**No. 12-57299**

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**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**FEDERAL DEPOSIT INSURANCE CORPORATION,**
**as Receiver for Strategic Capital Bank,**

**Plaintiff-Appellant,**

**- v -**

**COUNTRYWIDE FINANCIAL CORP., *et al.*,**

**Defendants-Appellees.**

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**On Appeal from the United States District Court**
**for the Central District of California**
**The Honorable Mariana R. Pfaelzer**
**Case No. 2:12-Cv-04354**

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# BRIEF OF APPELLANT FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR STRATEGIC CAPITAL BANK

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## Statement of Jurisdiction

Plaintiff-Appellant, the Federal Deposit Insurance Corporation, as Receiver for Strategic Capital Bank ("FDIC"), filed this action on May 18, 2012, in the United States District Court for the Central District of California.[1] Subject matter jurisdiction is based upon 12 U.S.C. § 1819(b)(2)(A) and 28 U.S.C. § 1331 (federal question). Appellate jurisdiction exists under 28 U.S.C. § 1291. Although this case is part of multi-district litigation ("MDL"), because the District Court dismissed all of FDIC's claims that arise out of the failure of Strategic Capital Bank ("SCBank"),[2] the case is immediately appealable under *In re Korean Airlines Co. Ltd. Antitrust Litigation*[3] This Court denied Defendants-Appellees' (collectively "Countrywide") motion to dismiss the appeal, which argued that the District Court's order is not a final appealable order, but without prejudice to Countrywide renewing its arguments in its answering brief.

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[1] Excerpts of Record ("ER") Tab 65 at 2 ("ER-65—2").
[2] ER-65—29.
[3] 642 F.3d 685, 698 (9th Cir. 2011).

## Issues Presented for Review

**Issue One**: In *Merck & Co. v. Reynolds*,[4] the Supreme Court held that the statute of limitations applicable to claims under the Securities Exchange Act of 1934 does not begin to run until an investor actually discovers *all* facts necessary to state a claim that would survive a motion to dismiss, or when a reasonably diligent investor would have discovered *all* facts necessary to assert such a claim.[5] Although the District Court correctly acknowledged that *Merck* applies equally to claims under the Securities Act of 1933 ("Securities Act"),[6] the District Court held that SCBank's claims expired before the bank failed on May 22, 2009.[7]

FDIC's extender statute provides that for claims of a failed bank that have not expired on the date of a bank's failure, any applicable statute of limitations sounding in tort is extended for at least an additional three years from that date.[8] SCBank failed on May 22, 2009, and therefore, so long as SCBank's claims under the Securities Act had

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[4] 559 U.S. 633, 644-48 (2010).
[5] 15 U.S.C. § 77m.
[6] 15 U.S.C. §§ 77a *et seq.*
[7] ER-65—16.
[8] 12 U.S.C. § 1821(d)(14).

not expired before May 22, 2008, the statute extended the statute of limitations for at least another three years making FDIC's claims timely.

Did the District Court err in concluding as a matter of law on a motion to dismiss that FDIC's claims arising out of the failed SCBank were untimely because the statute of limitations had expired before the bank failed, even though prior to May 22, 2008, a reasonably diligent plaintiff could not have discovered facts that the offering materials for the certificates that SCBank purchased from Countrywide misrepresented the credit qualities of the particular loans underpinning those certificates?

**Issue Two**: State and federal courts have concurrent jurisdiction over Securities Act claims.[9] Under the Supreme Court's decision in *American Pipe & Construction Co. v. Utah*,[10] and its progeny, the filing of a claim as a class action in state or federal court tolls the federal statute of limitations for all potential class plaintiffs. If the class is not certified or if the court excludes certain potential plaintiffs from the

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[9] 15 U.S.C. § 77v(a).

[10] 414 U.S. 538, 550-59 (1974).

certified class, plaintiffs may file suit within a reasonable time of such decision.

Did the District Court err in holding that *American* Pipe did not toll FDIC's claims, after:

(a) ignoring this Court's precedent holding that once a named plaintiff in a class action demonstrates that it has individual standing to sue, the similarities between its claims and those of absent class members are to be determined under Federal Rule of Civil Procedure 23 ("Rule 23"), not under prudential standing or Article III standing;

(b) misinterpreting Supreme Court precedent providing that a named plaintiff may represent the claims of absent class members so long as their claims arise out of the "same set of concerns";

(c) incorrectly holding that *American Pipe* tolling is retroactively revoked for absent class members if the named plaintiff in a class action is found to have lacked standing to represent their claims; and

(d) incorrectly holding that class actions filed under the Securities Act in state court do not create *American Pipe* tolling of the Act's limitations period?

## Statement of the Case

Between 2004 and 2008, Countrywide issued, underwrote, and sold more than 9,000 different residential mortgage-backed securities ("RMBS"), in hundreds of securitizations, of over one million mortgage loans of dozens of different types. The ensuing securities litigation (against not only Countrywide but also other securities firms that underwrote and sold securities that Countrywide issued), including this action, is the subject of an MDL proceeding before the District Court.[11] The same judge of the District Court previously presided over both derivative and securities litigation brought on behalf of shareholders of Countrywide.[12]

This litigation is one of the twenty-six MDL cases related to Countrywide RMBS. In 2012, FDIC sued Countrywide under the Securities Act with respect to four certificates issued and underwritten by Countrywide, CWALT 2006-J8 A2, CWALT 2006-J1 1-A-6, CWALT 2007-5CB 1-A-1, and CWALT 2007-5CB 1-A-11 (collectively

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[11] ER-67—12.

[12] *See In re Countrywide Fin. Corp. Derivative Litig.*, 554 F. Supp. 2d 1044 (C.D. Cal. 2008)

"certificates" or "CWALT certificates").[13] The District Court held that FDIC's claims were untimely and dismissed all of them. This appeal ensued. This decision is one of a number of other similar decisions rendered by the District Court in the Countrywide RMBS MDL.

## Statement of the Facts

The claims in the Amended Complaint concern four RMBS that SCBank purchased before it failed.[14] Defendant-Appellee CWALT, Inc. ("CWALT") was the issuer of the securities.[15] Defendant-Appellee Countrywide Securities Corporation ("Countrywide Securities"), among others, was an underwriter of the securities.[16] Defendant-Appellee Countrywide Financial Corp. was the parent company and control person of CWALT and Countrywide Securities.[17]

RMBS are created by the process of securitization.[18] An entity known as a depositor (here, CWALT) purchases mortgage loans.[19] It

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[13] ER-36—9.
[14] ER-65—29.
[15] ER-36—9.
[16] ER-36—3.
[17] ER-36—33-34.
[18] ER-36—5.
[19] ER-36—7.

then sells the mortgage loans to a trust for cash.[20] As the new owner of the mortgage loans, the trust is entitled to receive all payments of principal and interest (the "cash flow") on the mortgage loans.[21] To finance its purchase of the mortgage loans, the trust issues and sells bonds, usually called certificates, to investors.[22] For purposes of liability under the Securities Act, both the depositor and the trust are deemed to be "issuers" of the certificates.[23] The mortgage loans are the only assets of the trust and thus the only source of payment to the holders of certificates.[24] The mortgage loans as a group are referred to as the "collateral pool" for the certificates.[25]

The certificates are designed to meet the needs of different types of investors. For example, some certificates enjoy a higher priority of payment from the cash flow, but pay a lower rate of interest, than others.[26] Each different type of certificate is referred to as a "tranche."[27]

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[20] *Id.*
[21] *See id.*
[22] ER-36—6.
[23] ER-36—7.
[24] *Id.*
[25] ER-36—6.
[26] *Id.*
[27] *Id.*

A tranche will be divided into certificates of different amounts according to the demand for them by investors.[28] When the trust issues the certificates, it sells them to a securities underwriter, which in turn sells them to investors.[29] The underwriter registers the certificates with the Securities and Exchange Commission ("SEC") under the Securities Act and sells them by means of a prospectus supplement, the contents of which are prescribed by the SEC.[30]

Securities underwriters play a critical role in the process of securitization.[31] They underwrite the sale of the certificates, including the preparation of the prospectus supplement, and are responsible for the accuracy of representations in the disclosure documents that they file with the SEC.[32] Securities underwriters provide to potential investors the information that they need to decide whether to purchase certificates.[33]

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[28] *See id.*
[29] ER-36—7-8.
[30] ER-36—8.
[31] ER-36—7.
[32] ER-36—8.
[33] *See* ER-36—8.

The Amended Complaint alleges that CWALT and Countrywide Securities made untrue or misleading statements in the prospectus supplements about the credit quality of the particular mortgage loans in the collateral pool for each CWALT certificate that SCBank purchased.[34] For example, the prospectus supplements overstate the amount of equity that many borrowers had in the houses that secured those mortgage loans.[35] Equity is the single most important measure of the credit quality of a mortgage loan. More equity means that it is less likely that the borrower will default and more likely that the value of the house will cover the balance of the mortgage loan if the borrower does default. To make these allegations about the particular loans that backed SCBank's certificates, it was necessary to know the addresses of the mortgage properties, which investors could not know until early 2010, when a vendor of real estate data developed a way to identify them.[36]

The prospectus supplements also stated that the originators of the mortgage loans (mainly Countrywide entities) followed certain stated

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[34] ER-36—9-36

[35] ER-36—9-20.

[36] ER-36—24.

underwriting guidelines in making the loans.[37] The Amended Complaint alleges that these statements were untrue or misleading because the originators actually disregarded their professed guidelines in making most of the mortgage loans.[38]

On May 22, 2009, SCBank was closed and FDIC was appointed its receiver.[39] On May 18, 2012, FDIC filed a complaint for violations of Sections 11 and 15 of the Securities Act in the offer and sale of the certificates to SCBank.[40] The case was made part of *In re Countrywide Financial Corp. Mortgage-Backed Securities Litigation*, MDL No. 2265, before the Honorable Mariana R. Pfaelzer. The MDL includes twenty-six cases with hundreds of claims asserted against dozens of defendants.

