IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

DEANTHONY THOMAS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No.: 11-6013-CV-SJ-SOW
	)	
U.S. BANK N.A., N.D., et al.,	)	
	)	
Defendants.	)	

ORDER

Before the Court are Sovereign Bank N.A.'s Motion to Dismiss Plaintiffs' Third Amended Complaint (Doc. #272);Wilmington Trust Company's Motion to Dismiss (Doc. #279); Community West Bank's Motion to Dismiss (Doc. #281); The Associates' Motion to Dismiss Third Amended Complaint By Joinder in Sovereign Bank's Motion to Dismiss Plaintiffs' Third Amended Complaint (Doc. #283); German American Capital Corporation's and Ace Securities Corp. Home Loan Trust 1999-A's Motion to Dismiss Based on Expiration of Statute of Limitations (Doc. #285); Joinder of Defendant PBS Lending Corp. In Non-Holder Defendants' Motion to Dismiss for Lack of Standing and its Alternative Motion to Dismiss Based Upon the Statute of Limitations (Doc. #288); Defendant Franklin Credit Management Corporation's Motion to Dismiss (Doc. #289); Wells Fargo Bank, N.A.'s Motion to Dismiss Plaintiffs' Third Amended Complaint (Doc. #292); J.P. Morgan Chase Bank, N.A.'s Joinder in Non-Holder Defendants' Motion to Dismiss for Lack of Standing and Chase's (1) Motion to Dismiss Based Upon the Expiration of the Statute of Limitations and (2) Alternative Motion for a More Definite Statement (Doc. #294); U.S. Bank National Association's Motion to Dismiss or, Alternatively,

For a More Definite Statement (Doc. #321); and UBS Real Estate Securities, Inc.' Motion for Summary Judgment (Doc. #490).

I. Background

This case was originally filed in Platte County Circuit Court in June 2004, and asserted claims under the Missouri Second Mortgage Loan Act ("MSMLA"), Mo. Rev. Stat. § 408.231 *et seq*. While in state court, plaintiffs filed a Second Amended Petition on January 24, 2011, which added defendant Franklin Credit Management Corporation as a defendant for the first time. On February 8, 2011, the case was removed pursuant to the Class Action Fairness Act of 2005.

Plaintiffs filed this putative class action seeking redress against various defendants, including the alleged owners, assignees, holders and/or trustees of all second mortgage loans made by FirstPlus Bank ("FirstPlus") to Missouri borrowers. Plaintiffs' first putative class consists of second mortgage loans on Missouri residential real estate originated by FirstPlus. Defendants, in connection with the FirstPlus second loans, include those defendants that purchased or had assigned to them and now hold or held such second mortgage loans and also the Servicer or Servicers who now collect or previously collected the payments of principal and interest on the second mortgages. The second plaintiffs' class is against U.S. Bank, National Association, ND ("U.S. Bank") in connection with any second mortgage loan on Missouri residential real estate which was purchased by or assigned to U.S. Bank to the extent that a second mortgage loan included charges not authorized by the MSMLA.[1]

[1] Plaintiffs' case involves three putative classes: two plaintiff classes, and one defendant class. The first proposed plaintiff class is comprised of individuals who obtained a Missouri second mortgage loan from FirstPlus. The loans made to the members of this putative class were sold, assigned and/or serviced by the "Investor" and "Assignee defendants." The second putative plaintiff class is comprised of individuals who obtained a Missouri second mortgage loan that was made by a lender other than FirstPlus, but which Missouri loan was "purchased by and/or assigned to U.S. Bank National Association ND," which purchased numerous FirstPlus Missouri second mortgage loans as well. All of the proposed members of this class were assigned to U.S. Bank. Finally, the defendant putative class is comprised of those entities and their trustees that (i) received any interest from the FirstPlus

Plaintiffs allege they were charged and paid excessive loan origination and/or other unauthorized fees in connection with a second mortgage loan secured by their homes in Missouri. Plaintiffs believe, among other things, that the second mortgage loans from FirstPlus violated Section 408.233.1, in that the loans violated the stringent fee limitations found in this statute. Plaintiffs further assert that these loan fees were "rolled into" and financed as a part of the principal loan amount for each of more than 3,000 FirstPlus-originated loans. Plaintiffs seek to recover the illegal loan fees, all of the interest paid in connection with the loans and damages for the losses resulting from alleged violations of the MSMLA. Plaintiffs seek this statutory relief both for themselves and for the members of the putative classes of Missouri borrowers they seek to represent.

On September 27, 2012, the Court issued an order denying defendants' motions to dismiss without prejudice. [See Doc. #250]. As relevant here, the Court applied the six-year statute of limitations to plaintiffs' MSMLA claims. The Court ordered plaintiffs to file a motion for leave to amend their Complaint to address certain deficiencies. Plaintiffs filed their motion for leave on October 30, 2012. The Court granted said motion on December 11, 2012. Plaintiffs filed their Third Amended Complaint on December 13, 2012.

