*. On April 12, 2011, six shareholders—but not any of the *Resh* Plaintiffs—moved the District Court for appointment as lead plaintiffs. (*See* ER 272.) On May 16, 2011, the District Court denied without prejudice the *Dean* plaintiffs' motions, postponing until after class certification its appointment of the lead plaintiffs who would represent and protect the putative class. (*See* ER 274.) On June 22, 2011, Dean and new co-plaintiffs amended the initial complaint. (*See* SER 059–99.)

Meanwhile, Resh knew that China Ag remained under siege—he sold his China Ag stock in June 2011 as the price continued to sink—but took no legal action. (*See* ER 112.) Heroca Holding also took no legal action, despite having closely monitored the stock price: It bought 20,000 shares on February 8 and 23, sold 10,000 shares on February 25, then bought 10,000 shares more on March 11. (*See* ER 119.)

On October 27, 2011, the District Court granted China Ag's motion to dismiss the *Dean* plaintiffs' Securities Act claims but denied its motion to dismiss the Exchange Act claims. (*See* ER 280.) The parties then conducted ten months of discovery, including the production of 500,000 pages of documents and eight depositions. (*See* ER 280–95.)

On January 6, 2012, the *Dean* plaintiffs moved for class certification (*see* ER 281), beginning what would be four months of protracted litigation on class-certification issues. Collectively, the parties submitted five expert reports (four from the *Dean* plaintiffs, one from China Ag) and, with motions to exclude and strike the *Dean* plaintiffs' expert reports, a total of nine briefs. (*See* ER 281–87.) The parties also took five depositions, three of the named plaintiffs and two of the parties' experts. (*See* ER 238.) The crux of this evidence—whether China Ag's stock traded on an efficient market—was relevant to the entire class. Unless it did, the putative class could not invoke the fraud-on-the-market presumption of reliance to satisfy the predominance requirement of Federal Rule of Civil Procedure 23(b)(3).

On May 3, 2012, with thousands of pages of evidence in the record, the District Court denied class certification. (*See* ER 205–12.) The District Court rejected China Ag's motions to exclude and strike, finding that the *Dean* plaintiffs' expert "used generally accepted methods." (*See* ER 208.) The District Court also

specifically found that the *Dean* plaintiffs were adequate and typical representatives under Rule 23(a). (*See* ER 208–10.) The District Court denied class certification, however, because the *Dean* plaintiffs were "unable to establish that [China Ag] stock was traded on an efficient market," and therefore could not "rely on the fraud-on-the market presumption of reliance." (ER 211.) "[W]ithout a presumption of reliance, Plaintiffs [were] unable to establish that questions of law or fact common to class members predominate over any questions affecting only individual members." (*Id.*) The *Dean* plaintiffs filed a Rule 23(f) petition, which this Court summarily denied. (*See* SER 111.)

On June 29, 2012, with the hope of certifying a class in *Dean* all but gone, Dean's counsel published a ***third*** notice to investors on international news platform GlobeNewswire. Going well beyond what the PSLRA required, Dean's counsel explicitly informed other shareholders—a pool that included Resh and his co-plaintiffs—that they needed to take immediate action if they wanted to preserve their claims:

> [T]he Court denied the plaintiffs' motion for class certification. As a result, your rights as a shareholder are no longer protected. ***You must act yourself to protect your rights***. You may protect your rights by joining in the current Action as a plaintiff or by filing your own action against China Agritech.

(SER 112–13 (emphasis added).)

Although Resh's job was to monitor developments such as these—he claims to have "caused over a hundred Class Action suits to be filed" (SER 109)—neither he nor the other *Resh* Plaintiffs responded to the urgent warning about protecting their rights. Over the next five months, during which the *Dean* plaintiffs continued litigating their case as individuals, the *Resh* Plaintiffs did not intervene or otherwise surface in the litigation. Nor did the *Resh* Plaintiffs bring their own action. In September 2012, China Ag settled with the *Dean* plaintiffs, and their action was dismissed with prejudice. (*See* ER 295.)

D. The District Court denied class certification again in *Smyth*.

On October 4, 2012, three weeks after *Dean* settled, another shareholder, Kevin Smyth, filed almost an identical class-action complaint against China Ag in the District of Delaware ("*Smyth*"). (*See* ER 255.) As in *Dean*, plaintiffs' counsel complied with PSLRA notice requirements and notified investors, including the *Resh* Plaintiffs, of the class action through Business Wire, informing them that "[a]ny member of the proposed class may move the court to serve as lead plaintiff through counsel of their choice." (SER 114–16.) Eight shareholders responded and sought appointment as lead plaintiffs. (*See* ER 256.) Again, the *Resh* Plaintiffs were not among them. Given the similarities between *Smyth* and *Dean*, the Delaware court granted China Ag's motion to transfer the case to the United

States District Court for the Central District of California, and like *Dean* before it, *Smyth* was assigned to the Honorable R. Gary Klausner. (*See* ER 241, 243.)

Then, for another year, China Ag defended against the same allegations presented in *Dean*. In August 2013, the *Smyth* plaintiffs moved for class certification. (*See* ER 246.) The District Court denied that motion, too, finding that the *Smyth* plaintiffs were not "typical" or "adequate" under Federal Rule of Civil Procedure 23(a). (*See* ER 130.) Again, none of the *Resh* Plaintiffs intervened. A few months later, the *Smyth* plaintiffs voluntarily dismissed their claims with prejudice. (*See* ER 252.) After nearly three years of litigation, China Ag believed it had at last met and resolved every claim stemming from the LM Report's allegations. More importantly, while *Smyth* was being litigated, the limitations period on federal securities claims had run.

E. The District Court dismissed Plaintiffs' class claims as time-barred.

1. *Plaintiffs finally surfaced, months after Dean and Smyth were resolved and the statute of limitations had expired.*

Then Michael Resh appeared. Copying liberally from the *Dean* complaint, he filed a class-action complaint on June 30, 2014, nine months after class certification in *Smyth* was denied and 17 months after the statute of limitations had lapsed. (*Compare* SER 059–99 *with* SER 163–221.) Resh offered no explanation for his delay, not even bothering to acknowledge that 21 other China Ag

shareholders had brought claims against China Ag while Resh, a self-proclaimed financial professional, did nothing.

As with *Dean* and *Smyth*, the case was assigned to the Honorable R. Gary Klausner. And on September 3, 2014—another two months later—the other *Resh* Plaintiffs surfaced. In the lone application for lead-plaintiff appointment, Plaintiffs William Schoenke, Heroca Holding, and Ninella Beheer pointedly omitted Resh; they mentioned neither him nor their own reasons for belatedly arriving on the scene. (*See* ER 303.) The amended class complaint, filed the very next day by all Plaintiffs, did nothing to clarify their shifting roles or relationships. (*See* ER 050–109.) Instead, the amended class complaint repeated almost verbatim the allegations in the original complaint. On October 17, 2014, the District Court denied without prejudice the lead-plaintiff application. (*See* ER 022.)

