No. 12-57299

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiff-Appellant,

v.

COUNTRYWIDE FINANCIAL CORP., *et al.*,

Defendants-Appellees.

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

REPLY BRIEF OF THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR STRATEGIC CAPITAL BANK

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Introduction

In its opening brief, the Federal Deposit Insurance Corporation ("FDIC") as receiver for Strategic Capital Bank ("SCBank") demonstrated that the District Court incorrectly held that the FDIC's claims were time-barred as a matter of law under the Securities Act's one-year statute of limitations, and improperly resolved the fact-bound timeliness issue on a Rule 12(b)(6) motion to dismiss. Treating all Countrywide certificates as if they were the same, and disregarding the fact that SCBank's CWALT certificates all maintained their Triple-A rating until August 2008, the court concluded that other litigation involving other certificates, along with press reports about Countrywide's underwriting failures, were alone sufficient to trigger the Securities Act's statute of limitations and to satisfy Rule 8 pleading requirements. But that conclusion conflicts with the Supreme Court's holding in *Merck* that the limitations period does not begin to run until a plaintiff in fact discovers, or "when a reasonably diligent plaintiff would have discovered, 'the facts constituting the violation,'"[1] and with

[1] *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 637 (2010). As discussed in the FDIC's opening brief, although *Merck* addressed the timeliness of claims under the Securities Exchange Act of 1934, the District Court

pleading standards under *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*.[2]

Countrywide[3] attempts to support the District Court's determination mainly by quoting from other similarly flawed decisions by the same court and with two cases from other circuits, neither of which support Countrywide's position.[4]

The District Court's judgment also should be reversed because it misapplies tolling principles under the Supreme Court's decision in *American Pipe and Construction Company v. Utah*.[5] Contrary to the District Court's conclusion, a class action suit filed in California state court against Countrywide by plaintiffs who had standing to assert their claims and who purported to represent investors in the CWALT certificates that SCBank purchased tolled the bank's claim. Indeed, the

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correctly acknowledged that the holding applies equally to the Securities Act claims at issue here.

[2] *See Bell Atlantic v. Twombly*, 550 U.S. 544, 555-57 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-83 (2009).

[3] We refer to all of the defendants as "Countrywide." Appellees Bank of America Corporation and Citigroup Global Markets filed briefs adopting the arguments of Countrywide.

[4] *See Freidus v. ING Groep, N.V.*, No. 12-4514-cv, 2013 WL 6150769 (2d Cir. Nov. 22, 2013); *Pension Trust Fund for Operating Eng'rs v. Mortg. Asset Securitization Transactions, Inc.*, 730 F.3d 263, 277 (2013).

[5] 414 U.S. 538 (1974).

District Court's conflicting holding that the class plaintiffs had standing to represent the entire class for settlement purposes illustrates the flaw in the District Court's analysis.

Argument

I. This Court Has Jurisdiction Over this Appeal

A. The November 21 District Court Order Is an Immediately Appealable Final Decision Disposing of All Claims in the FDIC's Action

Two well-settled legal principles compel the denial of Countrywide's motion—the rule that individual multi-district litigation ("MDL") cases "remain fundamentally separate actions," and the principle that an order "effectively extinguish[ing]" an action, disposing of all claims of all parties, is a final order appealable under section 1291.[6] Applying these principles, the Court held in *Korean Airlines* that it had jurisdiction under section 1291 over an appeal by plaintiffs in an antitrust MDL whose complaints raised only state law claims that were dismissed on preemption grounds and who were denied leave to

[6] *In re Korean Air Lines Co., Ltd., Antitrust Litig.*, 642 F.3d 685, 698, 700 (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) and *Watson v. Weeks*, 436 F.3d 1152, 1155 (9th Cir. 2006)).

amend their complaints to add federal law claims.[7] The Court found jurisdiction even though other MDL cases that included federal law claims survived the dismissal, and even though appellants did not request a Rule 54(b) certification.[8] Similarly, the Court in *In re Phenylpropanolamine Litigation* found jurisdiction under section 1291 to review the dismissal of some cases in an MDL for failure to comply with a case management order.[9] Other courts of appeals agree that jurisdiction over such cases is proper and Countrywide has cited no case in any circuit court that agrees with its position.[10]

B. Fed. R. Civ. P. 54(b) Is Inapplicable

Without even acknowledging Ninth Circuit law to the contrary, Countrywide incorrectly maintains that the FDIC must obtain a Rule 54(b) certification in order to appeal the dismissal of its case before all