Plaintiffs' Third Amended Complaint named the following defendants:

- US Bank N.A. ND
- US Bank
- Ace Securities Corp. Home Loan Trust 1999-A ("Ace")
- Associates First Capital Mortgage Corporation ("The Associates")

Missouri second mortgage loans, or (ii) held or hold the FirstPlus Missouri second mortgage loans. [See Doc. #259].

- Banc One Financial Services Inc. (J.P. Morgan Chase Bank, N.A., is the successor to Banc One)
- Challenge Realty[2] ("Challenge")
- Community West Bank ("Community West")
- Countrywide Home Loans Inc. (dismissed on May 21, 2013)
- Does 1 though 100
- FirstPlus Home Loan Owner Trusts[3]
- Franklin Credit Management Corporation ("Franklin")
- German American Capital Corporation ("GACC")
- J.P. Morgan Chase Bank, N.A. ("JP Morgan")
- PSB Lending Corporation ("PSB")
- Sovereign Bank
- UBS Real Estate Securities, Inc. ("UBS")
- Wells Fargo Bank N.A. ("Wells Fargo")
- Wilmington Trust Company ("Wilmington")

1. US Bank/ U.S. Bank NA ND

Named plaintiffs DeAnthony and Susan Thomas filed this action in Missouri state court on June 2, 2004, asserting claims against U.S. Bank and others for violations of the MSMLA. Plaintiffs moved the Court for leave to file a Second Amended Complaint in January 2011 in order to add 17 named plaintiffs, including Donn Wright and Theresa Klein-Wright ("Wrights"). Plaintiffs filed the Third Amended Complaint against U.S. Bank, among others, on December

[2] Plaintiffs informed the Court that Challenge was a defendant in the previous removal of this case, Case No. 04-6098. Challenge apparently defended that case, but after the case was remanded, counsel for Challenge withdrew. Challenge has not filed an Answer in this case or otherwise defended. [See Doc. #114].
[3] Claims against FirstPlus were dismissed with prejudice on January 22, 2013. [See Doc. #307].

13, 2012, after U.S. Bank and certain affiliates had entered into two comprehensive settlement agreements with plaintiffs, but before those settlement agreements became fully effective. On December 19, 2012 and January 23, 2013, the Court entered separate orders dismissing all of the claims in the Third Amended Complaint against U.S. Bank and its affiliates as provided for in the respective settlements. The only remaining claims not covered by the settlement agreements that plaintiffs are pursuing against U.S Bank relate to its role as Successor Indenture Trustee under the terms of an Indenture dated as of August 1, 1999 by and between Ace Securities Corp. Home Loan Trust 1999-A as Issuer and First Union National Bank as Indenture Trustee (the "Ace Indenture"). According to the Third Amended Complaint, the only named plaintiffs with a loan identified as held by the Ace Trust—and thus connected in any way to the Ace Indenture and U.S. Bank as successor indenture trustee for the Ace Indenture—is the Wrights. The Wrights closed their loan in December 1997. They paid the loan off in 2000.

2. Ace Securities Corp. & German American Capital Corporation

As stated above, the Wrights were added as named plaintiffs in January 2011. The Wrights also made claims against Ace Securities Corp. Home Loan Trust 1999-A and German American Capital Corporation. They are the only named plaintiffs specifically making claims against these defendants. The Wrights closed their loan in December 1997. They paid the loan off in 2000.

3. The Associates[4]

According to the Third Amended Complaint, plaintiffs Alan and Jackie Parks allege that the Associates purchased, received an assignment of or otherwise took title to an undisclosed number of FirstPlus loans, including that of the Parks. The Third Amended Complaint alleges

[4] The Associates joined in Sovereign Bank's Motion to Dismiss as they relate to plaintiffs Alan and Jackie Parks.

that the Parks received the subordinate loan from FirstPlus in February 1998, and they paid the loan off by September 2004. The Parks did not name the Associates as a defendant until January 2011.

4. Community West Bank

Not one named plaintiff has alleged an MSMLA claim against Community West. No allegations have been made that Community West was ever an assignee, holder or servicer of a specific loan. Community West argues that, even aside from the fact that no named plaintiff has made a claim against it, all named plaintiffs have conceded that each of their loans was made more than three years before the suit was filed in June 2004. In conclusory fashion, the Third Amended Complaint states that "Community West purchased, received an assignment of or otherwise took title to an as-yet undisclosed number of FirstPlus . . . Loans including, without limitation, the FirstPlus . . . Loan made to putative class members James R. and Catherine L. Snyder on or about July 2, 1999."

5. Franklin Credit Management Corporation

Franklin was added to this case on January 24, 2011. The Third Amended Complaint alleges that Franklin purchased, received an assignment of, or otherwise took title to a loan of putative class members Pete A. and Nadine E. Vent. The Vents received their FirstPlus loan on April 28, 1998.