2. *The District Court concluded that Plaintiffs' class claims are barred by the statute of limitations and dismissed Plaintiffs' class-action complaint against China Ag.*

On December 1, 2014, the District Court granted China Ag's and Charles Law's motions to dismiss Plaintiffs' class-action complaint without leave to amend on the basis that Plaintiffs' claims were barred by the applicable statute of limitations. (*See* ER 006.) In granting the motions, the District Court held that Plaintiffs' class complaint was time-barred because it was filed more than two

years after the LM Report and Bronte Capital blog post appeared online. (*See* ER 008.)

The District Court rejected Plaintiffs' arguments that the earlier *Dean* and *Smyth* putative class actions tolled the statute of limitations. (*See* ER 010–11.) While the Supreme Court has held that the commencement of a class action tolls the limitations period for subsequent ***individual*** actions, the District Court recognized that the Supreme Court has not yet spoken to whether tolling applies to subsequent ***class*** actions. (*See* ER 009.) The District Court read this Court's decisions in *Robbin v. Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987), and *Catholic Social Services* to preclude tolling here. (*See id.*)

The District Court also rejected Plaintiffs' argument that tolling should apply here because the prior class-certification denials purportedly addressed only lead-plaintiff deficiencies, not class deficiencies. (*See* ER 010.) The District Court explained that the *Dean* class-certification denial was on Rule 23(b)(3) predominance grounds, meaning that "the claims were not suitable for class treatment." (*Id.*) As for Plaintiffs' contention that the *Dean* class-certification denial applied only to the *Dean* plaintiffs and the evidence they presented, the District Court found this unpersuasive because it "would allow tolling to extend indefinitely as class action plaintiffs repeatedly attempt to demonstrate suitability for class certification on the basis of different expert testimony and/or other

evidence." (ER 011.) Because an amendment would not cure this statute-of-limitations deficiency, the District Court dismissed Plaintiffs' class complaint without leave to amend. (*See id.*)

3. *The District Court dismissed non-appearing Defendants and invited Plaintiffs to file a complaint asserting individual claims.*

Given that China Ag and Charles Law were the only defendants who had appeared, the District Court's December 1, 2014 ruling technically applied only to them. The District Court therefore ordered Plaintiffs to show cause why the dismissal should not apply equally to the remaining named Defendants. (*Id.*) Finding that Plaintiffs "fail[ed] to provide an adequate reason why, in light of the Court's December 1, 2014 Order, the claims against the Remaining Defendants should not also be dismissed," the District Court on January 7, 2015, dismissed the remaining Defendants from the case. (ER 005.) In that same Order, the District Court emphasized that Plaintiffs were "not prevented from filing a complaint asserting individual, rather than class action, claims against China AG, Law, and the Remaining Defendants if they so choose." (*Id.*)

4. *The District Court denied Plaintiffs' Motion for Reconsideration, and they declined to file individual claims.*

Instead of filing individual claims, Plaintiffs on December 19, 2014, moved for reconsideration of the District Court's December 1 Order granting China Ag's and Law's motions to dismiss the class claims. (*See* ER 306.) On February 23,

2015, the District Court denied Plaintiffs' Motion for Reconsideration, finding that Plaintiffs had not provided any basis for altering or amending the ruling. (*See* ER 001–04.) In doing so, the District Court repeated its conclusion that the *Dean* class-certification denial was on class-wide predominance grounds, not lead-plaintiff deficiencies. And in any event, the District Court added, "Plaintiffs' class action claims [are] time-barred regardless of the grounds on which class certification was denied in the two earlier actions." (ER 003.)

While the District Court made clear that Plaintiffs' class claims were barred by the statute of limitations, it again emphasized that Plaintiffs could still file an amended complaint asserting individual claims against Defendants. (*See* ER 002.) Plaintiffs did not file an amended complaint or a separate individual action. They chose instead to file this appeal.

SUMMARY OF ARGUMENT

Plaintiffs' claims are untimely under the applicable two-year statute of limitations. *See* 28 U.S.C. § 1658(b). For any hope of proceeding, Plaintiffs must show that the statute of limitations was tolled during the pendency of ***both*** *Dean* ***and*** *Smyth*—tolling during only one of those prior class actions would be insufficient to render the *Resh* complaint timely.[1]

[1] Plaintiffs do not dispute that the statute of limitations began running on February 3, 2011, when the LM Report first alerted shareholders to the purported fraud. (*See* App. Br. at 10.) On June 22, 2011, the *Dean* amended complaint was

Plaintiffs cannot make the required showing. The Supreme Court has recognized the existence of tolling only for later-filed ***individual*** claims based on the need to protect absent class members' reliance on the class mechanism (referred to here as "*American Pipe* tolling"). *See Am. Pipe and Constr. Co. v. Utah*, 414 U.S. 538, 551–52 (1974); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983). For its part, this Court in *Robbin* rejected *American Pipe* tolling for subsequent ***class*** claims filed outside the statutory period where, as here, certification was previously considered and denied. 835 F.2d at 214–15. This Court's later statements on *American Pipe* tolling only reaffirmed that conclusion. *See, e.g.*, *Catholic Social Servs.*, 232 F.3d at 1146–49. Other circuits have taken varying approaches to tolling for subsequent class claims, but one theme unites them all—the tolling doctrine announced by the Supreme Court in *American Pipe* does not allow absent class members who sleep on their rights to relitigate class-certification denials beyond the statutory period.

This is with good reason. *American Pipe* tolling reflects a policy of judicial administration that carefully balances the efficiencies inherent in class treatment against the motivations behind enacting statutes of limitations—namely, repose for

filed, and 316 days later, on May 3, 2012, the District Court denied class certification. (*See* ER 274, 287.) On October 4, 2012, the *Smyth* complaint was filed on behalf of a class identical to the one alleged in the amended *Dean* complaint, and 357 days later, on September 26, 2013, the District Court denied class certification in *Smyth*. (*See* ER 236, 249.) On June 30, 2014—1,243 days after the LM Report was released—Resh filed this action. (*See* ER 301.)

defendants and finality for the judicial system. Where absent class members rely on the existence of a putative class that later fails, those absent class members will be allowed to intervene or file individual claims despite the applicable statute of limitations. For class claims, however, the balance of interests is different, particularly for claimants who seek to relitigate class-certification denials. In this context, a defendant's interest in finality and repose trumps an abusive litigant's wishful goal of side-stepping the statute of limitations after years of inaction.

