SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

RICHARD LYMAN a/k/a RICHARD P. LYMAN, Plaintiff-Appellant, -against- J.P. MORGAN CHASE & CO. as successor in interest to HAMBRECHT & QUEST, J.P. MORGAN CHASE BANK, N.A. and J.P. MORGAN CHASE SECURITIES LLC, Defendants-Respondents.	Appellate Division First Department Case No. 2020-04672 New York County Clerk's Index No. 450919/2020

NOTICE OF MOTION BY THE SECURITIES INDUSTRY FINANCIAL MARKETS ASSOCIATION FOR LEAVE TO FILE AN *AMICUS CURIAE* MEMORANDUM IN SUPPORT OF DEFENDANTS-RESPONDENTS' MOTION FOR REARGUMENT OR LEAVE TO APPEAL

PLEASE TAKE NOTICE, that upon the annexed affirmation of Jed Schwartz, dated February 4, 2022, and all exhibits thereto including a copy of the proposed *amicus curiae* memorandum of law, the Securities Industry Financial Markets Association ("SIFMA"), by and through its undersigned attorneys, will move this Court, at 27 Madison Avenue, New York, New York 10010, on February 22, 2022 at 10:00 am, or as soon thereafter as counsel may be heard, for an order permitting the proposed *amici* to serve and file a memorandum as *amicus curiae* in support of Defendants-Respondents' Motion for Reargument or Leave to

Appeal in the above-captioned action, and for such other and further relief as the court may deem just and proper under the circumstances.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214(b), answering papers, if any, are to be served on the undersigned no later than seven (7) days prior to the return date.

Dated: New York, New York
February 4, 2022

Respectfully submitted,

By: ______________________

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AFFIRMATION OF JED SCHWARTZ

JED SCHWARTZ, an attorney admitted to practice before the courts of the State of New York, and not a party to the above-caption action, affirms the following to be true under penalty of perjury pursuant to CPLR 2106:

1. I am an attorney duly admitted to the bar of the State of New York and a member of the law firm Milbank LLP, counsel to Proposed Amicus the Securities Industry Financial Markets Association ("SIFMA"). I submit this affirmation in support of SIFMA's Motion for Leave to File an *Amicus Curiae* Memorandum in Support of Defendants-Respondents' Motion for Reargument or Leave to Appeal.

2. Both parties to this appeal were contacted in advance of making this motion. Counsel for the Defendants-Respondents consented to the filing of the

memorandum attached to this motion. Counsel for Plaintiff-Appellant declined to consent.

3. Attached hereto as Exhibit 1 is a true and correct copy of SIFMA's *amicus curiae* memorandum in support of Defendants-Respondents' Motion for Reargument or Leave to Appeal.

4. SIFMA is the leading securities industry trade association, representing the interests of hundreds of broker-dealers, investment banks, and asset managers. SIFMA's mission is to support a strong financial industry while promoting investor knowledge, capital information, job creation, economic growth, and trust and confidence in the financial markets. SIFMA often files amicus briefs in cases involving issues of great importance to its members, like this one.

5. This case presents important issues regarding the law applicable to securities transactions, the statute of limitations for a claim against a securities broker for the alleged unauthorized sale of a security, and standing to bring such a claim. This Court's resolution of this matter will address whether a plaintiff can bring a claim for the sale of a security when the plaintiff makes a demand for the security at ***any point*** in the future after the sale, regardless if decades have passed. By relying on bailment principles to allow a plaintiff to toll the statute of limitations until demand, this case also creates the risk of unintended consequences because the implication that a bailment relationship exists between customers and broker-dealers

could disrupt the legal framework underlying the indirect holding system that is the basis for modern securities transactions.

6. SIFMA member companies are the leading securities brokers in the nation, who together manage millions of securities transactions each day. The finality of these securities transactions is essential to promoting trust in the financial markets and to limiting broker-dealers' potential exposure to liability for transactions that settled decades ago. If claims against broker-dealers may be brought at any point after the sale of a security, customers could assert claims many years after an account has closed and beyond the period that firms are required to maintain account records, such that the records necessary to defend against the claim are no longer available.