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[7] *Id.* at 698.
[8] *See id.*
[9] *See* 460 F.3d 1217, 1242 (9th Cir. 2006).
[10] *See also In re Avandia Mktg., Sales Practices and Prods. Liab. Litig.*, 685 F.3d 353, 357 (3d Cir. 2012) (finding appellate jurisdiction under section 1291 to review a district court order dismissing one of many MDL cases); *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 391 F.3d 907, 911 (8th Cir. 2004) (finding jurisdiction under section 1291 over three class action opt-out cases that were included in an MDL); *In re Bridgestone/Firestone, Inc.*, 420 F.3d 702, 704-05 (7th Cir. 2005) (determining it had section 1291 jurisdiction over an appeal of a *forum non conveniens* dismissal of one of 700 MDL cases).

the claims of all parties in all of MDL cases are adjudicated.

By its terms Rule 54(b) applies only "when ***an*** action presents more than one claim for relief . . . or when multiple parties are involved," and allows for certification of a "final judgment" only "as to one or more, but fewer than all, claims or parties."[11] Further, the Rule provides that "[o]therwise any order . . . that adjudicates fewer than all the claims . . . of fewer than all the parties does not end ***the*** action . . . and may be revised at any time before the entry of ***a*** judgment adjudicating all the claims and all the parties' rights and liabilities."[12]

Thus, Countrywide's argument that the appeal of the November 21 Order falls within Rule 54(b) rests on the faulty premise that all cases that are part of an MDL together comprise one single "action" and that a single judgment will ultimately resolve all claims of all parties in all of the MDL cases. This premise cannot be squared with the language of Rule 54(b) or with the firmly established principle that MDL actions "remain fundamentally separate actions." In an MDL, no one single final adjudication will dispose of "all the claims and all the parties' rights and liabilities." Instead, under section 1407(a), after

[11] Fed. R. Civ. P. 54(b) (emphasis added).
[12] *Id.* (emphasis added).

completion of pretrial proceedings, each individual case will be remanded back to the district from which it was transferred.[13] There will be multiple judgments adjudicating the parties' claims. Here, the November 21 Order on appeal dismisses all of the FDIC's claims against all of the defendants in their entirety. It conclusively ends the FDIC's action. Rule 54(b) certification of the District Court's dismissal order is not required.

C. The Cases Countrywide Cites Do Not Support Dismissal of the FDIC's Appeal

Countrywide's reliance on *Huene* v. *United States*[14] is unavailing because *Huene* did not arise in the context of an MDL. In *Huene*, the Court held that absent Rule 54(b) certification it lacked jurisdiction to hear an appeal from the dismissal of one of only two FOIA actions brought by the *same* party against the United States that were consolidated under Fed. R. Civ. P. 42, which permits courts to consolidate cases for *all* purposes.[15] By contrast, actions brought in different jurisdictions that are made part of an MDL are consolidated

[13] 28 U.S.C. § 1407(a).
[14] 743 F.2d 703 (9th Cir. 1984).
[15] *See id.* at 705.

only for completion of pretrial proceedings.

Countrywide's reliance on a footnote in a 1974 decision, *In re Western Liquid Asphalt Cases*,[16] is also misplaced. In *Liquid Asphalt,* the Court heard an interlocutory appeal under 28 U.S.C. § 1292 from a partial summary judgment order dismissing antitrust claims of indirect purchasers of liquid asphalt while allowing direct purchasers' claims to go forward. In a footnote, the Court explained that a motions panel of the Court dismissed without prejudice an appeal filed under 28 U.S.C. § 1291 by MDL plaintiffs who purchased only indirectly, concluding that absent a Rule 54(b) certification they could not appeal until the end of all MDL litigation. But this conclusory footnote cannot serve as the basis of a sweeping rule requiring Rule 54(b) certification before any order dismissing all claims in an individual MDL action can be appealed, especially because *Liquid Asphalt* was decided before the Supreme Court in *Coopers & Lybrand* clarified that an action becomes appealable under section 1291 when all claims have been decided, thereby ending the action.[17]

Nor can Countrywide rely on the issuance of an order to show

[16] 487 F.2d 191, 194 n.1 (9th Cir. 1974).
[17] *See* 437 U.S. at 467.

cause in *Putnam Bank v. Countrywide Fin. Corp.*[18] to predict that, absent Rule 54(b) certification, the Court would reject section 1291 jurisdiction over the FDIC's appeal. The order on appeal in *Putnam Bank* was an omnibus order that addressed multiple cases, and dismissed only two of them.[19] Here, the November 21 order on appeal dismisses only the FDIC's action in its entirety.