Recognizing that they seek an outcome foreclosed by this Court's precedent, Plaintiffs try to manufacture a procedural vehicle that would keep all class claims alive beyond the applicable statutory period. They offer a two-step argument: (i) *American Pipe* tolling should apply to all subsequent claims, whether on behalf of individuals or a class, with repeat class allegations viewed only through the prism of preclusion; and (ii) preclusion cannot apply because absent class members can never be bound to class-certification denials. Thus, according to Plaintiffs, there should be no limit on repeat class actions at all. The Court should reject Plaintiffs' blueprint for endless class litigation and stick with its own precedents holding that *American Pipe* tolling applies only to subsequent individual actions. And whether the Court decides this case on statute of limitations or general comity grounds, the District Court's decision dismissing the class claims should be affirmed.

Plaintiffs' challenges to the District Court's other orders are not appealable, and in any event, those orders do not constitute prejudicial error. Because Plaintiffs have failed to show that the District Court erred in applying the law such that their substantial rights were affected, this Court must affirm all decisions below.

ARGUMENT

A. Plaintiffs' claims are barred by the Exchange Act's two-year statute of limitations.

The *Resh* Plaintiffs do not dispute that their claims are time-barred on their face. Under the Exchange Act, plaintiffs must bring their claims no later than two years after they discovered or should have discovered the violation. *See* 28 U.S.C. § 1658(b); *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010). Here, the *Resh* Plaintiffs were on notice of the alleged fraud beginning with the LM Report and the subsequent *Dean* action in February 2011. (*See* SER 128–43, 151–52.) As required by the PSLRA, the *Dean* plaintiffs in February 2011 notified all putative class members, including the *Resh* Plaintiffs, of their opportunity to participate in the litigation. (*See* SER 151–54.) Yet Resh did not file his claims until June 30, 2014—17 months too late. (*See* ER 301.)

B. Tolling does not save Plaintiffs' time-barred claims.

1. *This Court's precedent does not support tolling for subsequent class actions.*

By arguing that tolling saves their putative class claims, Plaintiffs ignore the longstanding rule that *American Pipe* tolling applies only to individual claims, not subsequent class actions. In *American Pipe*, the Supreme Court held that tolling applies to absent class members who seek to intervene with individual claims after class certification is denied, reasoning that "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.

Almost a decade later, the Supreme Court extended *American Pipe* tolling to permit absent class members to rely on tolling for their separate individual lawsuits. *See Crown, Cork*, 462 U.S. at 354 (once class certification is denied, "class members may choose to file their own suits or to intervene as plaintiffs in the pending action"). While both *American Pipe* and *Crown, Cork* allow absent class members to obtain tolling when seeking ***individual*** relief, neither addresses whether absent class members obtain tolling when seeking relief on behalf of the same putative class and attempt to relitigate an earlier class-certification denial after the limitations period lapses. *See Korwek v. Hunt*, 827 F.2d 874, 877 (2d Cir. 1987) ("[N]either case speaks to the issue before this Court on this appeal: the

tolling of statutes of limitations for subsequently filed ***class actions***.") (emphasis in original).

The Supreme Court's silence, however, does not make this an open question. This Court specifically addressed the issue in *Robbin*, where it "squarely rejected" the premise that tolling can stop the clock for plaintiffs who seek to litigate anew claims on behalf of an identical class. *See* 835 F.2d at 214–15. In *Robbin*, an initial group of plaintiffs filed a securities class action in federal court and lost a motion to certify their class. Two years later, Robbin filed a new class-action complaint making the same allegations. *See id.* at 213–14. Noting that *American Pipe* and *Crown, Cork* create "a careful balancing" of interests—among them, a defendant's interest in finality—this Court found that "to extend tolling to class actions tests the outer limits of the *American Pipe* doctrine and . . . falls beyond its carefully crafted parameters into the range of abusive options." *Id*. at 214 (internal quotation marks omitted). The Court concluded that Robbin's class action was time-barred, but his individual action could proceed. *See id.* at 215. Other circuits—including the First, Second, Fifth, and Eleventh—are in accord.[2]

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[2] *See Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998) (refusing to "stack" tolling for three earlier class actions to make fourth class action timely); *Korwek*, 827 F.2d at 879 (no tolling for class action alleging same class and same claims as previously filed suit); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985) (no tolling in two successive class actions for subsequent individual action); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994) (no tolling for subsequent class actions by member of original

The reasoning of *Robbin* and its progeny applies with full force to this case. Indeed, Plaintiffs here are distinguishable from those in *Robbin* only in that their delay has been more egregious. They sat through not one, but two failed certification attempts without a word. Notably, Plaintiffs ignored *Robbin* at the District Court, and address it here only in a footnote that offers no cogent reason to depart from its holding. (*See* App. Br. at 25–26, n.14.) While Plaintiffs now assert that *Employers-Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Capital Advisors*, 498 F.3d 920, 925 (9th Cir. 2007), "questioned the scope of *Robbin*'s holding," they misquote the decision to make that claim. (*See* App. Br. at 25–26, n.14.) *Anchor Capital* merely acknowledges that *American Pipe* tolling might be permitted for a subsequent class action if the earlier class action was terminated without a decision on the merits of certification:

> There is case law suggesting that Appellants would have been precluded from filing another class action. *See Robbin v. Fluor Corp.*, 835 F.2d 213, 213 (9th Cir. 1987). It is also possible, however, that this rule only applies when the appropriateness of the class action has been previously rejected. Here the appropriateness of a class action was never examined; instead the case was voluntarily dismissed before the class was certified.

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class); *see also Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988), *abrogated and overruled on other grounds* (no tolling because "the pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class").

498 F.3d at 925 (internal citation omitted). That is not the case here, and Plaintiffs offer no other way to distinguish *Robbin*.

Following *American Pipe* and *Crown, Cork*, courts consistently acknowledge the importance of upholding statutes of limitations and preventing abusive tolling, finding that the Supreme Court "did not intend to afford plaintiffs the opportunity to argue and reargue the question of class certification by filing new but repetitive complaints." *Korwek*, 827 F.2d at 879; *accord Basch*, 139 F.3d at 11 ("Plaintiffs may not stack one class action on top of another . . . with the hope of attracting more potential plaintiffs and perpetually tolling the statute of limitations as to all such potential litigants, regardless of how many times a court declines to certify the class."); *Salazar-Calderon*, 765 F.2d at 1351 (refusing to "piggyback one class action onto another" to indefinitely toll statute of limitations).

Here, it is undisputed that Plaintiffs' case is the same as the two previous actions, alleging the same facts on behalf of the same putative class. (*Compare* ER 050–109 *with* SER 059–99 and ER 136–50.) After the District Court dismissed *Dean* and *Smyth*, and the limitations period expired, China Ag reasonably expected that it would face no further shareholder class actions, and the District Court likely expected the same. *See Am. Pipe*, 414 U.S. at 554 ("[T]he right to be free of stale claims in time comes to prevail over the right to prosecute them."). If Plaintiffs are

permitted to move forward with yet another round of certification, other investors will conclude that they, too, can file another class action—with the limitations period tolled while *Resh* is pending—if the District Court again denies class certification. This litigation could conceivably have no end.