Countrywide moved to dismiss the Amended Complaint as untimely.[41] Claims under the Securities Act must be brought within "one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of

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[37] ER-36—24.
[38] ER-36—25-31.
[39] ER-65—2.
[40] ER-65—2.
[41] ER-65—4.

reasonable diligence."[42] Under 12 U.S.C. § 1821(d)(14), FDIC has at least three years to bring claims sounding in tort that were alive when it was appointed receiver. Thus, the question was whether the statute of limitations began to run before May 22, 2008, more than one year before FDIC was appointed receiver.

By Order, dated November 21, 2012, the District Court granted Countrywide's motion and dismissed all of FDIC's claims as time-barred as a matter of law.[43] In its view: (1) a reasonable investor would have discovered the facts constituting the alleged violations of the Securities Act before May 22, 2008; and (2) the limitations period was not tolled by the earlier filing of a class action that made claims under the Securities Act with respect to the same trusts on which FDIC has sued, because the named plaintiffs lacked standing to sue on behalf of purchasers of certificates in tranches other than the fifty-eight tranches purchased by the named plaintiffs.[44] FDIC timely appealed that Order.

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[42] 15 U.S.C. § 77m.

[43] ER-65—29.

[44] ER-65—4, 23.

## Summary of Argument

Throughout the MDL, the District Court has proceeded on three false premises that led it to err in dismissing the Amended Complaint: (1) the statute of limitations on claims related to all of Countrywide's multifarious RMBS began to run on the same date; (2) the District Court can pinpoint that date within a range of only fifty days based solely upon motions to dismiss and without usurping the role of the finder of fact;[45] and (3) general allegations that Countrywide abandoned its underwriting standards, which may have sufficed to state a claim in earlier shareholder litigation, also suffice to state Securities Act claims on RMBS backed by specific mortgage loans.

These false premises led the District Court to ignore substantial issues of fact that cannot be decided as a matter of law, including whether a reasonably diligent investor could have discovered facts constituting a violation of the Securities Act even though there was *no evidence of any kind available in the public domain* that the offering

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[45] *In re Countrywide Fin. Corp. Mortgage-Backed Secs. Litig.*, 2012 WL 1322884, at *3, Nos. 2:11-ML-02265-MRP (MANx), 2:11-CV-10414 MRP (MANx) (C.D. Cal. Apr. 16, 2012).

materials for the certificates SCBank purchased misrepresented the credit qualities of the particular loans underpinning those certificates.

Moreover, even though the District Court acknowledged that the statute of limitations cannot begin to run until a reasonably diligent plaintiff should have *discovered* the violation of law, the District Court focused principally on when a reasonably diligent owner of the relevant CWALT certificates should have begun to *investigate*. The court compounded the error by concluding as a matter of law that an investor should have begun to investigate whether Country made untrue or misleading statements about the mortgage loans that back those certificates during a time period when: (1) the certificates were rated triple-A and had not been downgraded even a single notch as of May 22, 2008; and (2) Countrywide had just announced in public filings that its *own* losses were caused by temporary illiquidity in the market—not from its pervasive disregard of its underwriting standards. And, of course, even if an investor had begun to investigate, as the court concluded it should have, there were no facts available to link the general allegations to the collateral pool for the certificates SCBank purchased.

The District Court also erred for an *independent reason* based upon its errant view of standing in RMBS class-action cases. FDIC's claims are also part of *Luther* v. *Countrywide Home Loans Servicing LP* (*"Luther"*),[46] a class action filed in California state court against Countrywide in late 2007 and later removed to the District Court where it was made part of the Countrywide MDL. The *Luther* class action was indisputably filed in state court within the limitations period in the Securities Act.

Notwithstanding a recent decision of the Second Circuit establishing that a class plaintiff can have standing to represent the interests of investors who purchased certificates other than those that the named plaintiff purchased, the District Court rejected the reasoning of the Second Circuit and decided that the named plaintiffs in *Luther* had standing to represent only purchasers of certificates in precisely the same tranches in which they purchased (fifty-eight of the more than 9,000 tranches in which Countrywide issued certificates).

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[46] BC380698 (Cal. Super. Ct. filed Nov. 14, 2007).

The District Court then concluded after observing that the *Luther* class-action complaint was "abusive"[47] that *American Pipe* tolling should be retroactively revoked. The court found that any reasonable member of the putative class that did not purchase certificates in one of the fifty-eight tranches, including SCBank, should have realized that the named plaintiffs did not have standing to represent them.[48] This is not the law in this Court or any other circuit court of appeals.

In an alternative holding, the District Court also erred in retreating from its earlier decision that *American Pipe* applied equally to Securities Act class actions filed in state *and* in federal court. In doing so, the court erred in concluding that *American Pipe* is premised upon Rule 23 instead of a rule applicable to all federal statutes of limitations. The court's holding was contrary to a recent decision by the Seventh Circuit, which concluded that *American Pipe* applies to *all* federal statutes of limitations (absent evidence that Congress intended otherwise)—and applies regardless of whether the class action is filed in

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[47] ER-65—18.

[48] ER-65—18.

state or federal court, so long as both court systems have concurrent jurisdiction over a statutory claim created by federal statute.[49]

The District Court's interpretation of *American Pipe* turns the policies announced in that case—the policies of fairness, efficiency and economy—on their heads. Even though *American Pipe* concluded that tolling is appropriate where a defendant receives fair notice about the specific nature and scope of the potential liability, the rule the District Court has adopted renders those considerations irrelevant. And, it defeats the policies of efficiency and economy identified in *American Pipe* because it would require that putative plaintiffs in a class action nevertheless file prophylactic suits by the hundreds to protect themselves against the dismissals of their claims as untimely should the court fail to certify a class in a way that included their claims. In other words, the rule the District Court has adopted would turn a statute of limitations—which is supposed to function as a safeguard to protect defendants from the stale claims of dilatory plaintiffs—into a gauntlet that virtually no plaintiff can survive.

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[49] ER-65—23.

## Argument

### I. The Standard of Review

The Court reviews a district court's dismissal on statute of limitations grounds *de novo*.[50] Dismissal for failure to state claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") is also reviewed *de novo*.[51]

### II. The District Court Erred in Concluding as a Matter of Law that SCBank Should Have Discovered Facts before May 22, 2008, Constituting a Violation of the Securities Act by Countrywide

There is no dispute that under the Securities Act, SCBank was required to file suit against Countrywide within one year of when it discovered, or a reasonably diligent investor could have discovered, each necessary fact required to state a claim that Countrywide violated the Securities Act.[52] And there is no dispute that there were *general* allegations in the public domain about Countrywide's underwriting shortcomings before May 22, 2008.[53]

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[50] *Papenthien v. Papenthien*, 120 F.3d 1025, 1027 (9th Cir. 1997).
[51] *Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995).
[52] *See Merck*, 559 U.S. at 644-48; *see also City of Pontiac Gen. Employees' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 174-75 (2d Cir. 2011).
[53] *See* DE 49—24-25.

There is also no dispute, however, that before May 22, 2008, there were no facts available to a reasonable investor that linked general allegations about Countrywide's underwriting practices to the CWALT certificates purchased by SCBank. Nevertheless, the District Court concluded as a matter of law that SCBank's claims accrued prior to May 22, 2008, because SCBank could have borrowed general and conclusory allegations from other complaints filed before that date.[54]

The District Court was mistaken. The standard under *Merck* is not whether the plaintiff could have simply reproduced allegations that would have survived a motion to dismiss. Rather, the question is whether a diligent investor would have uncovered facts constituting a violation sufficient to give the investor a good-faith basis for filing a lawsuit.

Here, before May 22, 2008, SCBank had no reason to believe that it even needed to begin investigating a claim against Countrywide, much less that it could have discovered sufficient facts to state a claim. SCBank's certificates, which were backed by Alt-A loans, were not downgraded at all, let alone below investment grade, until after May

[54] ER-65—15-16.

22, 2008.[55] In fact, no senior tranche (rated trible-A by at least two of the three major ratings agencies) of RMBS backed by Alt-A loans had ever been downgraded below investment grade until after May 22, 2008.[56] And, Countrywide announced at the end of March 2008 that its recent losses were unrelated to its RMBS business practices. Thus, nothing alerted investors to commence an investigation of the certificates. And, even if they had been alerted, SCBank, along with the other investors in the same certificates, simply had no way to access specific information about the loans supporting their certificates needed to support the claim.

SCBank could not have stated a claim against Countrywide on these certificates until well after May 22, 2008. At the very least, there is a question of fact about whether, before May 22, 2008, there were facts that could have been discovered through the exercise of reasonable

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[55] DE 49—26.

[56] *See* FDIC Motion for Judicial Notice, filed September 23, 2013 (Bloomberg data showing that the earliest date on which any senior tranche of an Alt-A RMBS issued between 2004 and 2008 was downgraded below investment grade was June 12, 2008, and the earliest date on which a senior tranche of a CWALT RMBS issued between 2004 and 2008 was downgraded below investment grade was July 17, 2008).

diligence that would have demonstrated that Countrywide violated the Securities Act when it underwrote and sold the CWALT certificates that SCBank purchased.

### A. No Publicly Available Information Linked General Criticism of Countrywide's Underwriting to the Certificates SCBank Purchased

The District Court decided that SCBank's suit was untimely based on general public allegations that Countrywide was not following its underwriting standards.[57] The court's decision is plainly against the weight of recent authority in Securities Act litigation involving RMBS.

In 2011, the First Circuit held that to survive a motion to dismiss, a plaintiff's complaint must plead more than general allegations of violations of underwriting standards by the defendants.[58] As the court explained, "[t]he harder problem is whether enough has been said in the complaint—beyond conclusory assertions—*to link such [poor underwriting] practices* with specific lending banks that supplied the mortgages that underpinned the trusts."[59] The court concluded that

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[57] *See* ER 65—15-16.
[58] *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.,* 632 F.3d 762, 773-74 (1st Cir. 2011).
[59] *Id.* at 773 (emphasis added).