II. FDIC's Claims Were Timely Filed

Conflating the requirements for inquiry notice and actual notice, the District Court[20] held that general press reports and prior complaints involving different investments are alone sufficient to constitute discovery of a claim and trigger the running of the Securities Act's one-year statute of limitations. But the Supreme Court held in *Merck* that the statute of limitations does not begin to run until a reasonable investor would have discovered "the facts constituting the

[18] No. 12-55521 (9th Cir. Mar. 26, 2012).

[19] *See In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 860 F.Supp.2d 1062, 1079 (C.D. Cal. 2012).

[20] The same District Court has issued similar holdings in other cases pending before it. These cases are similarly flawed. *See In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 934 F.Supp.2d 1219 (C.D. Cal. 2013); 860 F.Supp.2d 1062 (C.D. Cal. 2012); *Allstate Ins. Co. v. Countrywide Fin. Corp.*, 824 F.Supp.2d 1164 (C.D. Cal. 2011); *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F.Supp.2d 1125 (C.D. Cal. 2011).

violation . . . .—irrespective of whether the actual plaintiff undertook a reasonably diligent investigation."[21]

Here, the FDIC's complaint includes well-pled allegations demonstrating that a reasonable investor *would not* have discovered the facts constituting the violation until 2010, when information became available that allowed an investor to determine that misrepresentations had been made in connection with the Countrywide RMBS that it had purchased.[22] The District Court gave no weight to these allegations, instead substituting its own version of the facts to hold, as a matter of law, that a reasonable investor would have discovered all the elements of its claims before May 2008 simply because there were generalized allegations about Countrywide's underwriting practices in the press and in lawsuits.

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[21] *Merck*, 559 U.S. at 653.

[22] Even before *Merck,* if a reasonable inquiry would not have led to discovery of the facts necessary to state a claim, the statute of limitations would not have begun to run. *See, e.g., Betz v. Trainer Wortham & Co., Inc.,* 519 F.3d 863, 876 (9th Cir. 2007) (stating that "[o]nce a plaintiff has inquiry notice, we ask when the investor, in the exercise of reasonable diligence, should have discovered the facts constituting the alleged fraud. The answer to that question tells us when the statute of limitations began to run.") Here, as the FDIC has adequately pled, even a reasonable inquiry would not have led to discovery of the critical fact that there were misrepresentations about the certificates purchased by SCB until 2010.

A. The FDIC's Well-Pled Allegations Demonstrate that a Reasonable Investor Would Not Have Discovered Its Claims Before May 2008

In its Second Amended complaint, the FDIC alleged that the information necessary to plead its claims was not available until 2010:

> [A] reasonably diligent plaintiff would not have discovered until later than May 22, 2008, facts that show that the particular statements referred to in . . . this Complaint were untrue or misleading. Those are statements about the 9,941 specific mortgage loans in the collateral pools of the securitizations involved in this action . . . . A reasonably diligent plaintiff did not have access to the loan files compiled by the originators of those specific mortgage loans nor to records maintained by the servicers of those specific mortgage loans (from either or both of which a reasonably diligent plaintiff may have discovered facts that show that the statements that defendants made about those specific loans were untrue or misleading) because originators and servicers of loans and securitization trustees do not make those files available to certificate holders. Moreover, on and prior to May 22, 2008, there were not available to a reasonably diligent plaintiff, even at considerable expense, data about those specific loans that show that the statements that defendants made about those specific loans were untrue or misleading. Such data became available for the first time in early 2010.[23]

Countrywide does not dispute that loan files and data were unavailable until 2010. Nor does it point to any other publicly available information that would have allowed SCBank to plead and prove that Countrywide misrepresented information in connection with the bonds

[23] Amended Complaint ¶ 145.

sold to SCBank prior to May 2008. Instead, Countrywide simply ignores the FDIC's allegations and contends that generalized allegations about Countrywide's poor underwriting alone were sufficient to trigger the statute of limitations. This position misconstrues the basis for the FDIC's claims.