7. The case also presents the issue of whether a person who does not allege to have held an account at a securities broker can nonetheless bring a breach of bailment contract claim against that broker related to securities held in the account of another person or entity.

8. Because the resolution of this case potentially exposes securities brokers to untimely liabilities, threatens the finality of securities transactions, and expands the group of persons who can assert claims against brokers, SIFMA has a direct interest in the outcome of the present motion. More broadly, as a representative of the securities industry who advocates for public policy supportive of the industry

and its constituents, SIFMA has a substantial interest in the correct application of the law.

WHEREFORE, the Securities Industry Financial Markets Association respectfully requests the Court to grant its motion for leave to file the annexed memorandum of law as *amicus curiae*.

Dated: Scarsdale, New York
February 4, 2022

Jed Schwartz

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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***AMICUS CURIAE* MEMORANDUM ON BEHALF OF THE SECURITIES INDUSTRY FINANCIAL MARKETS ASSOCIATION**

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Securities Industry Financial Markets
Association

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IDENTITY AND INTERESTS OF PROPOSED *AMICUS* [1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry while promoting investor knowledge, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA has offices in New York and Washington, D.C., and is the United States' regional member of the Global Financial Markets Association. SIFMA regularly files *amicus curiae* briefs in cases that raise important policy issues that impact the markets represented by SIFMA, or that otherwise concern common practices in the financial services industry.

The First Department's decision in this case, *Lyman v. J.P. Morgan Chase & Co.*, 200 A.D.3d 525, 525-26 (1st Dep't 2021), undermines several important legal principles: (1) that the rights and duties of broker-dealers and their customers with respect to securities arise under the modern Uniform Commercial Code rather than common law property concepts, (2) that New York Court of Appeals' precedent as to the applicable statute of limitations for a claim against a securities broker for the alleged unauthorized transfer of a security should be applied consistently; and (3)

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, contribute money towards preparing or submitting this brief.

that a Plaintiff who does not even allege that he holds an account at a broker should not be allowed to bring a "bailment" claim against that broker. This Court's resolution of this matter will likely have significant financial repercussions for SIFMA's members.

The First Department's decision, if upheld, would undermine key policy goals of the Uniform Commercial Code to have simple and clear rules governing securities transactions. By adopting a demand requirement that affects when the statute of limitations begins to run, the First Department's decision would allow customers of brokers to bring claims for unauthorized transactions at essentially any point in the future unbounded by any statute of limitations. Allowing this would make it difficult for brokers to store and find records to refute even fraudulent claims. The decision also contradicts Court of Appeals' precedent holding that a claim against a securities broker for the alleged unauthorized transfer of a security accrues at the time of interference, not at a later point when the plaintiff makes a demand for the security. SIFMA therefore respectfully submits this brief as *amicus curiae* to present the position of SIFMA's members on these important issues, and to provide the Court with information about the significant negative implications of applying common-law bailment principles to modern securities holding systems, and the practical implications of denying the Defendants-Respondents' Motion for Reargument or Leave to Appeal.

PRELIMINARY STATEMENT

The First Department's decision contains fundamental legal errors and risks unsettling well-settled legal principles governing securities transactions.

Article 8 of the Uniform Commercial Code ("UCC") was drafted to facilitate the efficient operation of the securities markets by balancing the rights of brokers, beneficial owners, and holders in due course in securities transactions. It was drafted after the "Paperwork Crisis," which occurred in the 1960s when the old system of settling securities transactions through the exchange of paper certificates overwhelmed brokers and led to, among other things, the New York Stock Exchange suspending trading on Wednesdays. In response to this crisis, the securities industry in the United States, in consultation with the U.S. Securities and Exchange Commission and pursuant to the agency's enforcement and regulatory authority, moved to an indirect holding system, under which ownership of securities is tracked through accounting entries in the records of intermediaries, rather than through physical paper certificates. Recognizing that conventional property principles would not appropriately define the relationship between brokers and customers, UCC Article 8 was amended to abrogate common law property concepts (such as bailment) in the context of securities transactions and instead codify express statutory rules that define the rights and responsibilities of the parties to securities transactions. New York adopted these amendments in 1987.