6. J.P. Morgan Chase Bank, N.A.

In prior pleadings, the named plaintiffs sued J.P. Morgan as a successor by merger to Banc One Financial Services and always in the capacity of an alleged holder of putative class members' loans. The Third Amended Complaint, for the first time, alleges that J.P. Morgan is being sued (1) individually; (2) as successor to defendant Banc One Financial Services, Inc.; (3)

as successor to one or more as-yet undisclosed entitles; (4) or as a trustee of various securitization trusts into which the loans were deposited; or (5) to the extent they did not purchase, receive by assignment, own or hold any of the loans, as a servicer of loans on behalf of a purchaser, assignee, owner and holder of the loans. The Third Amended Complaint makes allegations against JP Morgan based on a single loan made to Terry and Natalie Melloy on October 10, 1997.

7. PSB Lending Corporation

The Third Amended Complaint alleges that "PSB is sued as the purchaser or assignee of FirstPlus Missouri Second Mortgage Loans and as an entity that directly or indirectly collected or received principal and/or interest payments on said loan." The Third Amended Complaint does not allege any named plaintiffs' loan was purchased or assigned to PSB, or that PSB collected or received principal or interest on the loans. Rather, plaintiffs have sued PSB based on a single loan made to putative class members Richard J. and Barbara A. Williams on or about February 24, 1998. PSB released the deed of trust in December 1999.

8. Santander Bank, N.A. f/k/a Sovereign Bank

Sovereign Bank states that the only named plaintiff with any connection to it is George Bennett, who was first added as a plaintiff in January 2011. According to the Third Amended Complaint, Bennett obtained his subordinate lien loan from FirstPlus on January 17, 1998. The Third Amended Complaint further adds that Bennett's loan was acquired by Sovereign Bank "on a date that is not yet known." Further, Bennett paid off his loan—and the deed of trust was released—in March 2001. Bennett alleges that Sovereign Bank is liable for First Plus' alleged MSMLA violations as an alleged purchaser or assignee of the First Plus loans made to Bennett. Sovereign Bank argues that this action was not filed until June 2004 and that Bennett was not

added as a named plaintiff until January 2011—thirteen years after the closing date of Bennett's loan and nearly ten years after the loan was paid off.

9. UBS Real Estate Securities Inc.

The Third Amended Complaint alleges that UBS was one of several investor or assignee defendants that allegedly purchased, acquired, took assignment of, collected, or serviced plaintiffs' or the putative class members' FirstPlus loans. None of the named plaintiffs allege that UBS ever held, purchased, or received an ownership interest in their loans. UBS argues that since the named plaintiffs concede their closings occurred between June 1997 and October 1998, more than five years before named plaintiffs filed suit on June 2, 2004, the statute of limitations bars any claims against it.

10. Wells Fargo Bank, N.A.

Wells Fargo argues that the only named plaintiffs with any alleged connection to it are the Wrights. As mentioned above, the Wrights obtained their second mortgage loan on December 5, 1997. The named plaintiffs, however, did not file a claim against Wells Fargo until June 2004.

11. Wilmington Trust Company

The Third Amended Complaint brings claims against Wilmington both in its individual capacity and as a trustee of the Ace Trust. Plaintiffs have alleged that the Wrights secured a second mortgage loan from FirstPlus on December 5, 1997. Plaintiffs further aver that in August 1999, the Ace Trust received the loan in trust via its trustee, Wilmington.

Defendants have filed numerous motions to dismiss and motions for summary judgment. Because the statute of limitations issue is dispositive, the Court will not address the other issues raised by the defendants.[5]

II. Standards

A. Motion to Dismiss

A motion to dismiss pursuant to Rule 12(b)(6) properly raises the defense of the statute of limitations when it "appears from the face of the complaint itself that the limitation period has run." Varner v. Peterson Farms, 371 F.3d 1011, 1016 (8th Cir. 2004). Statutes of limitations are favored under Missouri law, and any exceptions, such as tolling, are strictly construed. Graham v. McGrath, 243 S.W.3d 459, 464 (Mo. Ct. App. 2007); Owen v. General Motors Corp., 533 F.3d 913, 920 n.5 (8th Cir. 2008).

B. Motion for Summary Judgment

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering summary judgment, a district court must view the acts "in the light most favorable to the nonmovant, giving it the benefit of all reasonable inferences to be drawn from the facts." Woodsmith Publ'g Co. v. Meredith Corp., 904 F.2d 1244, 1247 (8th Cir.1990). The moving party is entitled to summary judgment as a matter of law if they can carry the burden of establishing "there is no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986).

[5] Although not thoroughly examined, the Court would have found that plaintiffs' putative class should have been dismissed on standing grounds for the reasons discussed in Wong v. Bann-Cor Mortg., 878 F.Supp.2d 989, 994-97 (W.D. Mo. 2012).