2. *The only exception articulated by this Court is inapplicable here.*

In *Catholic Social Services*, this Court recognized a limited exception to the general ban on class-action tolling but was careful not to endorse serial relitigation of class-certification denials. Rather, it held that tolling was appropriate there because the district court had ***granted*** class certification and the class representatives had lost standing only because of an intervening change in the law. *See* 232 F.3d at 1147. Reaffirming *Robbin*, the Court made clear that it would not have tolled the statute of limitations had the district court ***denied*** class certification and subsequent class representatives sought to relitigate that denial: "If class action certification had been denied in [an earlier case], and if plaintiffs in this action were seeking to relitigate the correctness of that denial, we would not permit plaintiffs to bring a class action." *Id.*

As the Court explained, the *American Pipe* tolling rule strikes a balance between the "dual purposes" of efficiency under Rule 23 and repose under statutes of limitations by relieving absent class members of the need to assert their individual rights during the initial pendency of a class action. *Id.* at 1146–47; *see*

also Am. Pipe, 414 U.S. at 555 (tolling in any particular context must be consistent "both with the procedures of Rule 23 and with the proper function of the limitations statute"). The balance of interests presented by the unique facts in *Catholic Social Services* warranted a departure from the general rule against tolling for subsequent class claims because there was no suggestion of abusive relitigation. The plaintiffs sought only to comply with the law as it changed and had "at all times vigorously pursued this litigation." *Catholic Social Servs.*, 232 F.3d at 1146. By contrast, Plaintiffs' prosecution here has been anything but vigorous.

Moreover, Plaintiffs' own authorities recognize that *Catholic Social Services* has no application here, where the District Court twice denied class certification in two separate actions—neither of which they sought to join. *See In re Toys "R" Us FACTA Litig.*, 2010 WL 5071073, at *14 (C.D. Cal. Aug. 17, 2010) ("In *Catholic Social Services* . . . the en banc court permitted tolled claims to be asserted in a later class action because the putative class action was ***not seeking either to relitigate an earlier denial of certification*** or to correct a procedural defect under Rule 23.") (emphasis added); *In re Am. Funds Sec. Litig.*, 556 F. Supp. 2d 1100, 1112 (C.D. Cal. 2008) (finding that *Catholic Social Services* "held that the case before it involved a class that had been properly certified in the first instance and

therefore ***did not involve any effort to circumvent a prior ruling of the court*** or to piggyback one class action on another") (emphasis added).

Nor do *Catholic Social Services* and *Robbin* conflict—the fact that *Catholic Social Services* addressed an earlier ***grant*** of class certification renders it unique among tolling cases. And even after *Catholic Social Services*, courts in this Circuit have continued to follow *Robbin* to deny tolling the statute of limitations for subsequent class actions. *See, e.g.*, *Newport v. Dell, Inc.*, 2008 WL 4347311, at *6 (D. Ariz. Aug. 21, 2008) ("*Catholic Social Services* may be interpreted as a unique case which does not undermine the essential holding in *Robbin*"—i.e., that "[a] related class action tolls the statute of limitations for individual claims only, not for subsequently-filed class actions"); *Madani v. Shell Oil Co.*, 2008 WL 7856015, at *2 (C.D. Cal. July 11, 2008) (finding tolling unavailable for subsequent class actions in the "rule clearly expressed in *Robbin*").

Statutory periods are designed to "assure fairness to defendants" and relieve courts "of the burden of trying stale claims when plaintiffs have slept on their rights." *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) (statutes of limitations "promote justice 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"). Where, as here, plaintiffs have ignored their rights despite years of warnings, the policy motivations behind statutes of

limitations are particularly compelling. At most, tolling under this Court's precedent permits Plaintiffs to bring individual actions on their own behalf, not to relitigate the same class action.

3. *Other circuits permit tolling where an earlier class-certification denial was based on class-representative deficiencies, but Plaintiffs' claims are untimely even under that approach.*

Seeking to avoid the consequences of *Robbin* and *Catholic Social Services*, Plaintiffs look to other circuits that permit tolling where the class-certification denial was based on deficiencies of the class representative himself. But even those circuits would not find tolling here: The District Court's denial of class certification in *Dean* was based not on the suitability of any plaintiff but on the propriety of certification for the class.

Courts that follow the more permissive, out-of-circuit approach still do not allow tolling "where a substantially identical class suit was denied certification due to a Rule 23 defect in the class itself." *See, e.g.*, *Yang v. Odom*, 392 F.3d 97, 112 (3d Cir. 2004). In *Yang*, the plaintiffs sought to represent a class of shareholders that was identical to a class another district court had previously refused to certify. *See id.* at 99–100. The original class comprised three subclasses, two of which the first court refused to certify on adequacy and typicality grounds, and one it refused to certify on numerosity grounds. *See id.* at 108. After acknowledging the different approaches in other circuits, the Third Circuit held that tolling applies to

subsequent class actions where a previous denial of class certification was based on adequacy and typicality grounds, which it characterized as "deficiencies of the putative representative." *Id.* at 112. The court therefore allowed tolling for those two subclasses.

But *Yang* expressly rejected the possibility of tolling for the subclass that was denied certification on numerosity grounds, which the Third Circuit recognized as a "class-based determination." *See id*. at 111. As *Yang* makes clear, the key issue under this view of tolling is whether the basis for the class-certification denial is a class-representative deficiency or a "class-based determination." *See id.* at 110–11 ("[W]hat doomed certification for the class was the finding that numerosity was lacking—a class-based determination."). This distinction is necessary to prevent plaintiffs from repeatedly challenging decisions about the merits of class treatment and "stacking . . . class action suits indefinitely." *See id.* at 112. And it applies even where the first decision "couche[s] its findings in terms of [plaintiff's] failure to meet her burden," as the District Court's decision did in *Dean*. *See id*. at 110–11. As long as the earlier certification denial was a class-based determination—whether or not characterized as a flaw in the putative class representative's evidentiary presentation—*American Pipe* tolling is not permitted for a subsequent class action.