In its decision, the First Department ignored the UCC principles that apply to securities transactions, and erroneously applied inapplicable common law property concepts to a modern securities transaction that should be governed by UCC Article 8. First, the First Department held that a customer who alleges an unauthorized securities transaction in his or her account can assert a common law claim for what it characterized as a "breach of the bailment contract". On that basis, the Court then held that such a customer does not have to sue until six years after making a ***demand*** for correction of the unauthorized transaction—which demand apparently can be made at any time (nearly 18 years after the fact in this case). *Lyman*, 200 A.D.3d at 525. Until this decision, it has been widely understood, based on Court of Appeals' precedent, among other things, that the statute of limitations accrues at the time of interference with the individual's security title and not at the time that an individual demands the return of their security. *Vigilant Ins. Co. of Am. v. Hous. Auth. of City of El Paso, Tex.*, 87 N.Y.2d 36, 44-45 (1995) (holding that claims regarding interference with the plaintiff's bonds accrued from the date the defendant did not "honor the [plaintiff's] title and right," and "not from discovery or the exercise of diligence to discover"). Thus, the First Department's application of bailment principles in the securities context not only undermines the UCC but also runs contrary to Court of Appeals' precedent dictating the applicable statute of limitations.

If allowed to stand, this decision threatens to expose brokers to fraudulent claims without limitation because customers alleging unauthorized trades could wait years (as in this case, nearly two ***decades***) to file suit, unilaterally controlling that time period by simply "demanding" return of their securities any time they wish. Under the First Department's decision, a customer could make such a demand ten, twenty, or more years in the future without being subject to a statute of limitations. By effectively eliminating any statutory limitations period for many claims of unauthorized securities transactions, the First Department's decision has injected an unworkable uncertainty into certain securities transactions.

The decision below not only exposes securities brokers to potentially indefinite liability, but also threatens to open the floodgates as to ***who*** can sue. The Plaintiff here does not allege that he had an account with the Defendant, but rather had an indirect interest in the securities held in that account. Thus, the First Department's decision allowing this claim to proceed would provide standing to any individual who claims some indirect interest in securities that the broker held, whether or not the individual had an account relationship with the broker. This imposes liability far beyond what New York Court of Appeals' precedent authorizes.

For these reasons, SIFMA supports J.P. Morgan Chase & Co.'s ("JPMC") request that this case be reconsidered, or that leave to appeal be granted.

ARGUMENT

I. The First Department Erred in Applying Common Law "Bailment" Principles to Securities Transactions.

a. Article 8 of the UCC Was Adopted Specifically to Abrogate Common Law Property Concepts for Securities Transactions to Facilitate Efficient Transactions in Securities.

Article 8 of the UCC was intended to displace common law property concepts for securities transactions, and the First Department incorrectly applied common law bailment principles here.

i. Background on the Indirect Holding System.

Before the modern indirect holding system was implemented, securities were traded by transferring physical paper certificates, which denoted ownership of a security. But as the financial markets in this country developed, and transactions in securities became more commonplace, the paperwork required to effectuate a securities trade became increasingly cumbersome and costly. The inefficiencies of this paper-based system culminated in the "Paperwork Crisis" of the 1960s. *See* Larry E Bergmann, *The U.S. view of the role of regulation in market efficiency*, Remarks at the International Securities Settlement Conference (Feb. 10, 2004), https://www.sec.gov/news/speech/spch021004leb.htm. During the Paperwork Crisis, the delays, clerical errors, and processing issues caused a significant backlog of unsettled securities transactions. *See* Wyatt Wells, *Certificates and Computers: The Remaking of Wall Street, 1967 to 1971*, 74 Harv. Bus. Hist. Rev. 193, 200-205