Once the moving party has met this burden, the nonmoving party may not rest on the allegations in the pleadings, but by affidavit or other evidence, must set forth facts showing that a genuine issue of material fact exists. Fed. R. Civ. P. 56(c); Lower Brule Sioux Tribe v. South Dakota, 104 F.3d 1017, 1021 (8th Cir. 1997). Summary judgment is not appropriate if a reasonable jury could find for the nonmoving party. Woodsmith, 904 F.2d 1244; see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

III. Discussion

The Eighth Circuit has recently reaffirmed that civil actions predicated upon a statute seeking to recover penalties or forfeitures are governed by the three-year statute of limitations set forth in Mo. Rev. Stat. § 516.130(2). The Eighth Circuit decided in Rashaw v. United Consumers Credit Union, that, if the Missouri Supreme Court examined the interpretation of Mo. Rev. Stat. § 516.420 found in Schwartz v. Bann-Cor Mortgage, 197 S.W.3d 168, 178 (Mo. Ct. App. 2006), the court would "ignor[e] [that] precedent in favor of the statute itself," and "would hold that § 516.420 is limited to penal statutes and does not apply to civil actions to recover penalties and forfeitures governed by § 516.130(2)." 685 F.3d 739, 744 (8th Cir. 2012), *reh'g denied*, (8th Cir. 2012), *cert. denied*, 133 S. Ct. 1250 (2013). In reaching this conclusion, the Eighth Circuit determined that the six-year limitations period set forth in Mo. Rev. Stat. § 516.420 applies only to penalties and forfeitures authorized by criminal statutes, and not civil. Id. at 744-75. Reviewing the statutory history and cases of the Missouri Supreme Court, the Eighth Circuit concluded:

> The [Supreme Court of Missouri] might decide that Schwartz provides the best interpretation of the current § 516.420. But Schwartz ignored both relevant legislative history and what should have been controlling (though dated) Supreme Court precedents. . . . We conclude the [Supreme Court of Missouri] would . . . hold that § 516.420 is limited to penal statutes and does not apply to civil actions to recover penalties and forfeitures governed by § 516.130(2).

Id. at 744.

Following the Eighth Circuit's decision in Rashaw, Judge Gaitan found that the three-year statute of limitation set forth in Section 516.130(2) applies to MSMLA claims. Wong v. Bann-Cor Mortgage, 918 F.Supp.2d 941, 946-47 (W.D. Mo. 2013) ("Rashaw appears to be the most thorough interpretation of the relevant Missouri statutes of limitation and the best guidance available on this issue."). Judge Gaitan reached the same result in Washington v. Countrywide Home Loans, Inc., No. 8-459-CV-FJG, 2012 WL 4468761, at *5 (W.D. Mo. Sept. 26, 2012) (MSMLA claims barred by three year statute of limitations in Section 516.130(2)). He concluded that because the suit was filed three years after the cause of action accrued, the claims were time barred by Section 516.130(2).

The plaintiffs in Washington appealed.[6] They argued that the six year statute of limitations set forth in Section 516.420 governed their MSMLA claims. On March 17, 2014, the Eighth Circuit affirmed the district court's decision. Washington v. Countrywide Home Loans, Inc., No. 12-3428, 2014 WL 998185 (8th Cir. Mar. 17, 2014). Judge Benton, writing for the court, held that the panel was bound by its previous decision in Rashaw, thus reaffirming that MSMLA claims, like the ones brought in this case, are subject to the three year statute of limitations period in Mo. Rev. Stat. § 516.130(2). Id. at *2.[7] Washington also rejected the "continuing or repeated wrong" exception to the statute of limitations, reasoning that the statute of limitations for MSMLA cases begins to run when the damage resulting from the wrong is sustained and capable of ascertainment. Id. at *3-4. Similar to the plaintiffs' loans in this case,

[6] The plaintiffs in Wong have recently appealed as well. That case is pending in front of the Eighth Circuit.

[7] The Court notes that the Eighth Circuit asked the Missouri Supreme Court to consider the following certified question: "Does § 516.130(2) or § 516.420 control plaintiffs' actions against a corporate mortgage lender under the Missouri Second Mortgage Loan Act?" On February 19, 2014, the Missouri Supreme Court denied the Eighth Circuit's request, adhering to Grantham v. Missouri Dept. of Corrections, No. 72576, 1990 WL 602159, at *1 (Mo. 1993) (en banc).

the allegedly unlawful charges were listed on the HUD-1 settlement statement provided to them before they signed the contract. Therefore, the Eighth Circuit concluded, "[A]ll of the damages, past and future" were known to them when they signed the contract. Even if additional violations of the statute later occurred, the [plaintiffs] could have maintained their entire MSMLA action—recovering all unlawful fees and barring all interest—immediately after closing." Id. at *3 (internal citations omitted).