"[w]hile this case presents a judgment call, *the sharp drop in the credit ratings after the sales* and the specific allegations as to FNBN offer enough basis to warrant some initial discovery aimed at these precise allegations."[60]

The First Circuit explained that even a sharp decline in credit ratings and allegations regarding the bank's poor underwriting were barely sufficient to survive a motion to dismiss under the facts of that case. Rather, it was a "judgment call" that presumably could have gone the other way. Here, there was not even a sharp drop in the credit ratings of SCBank's certificates, and, even if there had been, there is a question of fact about whether this would be sufficient to constitute the discovery of a Securities Act claim, particularly given the assurances publicly provided by Countrywide.

More recently, in *Pension Fund for Operating Engineers v. Mortgage Asset Securitization Transaction, Inc.* ("*Operating Engineers*"),[61] the Third Circuit confirmed that a cause of action does

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[60] *Id.* at 773-74 (emphasis added).

[61] ___ F.3d ___, 2013 WL 5184064, at *9 (3d Cir. Sept. 17, 2013). The Third Circuit ultimately found the pension fund's suit was untimely based upon the particular facts of the case, including the fact that the

not accrue until a plaintiff is alerted to the misconduct and can demonstrate a link between the misconduct and the loans underlying the RMBS: "[T]he statute of limitations would not have begun to run until [the plaintiff] discovered the untrue statements or the omissions concerning her particular Certificates."[62]

Other courts have, likewise, rejected the legal conclusion of the District Court. For example, the United States District Court for the Southern District of New York did so in *Federal Housing Finance Agency v. UBS Americas, Inc.*,[63] a suit in which the Federal Housing

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pension fund was included in the class of plaintiffs that filed the *Luther* amended complaint in September 2008. The court found that the filing of the amended complaint should have induced the fund to commence an investigation. *Id.* at *13-15. The fund, however, waited until October 2010, to hire a consultant to do an individualized search based on information provided by the defendant of nationwide data bases, and "reverse engineer" the specific certificates in that case to obtain loan level information. The court found that this could have been accomplished in 2008 and, therefore, the complaint was untimely. *Id.* There are no similar facts that allow the conclusion that the certificates in this case could have been "reverse-engineered." Moreover, *Merck* imposes no duty on an investor to go to such lengths; it requires only that an investor exercise reasonable diligence.

[62] *Id.* at *12.

[63] 858 F. Supp. 2d 306, 320-22 (S.D.N.Y. 2012), *motion to certify appeal granted* (June 19, 2012), *aff'd*, 712 F.3d 136 (2d Cir. 2013).

Finance Agency ("FHFA") brought an action under the Securities Act as conservator for Freddie Mac and Fannie Mae. There, defendants argued that, because there were public and private reports in the public domain about systematic underwriting failures by many mortgage originators whose loans were included in the securitizations at issue, Freddie and Fannie could have "discovered," through the exercise of reasonable diligence, that they had claims against the UBS Americas entities more than one year before they were placed into conservatorship. Therefore, they argued, the claims were barred at the time of conservatorship.[64]

The court flatly rejected this argument, noting that: "[A]n important event occurred [between September 2007 and September 2008—when the [Government Sponsored Enterprises] . . . were placed into FHFA conservatorship] that caused the GSEs to discover that the loans included in the securitizations they bought from defendants were not as advertised: the securities were downgraded from investment grade to near-junk status," with the earliest occurring in February

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[64] *Id.* at 320.

2008.[65] The court rejected the argument that general allegations available in public reports were sufficient to put the GSEs on notice of their claims, stating that "when the GSEs learned of the loan originators' dubious underwriting practices says little about when they discovered the facts that form the basis of this complaint."[66]

Rather, the court stressed the need for specific information about the certificates pursued by the GSEs, observing that "[t]he downgrade of the securities' credit ratings *and* the results of the loan audit that FHFA undertook in response to that action are crucial to the Agency's claim in this regard, since they are the only facts that *connect* the originators' general practices to particular securities that the GSEs bought from defendants."[67] The court continued, stating that while the loan origination practices cited by defendants may have signaled a problem in the RMBS market "generally—and may, as plaintiff suggests, have triggered a duty on the part of *defendants* [the originators of the certificates] to scrutinize the loans included in their securitizations more closely—such reports were insufficient to trigger

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[65] *Id.* at 321.

[66] *Id.*

[67] *Id.* (emphasis added).

the Securities Act's statute of limitations."[68] Thus, the GSEs did not discover their claims until they had specific information linking general allegations to specific facts—*i.e*, the credit downgrades and the loan audits—about problems with their certificates.[69]

Similarly, in *In re Bear Stearns Mortgage Pass-Through Certificates Litigation* the same court reached the same conclusion, observing that "absent a decline in the Certificates' ratings (or some other indicator of a steep decline in the Certificates' value), it is difficult to see how a plaintiff could have plausibly pled that the epidemic of indiscretions in the MBS industry had infected his or her Certificates."[70] Moreover, the *Bear Sterns* court recognized that even a

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[68] *Id.*

[69] *Id.* at 322 (stating that "it cannot be said that they should have 'discovered' that those securitizations in fact contained loans that failed to meet the standards set out in the offering materials until they were alerted to his possibility by the rating agencies in early 2008").

[70] 851 F. Supp. 2d 746, 765 (S.D.N.Y. 2012). The court also noted several courts in the Southern District of New York have concluded, *even under the inquiry-notice standard for accrual that the Supreme Court rejected in Merck*, that generalized reports like the ones at issue in the case were "insufficient to trigger the statute of limitations." *Id.* at 764 (citing *Freidus v. ING Groep N.V.*, 736 F. Supp. 2d 369, 380 (S.D.N.Y. 2010) and *Yu v. State Street Corp.*, 686 F. Supp. 2d 369, 380 (S.D.N.Y. 2010)).

ratings downgrade provides no information about the potential misrepresentations that are necessary to form the basis for a securities claim: "[A] downgrade can occur for any number of reasons—for example, a recession or a collapse in housing prices—that are unrelated to the problematic underwriting and quality control practices that form the basis of each complaint."[71]

Numerous other courts have reached the same conclusion that a plaintiff must have specific factual information that defendants violated the securities laws with respect to the certificates that plaintiff purchased in order to have discovered all facts necessary to support a violation of the Securities Act. For example, in *New Jersey Carpenters Health Fund v. Novastar Mortgage, Inc.*, the district court concluded that the plaintiff failed to tie its claim of loosened underwriting guidelines to the specific loans that secured the certificates plaintiff purchased.[72] In *Police & Fire Retirement System of the City of Detroit v. Goldman Sachs & Co.*, the district court dismissed the complaint with leave to amend for failing to specify how the alleged misrepresentations

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[71] *In re Bear Stearns*, 851 F. Supp. 2d at 766.

[72] No. 08 Civ. 5310 (DAB), 2012 WL 1076143, at *5 (S.D.N.Y. 2012).

made by the defendants affected the value of the particular certificates purchased.[73] In *New Jersey Carpenters Vacation Fund v. Royal Bank of Scotland Group, PLC*, the district court held that the plaintiffs "sufficiently, albeit just barely," connected the allegations that the defendant abandoned its underwriting standards to the offerings in question by alleging a "*wholesale downgrade of credit ratings in the HVM-LT offerings*, highlight[ing] statements by rating agencies which indicate[d] that they believed downgrades occurred because they were 'lied' to and underwriting was not done as they expected, *and also point[ing] to very high rates of delinquency and default* that occurred in the loan[s]."[74] In *In re Lehman Bros. Securities & ERISA Litigation*, the district court stated that the plaintiffs sufficiently alleged that delinquency and foreclosure rates increased after the certificates were issued *and that the rating agencies downgraded the certificates* between 2007 and 2009 in part because of "aggressive underwriting practices" used in originating the loans in the pools.[75] And, in *City of*

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[73] No. 10 Civ. 4429 (MGC), 2012 WL 2026556 at *1 (S.D.N.Y. 2012).
[74] 720 F. Supp. 2d 254, 270 (S.D.N.Y. 2010) (emphasis added, internal citations omitted).
[75] 684 F. Supp. 2d 485, 493 (S.D.N.Y. 2010) (emphasis added).

*Ann Arbor Employees' Retirement System v. Citigroup Mortgage Loan Trust, Inc.* the district court dismissed the complaint without prejudice where plaintiff failed to plead how the alleged acts or omissions were "tied to the loans in which they invested."[76]

In order for a plaintiff to have discovered *all* facts necessary to file a complaint that would withstand a motion to dismiss under *Iqbal* and *Twombly*,[77] therefore, it must have discovered facts indicating that the representations in the offering materials were false. Here, absent a downgrade by the rating agencies or some other specific evidence of dramatic defaults or loss in value, there was no notice to SCBank, or any similarly situated investor, of problems with CWALT certificates, much less sufficient facts to file a good faith complaint.

SCBank did not have such facts prior to May 22, 2008, because there simply was no source of information that provided a link between the general allegations in the public domain about Countrywide's underwriting lapses and the specific certificates backed by Alt-A loans

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[76] 703 F. Supp. 2d 253, 263 (E.D.N.Y. 2010).

[77] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

purchased by SCBank.[78] After SCBank failed, however, a leading vendor of real estate data, CoreLogic, first developed and made available to the public a method to cross-reference databases of securitized loans and other databases of land records, thereby enabling potential plaintiffs to discover the addresses of the properties that secured the mortgage loans in a particular RMBS transaction. Only with that information could SCBank have obtained information about those mortgage loans in order to test the truth of Countrywide's statements about them.[79]

If allowed to stand, the District Court's holding would force all investors with potential claims to rush to file suit based solely upon general allegations made by another investor in order to avoid the dismissal of their claims as untimely. Such a rule would directly conflict with the Supreme Court's recent rulings in *Iqbal* and *Twombly*, which require greater specificity in allegations and imprudently

[78] ER-36—43-44.