(Summer 2000). Indeed, as a result of the crisis, the New York Stock Exchange was forced to restrict trading to four days a week, closing on Wednesdays to allow member firms to catch up. *Id.* at 214. It was not enough. Trades failed and there was chaos in the back offices of several brokerages. Multiple brokerages failed, with more than 100 member firms of the New York Stock Exchange (one sixth of the total) disappearing as a result of mergers or liquidations caused by the crisis. *Id.* at 232.

To address this crisis, it was important to simplify the paperwork for securities transactions and to allow brokers to manage the risks of securities trades through a more manageable system. Consequently, the industry moved to an indirect holding system, where ownership is evidenced not by physical possession of paper certificates, but rather by accounting entries in the records of intermediaries. *See* Jeanne L. Schroeder, *Is Article 8 Finally Ready This Time? The Radical Reform of Secured Lending on Wall Street*, 1994 Colum. Bus. L. Rev. 291, 324. Under this new indirect holding system, most outstanding shares of publicly traded companies are owned by Cede & Co., a nominee used by the Depository Trust Company ("DTC"), a limited purpose trust company that acts as a centralized recordkeeping depository and holds securities for the benefit of its participants. *Id.* at 324-25. The DTC holds certificates representing all of the particular stock held on account of its account holders, and its records reflect the number of securities held on account of its participant companies, including broker dealers. *Id.* at 325. Today, the vast majority of trading of publicly held securities is executed through broker-dealers that participate in DTC, and most public securities are held by these broker-dealers and banks on behalf of their customers. Cede & Co. is the only registered owner of those companies' stock. *Id.*

The centralization of the ownership system has significantly decreased the transaction costs of securities transfers and increased overall efficiency, to the point that today Americans of any means can transact in the securities markets for zero commission at many brokers (a practice that was unheard of in the paper-based era, when each securities transaction required significant manual processing). At the time of the Paperwork Crisis, the average daily trading volume on the New York Stock Exchange was over 12 million shares per day. *See* Katie Kolchin, *DTCC's Important Role in U.S. Capital Markets*, SIFMA (June 11, 2019), https://www.sifma.org/resources/research/sifma-insights-spotlight-dtcc/. Today, that figure is typically more than 900 million shares, and often exceeds one billion. *See* Alice Gomstyn, *How a Blizzard of Paperwork Paralyzed Wall Street in the 1960s*, Business Insider (Oct. 19, 2015), https://www.businessinsider.com/wall-street-paperwork-crisis-in-1960s-2015-10. The high efficiency and low transaction costs of trading securities in the United States have helped maintain securities markets in the United States as the most competitive and liquid securities market in the world.

ii. Article 8 Was Created to Support the Indirect Holding System, by Displacing Common Law Property Concepts in the Context of Securities Transactions, and Provides for Specific Statutory Rights.

UCC Article 8 was amended specifically to create a clear legal framework establishing the rights and duties of all market participants with respect to the indirect holding system. Indeed, the official Prefatory Note to Article 8 contains an entire section titled "Need for Different Legal Rules for the Direct and Indirect Holdings Systems." David Frisch, 8 *Lawrence's Anderson on U.C.C.* § 8-101:1, Official Prefatory Note 1, 3 (rev. 3d. ed. 2021) (hereinafter "Prefatory Note"). Article 8 was revised to make securities transactions more efficient by creating a system where, instead of surrendering an indorsed certificate for registration of transfer, an instruction is now sent to the issuer directing it to register the transfer.

Under the indirect holding system, each owner's interest in a security is evidenced by an entry on his account with a broker, bank, clearing corporation, or other intermediary, and the security itself is represented by a piece of paper in the possession of a third party like Cede & Co., or by an entry on the books of the issuer. *See* James Steven Rogers, *Policy Perspectives on Revised U.C.C. Article 8*, 43 UCLA L. Rev. 1431, 1440-42 (1996).