Notwithstanding the recent decisions by the Eighth Circuit, plaintiffs vehemently argue that the six year statute of limitations governs their MSMLA claims. Alternatively, they argue that, even if the three-year statute of limitations applies, their claims are not barred by the statute of limitations because (1) the statute of limitations was tolled and (2) plaintiffs paid interest and principal on their FirstPlus loans within the contested three year period and a cause of action arising from the violation of the MSMLA accrued each time interest and principal was charged and received on the loan. On the other hand, defendants argue that dismissal of plaintiffs' putative class is required because the named plaintiffs' claims are each time barred under the three-year statute of limitations.

A. The Three-Year Statute of Limitation Applies

Despite plaintiffs' vigorous objections to the contrary, this Court is bound to apply Rashaw and Washington to the claims in this case.[8] "Vertical stare decisis—both in letter and in spirit—is a critical aspect of our hierarchical Judiciary headed by "one supreme Court." Winslow v. F.E.R.C., 587 F.3d 1133, 1135 (D.C. Cir. 2009) (quoting U.S. Const. art. III, § 1). Thus, the Court declines plaintiffs' invitation to flout Eight Circuit precedent.

[8] Plaintiffs' arguments regarding the constitutionality of the *Rashaw* decision under *Erie R.R. Co. v. Tompkins*, the legislative history of Missouri's statute of limitations provisions, and the Missouri Supreme Court precedent that the *Rashaw* court relied on in reaching its conclusion, were made in *Rashaw's* Petition for Panel Rehearing.

Under Missouri law, the right to bring a suit "accrues and the statute of limitations is set into motion '[w]hen the fact of damage becomes capable of ascertainment . . .' even if the actual amount of damage is unascertainable." Washington, 2012 WL 4468761, at *3 (citation omitted). A cause of action under the MSMLA accrues on the date a plaintiff's loan closes. E.g., Washington, 2014 WL 998185, at *3; Wong v. Bann-Cor Mortg., 918 F.Supp.2d 941, 948 (W.D. Mo. 2013) ("the Court finds the date of accrual of each individual's cause of action must be the date of each loan's origination."); Washington, 2012 WL 4468761, at *3.

Under Section 516.130(2), named plaintiffs had three years following the closing of their loans to file their MSMLA claims. The named plaintiffs' closings all occurred between June 1997 and October 1998—more than five years before the named plaintiffs first filed suit on June 2, 2004. As the named plaintiffs' Petition was filed more than three years after the closing of their loans, their action is untimely. See id.

The continuing tort doctrine, moreover, is inapplicable here because "all of the damages, past and future' were known to them when [plaintiffs] signed the contract. Even if additional violations of the statute later occurred, the [plaintiffs] could have maintained their entire MSMLA action—recovering all unlawful fees and barring all interest—immediately after closing." Washington, 2014 WL 998185, at*3 (citations omitted); Wong, 918 F.Supp.2d at 948. In other words,

> The Court finds that the continuing tort doctrine is inapplicable in this matter, as the interest charged on the loans is a damage that would have been known to plaintiffs at the time of loan closing, and does not constitute a continuing violation of the statute. As noted in defendant's reply to the motion to strike . . ., the payment of interest is unlawful only where illegal loan fees have been financed as part of the loan amount, and whether or not a violation occurred depends on what happened at loan origination—in other words, payment of interest alone is not a violation of the MSMLA.

Washington, 2012 WL 4468761, at *5.

The possibility that plaintiffs suffered an injury and incurred damages was known at the time plaintiffs closed their second mortgages in 1997 and 1998, respectively. All the alleged improper fees charged to the named plaintiffs were listed on their HUD-1 settlement statements that were executed at closing. Like in Washington and Wong, the Court declines to apply the "continuing wrong or repeated wrong" exception. Therefore, the Court dismisses plaintiffs' claims as time barred by Section 516.130(2).

B. No Class Action Tolling

In an effort to save their claims from the statute of limitations, plaintiffs argue the statute of limitations period was told by the class action tolling principles of American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974). Plaintiffs contend "the contested three-year statute of limitations was tolled from May 16, 2000 to May 18, 2004, while the *Adkison* case was pending, and again from the commencement of the instant suit on June 2, 2004.

This case has had a long and complicated history. In May 2000, the *Adkison* putative class action was filed alleging violations of the MSMLA. Plaintiffs in *Adkison* amended their Petition at least three times. While the case was in state court, plaintiffs never sought to certify a defendant class.[9] On December 3, 2002, the trial court granted summary judgment to the defendants, finding that the plaintiffs did not have a cause of action under MSMLA. The Missouri Court of Appeals for the Western District upheld that decision on May 18, 2004. Adkison v. First Plus Bank, 143 S.W.3d 29 (Mo. Ct. App. 2004).