[79] ER-36—43-44; *see also Fed. Hous. Fin. Agency*, 858 F. Supp. 2d at 320-22.

sanction a rule of law that "subject[s] a multiplicity of defendants 'to the most unrestrained of fishing expeditions.'"[80]

### B. As of May 22, 2008, SCBank Had No Reason to Commence an Investigation about Whether It Had a Securities Act Claim against Countrywide

In *Merck*, the Supreme Court observed that, even though the statute of limitations does not begin to run until a reasonably diligent plaintiff would have discovered all facts constituting the violation, "[i]n determining the time at which 'discovery' of those 'facts' occurred, terms such as 'inquiry notice' and 'storm warnings' may be useful to the extent that they identify a time when the facts would have prompted a reasonably diligent plaintiff to begin investigating."[81] Here, not only could a reasonably diligent investor in SCBank's position not have discovered essential facts necessary to file a complaint that would withstand a motion to dismiss under *Iqbal* and *Twombly*, but, in fact, for several reasons, a reasonable investor such as SCBank had no reason even to suspect that it might have a claim against Countrywide.

[80] *Plumbers' Union Local*, 632 F.3d at 774 (*quoting Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988) (stating that to "permit a plaintiff, on such a skimpy foundation, to drag a defendant past the pleading threshold would be to invite litigation by hunch").
[81] *Merck*, 559 U.S. at 652.

#### 1. The Certificates that SCBank Purchased Received the Highest Possible Credit Ratings and Were Not Downgraded until after May 22, 2008

The certificates that SCBank purchased were rated triple-A when they were issued and SCBank bought them. Triple-A is the highest possible rating, reserved for the very safest investments.[82] To obtain these triple-A ratings for its certificates, Countrywide submitted to the rating agencies the same untrue or misleading statements about the mortgage loans that backed the certificates that it made in the offering documents.[83] The rating agencies relied on these statements to rate the certificates triple-A.[84] The agencies monitored the certificates after they were issued.[85] Therefore, if a rating agency discovered that the statements Countrywide submitted to it were untrue or misleading, then the agency should withdraw its rating, consider the impact of the untrue or misleading statement, and revise its rating accordingly.

By May 22, 2008, not one of the rating agencies had withdrawn its ratings or downgraded any of SCBank certificates even a single notch

[82] ER-65—15.

[83] ER-36—44.

[84] *Id.*

[85] ER-36—44.

from triple-A.[86] August 1, 2008, was the earliest date on which any of these certificates were downgraded below triple-A, and September 22, 2008, was the earliest date on which any of them was downgraded below investment grade.[87] By contrast, the rating agencies had downgraded many other Countrywide RMBS long before May 22, 2008 (a point that the District Court ignored because of its faulty premise that all Countrywide RMBS were alike, so the statute of limitations began to run on all of them at the same time).[88]

### 2. Countrywide's Own Conduct Confirms that a Reasonable Investor Would Not Have Begun to Investigate a Securities Act Claim by May 2008

Countrywide made new offerings of Alt-A RMBS until as late as May 23, 2008,[89] long after the time at which, according to the District

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[86] ER-65—15. As the District Court correctly noted, "CWALT 2006–J8 A2 was downgraded below investment grade on October 30, 2008. CWALT 2006–J1 1–A–6 was downgraded below investment grade on November 5, 2008. CWALT 2007–5CB 1–A–1 and 1–A–11 were downgraded below investment grade on September 22, 2008." ER-65—14 n.16.

[87] *Id.*; ER-65—15 (stating "that ratings agencies did not downgrade the specific securities purchases by [SCBank] before May 2008").

[88] ER-65—11, 15-16.

[89] *CWALT, Inc. Mortgage Pass-Through Certificates, Series 2008-HY1*, Moody's, https://www.moodys.com/credit-ratings/CWALT-Inc-Mortgage-

Court, reasonable investors had discovered that Countrywide made untrue or misleading statements in the offering documents for the thousands of RMBS it had sold up to then.[90] If the District Court were correct, it would have been impossible for Countrywide to sell RMBS to a market that was already on notice of its pervasive misconduct.

As the Third Circuit explained in *Operating Engineers*, reassurances given by issuers of RMBS can lead a reasonably diligent plaintiff not to inquire about a potential securities claim.[91] Here, the District Court simply ignored the relationship between assurances by Countrywide and the triggering of a duty on behalf of a reasonably diligent investor to commence an investigation. When the reasoning in *Operating Engineers* is applied in this case, SCBank's claims were alive on the date it failed, and therefore, were timely filed by FDIC.[92]

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Pass-Through-Certificates-Series-2008-HY1-credit-rating-720816811 (last visited Sept. 23, 2013).

[90] ER-65—11 (stating that "[b]y May 22, 2008, any purchaser of Countrywide RMBS was fully aware of severe problems in the underwriting and appraisals").

[91] 2013 WL 5184064, at *13.

[92] The Third Circuit concluded that the filing of the amended complaint in *Luther* in September 2008 should have led a reasonable investor to

In public filings on March 31, 2008, Countrywide assured investors, including SCBank, that its losses in the previous quarter were not the result of its pervasive disregard of its underwriting standards but instead "consisted primarily of valuation adjustments on nonprime loans held for sale due to lessened liquidity for non-agency loans and credit spread widening."[93] Just as the Third Circuit concluded in *Operating Engineers*, these assurances by Countrywide also would have led a reasonably diligent plaintiff not to inquire about potential claims related to its certificates.

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begin an investigation of whether it had a claim against Countrywide. *Id.* at *13. Applying that conclusion here renders FDIC's claims timely as of the date SCBank failed on May 22, 2009.

[93] *See, e.g.*, Countrywide Financial Corp. Form 10-Q for the period ended March 31, 2008, at 71 (Accessible at SEC's Edgar) (Countrywide's "loss in the quarter ended March 31, 2008 consisted primarily of valuation adjustments on nonprime loans held for sale due to lessened liquidity for non-agency loans and credit spread widening"). This court may consider facts that "are contained in materials of which the court may take judicial notice." *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir.1994) (citations omitted).

### 3. Credit Watches by Rating Agencies Did Not Alert a Reasonable Investor that Countrywide Made Untrue or Misleading Statements

The District Court held that "though the rating agencies did not downgrade the specific securities purchased by SCBank before May 2008, the agencies began placing CWALT issuances on warning and other negative outlook lists before the relevant date."[94] As an initial matter, it was not until March 2008 that the agencies began to place any of the certificates in this case on credit watch. In any event, a credit watch cannot trigger the statute of limitations as a matter of law. Just as an RMBS may be downgraded for many reasons other than that the mortgage loans that back it were the subject of untrue or misleading statements, so may it be put on a credit watch for many other reasons.[95] Indeed, a credit watch may well send a reasonable investor the opposite

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[94] ER-65—15.

[95] *See In re Bear Stearns*, 851 F. Supp. 2d at 766 (stating that "a downgrade can occur for any number of reasons—for example, a recession or a collapse in housing prices—that are unrelated to the problematic underwriting and quality control practices that form the basis of each complaint."); *Pub. Employees' Ret. Sys. of Miss. v. Goldman Sachs Group, Inc.*, No. 09 CV 1110 (HB), 2011 WL 135821, at *8 (S.D.N.Y. Jan. 12, 2011).

message, *i.e.*, that the rating agency is paying careful attention to the security but has yet to find a reason to downgrade it.

For similar reasons, courts have found that downgrades of the ratings for subordinate tranches do not give rise to actual or constructive knowledge to the purchasers of the senior securities in the same trusts because the purpose of such subordinated tranches is to absorb losses to the underlying collateral and to protect the cash flow of higher-rated certificates like those purchased by SCBank.[96] In this case, SCBank's investments were not downgraded *at all* until many months after May 2008, so SCBank had even less reason to suspect misstatements in the offering documents.

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[96] *See Fed. Hous. Fin. Agency v. J.P. Morgan Chase & Co.*, No. 11 Civ. 6188 (DLC), 2012 WL 5395646, at *19 (S.D.N.Y. Nov. 5, 2012) (finding "little, if any reason to believe that the downgrade of those tranches should have led the [investors] to discover that the underlying mortgages were not simply risky, but so poorly underwritten as to put at risk even the most senior certificates"); *In re Bear Stearns*, 851 F. Supp. 2d at 766; *see also Pub. Employees' Ret. Sys. of Miss.*, 2011 WL 135821, at *8 (holding that downgrades in 2007 did not trigger statute of limitations, particularly where it was not until February 2008 that any rating agency downgraded the certificate below investment grade).

#### 4. The Few Class Actions that Were Filed before May 22, 2008, Were Not Reported in the Press

The District Court held that any reasonable investor would have begun to investigate a legal claim before May 22, 2008, because three class-action complaints filed before then "were sufficient to alert a reasonable investor that the Offering Documents contained misstatements, regardless of any action of the credit rating agencies."[97] But the District Court does not explain how a reasonable investor would have known about the filing of these complaints. For example, the state-court complaint in *Luther*, on which the District Court relied most heavily, was filed in state court and received virtually no attention in the media.[98] Indeed, from the date on which *Luther* was filed in November 2007 through May 22, 2008, there was not a single mention of it in *The Wall Street Journal*, *The New York Times*, *Financial Times*, *Business Week*, *Fortune*, *Forbes*, or any other general or business

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[97] ER-65—14.