The Article 8 drafters' goal was to create a legal structure that would harmonize the interests of securities intermediaries and investors in the indirect holding system. Sections 8-503 through 8-508 accomplish this by articulating the rights and duties that define the relationship between a securities intermediary and the person who holds a securities position, known as the "entitlement holder".[2]

These provisions displaced traditional notions of property rights or title to specific chattel, as is traditionally required for a bailment relationship. Article 8 explicitly displaced the pre-existing common law framework by stating: "[a]n entitlement holder's property interest with respect to a particular financial asset . . . may be enforced against the securities intermediary ***only by exercise of the entitlement holder's rights under Sections 8-505 through 8-508.***" N.Y. U.C.C. Law § 8-503(c) (emphasis added). This language makes clear Article 8 is the ***only*** framework under which the rights to a security entitlement, as defined in Sections 8-505 through 8-508, should be analyzed. Article 8's Prefatory Note explains that

[2] Section 8-102(a)(17) defines what the security holder has as "security entitlement," and defines this term as "the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5." N.Y. U.C.C. Law § 8-102(a)(17). Section 5 articulates the contours of the relationship between the entitlement holder and the intermediary. For example, Section 8-503 states that "all interests in that financial asset held by the securities intermediary are held by the securities intermediary ***for*** the entitlement holders." N.Y. U.C.C. Law § 8-503(a) (emphasis added). Section 8-505 articulates the intermediary's duties to the entitlement holder: "[a] securities intermediary is obligated to its entitlement holder for a payment or distribution made by the issuer of a financial asset if the payment or distribution is received by the securities intermediary." N.Y. U.C.C. Law § 8-505(b). Section 8-507 further specifies the duties owed to the holder: "A securities intermediary shall comply with an entitlement order if the entitlement order is originated by the appropriate person. . . . " N.Y. U.C.C. Law § 8-507(a).

"the technique used in revised Article 8 [was] to acknowledge explicitly that the relationship between a securities intermediary and its entitlement holder is *sui generis*, and to state the applicable commercial law rules directly, rather than by inference from a categorization of the relationship based on legal concepts of a different era." Prefatory Note, at 9.

As the Comments to the UCC explain: "Although this section recognizes that the entitlement holders of a securities intermediary have a property interest in the financial assets held by the intermediary, ***the incidents of this property interest are established by the rules of Article 8, not by common law property concepts***. . . . A security entitlement is not a claim to a specific identifiable thing; it is a package of rights and interests that a person has against the person's securities intermediary and the property held by the intermediary." N.Y. U.C.C. Law § 8-503 (McKinney), Official Comment 2 (emphasis added).

In other words, crucial to the administration of this regime is setting aside traditional common law property concepts that apply to specific, identifiable property. This structure was deliberately crafted to reformulate the relationship between market participants and to reorder the law governing securities transactions. The newly designed "package of rights and interests" under UCC Article 8 renders an owner of securities an "entitlement holder" as to her broker, who, in turn, is considered an entitlement holder as to the DTC. *See* N.Y. U.C.C. Law § 8-501(b)(1) ("a person acquires a security entitlement if a securities intermediary . . . indicates by book entry that a financial asset has been credited to the person's securities account"); *id.* § 8-503(b) ("An entitlement holder's property interest with respect to a particular financial asset . . . is a pro rata property interest in all interests in that financial asset held by the securities intermediary . . .").