The unnamed[10] defendants contend that the statute of limitations was not tolled under American Pipe for a couple of reasons. First, defendants argue that American Pipe does not

[9] Apparently plaintiffs in *Adkison* filed a motion to certify a FirstPlus borrower class, but the court granted summary judgment against the named plaintiffs before the motion was fully briefed.

[10] The following defendants were not named in Adkison: (1) Sovereign Bank; (2) Community West; (3) GACC; (4) the Associates; (5) Franklin; (6) J.P. Morgan; (7) Wells Fargo; (8) U.S. Bank; and (9) PSB Lending. Community

provide a basis for tolling as they were never named as defendants in *Adkison*. Second, defendants argue that the presence of a "defendant class" in the *Adkison* complaint does not toll the limitations period. Third, defendants contend no attempt was made to certify the defendant class. Lastly, defendants argue *Adkison* was dismissed on substantive legal grounds.

The class action tolling doctrine was announced by the Supreme Court in American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974). 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." Id. at 554 (footnote omitted). The Supreme Court later clarified that tolling applies not only to intervenors, but to putative class members that file their own actions. Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 349 (1983).

Since American Pipe and Crown, courts have held that "[C]lass action tolling does not apply to a defendant not named in the class action complaint." Wyser-Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553, 567-68 (6th Cir. 2005) (citing numerous case, including Arneil v. Ramsey, 550 F.2d 774, 782 n.10 (2d Cir. 1977) (nothing in American Pipe supports tolling of the period as to a person not named as a defendant in the class action); see Adams v. Public Sch. Dist. v. Asbestos Corp., 7 F.3d 717, 719 (8th Cir. 1993) (stating in dicta that "[o]bviously, those parties that were not also defendants in the class action never received notice of the potential claims, and thus the reasoning in American Pipe does not support tolling the statute with regard to claims against them."). Further, in an unpublished opinion, the Sixth Circuit has held that

West (Goleta National Bank) was not a named defendant because the Third Amended Petition, filed in January 2002, was never served on Community West. See Sieg v. Int'l Environ. Mgt., Inc., 375 S.W.3d 145, 149-150 (Mo. Ct. App. 2012). Since Community West was not added as a defendant until 2004, the statute of limitations barred any claims against it. Furthermore, the Associates cannot be considered a named defendant because they were named as a defendant in the Third Amended Petition in January 2002. And because the Parkses' loan originated on February 13, 1998, the statute of limitations barred any of the Parkses' claims. Lastly, while U.S. Bank was made a defendant in the *Adkison* in 2001, it was not sued in its capacity as successor indenture trustee until 2005.

American Pipe tolling did not apply to claims against a defendant that had not been named in a prior class action. See Highland Park Ass'n of Bus. & Enters. v. Abramson, 91 F.3d 143 (6th Cir. July 3, 1996) (unpublished).

Plaintiffs do not generally dispute that the statute of limitations is not tolled where the defendant is not named in the prior action. Instead, plaintiffs insist that the presence of a "defendant class" in the *Adkison* complaint tolled the limitations period against the named and unnamed defendants in *Adkison*. This argument is without merit.[11] The "tolling of limitations periods against a defendant by a class action [does] not apply to a subsequent action against a different defendant, even if the claims arise out of the same or a similar transaction." Guy v. Lexington –Fayette Urban Cnty. Gov't, 488 Fed. Appx. 9, 21 (6th Cir. 2012) (citing Wyser-Pratte, 413 F.3d at 568). In short, the tolling caused by the filing of one putative class cannot toll the statutes of limitations for claims against a different defendant in a second putative class action. See id.

The reasoning supporting such an application of American Pipe flows logically from the fact that there can be no tolling "unless the defendant . . . had actual notice of the pendency of the [earlier] action." E.g., Meadows v. Pac. Inland Sec. Corp., 36 F.Supp.2d 1240, 1249 (S.D. Cal. 1999) (the filing of a defendant class did not toll the statute of limitations with respect to a different defendant in a later-filed class action); Robinson v. Fountainhead Title Grp. Corp., 447 F.Supp.2d 478, 484 (D. Md. 2006) (declining to toll the statute of limitations to newly added

[11] The cases relied on by plaintiffs are easily distinguishable. Those cases that permitted American Pipe tolling on the basis of a defendant class did so when plaintiffs actually sought to certify the *defendant* class. See In re Bestline Prods. Sec. & Antitrust Litig., 1975 WL 386, at *2 (S.D. Fla. Mar. 21, 1975) ("After filing the amendment complaint, the plaintiffs consistently pursued certification of both a plaintiff class and defendant class."); Appleton Electric Co. v. Graves Truck Line, Inc., 635 F.2d 603, 609-10 (7th Cir. 1980) (district court certified both plaintiff and defendant class).

defendants because they did not receive notice of the action until after limitations period expired).