[98] Docket Entry ("DE") No. 44, Ex. 1, No. BC380698 (Cal. Super. Ct. filed Nov. 14, 2007).

publication that FDIC has been able to find. Nor was there mention in the press of any of the other class actions that the District Court cited.[99]

#### 5. News Articles Were Too General to Alert a Reasonable Investor that the Offering Documents Contained Untrue or Misleading Statements

The District Court also erred in holding as a matter of law that articles in the news media would have alerted a reasonable investor to Countrywide's problems with "inflated appraisals, abandonment of underwriting standards and false loan-to-value ratios ("LTVs"), in contravention to representations in the Offering Documents."[100] The District Court did not identify the articles on which it relied to reach this conclusion, but the fifteen articles that Countrywide referenced in its briefs contain only generic bad news about the mortgage market. These articles are not nearly specific enough for the District Court to determine as a matter of law that a reasonable investor would have begun an investigation (much less found evidence of misrepresentations) while Countrywide continued to sell new issuances

[99] ER-65—6-8.

[100] ER-65—16.

of similar RMBS, and while the certificates continued to hold triple-A ratings.

Moreover, seven of the articles do not mention Countrywide at all.[101] And the articles that do mention Countrywide state only that the *subprime market* had deteriorated and that declining house prices had begun to affect the delinquency rates of certain "exotic" loans. But not one of the articles attributes this situation to Countrywide's abandonment of its underwriting standards.

What is more, the SCBank certificates were *not* subprime RMBS. Instead, SCBank's certificates were all backed by Alt-A (not subprime) mortgages. None of the fifteen news articles cited by defendants refers to Countrywide's Alt-A mortgage loans or securitizations. Alt-A mortgage loans generally were made to creditworthy borrowers with high incomes and good credit scores.[102] Even if a reasonable investor

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[101] *See In re Morgan Stanley Mortgage Pass-Through Certs. Litig.*, 810 F. Supp. 2d 650, 665 (S.D.N.Y. 2011) (stating that the "cited articles and report were not specifically about Morgan Stanley and were therefore too general to provide inquiry notice").

[102] Private label mortgage-backed securities (that is, those not issued by GSEs like Fannie Mae and Freddie Mac) were divided into three categories: jumbo prime (loans made to prime, or "A," borrowers that

that read these articles might have begun to suspect that the underwriting of such *subprime* loans was deficient and the credit quality of those loans impaired, it is not possible, from these articles, to conclude *as a matter of law* that a reasonable investor would have suspected that there were misrepresentations or omissions in the prospectus supplements for securitizations related to *Alt-A* mortgage loans.

### C. No Reasonable Investor Could Have Alleged in Good Faith before May 22, 2008, that Countrywide Had Made Untrue and Misleading Statements about the Specific Certificates that SCBank Purchased

There is a reason why not a single individual, non-class-action RMBS complaint was filed before May 22, 2008, but *hundreds* have been filed since then. The law does not permit a plaintiff to sue before

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were too large to be purchased by Fannie Mae or Freddie Mac); Alt-A (also referred to as "Alternative A"); and subprime ("B" and "C" borrowers). *See* Rajdeep Sengupta, *Alt-A: The Forgotten Segment of the Mortgage Market*, FED. RESERVE BANK OF ST. LOUIS REVIEW, Jan./Feb. 2010, 92(1), pp. 55-56; *see*, *e.g.*, *Plumbers' & Pipefitters' Local #562 Supplemental Plan & Trust v. J.P. Morgan Acceptance Corp.*, No. 08 CV 1713(ERK)(WDW), 2012 WL 601448, at *11 (E.D.N.Y. Feb. 23, 2012) (holding that 70 articles, 39 of which mentioned originators of loans in the relevant offerings, did not trigger statute of limitations").

it has good-faith basis to believe that its particular securities were sold by means of untrue or misleading statements.[103] Responsible investors do not file complaints without a specific good-faith basis to allege that their own investments were harmed by the misconduct of defendants, and certainly courts should not create rules that require would-be plaintiffs to file unsubstantiated allegations to protect themselves against the running of the statute of limitations.

Indeed, a plaintiff cannot comply with Federal Rule of Civil Procedure 11 ("Rule 11") if it simply copies allegations that it has no good-faith basis to think are true about the securities that it purchased.[104] The mere fact that class-action lawyers filed a complaint that could have withstood a motion to dismiss (to this day, *Luther* has not been tested by a motion to dismiss) is not sufficient *as a matter of law* to establish that other investors could merely have copied those same allegations and filed similar complaints.[105] Not surprisingly, as

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[103] *See* Rule 12(b)(6); *see also Dahlia v. Rodriguez*, ___ F.3d ___, 2013 WL 4437594, at *11 (9th Cir. Aug. 21, 2013).

[104] *See Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 365 (7th Cir. 1990) (concluding that merely copying allegations from someone else's complaint was a violation of Rule 11).

[105] *See Fed. Hous. Fin. Agency*, 858 F. Supp. 2d at 321.

discussed in subpart II, A, above, many courts dismissed complaints that did not link the alleged misconduct to specific securities at issue.

Countrywide itself has argued many times that Rule 11 requires that the plaintiff possess facts about the specific loans that back the particular certificates in order to file a Securities Act claim. To take one example, Countrywide has argued that

> Rule 11 prohibits Plaintiffs from substituting adequate pleading of facts with generalized criticisms about how Countrywide supposedly originated loans . . . . Fundamentally, *Plaintiffs have not pleaded any facts showing that any loan that actually made its way into any of the pools underlying the MBS sold in this case was originated improperly*, much less that the description of the loans in the Offering Documents at issue was materially false.[106]

Thus, in order to state a viable claim in good faith, a diligent plaintiff must have evidence that statements about the credit quality of the specific loans underlying its certificates are untrue or misleading. As the Amended Complaint explains, facts about the specific loans that back SCBank's certificates were unavailable before May 22, 2008.[107]

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[106] Countrywide Defs.' Mem. of Law in Support of Mot. to Dismiss, 58-59, *Maine State Ret. Sys. v. Countrywide Fin. Corp.*, No. 2:10-00302 (C.D. Cal. filed Aug. 16, 2010) (DE 158-1 (emphasis added).

[107] ER-36—43-44.

Such facts could be found in the files of the originators of those loans or their servicers, but investors did not (and, except through discovery, still do not) have access to loan files or servicing records.

The District Court relied primarily on the *Luther* complaint and two complaints filed on behalf of Countrywide's own shareholders to conclude that a reasonable investor could have filed a Securities Act complaint on or before May 22, 2008.[108] Neither the *Luther* complaint, nor the other complaints referenced by the District Court, supports its conclusion in this case. The District Court misunderstood or ignored the fundamental differences between claims of Countrywide's own shareholders and those of investors in any of its hundreds of RMBS transactions.[109] The former cases allege that Countrywide made untrue or misleading statements about the level of risk that it had taken on, which, when revealed, caused Countrywide's shares to plummet. But as

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[108] ER-36—43-44. The District Court noted that defendants "submitted ten complaints filed against Countrywide entities before May 22, 2008," but found only three complaints to be "particularly relevant." ER-65—13.

[109] ER-65—13.

Countrywide itself has argued elsewhere,[110] those complaints are irrelevant because the undisclosed risks that affected the value of Countrywide's shares are entirely different from the undisclosed risks that affected the specific Countrywide-issued RMBS that SCBank (or any other investor in Countrywide's RMBS) purchased.

In the shareholder actions, the District Court held that the complaints sufficiently alleged "a strong inference of a Company-wide culture that, at every level, emphasized increased loan origination volume in derogation of underwriting standards,"[111] and that "[f]rom mid-2003 onward, Countrywide continually loosened its underwriting guidelines to the point of nearly abandoning them in 2006."[112] Such allegations about Countrywide's "culture" may have sufficed in

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[110] When it suits them, defendants have argued in other RMBS cases that this distinction is significant. *See* Countrywide Mem. of Law in Supp. of Mot. to Dismiss, 5 n.9, *Footbridge Ltd. Trust v. Countrywide Home Loans, Inc.*, No. 09-cv-4050 (S.D.N.Y. filed Sept. 18, 2009) (DE 38) (arguing that cases brought by Countrywide shareholders "are not relevant to [RMBS cases], which turn[] entirely on the specific MBS disclosures actually made to MBS investors in the Offering Documents").

[111] *In re Countrywide Fin. Corp. Derivative Litig.*, 554 F. Supp. 2d at 1044.

[112] *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1145 (C.D. Cal. 2008).

complaints by its shareholders, but they say nothing about Countrywide's origination of loans that back the particular certificates that SCBank purchased.

FDIC has not sued Countrywide for abandoning its underwriting standards, nor has it sued the Countrywide entities that actually originated loans. Rather, it has sued the Countrywide entities that issued and underwrote RMBS *for representing* that Countrywide followed its underwriting practices in making the specific loans that back those securities when they, in fact, did not.