Numerous courts have recognized that Article 8 supplants common law property rights. For example, in *S.E.C. v. Credit Bancorp, Ltd.*, plaintiffs argued that they entered into a bailor-bailee relationship with Credit Bancorp when they delivered securities to Credit Bancorp for the purpose of securing future loans or advances. No. 99 CIV 11395 RWS, 2000 WL 1752979, *1, *23 (S.D.N.Y. Nov. 29, 2000), *aff'd,* 290 F.3d 80 (2d Cir. 2002). The court rejected the argument that plaintiffs, as bailees, retained legal and equitable title because, "[u]nder Revised Article 8 of the U.C.C. . . . the property rights of securities entitlements holders over assets held by securities intermediaries are defined by Article 8 rather than by common law." *Id.* at *24. The court concluded that "***application of the common law of bailment to [Plaintiffs'] claims as against Credit Bancorp has no place under the scheme set forth by the U.C.C.***" *Id.*[3]

[3] *See also In re Lehman Bros. Holdings Inc.,* No. 17cv3762, 2018 WL 1441407, *1, *8 (S.D.N.Y. Mar. 22, 2018) (holding that while entitlement holders of a securities intermediary had a property interest in the financial assets held by the intermediary, "the incidents of [the] property interest are established by the rules of Article 8, not by common law property concepts."); *Harris v. TD Ameritrade Inc.*, 338 F. Supp. 3d 170, 190 (S.D.N.Y. 2018) ("Article 8 supplants any contrary common-law principles.").

b. The First Department's Judgment Should Be Vacated Because It Conflicts with the UCC and Court of Appeals' Precedent.

The First Department improperly applied bailment principles to this case. Under Section 8-102(a)(7) of the UCC, Plaintiff is an entitlement holder. *See* Pl.'s First Am. Compl., ¶¶ 18-22. As an entitlement holder of a securities intermediary, the "incidents of [Plaintiff's] property interest are established by the rules of Article 8, not by common law property concepts." *In re Lehman Bros. Holdings Inc.*, 2018 WL 1441407, at *8; *see also Credit Bancorp, Ltd.*, 2000 WL 1752979, at *24 ("Under Revised Article 8 of the U.C.C., . . . the property rights of securities entitlements holders over assets held by securities intermediaries are defined by Article 8 rather than by common law"); *Harris*, 338 F. Supp. 3d at 189-190. Thus, the First Department's application of bailment principles to this case runs contrary New York statutory law codified in UCC Article 8, and for that reason, the Court's decision must be vacated.

The First Department's judgment conflicts with UCC Article 8 in another way. Article 8 of the UCC does not require that a holder of a securities entitlement make a demand before bringing a claim.[4] *See, e.g.,* N.Y. U.C.C. Law § 8, *et seq.*

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[4] By way of analogy, UCC Article 4 requires that a bank depositor bring a claim for an unauthorized transaction in their account within one year. N.Y. U.C.C. Law § 4-A-505. The First Department has held that the statute of limitations to bring a claim under UCC Article 4 is not tolled where a bank depositor fails to inspect their account statements. *B.B.C.F.D., S.A. v. Bank Julius Baer & Co. Ltd.*, 77 A.D.3d 463, 466 (1st Dep't 2010) (affirming that UCC Article 4 preempted common law claims relating to fund transfers and that such other claims were time

Further, the First Department's decision directly conflicts with Court of Appeals' precedent holding that causes of action for claims regarding interference with an individual's securities title accrue when an injury is sustained. *See, e.g., Vigilant Ins.,* 87 N.Y.2d at 43. ("As the Court has stated in other contexts, a cause of action does not accrue until an injury is sustained. An action accrues . . . when all of the facts necessary to sustain the cause of action have occurred, so that a party could obtain relief in court.") (internal citations omitted).

In *Vigilant*, plaintiffs brought conversion and breach of contract claims under UCC Article 8 after a transfer agent refused to honor their demand for the return of their bonds. *Id.* at 39-40. Defendants argued that the plaintiffs' claims were time barred because the cause of action accrued when the transfer agent first placed "stops" on the bonds, preventing their transfer—that is, at the time of the alleged interference with plaintiffs' title in the bonds. *Id.* at 40. The Court of Appeals agreed by applying UCC Article 8 and holding that claims arising from the interference with a security entitlement holder's interest accrue at the time of interference, not when the entitlement holder later demands the security or later discovers the wrong. *Id.*[5]

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barred under UCC Article 4's statute of repose). In other words, there is no "demand" requirement under UCC Article 4. Likewise, there is no demand requirement under UCC Article 8.