Because predominance is a class-based determination rather than a flaw in the representative, the statute of limitations was not tolled for subsequent class actions during *Dean* even under the Third Circuit's more liberal standard. The District Court denied class certification in *Dean* because Federal Rule of Civil Procedure 23(b)(3)'s predominance requirement was not met ***for the putative class***. (*See* ER 211 (denying certification because "Plaintiffs are unable to establish that questions of law or fact common to class members predominate over any questions affecting only individual members").) Indeed, the District Court explicitly found that the lead plaintiffs in *Dean* were adequate representatives of absent class members and asserted claims typical of the class. (*See* ER 208–09.) As representatives, they satisfied each of Rule 23(a)'s requirements. (*See id.*) The *Resh* Plaintiffs therefore cannot take advantage of tolling during the pendency of *Dean*; 316 days of the two-year limitations period elapsed during that action. That alone makes the class claims here six months too late.[3]

Unsatisfied with the implications of their own precedent, Plaintiffs try to recast each of Rule 23(b)'s requirements as all being specific to the class representatives, since it is those plaintiffs who make the case for certification. Under Plaintiffs' theory, plaintiffs with better lawyers might succeed where

[3] Even if the *Resh* Plaintiffs were given the benefit of tolling during the 357 days that *Smyth* was pending—and, as explained below, they should not be—their class claims would still be time-barred.

previous plaintiffs have failed, so all certification denials are about the quality of the class representatives. Plaintiffs purport to gain *American Pipe* tolling during *Dean* because the District Court's decision to deny certification there was based on "lead plaintiff's experts' deficiencies rather than any suitability of the claims for class treatment." (App. Br. at 11–13, 34.) But because the plaintiff bears the evidentiary burden on each of the Rule 23 requirements, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, 131 S. Ct. 2541, 2551 (2011), a class-certification decision is always based on the quality of the plaintiff's evidentiary presentation. That does not suggest there is no difference between representative-related elements—i.e., adequacy and typicality—and class-related elements—i.e., numerosity and predominance. *See, e.g.*, *Brown v. NFL Players Ass'n*, 281 F.R.D. 437, 443 (C.D. Cal. 2012) ("The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.") (internal quotation marks omitted). A class representative's failure to establish predominance is never just a representative-related failure: As the District Court made clear, that failure signals the unsuitability of the class. *See* ER 010 (*Dean* plaintiffs' claims were "not suitable for class treatment" because plaintiffs "failed to establish the 'predominance' requirement of Rule 23(b)(3)"); *see also Yang*, 392 F.3d at 110–11 (rejecting tolling for class where court "couched its findings in terms of Thompson's failure to meet her burden," because "what doomed

certification for the class was the finding that numerosity was lacking—a class-based determination").

That the District Court allowed a second motion for class certification in *Smyth* does not change this conclusion. Its decision to allow another certification motion was not based on the statute of limitations or tolling, because the limitations period at that point had not yet run. (*See* ER 134.) As a result, the District Court allowed the *Smyth* plaintiffs—who brought suit 20 months after the alleged fraud came to light and did not require the benefit of tolling—to present their own evidence on a class-certification motion. (*See id.*) *Smyth* is therefore irrelevant to the question whether new plaintiffs can continue to relitigate certification ***after*** the statute of limitations expired.

District courts in this Circuit reached the same conclusion even before *Catholic Social Services*, giving putative lead plaintiffs the benefit of tolling only where an earlier class-certification denial was based on adequacy and typicality—class-representative deficiencies. *See In re Quarterdeck Office Sys., Inc. Sec. Litig.*, 1994 WL 374452, at *4–5 (C.D. Cal. Mar. 24, 1994) (allowing tolling for intervening plaintiffs because no court had "determined that proceeding as a class action is inappropriate, merely that [lead plaintiffs] are not proper class representatives"); *Shields v. Smith*, 1992 WL 295179, at *4–5 (N.D. Cal. Aug. 14, 1992) (permitting new class representative to intervene in original lawsuit and

serve as "typical" plaintiff just two months after class-certification denial on adequacy grounds). While these cases precede both *Catholic Social Services* and the PSLRA, which strengthened protections against abusive class actions like this one, the *Resh* Plaintiffs' attempt to relitigate prior class-certification denials would be rejected under their reasoning as well.

If a do-over were this easy, new plaintiffs could repeatedly launch class actions simply by contending that they could have done a better job of arguing class certification than those who stepped forward within the limitations period. The issue is not whether Plaintiffs can make a better predominance argument than the *Dean* plaintiffs—they had countless opportunities to try. The issue is whether Plaintiffs are allowed to sit back and do nothing while two class actions fail and then ask the Court for the benefits of tolling after the statutory period runs so they can relitigate the very issues already decided. If this view of tolling took root, there would be no repose—and virtually no end to serial class claims.

C. Tolling decisions balance the competing interests behind statutes of limitations and Rule 23.

1. *Plaintiffs' preclusion argument was not raised at the District Court.*

In an argument not raised before the District Court, Plaintiffs now assert that *American Pipe* tolling should always be allowed for subsequent class actions as long as the new plaintiff is not bound by claim preclusion—which absent class

members never are. Stated in the affirmative, Plaintiffs argue that because *American Pipe* tolling permits them to bring timely individual claims against China Ag, they must be allowed under Rule 23 to bring class claims as well. This argument asks the Court to merge two doctrines—tolling and preclusion—to allow sequential class actions to proceed *ad infinitum*. The Court should decline to do so.

As an initial matter, this Court should not wade into a thorny procedural issue where there is no lower court decision to review. Having failed to raise this theory before the District Court (*see* SER 001–58), Plaintiffs waived their right to argue it now. *See Doi v. Halekulani Corp.*, 276 F.3d 1131, 1140 (9th Cir. 2002) ("[I]t is well-established that an appellate court will not consider issues that were not properly raised before the district court. It follows that if a party fails to raise an objection to an issue before judgment, he or she waives the right to challenge the issue on appeal.") (internal quotation marks and original alteration omitted). Nor do Plaintiffs have an excuse for bringing up this argument only now—the authority they cite existed well before they filed their claims. Because the parties did not brief the relation between preclusion and tolling below, and because there is no decision by the District Court to review, this Court should not entertain Plaintiffs' preclusion argument.

2. *Plaintiffs' new argument improperly conflates tolling and preclusion.*

On its merits, Plaintiffs' new argument proposes an unworkable and unprecedented approach to tolling that would eviscerate statutes of limitations for serial class actions. Plaintiffs argue that two Supreme Court decisions addressing complex issues of federalism—*Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), and *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), along with an intermediate decision by the Seventh Circuit in *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011)—imply that if *American Pipe* tolling extends the life of individual claims, it must also extend the life of class claims. (*See* App. Br. at 26). Yet neither *Shady Grove* nor *Smith* nor *Sawyer* stands for the proposition that an individual may relitigate a class-certification denial and ***always*** maintain class claims despite the applicable federal statute of limitations. Nor do those cases address reviving time-barred claims under the careful balancing required by the *American Pipe* tolling doctrine.