Simply put, when SCBank obtained general information about Countrywide's abandonment of its underwriting standards has no bearing on when it learned that the defendants failed to ensure that non-compliant loans were not included in relevant loan pools.[113]

### D. At a Minimum, Whether the Claim Was Timely Is a Question of Fact Not Susceptible to Dismissal under Federal Rule of Civil Procedure 12(b)(6)

False premises led the District Court to ignore substantial issues of fact that it should not have decided as a matter of law. Numerous courts have held that, at least until the certificates are downgraded

[113] *See Fed. Hous. Fin Agency*, 858 F. Supp. 2d at 321 (discussed above).

below investment grade, it is a question of fact when the limitations period began to run.[114] The District Court rejected this authority because it thought that such a rule would "absolve investors from monitoring the performance and truthfulness of the representations in their investments" by "delegat[ing] all responsibility for assessing representations to the rating agencies."[115] The District Court was mistaken. These courts held only that it is a question of fact whether

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[114] *See id.* at 321-22; *see also Nat'l Credit Union Admin. Bd. v. RBS Secs., Inc.*, No. 11-2340-RDR, 11—2649—RDR, 2012 WL 3028803, at *24 (D. Kan. July 25, 2012); *Public Employees.' Ret. Sys. of Miss. v. Merrill Lynch & Co.*, 714 F. Supp. 2d 475, 479-80 (S.D.N.Y. 2010) (stating that "[a]lthough extraneous evidence from both sides may be considered on a motion to dismiss that is premised on statute of limitations grounds, . . . nonetheless, where there are plausible inferences to be drawn in either direction, the issue of 'whether a plaintiff had sufficient facts to place it on inquiry notice is 'often inappropriate for resolution on a motion to dismiss under Rule 12(b)(6)'") (internal citation omitted); *In re Wells Fargo Mortgage-Backed Certificates Litig.*, 712 F. Supp. 2d 958, 967-68 (N.D. Cal. 2010) (stating that in "the Court's view, . . . the question of whether this press coverage was sufficient to put a reasonable investor on notice of his claims . . . is a factual question not appropriate for resolution on a motion to dismiss"); *In re Morgan Stanley*, 810 F. Supp. 2d at 664-65.
[114] ER-65—14; *In re Wells Fargo Mortgage-Backed Certificates Litig.*, 712 F. Supp. 2d 958, 967-68 (N.D. Cal. 2010); *In re Morgan Stanley*, 810 F. Supp. 2d at 664-65.
[115] ER-65—14.

the owner of a security still rated triple-A should have begun to investigate a lawsuit. And, of course, absent a reason to investigate, a reasonable investor in that situation cannot be faulted for failing to discover all facts necessary to support a Securities Act claim under *Merck*. Moreover, it is a question of fact when a reasonable investor should have discovered that it had a Securities Act claim.

## III. The District Court Erred in Ruling that the Statute of Limitations on FDIC's Claims Was Not Tolled

There is a second, independent reason why the District Court erred in dismissing this action as time-barred. Under the Supreme Court's 1974 decision in *American Pipe*, the statute of limitations on FDIC's claims was tolled by the November 2007 filing of the *Luther* class action, which made the same claims on RMBS that SCBank purchased. The District Court held otherwise because the named plaintiffs in *Luther* did not purchase their RMBS in the same trust or tranche as SCBank.[116] In essence, the District Court held that, to create *American Pipe* tolling for the claims of an absent class member,

[116] ER-65—20, n.22.

there must be a named plaintiff that itself has standing to pursue the exact claims of that class member.[117] This is not the law.

### A. The Federal Common-Law Rule Announced in *American Pipe* Tolled FDIC's Securities Act Claims

In *American Pipe*, the Supreme Court concluded: "The commencement of a class action suspends the applicable statute of limitations [on motions to intervene] as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."[118] Later, the Supreme Court clarified in *Crown, Cork & Seal Co., Inc. v. Parker* that this rule also applies to individual actions filed by members of the putative class.[119] The Supreme Court's decision in *American Pipe* was based on prior precedent, *Burnett v. New York Central Railroad Co.*,[120] where the Court observed that federal statutes of limitations are primarily designed to assure fairness to defendants by requiring a plaintiff to put

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[117] ER-65—20.

[118] 414 U.S. at 554.

[119] 462 U.S. 345, 354 (1983).

[120] 380 U.S. 424 (1965).

its adversary on notice to defend within the limitation period.[121] *American Pipe*, therefore, married the *Burnett* rule of fairness to the goals of efficiency and economy that underlie Rule 23.[122] The Court observed that absent the rule, potential class members would be induced to file motions to intervene or file independent actions to protect their claims in the event the class was not certified or was certified in a manner that excluded their claims.[123]

The tolling rule set forth in *American Pipe* and *Crown Cork* applies here because the *Luther* complaint was brought on behalf of the named plaintiffs and all persons who had purchased CWALT

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[121] *Id.* at 428. Although the District Court correctly stated that federal common law was "cabined" in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) ER 65—24, the federal courts still, as the Supreme Court has repeatedly recognized, may create a special federal rule in "few and restricted" circumstances. *See Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (*citing O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994)) (*quoting Wheeldin v. Wheeler,* 373 U.S. 647, 651 (1963)); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 (1981).
[122] The Court in *American Pipe* observed that the rule was in accordance with the Advisory Committee's Note on Rule 23, which provides that whether a non-named plaintiff is entitled to the benefit of the filing of the action by the named plaintiffs should be decided "by reference to the laws governing . . . limitations as they apply in particular contexts." 414 U.S. at 554 n.24.
[123] *Id.* 553-54.

certificates issued between 2005 and 2007. SCBank was such an investor. This Court has held that, under *American Pipe* and *Crown Cork,* tolling is extended "as far as is justified by the objectively reasonable reliance interests of the absent class members."[124] Any investor in CWALT certificates between 2005 and 2007 was justified in relying on the definition of the class until class certification was denied.

That the *Luther* complaint was filed in California state court does not alter the analysis. The *Luther* complaint was filed within the statute of limitations period and state courts have concurrent jurisdiction over the Securities Act claims asserted in that complaint.[125] Just as the filing of suit in state court within the limitations period in *Burnett* tolled the statute of limitations, the commencement of the *Luther* action in state court tolled the statute of limitations for SCBank under the extension of the *Burnett* rule to class actions in *American Pipe*.

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[124] *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 532 (9th Cir. 2011) (internal quotation marks and citation omitted).

[125] *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031, 1032 (9th Cir. 2008) ("Section 22(a) of the Securities Act of 1933 creates concurrent jurisdiction in state and federal courts over claims arising under the Act.").

California courts have recognized the applicability of *American Pipe* tolling to purported class-action suits filed in the State's courts.[126] Under California case law, like the case law in this Court, a named plaintiff need only have standing to assert its claims—a named plaintiff need not show that it has the same basis for standing as each potential class member.[127] There is no question that the named plaintiffs in *Luther* had standing to assert their CWALT Securities Act claims, which is all that is required under California law. As a result, Countrywide was put on notice within the limitations period of the substance of the claims and the potential number of plaintiffs who could participate if the class were to be certified. Accordingly SCBank's claims were tolled upon the filing of the *Luther* class action in state court.

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[126] *San Francisco Unified Sch. Dist. v. W.R. Grace & Co.*, 44 Cal. Rptr. 2d 305, 316 (Ct. App. 1995); *Becker v. McMillin Constr. Co.*, 277 Cal. Rptr. 491, 496-97 (Ct. App. 1991).

[127] *In re Tobacco II Cases*, 46 Cal.4th 298, 318, 207 P.3d 20, 93 Cal Rptr. 3d 559 (2009); *see generally Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 191-95 (D.C. Cir. 2013) (distinguishing between Article III standing and prudential standing).

### B. The District Court Erred in Concluding that, Because It Concluded that the Named Plaintiffs in *Luther* Lacked Standing, *American Pipe* Did Not Apply

The District Court declared that "[i]f a class action plaintiff lacked standing to sue on certain claims, then jurisdiction could never attach for those claims."[128] From that, the District Court concluded that a named plaintiff must have standing for precisely the same injury as all putative class members for *American Pipe* tolling to apply.[129] That simply is not the law. The District Court also erroneously concluded that absent "Article III [standing] federal courts lack the power to hear the asserted claims, and therefore have no power to modify Congressionally determined statutes of limitations."[130] This is wrong because a district court does not "modify" a statute of limitations simply by recognizing that the statute has been tolled.[131]

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[128] ER-65—17.
[129] ER-65—20.
[130] ER-65—17.
[131] *See e.g. Chardon v. Soto*, 462 U.S. 650, 652 n.1 (1983); *SEC v. Jackson*, 908 F. Supp. 2d 834, 868 (S.D. Tex. 2012).

### 1. Under Ninth Circuit Precedent, Article III Standing Is Satisfied Where at Least One Named Plaintiff Has Standing to Assert Its Claim

The District Court ignored controlling Ninth Circuit case law holding that Article III standing is satisfied for a class action where at least one named plaintiff has standing to assert its claim. This rule is not unique to the Ninth Circuit.[132] Here, the named plaintiffs in *Luther* plainly had standing to make claims on the certificates that they themselves purchased. There always was, therefore, a live controversy in *Luther* for purposes of the prudential standing in the California state court and for purposes of Article III standing once the case was removed to the District Court. Any other defect in the typicality of the claims of the named plaintiffs would have been properly considered under Rule 23 (or its state-law equivalent) on a motion for class certification.

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[132] *Newberg on Class Actions*, § 2:6 (2013) (stating that "when a class plaintiff shows individual standing, the court should proceed to [the assessment of the] Rule 23 criteria."); *see also Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 422 (6th Cir. 2012); *Arreola v. Godinez*, 546 F.3d 788, 794-95 (7th Cir. 2008) (same); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 306-07 (3d Cir. 1998) (same).

In 2011, the Court in *Stearns v. Ticketmaster Corp.* recognized for purposes of Article III, that "standing [in a class action] is satisfied if at least one named plaintiff meets the requirements . . . . Thus, we consider only whether at least one named plaintiff satisfies the standing requirements."[133] Also in 2011, this Court decided a nearly identical question in *Ellis v. Costco Wholesale Corporation.*[134] The named plaintiff alleged that she was denied a promotion to general manager because of her gender. She filed a class action for employment discrimination on behalf of all female Costco employees who had been denied a promotion to general manager or assistant general manager. This Court rejected Costco's argument that the named plaintiff lacked standing to represent putative class members who had been denied promotion to assistant general manager. Instead, the Court held, Costco's argument "more appropriately addresses whether [her] claim is typical of other class members" under Rule 23.[135]

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[133] 655 F.3d 1013, 1021 (9th Cir. 2011) (quoting *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc)).
[134] 657 F.3d 970 (9th Cir. 2011).
[135] *Id.*

This Court's holdings in *Ellis* and *Stearns* require the reversal of the District Court's order dismissing this action. Once the *Luther* plaintiffs established their individual standing, there was no need for further inquiry regarding standing.