[5] *See also Guild v. Hopkins*, 271 A.D. 234, 244 (1st Dep't 1946), *aff'd* 297 N.Y. 477, 478 (1947) (holding that conversion and breach of contract claims against a broker accrued "when each wrong occurred," and that the fact "she may not have discovered the wrongs complained of until long after they were committed [was] immaterial"); *Smith v. Staten Island Land Co.*, 175 A.D. 588, 603 (1st Dep't 1916) ("When, however, the [defendants] sold the securities. . . thereupon a cause of

By imposing a demand element, the First Department has re-written when the applicable limitations period accrues. Under the First Department's reasoning, as the facts of this case illustrate, a customer who claims to have ignored an account for an unlimited period of time can bring suit at essentially *any* future date by the mere expedient of suddenly "demanding" return of their securities and then filing suit—on the grounds that their claim did not ripen until they chose to make a demand. This cannot be squared with the goals or language of Article 8 or with Court of Appeals' precedent.

II. The First Department Decision Poses Substantial Risks to the Orderly Functioning of Securities Markets.

The existing New York Court of Appeals' precedent, under which the statute of limitations begins to accrue at the time of an allegedly unauthorized transaction, has good policy reasons supporting it.

New York courts quite sensibly have "repeatedly rejected accrual dates which cannot be ascertained with any degree of certainty, in favor of a bright line approach." *Deutsche Bank Nat'l Tr. Co. v. Flagstar Cap. Mkts. Corp.*, 32 N.Y.3d 139, 146 (2018) (citing *Ace Sec. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 593-94 (2015)). This provides clear guidance to putative plaintiffs as to when their

action arose. . . and the statute of limitations commenced to run, regardless of whether or not he had notice of the conversion."); *Barrett v. Huff*, 6 A.D.3d 1164, 1166 (4th Dep't 2004) (holding that the statute of limitations for plaintiff's claim of conversion for interference with property began to run "from the date of the tort," not from the date of discovery).

claims must be brought, while also affording defendants certainty. Under the First Department's reasoning, however, the limitations period does not begin to run until a putative plaintiff makes a demand, which seemingly can be done whenever the plaintiff chooses; this leaves the limitations period entirely open-ended.

Adopting a demand requirement that effectively allows the limitations period to run indefinitely exposes brokers to a real risk of stale, or even fraudulent, claims. This is a particular concern in the context of the securities markets, where prices can change quite dramatically over time. A $10,000 investment in Apple stock at the time of its IPO would be worth upwards of $7 million today; but, of course, many investors who purchase shares in an IPO sell them not long thereafter. It is not far-fetched to imagine that an early investor who sold their shares might come to regret that choice, and decades later decide to "demand" return of their shares, claiming the sale in their account was unauthorized. Under the First Department's reasoning, the statute of limitations does not preclude such claims. Indeed, this case illustrates the risk: Plaintiff sold 26,225 shares of Shire Pharmaceutical Corporation for $452,765.89 in September 2000—and raised the issue of unauthorized trading only in 2018, when Shire was acquired at a significant multiple of that price. Statutes of limitations exist precisely to allow legitimate, timely claims, while protecting broker-dealers against plaintiffs who may simply have a case of "seller's regret," from filing meritless suits.

Additionally, allowing a claim to run indefinitely could lead to disorder for which financial institutions are ill-prepared. Specifically, financial institutions would be unprepared to address or defend themselves against untimely complaints that are raised past the limitations period because they have not historically been required to maintain the relevant records indefinitely. Under federal law, financial institutions are required to maintain certain transaction records for six years, ensuring that adequate records will be available in cases of dispute. *See* 17 C.F.R. §§ 240.17a-3 and a-4 (requiring broker-dealers to keep certain records for six years). Running the limitations period from the date of the allegedly unauthorized transaction therefore makes good sense given that brokers are not required to keep records past a set period of time.