The first case, *Shady Grove*, is not about tolling at all. It addressed whether, under the *Erie* doctrine, a state's law limiting the certifiability of certain classes can bind federal courts sitting in diversity. *See* 559 U.S. 398. There, a plaintiff sought class-action status for a state-law claim (in federal court on diversity grounds) where a New York law prohibited class actions for the remedy sought. *See id.* at 396. The Supreme Court concluded that New York's law conflicted with

Federal Rule of Civil Procedure 23 because it restricted the type of classes that could be certified, and *Erie* required Rule 23 to trump the state law in federal court. *See id.* at 398–410.

In discussing the application of Rule 23, the Supreme Court specifically recognized Congress's ability to carve out exceptions to its own procedural prescriptions. "Congress, unlike New York, has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit—either by directly amending the rule or by enacting a separate statute overriding it in certain instances." *Id.* at 400. In other words, *Erie* dictates that Rule 23 can be modified only at the federal level.

Plaintiffs claim that *Shady Grove* entitles them to maintain ***any*** class action that otherwise satisfies Rule 23's requirements. But *Shady Grove* announces no such rule and certainly does not answer the question whether every class-action plaintiff must always be given the benefit of *American Pipe* tolling. Quite unlike the posture of *Shady Grove*, Plaintiffs' tolling argument does not present a conflict between federal and state law, and it does not invoke principles of federalism. Congress enacted the statute of limitations applicable to federal securities claims, and Congress, as the Supreme Court acknowledged, has the power to place limits on the Federal Rules of Civil Procedure. Notably, *Shady Grove* does not mention *American Pipe* or *Crown, Cork*, much less state that it overruled every circuit court

that denied *American Pipe* tolling to successive class actions after an initial class-certification denial.

Plaintiffs then turn to *Sawyer* to argue that tolling is foreclosed only where an earlier class-certification denial has preclusive effect. *Sawyer* involved a class action under the Telephone Consumer Protection Act. *See Sawyer*, 642 F.3d at 561. The first plaintiff filed a class complaint in Wisconsin state court within the statutory period, but dismissed it before the court reached a decision on class certification. *See id.* Because the limitations period expired while the action was pending, the absent class members who relied on the class mechanism were "left . . . in the lurch." *See id.* Three days later, a new putative class action was filed. *See id.*

In addressing these sympathetic facts, where absent class members had no notice that the first suit would be dismissed and class certification had not yet been decided, the Seventh Circuit introduced the concept of preclusion. *See id.* at 563–64. *Sawyer* relied on preclusion to reconcile the apparent circuit split over the proper scope of *American Pipe* in sequential class actions. *Sawyer* assumes that *American Pipe* tolling extends the life of all claims—individual or class—and concludes that class claims are barred only where a previous certification decision is binding on absent class members. *See id.* at 564. It does not speak to the competing interests of Rule 23 and statutes of limitations, despite *American Pipe*'s

mandate that tolling be applied only in situations where it is consistent with both interests.

One month after *Sawyer* was published, the Supreme Court in *Smith* clarified that *American Pipe* tolling and preclusion are distinct concepts and held that absent class members are never bound by class-certification denials. Like *Shady Grove, Smith* confronted the complex relationship between state and federal courts, addressing preclusion arising from an earlier class-certification denial. *See* 131 S. Ct. at 2373. *Smith* involved parallel class actions proceeding in West Virginia state court and federal court. Both cases were litigated for years, but the federal court was the first to decide, and deny, class certification. *See id.* at 2374. After that class-certification denial, the district court issued an injunction to prohibit the West Virginia court from hearing a class-certification motion, finding applicable the "relitigation exception" to the Anti-Injunction Act. *See id.*

The Supreme Court held that the district court exceeded its authority under the relitigation exception to the Anti-Injunction Act. *See id.* at 2377–78. "That exception is designed to implement 'well-recognized concepts' of claim and issue preclusion." *Id.* at 2375 (citing *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988)). The Supreme Court confirmed that with limited exceptions, preclusion can only bind parties to an action. *Id.* at 2379. Because the federal class was never certified, putative class members never became parties to the

federal action and could not be bound by the district court's class-certification denial. *Id.* at 2379–81. Free from the preclusive effect of the federal decision, the West Virginia proceeding should not have been enjoined. *Id.* at 2382.

Smith addresses *American Pipe* tolling in a single footnote, reaffirming that under *American Pipe*, "a putative member of an uncertified class may wait until after the court rules on the certification motion to file ***an individual claim or move to intervene*** in the suit." *Id.* at 2379, n.10 (emphasis added). If *Smith* had intended to overrule the limitation on *American Pipe* tolling, it would have said so.

Critically, the *Smith* Court explained that *American Pipe* tolling is "specifically grounded in policies of judicial administration" and is "consistent with a commonplace [*sic*] of preclusion law—that nonparties sometimes may benefit from, even though they cannot be bound by, former litigation." *Id.* A corollary to this commonplace principle is that plaintiffs who sit on their rights, and are therefore not subject to preclusion, cannot also take advantage of all benefits of former litigation, including unlimited tolling. In this way, *Smith* clarified that *American Pipe* tolling is not wedded to preclusion, but is instead based on policies of judicial administration animated by the competing rationales behind statutes of limitations and the class vehicle. *Smith* therefore overrides the reasoning of *Sawyer*.

Plaintiffs also seek to exploit another disconnect between *Sawyer* and *Smith* to urge the Court to adopt a rule that would eliminate all restrictions on serial relitigation of class-certification denials. *Sawyer* assumes that a class-certification denial is binding on absent class members and bars subsequent relitigation. 642 F.3d at 563–64. But the Supreme Court recognized in *Smith* that absent class members are never preclusively bound if a class is not certified. *See* 131 S. Ct. at 2380 ("Neither a proposed class action nor a rejected class action may bind nonparties."). Rather than acknowledge that *Sawyer* no longer presents a viable approach to *American Pipe* tolling in light of *Smith*, Plaintiffs attempt to seize the benefits of both. They wish to avoid preclusion based on *Smith* and then also to avoid the statute of limitations based on *Sawyer*. Plaintiffs cannot have it both ways, and none of the cases they cite contemplate the outcome they propose, which would allow unlimited relitigation of certification denials.

Nor can Plaintiffs prevail even under *Sawyer*'s view of tolling. *Sawyer* reasons that a court "declining to certify a class in the first suit binds all class members, who cannot try to evade that decision by asking for a second opinion from a different judge." 642 F.3d at 563–64 ("Class members must abide by the first court's understanding and application of Rule 23."). And, according to *Sawyer*, decisions that go to the merits of the class, like numerosity and predominance, bind all absent class members. *See id.* at 564. Within the

framework proposed by *Sawyer*, Plaintiffs' claims are foreclosed by the earlier class-certification denial in *Dean*, and Plaintiffs cannot relitigate it.