Contrary to Countrywide's assertion, the FDIC could not support its misrepresentation claims by merely alleging that Countrywide demonstrated a "rampant disregard for underwriting standards."[24] Rather, the FDIC was required to show that this disregard rendered untrue the representations in the offering documents about the loans that were the collateral for its RMBS certificates, including representations regarding loan-to-value ratios, owner occupancy, and appraisal standards. Countrywide does not, and cannot, explain how a reasonable investor would have discovered this critical link before May 2008.

In fact, in the FDIC's opening brief, it demonstrated that, contrary to the District Court's finding, SCBank had no reason even to *investigate* potential Securities Act claims against Countrywide before

[24] Resp.21.

May 2008. At that time, there was no evidence that suggested that any disregard that Countrywide had for its underwriting had an impact on SCBank's bonds. In fact, those bonds had *not even been downgraded*. In the absence of such a downgrade, a reasonable investor would have had no reason to believe that it would suffer a material, much less any, loss on its securities.[25]

Countrywide attempts to downplay these facts, arguing that rating agency actions should have no bearing on an investor's discovery of its claims, while general allegations and press reports unrelated to the certificates should.[26] As support, Countrywide cites language from other decisions by the District Court minimizing the significance of credit ratings.[27] But other courts have expressly recognized the justification for investor reliance on the accuracy of credit ratings.[28]

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[25] *See* FDIC Br.18-19.
[26] Resp. 30.
[27] Resp. 30-31.
[28] *See Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, 651 F.Supp.2d 155, 181 (S.D.N.Y. 2009) (stating that "sophisticated investors, have come to rely on the accuracy of credit ratings . . . because [of their] . . . access to non-public information that even sophisticated investors cannot obtain"). And, the Credit Agency Reform Act of 2006 (CARA) was intended "to improve ratings quality for the protection of investors." 152 Cong. Rec. S 10011-06.

Indeed, in a subsequent case, even the District Court itself recognized the significance of a downgrade in the timeliness analysis.[29]

B. The Case Law upon Which Countrywide Relies Supports the FDIC's Position That the Claims Were Timely

Defendants' reliance on two cases—*Pension Trust Fund for Operating Engineers* and *Freidus v. ING Groep, N.V.*—is equally misplaced.

1. The Third Circuit's Decision in *Operating Engineers* Supports Reversal

Operating Engineers supports the FDIC's position that its claims are timely for two reasons. First, unlike the District Court here, the Third Circuit in *Operating Engineers* expressly recognized the distinction between "non-security specific storm warnings" sufficient to cause a reasonable investor to *investigate* and the *discovery* of specific facts needed to trigger the statute of limitations.[30] As a consequence, *Operating Engineers* rejected the District Court's central premise—that general statements are sufficient in and of themselves to support

[29] 934 F.Supp.2d at 1228.
[30] 730 F.3d at 277.

allegations in a complaint that can withstand a motion to dismiss.[31] The Third Circuit recognized that an investor cannot satisfy pleading requirements with general allegations, reasoning that only after September 2008 (*i.e.*, *after* the relevant date in this case), would a reasonably diligent investor "have discovered the untrue statements or the omissions" about its particular certificates.[32]

Second, in *Operating Engineers*, the Third Circuit found that a reasonably diligent plaintiff would only have *begun to inquire* about its certificates by September 9, 2008, based on the filing of the *Luther* class action complaint *in which the plaintiff pension fund in Operating Engineers was a named plaintiff*.[33] Defendants cannot point to similar facts here that would have prompted a reasonable investor to begin to inquire before May 2008 about the certificates sold to SCBank.

There are other distinctions between the facts here and those the Third Circuit relied on in *Operating Engineers.* In *Operating*

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[31] *Id.* Under *Operating Engineers*, all of the complaints listed by Countrywide at pages 18-19 of its brief would be inadequately pled because, like the November 2007 *Luther* complaint, they are based solely upon general allegations in the public domain without any link to the loans underlying the certificates.

[32] *Id.* at 279.

[33] Resp. 24-25 (citing *Operating Eng'rs*, 730 F.3d at 277).

Engineers, plaintiff hired a consultant to "use[] a proprietary process" that involved combing through bankruptcy court filings in order to "uncover financial information for certain of the individual borrowers of the loans underlying the Certificates in order to test the accuracy of" statements made by defendants."[34] The court found that the consultant's analysis, which took two months to perform in late 2010, "would have been equally successful in September 2008."[35] There is no support for such a finding in this case. To the contrary, the FDIC has pled facts specifically stating that it *could not have discovered* the kind of data found in *Operating Engineers* before May 2008.