Here, while the *Adkison* plaintiffs did file a motion to certify a class of *plaintiffs*, they did not seek certification of a *defendant* class. Plaintiffs have, moreover, failed to allege or establish that any of the unnamed defendants received notice of the putative class action in *Adkison*.[12] These facts are fatal to plaintiffs' tolling arguments. Indeed, as Judge Smith recently found in a similar MSMLA case: "Plaintiffs' lack of diligence [in seeking certification of the defendant class] precludes their ability to rely on the benefit of a non-existent defendant class." Gilmor v. Preferred Credit Corp., No. 10-1089-CV-W-ODS, 2011 WL 111238, at *8 n.9 (W.D. Mo. Jan. 13, 2011).

For these reasons, the Court finds that plaintiffs are not entitled to rely on the American Pipe tolling principles. Accordingly, the claims against the unnamed defendants are dismissed because they are barred by the statute of limitations.

C. Relation-Back

The Court now addresses the named[13] defendants from *Adkison*. They argue that the tolling mechanism for class actions is not applicable in this case. Specifically, Wilmington contends that it was not named in Adkison until May 16, 2001. Thus, since the Wrights'—who are the only plaintiffs alleging a connection to Wilmington—loan originated in December 1997, the statute of limitations bars their claims. The Associates argue that it was added as a defendant on January 22, 2002, and the Parkses' loan closed on February 13, 1998. Thus, the claims against them expired in February 2001. The Associates also point out that they were dismissed

[12] Plaintiffs argue they can show that Sovereign Bank had notice of the claims. However, plaintiffs may not rely on these facts because they were not alleged in their Complaints. See Clark v. Mickes, No.4:05-CV-1500-ERW, 2006 WL 1877084, at *6 n.3 (E.D. Mo. July 6, 2006).

[13] The following defendants were named in *Adkison*: (1) Ace and (2) Wilmington.

without prejudice from *Adkison* on June 13, 2002, and the Parkses did not become plaintiffs until January 24, 2011.

In response, plaintiffs argue the claims against Wilmington and the Associates should relate back to the date when Adkison was filed, on May 16, 2000. Plaintiffs maintain that such a relation back is proper because Wilmington and the Associates were "substituted for [] Doe defendants in the Adkison case."

The relation back doctrine is a matter of substantive law and is therefore governed by the laws of Missouri. Plubell v. Merck & Co., Inc., 434 F.3d 1070, 1071-72 (8th Cir. 2006). Pursuant to Mo. R. Civ. P. 55.33(c), an amendment relates back to the date of the original pleading "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." And when there is an amendment changing the defendant, or "the party against whom a claim is asserted," an amendment relates back if the preceding provision is satisfied and "the party to be brought in by amendment: (1) has received . . . notice of the institution of the action as will not prejudice the party in maintaining the party's defense on the merits and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." Mo. R. Civ. P. 55.33(c). All three requirements of Rule 55.33(c) must be satisfied for relation back to apply.

"Missouri Rule 55.33(c) is derived from Rule 15(c) of the Federal Rules of Civil Procedure." Plubell, 434 F.3d at 1072 (citing Koerper & Co. v. Unitel Int'l, Inc., 739 S.W.2d 705, 706 (Mo. 1987) (en banc)). "The Missouri Supreme Court interprets Rule 55.33(c) to embody [Fed. R. Civ. P.] 15(c)'s rationale: "Rule 15(c) is based on the concept that a party who

is notified of litigation concerning a given transaction or occurrence has been given all the notice that statutes of limitation are intended to afford." Id. (citation omitted).

1. Claim Asserted in Amended Pleading Arose out of the Conduct, Transaction, or Occurrence Set Forth in Original Pleading

The first requirement of Rule 55.33(c) is that the claim asserted against the defendants must arise out of the conduct, transaction, or occurrence set forth in the original pleading. The Court finds that this requirement is satisfied for the purposes of this Order, as there is no dispute that the Second Amended Petition asserted a claim for violating the MSMLA.

2. Amended Pleading Changes the Defendants

The Court notes that there is disagreement regarding the applicability of the second part of Rule 55.33(c), specifically, when a plaintiff "chang[es] the party against whom a claim is asserted." For the purposes of this Order, the Court assumes the amended pleading changed the defendants.

3. Defendants Did Not Receive Notice of the Action

The second requirement of Rule 55.33(c) is that the party to be brought in by amendment must have received notice of the institution of the action such that it will not be prejudiced in maintaining a defense on the merits. Plaintiffs have failed to allege any facts that would suggest either defendant should have known of the *Adkison* action before they were named as defendants. Further, plaintiffs have failed to allege any facts that would show the *Adkison* plaintiffs were mistaken about the identity of the correct party. Therefore, the Court finds that defendants did not receive notice of the action.