#### 2. Under Supreme Court Precedent, the Named Plaintiff Need Only Share "the Same Set of Concerns" as Class Members

The District Court's decision conflicts with *Gratz v. Bollinger* in which the Supreme Court considered whether representation of absent class members was a question of Article III standing or a question of adequacy of representation under Rule 23.[136] Although the Court declined to decide the issue, it concluded after extensive analysis of the issue that no matter which analysis was proper, both Article III standing and Rule 23 adequacy were satisfied since the named plaintiff need only share "the same set of concerns" as class members to satisfy either one.[137]

The named plaintiff in *Gratz* was a potential transfer student who alleged that the University of Michigan improperly discriminated on the

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[136] 539 U.S. 244, 263 n.15 (2003).
[137] *Id.* at 267.

basis of race in admitting transfer students. The Supreme Court held that the named plaintiff could also represent absent class members who allegedly suffered discrimination in undergraduate freshman admissions in addition to representing upper class students who allegedly suffered discrimination in transfer admissions. The Court explained that "the University's use of race in undergraduate transfer admissions does not implicate a *significantly different set of concerns* than does its use of race in undergraduate freshman admissions."[138] Here, the holding of the District Court that "the named plaintiff must have standing to sue for each of the asserted claims by purchasing in the offerings that are putatively part of the class action" cannot be reconciled with *Gratz.*

### 3. The "Similar Set of Concerns" Standard Established by the Supreme Court Applies in RMBS Litigation

The District Court's decision also conflicts with a 2012 decision of the Second Circuit that applied *Gratz*'s "similar set of concerns" standard in RMBS litigation. In *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, the complaint asserted pleaded claims based

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[138] *Id.* at 265 (emphasis added).

upon seventeen different offerings made pursuant to a single shelf registration statement and seventeen separate prospectus supplements, each of which was alleged to contain untrue or misleading statements about the loans that backed the RMBS.[139] Because the plaintiff had purchased certificates in only two of the seventeen offerings, the district court dismissed the complaint as to the other fifteen offerings for lack of standing.[140]

The Second Circuit reversed and held that the named plaintiff had standing to assert Securities Act class claims against issuers, underwriters, and other participants in the RMBS securitization on behalf of purchasers of other certificates that were backed by mortgages from the same lenders that originated mortgages backing plaintiff's certificates. Applying the reasoning of the Supreme Court in *Gratz*, the Second Circuit concluded that a plaintiff has "class standing" if it "personally has suffered some actual . . . injury as a result of the putatively illegal conduct of the defendant, and . . . that such conduct implicates the *same set of concerns* as the conduct alleged to have

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[139] 693 F.3d 145, 149 (2d Cir. 2012).
[140] *Id.* at 154.

caused injury to other members of the putative class by the same defendants."[141]

It also found that the fact that the named plaintiff and members of the class purchased securities in different tranches, and therefore, might have suffered different damages did not "raise such a 'fundamentally different set of concerns' as to defeat class standing."[142]

The District Court disagreed with the Second Circuit:

> The [SEC] filings were false because of their *content*, which made certain representations about the underwriting. The actual underwriting standards, and the originator's conformance to them, are irrelevant. What matters for RMBS litigations alleging misstatements, like the instant lawsuit and that in *NECA-IBEW*, is what the defendants said about those standards. The *statements* about underwriting standards are the substance of the class action suits.[143]

The District Court's statement misses the point. The content of Countrywide's statements in the prospectus supplements about underwriting standards was virtually identical in all of the relevant CWALT securitizations executed during the 2005-2007 period. Defendants stated in the prospectus supplements that the mortgage

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[141] *Id.* at 162 (internal quotation marks and citations omitted).
[142] *Id.* at 164 (quoting *Gratz*, 539 U.S. at 264.).
[143] ER-65—22.

loans in each trust were made in compliance with the underwriting standards of the originators of those loans. FDIC intends to prove at trial that statements in the offering materials were untrue because the originators did not follow their own underwriting standards when they originated the mortgage loans that were the underlying collateral for the RMBS included in these offerings.[144]

More importantly, the District Court should not have speculated about the importance of the originator's compliance with its underwriting standards. On a motion to dismiss, the District Court is required to accept as true the allegations in a complaint.[145] FDIC alleged that"[i]n the prospectus supplements, the defendants made statements about the underwriting standards of the originators of the mortgage loans in each collateral pool . . . They included statements

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[144] The District Court relied heavily on its observation that "[e]ach certificate in an RMBS is backed by different loan pools, described in the offering documents." *Id.* at *22. In fact, a single loan pool usually backs numerous certificates and sometimes *all* certificates in an offering. Thus, even under the District Court's own logic, a named plaintiff would have standing to bring a class action covering claims on all certificates backed by the same pool of loans.

[145] *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Zadrozny v. Bank of New York Mellon*, 720 F.3d 1163, 1167 (9th Cir. 2013).

that the originators made mortgage loans in compliance with their underwriting standards and made exceptions to those standards only when compensating factors were present."[146] FDIC then made detailed allegations about why those straightforward statements were untrue and misleading.[147] In particular, FDIC alleged that the CWALT originators: (1) disregarded or made extensive exceptions to the underwriting standards when no compensating factors were present, and made wholesale (rather than case-by-case) exceptions; (2) made loans that the borrowers could not repay; and (3) failed to follow practices intended to detect fraud.[148]

The District Court should have accepted these allegations as true at this stage of the action. As the Second Circuit noted in *NECA-IBEW* in connection with allegations similar to those made by FDIC that:

> proof would center on whether the particular originators of the loans backing the particular Offering from which a Certificate-holder purchased a security had in fact abandoned its underwriting guidelines, rendering defendants' Offering Documents false or misleading.[149]

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[146] ER-36—24.

[147] ER-36—24-31.

[148] ER-65—28-30.

[149] *NECA-IBEW*, 693 F.3d at 163.

### C. Even if the Named Plaintiffs in *Luther* Lacked Class Action Standing, *American Pipe* Still Applies and the Claims Were Timely Filed

Even if the District Court were correct and the named plaintiffs in *Luther* lacked standing to sue on behalf of purchasers from trusts and tranches that the named plaintiffs did not purchase, the filing of *Luther* tolled the statute of limitations on FDIC's claims. Both the principles of *American Pipe* and the great weight of authority interpreting *American Pipe* establish that tolling cannot be revoked retroactively if the named plaintiffs are later determined to have lacked standing. The District Court erred in ruling to the contrary.

#### 1. The Purpose of *American Pipe* Is to Permit Tolling under Precisely These Circumstances

Although some lower courts concluded—long after *Luther* was filed—that a class plaintiff lacks standing to represent purchasers in offerings other than the ones in which the class plaintiff itself purchased, there is no reason why that conclusion should revoke *American Pipe* tolling. The two policies of *American Pipe*, avoiding unnecessary opt-out actions and ensuring that defendants have notice of the claims against them, plainly apply to claims that were part of a class action when it was filed, even if another court later determines

that the plaintiff lacked standing to bring them.[150] Even under those circumstances, it is still more efficient to encourage class members to remain in the class until such a decision is made than to force them to file unwanted opt-out actions.[151]

In addition, whether or not the named plaintiff has standing, the complaint gives the defendant notice of its potential liability to all members of the class as originally defined.[152] Neither logic nor any decision of the Supreme Court or Ninth Circuit suggests that *American Pipe* tolling does not apply under these circumstances. In fact, this Court has applied *American Pipe* tolling in a situation in which the court lacked jurisdiction to hear *any* of the original named plaintiffs' claims.[153]

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150 *In re Morgan Stanley*, 810 F. Supp. 2d at 669.

151 *Id.* (stating that "the purpose of *American Pipe* tolling is to disincentivize putative class members from undermining the efficiency and economy policies underlying Rule 23 by flooding the court with duplicative, protective motions").

152 *See id.*

153 *See Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1149 (9th Cir. 2000); *see also*, *Hatfield v. Halifax PLC*, 564 F.3d 1177, 1186 (9th Cir. 2009); *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1175 (9th Cir. 1986).

Recognizing that a contrary result would conflict with the policies underlying *American Pipe*, the vast majority of courts—including every federal court of appeals that has directly addressed the issue—has concluded that *American Pipe* tolling applies even when the named plaintiff lacks standing to bring plaintiff's claim.[154]

[154] *See e.g.*, *Griffin v. Singletary*, 17 F.3d 356, 360-61 (11th Cir. 1994) (holding that filing of class action in which class representatives lacked standing tolled statute of limitations with respect to later-filed individual claims); *Haas v. Pittsburgh Nat'l Bank*, 526 F.2d 1083, 1097-98 (3d Cir. 1975) (same); *see also, e.g., In re Smith Barney Transfer Agent Litig.*, 884 F. Supp. 2d 152, 160 (S.D.N.Y. 2012); *In re Morgan Stanley*, 810 F. Supp. 2d at 669; *Hill v. State Street Corp.*, No. 09cv12146-NG, 2011 WL 3420439, at *26 (D. Mass. Aug. 3, 2011); *In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 372 (S.D.N.Y. 2011);*Genesee County Employees' Ret. Sys. v. Thornburg Mortgage Sec. Trust 2006-3*, 825 F. Supp. 2d 1082, 1161-62 (D.N.M. 2011); *In re Lehman Bros. Sec. & ERISA Litig.*, 799 F. Supp. 2d 258, 309 (S.D.N.Y. 2011); *In re Deutsche Bank AG Sec. Litig.*, No. 09 Civ. 1714 (DAB), 2011 WL 3664407, at *6 (S.D.N.Y. Aug. 19, 2011), *reconsideration granted on other grounds*, 2012 WL 3297730 (S.D.N.Y. Aug. 10, 2012); *In re IndyMac Mortgage-Backed Sec. Litig.*, 793 F. Supp. 2d 637, 646-47 (S.D.N.Y. 2011). *Walters v. Edgar*, 163 F.3d 430, 432 (7th Cir. 1998), cited by the District Court, did not address statutes of limitations or tolling.