As alleged in the Amended Complaint, until it was possible to identify the properties in the pool by their addresses, the FDIC could not perform the forensic analysis needed to determine that there were misrepresentations in the offering documents for the Countrywide RMBS purchased by SCBank.[36] But in any event, even if the Court

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[34] 730 F.3d at 278.

[35] *Operating Eng'rs*, 730 F.3d at 279.

[36] The Court in *Operating Engineers* apparently assumed that the consultant's analysis could have been performed more than two years earlier. However, the conclusion that the specific bankruptcy filings or databases used by the consultant in 2010 to identify relevant borrowers were available in 2008 lacks any factual predicate.

were to assume that the same analysis undertaken in *Operating Engineers* could have been performed in this case as of September 2008, the FDIC's claims would be timely as a matter of law because that date is less than a year before SCBank failed, and the statute of limitations would not yet have run.

2. The Second Circuit's Decision in *Freidus* Does Not Support Countrywide's Position

Countrywide mistakenly relies on *Freidus*, an unpublished Second Circuit opinion, as support for the District Court's conclusion that general allegations in the public domain can provide the basis for a Securities Act claim. *Freidus* does not address that issue at all.

In *Freidus, ING Groep, N.V.* ("ING") sold general corporate securities to investors in June 2007.[37] In its offering materials, ING did not describe the character of its mortgage assets, including that the mortgage assets were subprime and Alt-A RMBS, or the fact that they were losing value.[38]

Several months after the June 2007 bond offering closed, ING disclosed in its public filings for the first time that credit markets had

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[37] *Freidus v. ING Groep, N.V.*, 736 F.Supp.2d 816, 822 (S.D.N.Y. 2010).
[38] *Id.* at 828.

become turbulent amid concerns about subprime mortgages and other assets and acknowledged that market disruption had impacted ING's financial condition.[39] ING also announced that it was holding $4.6 billion in subprime RMBS and $41.9 billion in Alt-A RMBS and that they had suffered a "negative revaluation."[40]

In February 2009, purchasers of the ING bonds sued under the Securities Act claiming in essence that ING "failed to disclose the amount and characteristics of ING's RMBS as well as the impact those assets had on its financial position."[41] The Second Circuit affirmed the district court's dismissal of the claims as untimely.

The Court of Appeals, relying upon its decision in *City of Pontiac General Employees' Retirement System v. MBIA, Inc.*,[42] held that

> the facts disclosed by the end of September 2007 [by ING in its public filings] would have alerted a reasonably diligent plaintiff to allege misstatements and omissions in the June 2007 offering, such that a reasonably diligent plaintiff could plead such omissions in a complaint.[43]

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[39] *Id.* at 823.
[40] *Id.* at 827-28.
[41] *Id.* at 827.
[42] 637 F.3d 169, 175 (2d Cir. 2011).
[43] *Freidus v. ING Groep, N.V.*, No. 12-4514-cv, 2013 WL 6150769, at *1 (2d Cir. Nov. 22, 2013).

In other words, it was not the general allegations in the public domain, but ING's own public disclosures that the Second C7ircuit deemed sufficient to allege facts that would have withstood a motion to dismiss under Rule 12(b)(6). Unlike SCBank, the plaintiffs in *Freidus* did not need loan-level information to link such public disclosures about ING's assets to their investments because their investments were in ING's corporate debt.

Furthermore, there is no merit to Countrywide's claim that the Second Circuit sanctioned the trial court's rejection of plaintiffs' argument that their claims were not untimely because ING failed to disclose more "granular details" along with its September 2007 disclosures.[44] In fact, the Second Circuit ignored the lower court's analysis altogether because it was decided based upon pre-*Merck* case law.

[44] Resp. 24 (quoting *Freidus*, 736 F. Supp.2d at 828-29).

C. Whether a Reasonably Diligent Investor Should Have Discovered Facts Sufficient Under *Twombly* and *Iqbal* Presented Questions of Fact Not Amenable to a Rule 12(b)(6) Motion

Under *Merck*, the statute of limitations does not begin to run until a plaintiff is able to discover facts constituting the violation. Central to the FDIC's allegations is the claim that there were misrepresentations in the offering documents for the certificates that SCBank purchased. As the FDIC alleged in its Amended Complaint and argued in its opening brief, SCBank had no basis for pleading this central element of its claim until well after May 2008 because publicly available information criticizing Countrywide's underwriting could not be linked to SCBank's certificates.