III. Plaintiff Was Never Party to, nor a Third-Party Beneficiary of, the Account Contract, and Thus Lacks Standing to Bring this Claim.

The First Department's decision here is all the more troubling because it seems to give standing to someone ***other than the alleged account holder*** merely because such person makes a "demand" for the securities and then proceeds to file a lawsuit. The Plaintiff alleges in his Complaint that he never actually had any account with JPMC; only a venture capital firm of which he was a partner did. Pl.'s First Am. Compl., ¶¶ 8-9, 11-14, 34. These allegations demonstrate that he had no contractual relationship with the Defendant. Pl.'s First Am. Compl., ¶¶13-14, 34. Thus, even if the UCC did not apply, and traditional bailment principles did—and they do not—the parties to that "bailment contract" were JPMC and the venture capital firm. Under Plaintiff's own allegations, he is a stranger to JPMC. He has no standing to sue JPMC under any breach of contract theory.

In a breach of contract claim, the existence of a contractual relationship between plaintiff and defendant is critical. *See Mazzei v. Money Store*, 308 F.R.D. 92, 109 (S.D.N.Y. 2015), *aff'd,* 829 F.3d 260 (2d Cir. 2016). Absent a contractual relationship, there can be no contractual remedy. *Suffolk Cnty. v. Long Island Lighting Co.*, 728 F.2d 52, 63 (2d Cir. 1984); *see also Impulse Mktg. Grp., Inc. v. Nat'l Small Bus. Alliance, Inc.,* No. 05-CV-7776(KMK), 2007 WL 1701813, *1, *6 (S.D.N.Y. June 12, 2007) ("Privity of contract has long been held as a requirement for a breach of contract action.").[6]

The proper plaintiff for any breach of contract claim, then, would be the venture capital firm (the only party that allegedly had a banking relationship with defendant), not the plaintiff. Plaintiff might have had standing to pursue some type of claim against that venture capital firm if it truly was exercising control of his property without his authority. But he has no standing to bring a claim against

[6] Under New York law, a non-party to a contract may only sue for breach if such non-party is an intended, and not merely an incidental, beneficiary of the contract. *LaSalle Nat'l Bank v. Ernst & Young LLP,* 285 A.D.2d. 101, 108 (1st Dep't 2001) (citing *Alicea v. City of New York*, 145 A.D.2d 315, 317 (1st Dep't 1988)). A non-party to a contract governed by New York law lacks standing to enforce the agreement in the absence of terms that clearly evidence an intent to permit enforcement by the third-party in question. *Id.* Here, Plaintiff does not assert that he is an intended third-party beneficiary of any contract between JPMC or the venture capital firm.

JPMC. *See Premium Mortg. Corp. v. Equifax, Inc.,* 583 F.3d 103, 108 (2d Cir. 2009) ("A non-party to a contract governed by New York law lacks standing to enforce the agreement in the absence of terms that clearly evidence[ ] an intent to permit enforcement by the third party in question."). In short, taking Plaintiff's allegations as true, Plaintiff lacks standing to assert rights in the contract.

CONCLUSION

For the foregoing reasons, SIFMA urges this Court to grant Defendants-Respondents' Motion for Reargument or Leave to Appeal, and to reverse the decision under review.

Dated: New York, New York
February 4, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *amicus* brief was printed in a proportionally spaced typeface (Times New Roman), and the body of the foregoing *amicus* brief was printed in 14-point type and the footnotes are printed in 12-point type.

I further certify that the foregoing *amicus* brief consists of less than 7,000 words (4,776 per Microsoft Word's word count function), inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, proof of service, certificates of compliance, or any addendum otherwise authorized.

Dated: New York, New York
February 4, 2022

Griselda Cabrera