### 2. It Was Not Unreasonable to Rely on the Filing of *Luther* to Protect the Claims of Members of the Putative Class

Even the District Court itself has acknowledged that, "where the standing of an original class action plaintiff is a matter of bona fide dispute, it may well be unfair to subsequently bar plaintiffs who reasonably—but mistakenly—relied on that plaintiff to represent their interests."[155] Nevertheless, the District Court turned the policies of fairness, economy, and efficiency on their heads in concluding that *Luther* was an "abusive placeholder lawsuit" because the named plaintiffs lacked standing to bring it, and, therefore, "no reasonable class member would have relied" on the named plaintiff to represent its interests.[156]

First, the District Court erred in finding that *Luther* was "abusive" based upon that court's erroneous view of prudential and Article III standing.[157] Should the class be certified in *Luther*, Rule 23 will have fulfilled its goal of providing efficiency and economy to the state and federal court systems where both state and federal courts

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[155] *Putnam Bank v. Countrywide Fin. Corp.*, 860 F. Supp. 2d 1062, 1067-70 (C.D. Cal. 2012).

[156] ER 65—18.

[157] *See supra* Part III.B.

have concurrent jurisdiction. Simply put, it was not unreasonable for class members to rely on a theory of standing set forth in a 2003 Supreme Court case, *Gratz*, recently applied in an RMBS case by the Second Circuit in 2012.[158]

Second, it was not evident from the face of the *Luther* complaint that the plaintiffs lacked standing to assert claims on behalf of purchasers of the four certificates that SCBank purchased. When *Luther* was filed, no court had yet ruled on whether a named plaintiff had standing to represent a class of all purchasers of RMBS that were issued pursuant to the same master prospectus. The first case to address that question was a 2009 decision of the Massachusetts District Court,[159] decided long after May 2008, the date by which the District Court determined that the statute of limitations had already begun to run. Moreover, several courts had previously upheld the standing of a plaintiff to assert Securities Act claims on behalf of those who

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[158] *NECA-IBEW*, 693 F.3d at 148 (citing *Gratz*, 539 U.S. at 267).
[159] *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 658 F. Supp. 2d 299, 303 (D. Mass. 2009), *aff'd in part and rev'd in par*t, 632 F.3d 762 (1st Cir. 2011).

purchased securities that were not identical but were issued under a common registration statement.[160]

In short, it was reasonable for the SCBank, or any class member, to rely on *Luther* to toll its claims because the *law* at the time strongly suggested that the named plaintiff had standing to represent claims on all of those offerings. At the very least, "the standing of [the] original class action plaintiff [was] a matter of bona fide dispute," which even the District Court concedes is sufficient to justify a class member's reliance on the class action to toll the statute of limitations on its own claims.[161]

The District Court's initial conclusion, therefore, was the correct one. No reasonable investor could have predicted with any certainty on May 22, 2008, which securities (if any) would be dismissed from *Luther* for lack of standing—to this day SCBank, now FDIC as receiver, is still a putative class member.[162] That is precisely why the doctrine of

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[160] *See, e.g., In re Worldcom, Inc. Sec. Litig.*, No. 02 Civ. 3146 (DLC), 2004 WL 540450, at *7 (S.D.N.Y. Mar. 19, 2004); *In re Fleming Cos. Sec., Derivative Litig.*, No. CIVA503MD1530TJW, 2004 WL 5278716, at *48-49 (E.D. Tex. June 16, 2004).
[161] *Putnam Bank,* 2012 WL 1574285, at *4.
[162] DE 49—28.

*American Pipe* exists, to permit a potential individual plaintiff like FDIC to rely on the tolling effect of a class action rather than to have to file its own protective action for fear that another judge in another court will later decide that the class plaintiff lacked the necessary standing.[163] Indeed, because of the policies of efficiency and economy, both the Supreme Court and this Court have made clear that absent class members have no obligation even to monitor the class action and are entitled to tolling whether or not they relied on the pendency of the class action to protect their claim.[164]

### D. *American Pipe* Applies Even Where the First Putative Class Action Is Filed in State Court

After "devot[ing] substantial time to its consideration," the District Court held in an earlier action that *American Pipe* tolling applies when a class action is filed in state court.[165] The District Court decided in this action, however, to "take this opportunity to rule in the alternative on a previously settled issue" and stated that "*American*

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[163] *See In re Morgan Stanley*, 810 F. Supp. 2d at 670.
[164] *See Am. Pipe*, 414 U.S. at 552; *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1489 (9th Cir. 1985).
[165] *Maine State Ret. Sys. v. Countrywide Fin. Corp.*, 722 F. Supp. 2d 1157, 1166 (C.D. Cal. 2010).

*Pipe* tolling cannot apply to a class action filed in state court, even if the claims in the state class action are federal."[166]

The District Court erred in reversing its position on this question.[167] After all, *Burnett*, upon which *American Pipe* is based in part, involved a federal suit that was originally brought in state court.[168] The *Burnett* Court concluded that so long as the action was commenced in a state court having concurrent jurisdiction within the limitations period, doing so tolled the running of the federal statute of limitations even though the case was later dismissed on venue grounds.[169] There is no reason that *Burnett* is inapplicable to a class action originally timely filed in state court having concurrent jurisdiction of Securities Act claims.

Leaving *Burnett* aside, the District Court erred for other reasons. The court relied almost entirely on the opinion of the Seventh Circuit in

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[166] ER 65—23-25.
[167] The District Court noted correctly that this part of its opinion is technically dicta. ER 65—23. Nevertheless, FDIC respectfully submits that in the interest of efficiency, this Court consider this alternative ground for dismissal.
[168] 380 U.S. at 424-25.
[169] *Id.* at 434-35.

*In re Copper*.[170] But a careful reading of *In re Copper* belies the conclusion that the District Court reached. The question was whether a class action that was filed in state court under state antitrust law gave rise to *American Pipe* tolling of federal antitrust claims.[171] The Seventh Circuit declined to apply *American Pipe* tolling, but *not* because federal courts lack the power to toll a federal statute of limitations based on a state court class action. Rather, the Seventh Circuit held that a state class action can never toll the statute of limitations on a federal claim that is subject to the *exclusive jurisdiction* of the federal courts.[172]

The court took pains to explain that the purpose of *American Pipe* tolling is to prevent the pressure of the statute of limitations from forcing class members to file duplicative individual lawsuits.[173] That rationale simply does not apply if the class action is in state court and individual claims under a federal statute would be subject to exclusive federal jurisdiction. "In this situation the state claimants are not being forced by the federal statute of limitations to file duplicative claims

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[170] 436 F.3d 782, 794 (7th Cir. 2006).
[171] *Id.* at 793.
[172] *Id.* at 794.
[173] *Id.*

since, in any event, it is necessary at some point to file suit in federal court if the plaintiff desires to invoke federal antitrust protection."[174]

The reasoning of the Seventh Circuit proves precisely the opposite conclusion to the one that the District Court drew from it. Actions under the Securities Act are not subject to exclusive jurisdiction in federal court; they are subject to the concurrent jurisdiction of the federal and state courts. *Luther* pled the same federal claims that FDIC has pled here.[175] Thus, if the statute of limitations for absent class members were not tolled by the filing of the state court class action, members of the putative class would be forced to file individual claims under precisely the same statute as the one relied on in *Luther*.

In addition, it is quite likely that many of those class members would file their duplicative claims under the Securities Act *in federal court*. Thus, by declining to recognize *American Pipe* tolling for state court class actions under the Securities Act, the federal courts would burden themselves with duplicative and unnecessary litigation that would otherwise have remained in state court.

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[174] *Id.*

[175] *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031, 1032-33 (9th Cir. 2008).

Any remaining doubt is removed by the Seventh Circuit's subsequent 2011 decision in *Sawyer v. Atlas Heating & Sheet Metal Works, Incorporated*[176] There, a named plaintiff brought a timely class action in Wisconsin state court asserting claims under the federal Telephone Consumer Protection Act, over which state and federal courts have concurrent jurisdiction.[177] After the federal statute of limitations had run, the named plaintiff dismissed the suit.[178] Sawyer, a putative class member, then filed suit in federal district court. The defendant moved to dismiss arguing that *American Pipe* only applies when suit is filed in federal court.[179] The Seventh Circuit rejected this argument:[180]

> Federal law determines the tolling effect of a suit governed by a federal statute of limitations. *American Pipe* establishes that federal rule. *Chardon v. Fumero Soto*, 462 U.S. 650 (1983), drives this point home by holding that, when the statute of limitations depends on state law, then state rules determine the tolling effect of a class suit, even if all litigation occurs in federal court. The source of law, and

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[176] 642 F.3d 560 (7th Cir. 2011).

[177] *Id.* at 561 (citing *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449-52 (7th Cir. 2005)).

[178] *Id.* at 561.

[179] *Id.* at 562.

[180] *Id.* at 562-63.

> not the identity of the forum, determines the effect of a failed class action.

Accordingly, *American Pipe* is a federal common-law rule applicable to federal statutes of limitations and the District Court's focus upon Rule 23 is simply misplaced.

## Conclusion

For all of the foregoing reasons, this Court should reverse the Order by which the District Court dismissed FDIC's Amended Complaint as time-barred.

Respectfully submitted,

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## Certificate of Compliance with Fed. R. App. P. 32(a)(7)(C) and Fed. R. App. P. 29(d)

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# Certificate of Service

I, Jerome A. Madden, hereby certify that on August 30, 2013, a true and correct copy of the foregoing brief of the Appellant Federal Deposit Insurance Corporation, as receiver for Strategic Capital Bank, was served upon all counsel of record by the CM/ECF system. A copy of the Excerpts of Record will be sent to counsel by overnight courier.

/s/ *Jerome A. Madden*
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