Attempting to support the District Court's holding that specific facts are not necessary and that general allegations in the public domain are sufficient to trigger the Securities Act limitations period, Countrywide argues that under the FDIC's view of the law a statute of limitations "would not be triggered until sometime during document discovery" when a plaintiff would have "access to loan files and

servicing records of the specific mortgage loans backing" the RMBS.[45] That argument ignores the allegations in the Amended Complaint and speciously shifts the focus to issues not raised in this appeal.

Whether facts pled are sufficient under *Twombly* and *Iqbal* to withstand a motion to dismiss under Rule 12(b)(6), and when a reasonably diligent investor would have discovered those facts are two separate questions. The second question requires the consideration and resolution of facts that are not in the record and have not been developed through discovery (which has yet to take place). Indeed, courts have recognized that "resolution of [whether a failed bank should have known it had a securities claim] is a fact-intensive inquiry, and not well-suited for resolution as a matter of law."[46] Accordingly, the District Court should not have ignored the facts pled in the Amended Complaint and substituted its own version to resolve that question as a matter of law on a motion to dismiss.

The FDIC alleged in its Amended Complaint that until 2010 "there were not available to a reasonably diligent investor, even at

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[45] Resp. 27.

[46] *FDIC v. Chase Mortg. Fin. Corp.* No. 12 Civ. 6166(LLS), 2013 WL 5434633, at *3 (S.D.N.Y. Sept. 27, 2013); *see also* FDIC Br. 46 n.114.

considerable expense, data about [the specific loans at issue] that show that the statements that defendants made about those specific loans were untrue or misleading."[47] Countrywide argues that the District Court was not required to accept this allegation because it was conclusory and, therefore, insufficient under *Twombly* and *Iqbal*.[48] Not only was that allegation sufficient, but, the District Court did not dismiss the case on that ground. Instead, the court went beyond the appropriate inquiry on a motion to dismiss and determined the factual issue of when a reasonably diligent investor would have discovered the necessary facts based on other litigation involving other certificates and press reports about Countrywide's underwriting failures.[49] The problem here is not that the FDIC did not meet its pleading obligations but that the District Court inappropriately decided whether a reasonably diligent investor could have discovered specific loan-level facts before May 2008 on a motion to dismiss. Accordingly, at the very least, whether SCBank's claims were timely under *Merck's* discovery

[47] Amended Complaint ¶ 145.
[48] Resp. 27-28.
[49] *FDIC v. Countrywide Fin. Corp.*, No. 2:12-cv-4354 MRP (MANx), 2012 WL 5900973, at *15 (C.D. Cal. Nov. 21, 2012) (holding that public sources "gave SCB sufficient information to survive a motion to dismiss before May 22, 2008").

rule is a question of fact and the District Court should not have dismissed the claims under Rule 12(b)(6).

III. SCBank's Claim Was Tolled under *American Pipe*

A. *American Pipe* Applies to Federal Claims Filed in State Court Where Concurrent Jurisdiction Exists

Countrywide, relying on the Seventh Circuit's decision, *In re Copper Antitrust Litig.*,[50] argues that *American Pipe* does not apply because *Luther* was filed in California state court and *American Pipe* applies only to federal claims brought in federal courts.[51] But, *Copper* does not support Countrywide's arguments. Rather, *Copper* holds only that a class action filed in state court on a *state law* claim does not toll the statute of limitations on similar *federal claims*.[52] *Copper* does not address the application of *American Pipe* tolling to class actions filed in state court that raise claims under federal law.

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[50] 436 F.3d 782, 793-94 (7th Cir. 2006).

[51] Resp. 34. Countrywide also relies upon the District Court's reasoning in this case and in another, related Countrywide MDL case. *See id.* at 34-35 (citing *FDIC v. Countrywide Fin. Corp.*, No. 2:12-cv-4354 MRP (MANx), 2012 WL 5900973 (C.D. Cal. Nov. 21, 2012) and *FDIC v. Banc of Am. Sec LLC*, 934 F.Supp.2d 1219 (C.D. Cal. 2013)).

[52] 436 F.3d at 793-94.