The analysis offered in *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637 (6th Cir. 2015), is no different. *Phipps* adopted the Seventh Circuit's reasoning in *Sawyer* when facing a putative class complaint filed in the aftermath of *Dukes*. After a nationwide class action was rejected by the Supreme Court, the *Phipps* plaintiffs filed their complaint asserting gender discrimination claims on behalf of a regional class of plaintiffs. *See* 792 F.3d at 640. The Sixth Circuit held that the plaintiffs' claims were timely because they were entitled to rely on tolling during the pendency of *Dukes* and no decision on the merits of their proposed class had ever been reached. *Id.* at 653.

Phipps, like *Sawyer*, attempts to reconcile the divergent approaches of different circuits by distinguishing situations, like that presented here, where a previous class-certification motion was denied. *See id.* at 648 ("When the instant complaint was filed, no court in any jurisdiction had denied certification of a Rule 23(b)(3) class of current and former female employees seeking monetary relief against Wal-Mart under Title VII.").[4] Here, because certification was denied not

[4] Notably, the Sixth Circuit also has a different mechanism for calculating the duration of tolling—the statute of limitations is tolled only while a class complaint is filed ***and*** a motion to certify is pending. *See Phipps*, 792 F.3d at 647 ("[I]t is the filing of a class action and the pendency of a motion to certify that suspend the running of a limitations period for putative class members.") (quoting

once but ***twice*** for the identical class proposed by Plaintiffs, *Phipps*, like *Sawyer*, supports the District Court's decision to dismiss the class-action complaint.

3. *Declining to extend tolling where there is a previous class-certification denial on class-based grounds promotes the policies underlying American Pipe and encourages vigilance.*

Under Plaintiffs' view of tolling, absent class members are not just encouraged to take a wait-and-see approach; they are encouraged to wait, watch multiple class-certification attempts fail, and once the dust has settled and the limitations period has run, relitigate the same issues previously adjudicated—all without ever having to explain, much less justify, their indolence. As a doctrine rooted in judicial administration, *American Pipe* tolling was never intended to inspire this kind of conduct. The doctrine was developed to protect absent class members who rely on the operation of the class mechanism to vindicate their rights. When that mechanism fails, they are required to take action for themselves.

Contrary to Plaintiffs' argument that declining to extend tolling to subsequent class actions will encourage duplicative lawsuits, the general bar on class tolling announced in *Robbin* encourages absent class members to be watchful and take prompt action within the statutory period if a motion for class certification

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Andrews, 851 F.2d at 150). Were this Court to apply that calculation here, Plaintiffs' claims would still be time-barred. Tolling would have occurred only between January 6, 2012, and May 3, 2012, and again between August 5, 2013, and September 26, 2013—a total of 160 days. The *Resh* Complaint, filed on June 30, 2014, would be 343 days too late. Again, Plaintiffs want to mix and match different circuits' doctrines to achieve the only result that saves their claims.

fails. The Supreme Court in *American Pipe* made clear that plaintiffs who sleep on their rights should not be able to invoke tolling to save their claims. *See* 414 U.S. at 554 (finding that plaintiffs who have slept on their rights should not benefit from tolling). Its progeny explain that *American Pipe* tolling cannot be used to allow absent class members to relitigate earlier class-certification denials beyond the statutory period. *See Andrews*, 851 F.2d at 148–49 (no tolling where "Plaintiffs herein [twice] took no action").

There is no question that Plaintiffs could have filed suit or intervened sooner to present their own class-certification evidence: They chose not to. As Plaintiffs concede, they were aware of the alleged fraud as early as February 2011. (*See* App. Br. at 10.) Not once, however, did they seek lead-plaintiff appointment in *Dean* or *Smyth*, nor did they make any effort to intervene in those actions when the District Court twice denied class certification. The *Resh* Plaintiffs were not relying on other plaintiffs to protect their rights. Indeed, they were the recipients of multiple notices during the pendency of *Dean* and *Smyth*, as required by the PSLRA. Tellingly, during the lead-plaintiff process in both *Dean* and *Smyth*, when it was unclear whether anyone would represent the putative class, PSLRA notices went out to all China Ag stock purchasers but neither Resh nor any other plaintiff sought appointment. (*See* ER 232–52, 261–96.)

At two other key intervals, the *Resh* Plaintiffs' disregard for this litigation deserves an even more critical assessment. First, in the five months between the District Court's denial of class certification in *Dean* and the filing of *Smyth*—during which absent class members were unprotected—Plaintiffs not once sought to intervene or even to appear in the case, despite plaintiffs' counsel having issued a notice warning absent class members to take action. (*See* ER 232–52, 261–96; SER 112–13.)

Once more, after the District Court denied class certification in *Smyth*—again leaving absent class members vulnerable—the *Resh* Plaintiffs chose to remain on the sidelines. (*See* ER 232–52.) Not until nearly six months after the parties settled *Smyth* did Resh himself finally appear. (*See* ER 232–52, 301.) And even after Resh emerged, it still took another two months for the other plaintiffs to become engaged. (*See* ER 303.) All told, between 2012 and 2014, the *Resh* Plaintiffs allowed ***14 months*** to go by during which no plaintiff was pursuing class claims against China Ag. Not one of the cases they cite has an analogous procedural history, riddled with so much delay in the face of so much notice about shareholder rights.

Given that Plaintiffs deliberately waited until after the statute of limitations had run to again litigate class certification, the principles behind *American Pipe* tolling and the PSLRA do not support its application. Congress passed the PSLRA

"to deter the filing of so-called strike suits—frivolous securities class actions that put defendants to the unappealing choice of settling claims, however meritless, or risking extravagant discovery and trial costs." *Freeman Invs., L.P. v. Pac. Life Ins. Co*., 704 F.3d 1110, 1114 (9th Cir. 2013). To that end, the PSLRA requires notice to inform absent class members about newly initiated securities litigation and offer them an opportunity to timely step forward for lead-plaintiff consideration. *See* 15 U.S.C. § 78u–4(a)(3)(A)(i) (requiring publication of notice to advise members of purported class "of the pendency of the action, the claims asserted therein, and the purported class period"). This notice is intended to ensure that "parties . . . whose interests are more strongly aligned with the class of shareholders will participate in the litigation and exercise control over the selection and actions of plaintiffs' counsel." *In re Oxford Health Plans, Inc. Sec. Litig*., 182 F.R.D. 42, 43–44 (S.D.N.Y. 1998).

In other words, notice under the PSLRA neutralizes the risk that absent class members will lose their chance to participate without making informed decisions, and it encourages qualified class representatives to seek appointment, benefiting the class as a whole. The PSLRA therefore provides a set of procedures that are unique in the field of aggregated litigation. These procedures strike a particular balance between reliance on the class vehicle, vigilance in protecting one's rights, and repose for securities defendants. The legislature carefully weighed and

articulated the desired balance of factors, distinguishing actions subject to the PSLRA from other class proceedings where multiple parallel lawsuits are a greater danger. Indeed, in the unlikely event that Plaintiffs' prophecies about duplicative lawsuits come to pass, the PSLRA provides for coordinated litigation, thereby avoiding identical lawsuits proceeding in different courts. *See* 15 U.S.C. § 78u–4(a)(3)(B) (consolidation appropriate for cases "asserting the same claim or claims arising under" securities laws).