4. Plaintiffs Have Not Alleged a Mistake In Identity

The third requirement of Rule 55.33(c) is that the party to be joined knew or should have known that, but for a mistake by plaintiffs concerning the identity of the proper party, the action

would have been brought against it. Again, plaintiffs have failed to allege any facts suggesting the *Adkison* plaintiffs were mistaken about the identity of the correct parties. This failure precludes plaintiffs from relying on the relation back doctrine. See Goodkin v. 8182 Maryland Assoc. Ltd. P'ship, 80 S.W.3d 484, 489 (Mo. Ct. App. 2002).

For all these reasons, the Court finds that the Third Amended Petition did not relate back to the original Petition. Accordingly, the claims against the named defendants are dismissed because they are barred by the statute of limitations.

D. Challenge Realty, Inc.[14]

The Third Amended Complaint alleges that defendant Challenge,

> On various dates after the respective dates of closing, Challenge purchased, received an assignment of or otherwise took title to an as-yet undisclosed number of FirstPlus Missouri Second Mortgage Loans including, without limitation, the FirstPlus Missouri Second Mortgage Loans made to Plaintiffs Michael L. and Yolanda C. Lorge and the 23 or so FirstPlus Missouri Second Mortgage Loans identified on the May 24, 2004 spreadsheet from FirstPlus Bank. Plaintiffs allege upon information and belief that Challenge thereafter, directly or indirectly through one or more agents and loan servicers, collected or received separate payments of principal and interest on the FirstPlus Missouri Second Mortgage Loans as continually made by the borrowers.

Further, plaintiffs allege

> Challenge is sued as a purchaser or assignee of FirstPlus Missouri Second Mortgage Loans and as an entity that directly or indirectly collected and/or received principal and/or interest payments on said loans. Challenge is also named as a representative of the hereinafter defined defendant class, which is comprised in part of entities that similarly acquired, owned and benefited from FirstPlus Missouri Second Mortgage Loans.

[Doc. #259, p.27]. On October 16, 1998, the Lorges received a second mortgage from FirstPlus.

The first time any plaintiff made an allegation against Challenge was when plaintiffs filed the Third Amended Complaint indicating the Lorges believed that Challenge either directly or

[14] Challenge was never included as a defendant in the *Adkison* case.

indirectly collected or received payments of principal and interest on their FirstPlus loan. Such claims are barred by the statute of limitations. The Lorges were required to file their complaint within three years of the closing of their second mortgage loan. Even assuming the Lorges filed their Complaint in June 2004, their claims are untimely. Therefore, the Court finds that the statute of limitations bars the claims against Challenge. Adams v. Eureka Fire Protection Dist., 352 Fed App'x 137, 139 (8th Cir. 2009); Smith v. Boyd, 945 F.2d 1041, 1043 (8th Cir. 1991) (district court may *sua sponte* dismiss a claim as long as the claim obviously fails).

IV. Conclusion

Accordingly, it is hereby

ORDERED that Sovereign Bank N.A.'s Motion to Dismiss Plaintiffs' Third Amended Complaint (Doc. #272) is granted. It is further

ORDERED that Wilmington Trust Company's Motion to Dismiss (Doc. #279) is granted. It is further

ORDERED that Community West Bank's Motion to Dismiss (Doc. #281) is granted. It is further

ORDERED that the Associates' Motion to Dismiss Third Amended Complaint By Joinder in Sovereign Bank's Motion to Dismiss Plaintiffs' Third Amended Complaint (Doc. #283) is granted. It is further

ORDERED that German American Capital Corporation's and Ace Securities Corp. Home Loan Trust 1999-A Motion to Dismiss Based on Expiration of Statute of Limitations (Doc. #285) is granted. It is further

ORDERED that the Joinder of Defendant PBS Lending Corp. In Non-Holder Defendants' Motion to Dismiss for Lack of Standing and its Alternative Motion to Dismiss Based Upon the Statute of Limitations (Doc. #288) is granted. It is further

ORDERED that Defendant Franklin Credit Management Corporation's Motion to Dismiss (Doc. #289) is granted. It is further

ORDERED that Wells Fargo Bank, N.A.'s Motion to Dismiss Plaintiffs' Third Amended Complaint (Doc. #292) is granted. It is further

ORDERED that J.P. Morgan Chase Bank, N.A.'s Joinder in Non-Holder Defendants' Motion to Dismiss for Lack of Standing and Chase's (1) Motion to Dismiss Based Upon the Expiration of the Statute of Limitations and (2) Alternative Motion for a More Definite Statement (Doc. #294) is granted. It is further

ORDERED that and U.S. Bank National Association's Motion to Dismiss or, Alternatively, For a More Definite Statement (Doc. #321) is granted. It is further

ORDERED that UBS Real Estate Securities, Inc.'s Motion for Summary Judgment (Doc. #490) is granted to the extent it was based on the statute of limitations. It if further

ORDERED that defendant Challenge Realty is dismissed with prejudice based on the statute of limitations. It is finally

ORDERED that the above-captioned case is dismissed with prejudice.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

Dated: April 29, 2014