In fact, the Seventh Circuit made clear in *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*,[53] that the *Copper* analysis would not apply here. In *Sawyer*, the Seventh Circuit expressly declined to apply *Copper* to claims over which state and federal courts have *concurrent jurisdiction*, holding that a timely class action in state court filed under the federal Telephone Consumer Protection Act could toll the statute of limitations on federal claims asserted in a later case pending in federal court.[54] The court concluded that, because the federal court did not have exclusive jurisdiction over a claim brought under the federal Telephone Consumer Protection Act, the class-action suit filed in state court tolled, under *American Pipe*, the statute of limitations applicable to Sawyer's individual claims filed in federal court.[55] The court

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[53] 642 F.3d 560 (7th Cir. 2011).

[54] And, in so doing, the Seventh Circuit directly refuted Countrywide's argument (Resp. 4) that "*American Pipe* and like precedents simply do not apply in the cross-jurisdictional context." Rather, the Seventh Circuit said: "It is true enough that both *American Pipe* and *Crown, Cork & Seal* involved sequential federal suits. But it does not follow that any rule or policy prohibits what Atlas Heating calls 'cross jurisdictional tolling.'" 642 F.3d at 562.

[55] Because *American Pipe* is a rule applicable to all federal statutes of limitations, the District Court's concern about the pleading requirements of the Private Securities Reform Act is misplaced. *See FDIC v. Countrywide Fin. Corp.*, No. 2:12-cv-4354 MRP (MANx), 2012 WL 5900973, at *14 (C.D. Cal. Nov. 21, 2012). The rule announced in

reasoned that federal law determines the effect of a suit governed by a federal statute of limitations—even a suit filed in state court.[56]

The court further explained that "*Chardon v. Fumero Soto* drives this point home by holding that, when the statute of limitations [for a federal claim] 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 the law, and not the identity of the forum, determines the effect of a failed class action."[57]

Countrywide attempts to side-step *Copper* and *Sawyer* by accusing the FDIC of misciting the holding of *Chardon*.[58] The quoted language, however, is from the *Sawyer* opinion itself which summarizes the Seventh Circuit's understanding of *Chardon*.

American Pipe is based fundamentally upon the federal policies underlying federal statutes of limitations as applied in the class action context. So long as those policy concerns are met, *American Pipe* applies. Concerns about violating the Rules Enabling Act by deriving a substantive rule of law from a procedural rule, Rule 23, is misplaced as well. Because *American Pipe* is based upon a rule applicable to all federal statutes of limitations extending it to the Rule 23 context does not violate the Act because the source of the rule is not Rule 23.

[56] 642 F.3d at 562.

[57] *Id.* at 563 (citing 462 U.S. 650 (1983)).

[58] Resp. 38.

And that understanding is correct. In *Chardon*, plaintiffs brought a civil rights class-action in federal court under 42 U.S.C. § 1983. Unlike the Securities Act, which has its own federal statute of limitations, section 1983 does not—the statute of limitations is borrowed from state law (in *Chardon*, Puerto Rico's statute applied). Under Puerto Rican law, when a statute of limitations is tolled, the statute begins running anew at the end of the tolling period. The defendant in *Chardon* argued that this rule conflicted with *American Pipe*, but the Supreme Court rejected this argument, holding instead that in a section 1983 action, Congress has directed the courts to apply state statutes of limitations, so state tolling rules apply unless they are inconsistent with federal law; and nothing in Puerto Rico's "renewal rule" conflicted with *American Pipe*.[59]

Thus, *Sawyer* supports the proposition that because *Luther* asserted federal securities claims, the federal law claims of the

[59] *Chardon*, 462 U.S. at 662. Countrywide takes selected quotes out of context from both the majority and dissent in *Chardon* to support its argument that *American Pipe* is merely procedural in nature and applicable only to federal class actions filed in federal court. Resp. 38-39. In so doing, Countrywide strains both the holding of *Chardon* and the dissent to draw conclusions that *Chardon* does not support.

putative class members, including those of SCBank, were tolled under *American Pipe*, even though *Luther* was filed in California state court. Nothing in *Chardon* supports a different conclusion.