D. In the alternative, the Court should affirm the District Court's dismissal as justified by principles of comity.

Plaintiffs proudly exclaim that this case is identical to *Dean* and *Smyth*—which they are right about—yet apparently ignore the principle of comity as an alternative basis for affirming the District Court's decision. The Supreme Court has announced that it "expect[s] federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute" in order to curb "serial relitigation of class certification." *Smith*, 131 S. Ct. at 2381–82. The principle of comity is another "means for limiting copycat class action litigation besides preclusion" and allows courts to "pay respectful attention to the decision of another judge." *Smentek v. Dart*, 683 F.3d 373, 375, 377 (7th Cir. 2012).

While not a rule of preclusion (*id.* at 376), comity serves as an alternative justification for the District Court's decision here, notwithstanding the District

Court's refusal to apply it in *Smyth*. (*See* ER 134.) The District Court's comity decision in *Smyth*—which China Ag believes was incorrect—was made in the context of a second putative class action, filed within the statutory period, where the plaintiffs were allowed to present their own evidence about the adequacy of the class vehicle. In contrast, the District Court here was entitled to look back on its own identical class-certification denial in *Dean* and determine that the *Resh* Plaintiffs should not be permitted to relitigate that decision.

Courts, including the Supreme Court in *Smith*, have long cautioned against permitting plaintiffs' counsel to repeatedly relitigate class certification beyond the statutory period because it creates "an asymmetric system in which class counsel can win but never lose." *Smith*, 131 S. Ct. at 2381 (noting strong policy concerns identified in *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 767 (7th Cir. 2003)); *see also Thorogood v. Sears, Roebuck & Co.*, 678 F.3d 546, 552 (7th Cir. 2012) (recognizing "acute" policy concerns discussed in *Smith* about successive class actions with new class representatives); *Smentek*, 683 F.3d at 376–77 ("class action lawyers . . . keep bringing identical class actions with new class representatives until they draw a judge who is willing to certify the class").

If plaintiffs' counsel could simply relitigate class certification whenever they or their colleagues lose, class-action defendants would be effectively forced "to buy litigation peace by settling." *Smith*, 131 S. Ct. at 2381 (observing problem of

"plaintiff after plaintiff after plaintiff (none precluded by the last judgment because none a party to the last suit) tr[ying] his hand at establishing some legal principle or obtaining some grant of relief") (internal quotation marks omitted). Courts are encouraged to use comity and other similar prudential principles to combat this abuse. *See id*. (recognizing problem of serial litigation of class certification and noting that "our legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs").

E. Plaintiffs have no legitimate basis to challenge the District Court's treatment of the lead-plaintiff motions in *Dean*, *Smyth*, and *Resh*.

Plaintiffs cannot challenge the District Court's Order denying their lead-plaintiff motion. Orders that are not material to a final judgment are not reviewable on appeal. *See Nat'l Am. Ins. Co. of Cal.*, 93 F.3d at 540 ("Orders that could not have affected the outcome, i.e., orders not material to the judgment, are not appealable."). Plaintiffs cannot articulate why the denial of their lead-plaintiff motion altered the outcome of this case in any meaningful way. Indeed, they have not tried.

Portions of their brief also suggest that the *Resh* Plaintiffs further seek to challenge the lead-plaintiff denials in *Dean* and *Smyth.* They have no ability to do so, lacking standing because they were not parties to those actions. *See In re Proceedings Before Fed. Grand Jury for Dist. of Nevada*, 643 F.2d 641, 643 (9th

Cir. 1981) ("The general rule is well settled: persons who were not parties of record before the district court may not appeal that court's order or judgment except in extraordinary circumstances."). And even if, at some point many months ago, Plaintiffs could have had standing to challenge these decisions, their deadline for doing so has passed. *See* Fed. R. App. P. 4. Moreover, their Notice of Appeal contains no indication of their intent to challenge these orders. (*See* ER 017.)

Nor do Plaintiffs identify any prejudicial harm resulting from the lead-plaintiff denials in *Dean* and *Smyth*. *See Ludwig*, 681 F.3d at 1053 ("The burden is on the party claiming error to demonstrate not only the error, but also that it affected his 'substantial rights,' . . . not merely his procedural rights."). Plaintiffs argue only that they would have intervened in *Smyth* had the District Court timely denied the lead-plaintiff motion. This contention is not only unfounded but disingenuous, given Plaintiffs' decision to wait nine months after the District Court denied class certification in *Smyth* to even file suit.

F. Plaintiffs fail to demonstrate that the District Court's dismissal of their individual claims *sua sponte* caused any prejudicial harm.

The District Court gave Plaintiffs an opportunity to file an amended complaint asserting individual claims after it dismissed their class complaint. Plaintiffs now argue that the District Court's dismissal was procedurally improper. Rather than dismiss their complaint, Plaintiffs argue the District Court should have dismissed their class claims alone and allowed their individual claims to proceed

without requiring amendment. Plaintiffs' own actions—or rather, inaction—reveal the futility of this assertion. Even if the District Court erred in dismissing Plaintiffs' individual claims, Plaintiffs do not, and cannot, demonstrate any prejudicial harm because they concede that the District Court allowed them to file an amended complaint or separately pursue their individual claims. (*See* App. Br. at 45 ("In fact, the District Court . . . expressly concede[s] that Plaintiff [*sic*] could still file a timely complaint alleging the claims in the action on an individual basis.").) To date, Plaintiffs have not filed an amended complaint or an individual action. Having no impact on their substantial rights, the District Court's Order caused Plaintiffs no harm. The Order should therefore stand.

CONCLUSION

American Pipe tolling exists to give each plaintiff a fair chance to pursue claims while allowing the class action process time to play out. It is not designed for professional litigants who sit on their claims, hoping to revive class allegations after other plaintiffs fail. Despite numerous opportunities to take interest in this litigation—to step up and represent the class he purports to be defending—Michael Resh, over the span of three and a half years, did nothing. The other plaintiffs were nowhere to be found, either. Plaintiffs' belated attempt to exploit the class-

action device cannot survive the statute of limitations. After years of indifference, Plaintiffs have squandered their opportunity to proceed as a class.

Dated: November 30, 2015

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for Defendant-Appellee is unaware of any related cases pending in this Court.

Dated: November 30, 2015

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because this brief contains 11,994 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared using a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: November 30, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 30, 2015.

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