B. So Long As a Class Plaintiff Has Standing to Assert Its Claim It May Represent Putative Class Members Who Have the "Same Set of Concerns"

This Court has held that a named plaintiff has Article III standing to pursue the claims of a class where the named plaintiff has standing to assert its own claim.[60] Here, Countrywide concedes that the *Luther* class representatives had standing to assert their individual claims,[61] but nevertheless argues that *Luther* did not toll the statute of limitations on SCBank's claims because the named plaintiffs in *Luther* did not purchase the same offerings as SCBank, and therefore had no standing to assert SCBank's claims.[62] But the Second Circuit, in *NECA-IBEW* considered this exact issue, and held that a "plaintiff has class standing to assert the claims of purchasers of certificates backed by mortgages originated by the same lenders that originated the

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[60] *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979 (9th Cir. 2011); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011).
[61] Resp. 47.
[62] Resp. 41.

mortgages backing the plaintiff's certificates, because such claims implicate 'the same set of concerns' as plaintiff's claims."[63]

Countrywide criticizes the FDIC's reliance on *NECA-IBEW*, claiming that the Second Circuit improperly combined "the distinct stages of standing and class certification" which "allows Rule 23 to trump Article III of the Constitution."[64]

But the Second Circuit did no such thing. Rather, it first found that the putative plaintiff in *NECA* had Article III standing to assert its own claims.[65] Next, it separately considered whether NECA had class standing to assert claims on behalf of purchasers of certificates from other offerings or tranches. The Second Circuit held that in a putative class action, a plaintiff has class standing if the plaintiff has "suffered some actual injury as a result of the putatively illegal conduct of the defendant" and "such conduct implicates 'the same set of concerns' as

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[63] 693 F.3d 145, 148-49 (2d Cir. 2012).
[64] Resp. 50-51.
[65] *NECA-IBEW*, 693 F.3d at 158 (stating that "NECA has Article III standing to sue defendants in its own right because it plausibly alleged (1) a diminution in the value of the 2007-5 and 2007-10 Certificates (2) as a result of defendants' inclusion of misleading statements in the 2007-5 and 2007-10 registrations statements and associated prospectuses that is (3) redressable through rights of action for damages under §§ 11 and 12 (a)(2).").

the conduct alleged to have caused injury to the members of the putative class by the same defendants."[66] The court noted that other putative class members had bought certificates issued under the same shelf registration statement in offerings having loans "originated by originators common to those backing" the certificates bought by the named plaintiffs. It concluded that the "same set of concerns" gave the named plaintiffs class standing to represent all putative plaintiffs who had bought certificates backed by loans from common originators.[67]

The Second Circuit also rejected the argument that because these misrepresentations appeared in different offering documents they were fundamentally different, finding that the "location of the representations has no effect."[68] The representations may be contained

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[66] *Id.* at 162 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982)) (internal quotation marks omitted).
[67] *Id.* at 162-64.
[68] *Id.* at 162-63. Countrywide and amicus curiae, the Securities Industry and Financial Markets Association ("SIFMA"), further cite and rely on *Lewis v. Casey* for the proposition that the "standing determination is quite separate from the certification of the class." SIFMA Br. 12. But, the Second Circuit recognized that this analysis is separate and different, citing *Lewis v. Casey* for the proposition that class standing is controlled by Rule 23. 693 F.3d at 159 n.10. It followed the Supreme Court's subsequent decision in *Gratz*, and held that both Article III standing and Rule 23 are satisfied where the class

in the shelf registration statement or, as here, in the prospective supplements. Indeed, the Second Circuit found that class action standing existed even though the mortgage-backed securities at issue in that case were "issued through 17 separate Offerings, each backed by a distinct set of loans. . . ." The court held that the existence of common originators was dispositive and gave plaintiffs class action standing with respect to claims of putative class members who had purchased certificates having common originators.[69]

The Amended Complaint alleges that the "vast majority" of loans securitized by Countrywide entities were done so under prospectus supplements that contained similar material misrepresentations and omissions. Further, the certificates purchased by SCBank and the named plaintiffs in *Luther* had common originators, including Countrywide Home Loans and American Home. Thus, SCBank's claims implicate the "same set of concerns" as the claims of the named plaintiffs in *Luther*.[70]

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plaintiff has standing to assert its own claim and shares the "same set of concerns" as the putative class members. 693 F.3d at 149.

[69] *Id.* at 163

[70] Amended Complaint ¶¶ 77, 82.

The District Court's observation that shelf offerings of corporate debt are distinguishable from shelf-offerings in RMBS cases does not undermine the holding in *NECA-IBEW*.[71] The District Court observed that in a corporate debt issuance the bondholder looks to the same pool of corporate revenues and assets to repay those securities while in an RMBS the certificate holder looks to different pools of loans so that the "representations made in the prospectus supplements about each certificate are therefore unique."[72] Here, however, there are common originators, and the certificate holders relied upon the same type of revenue to repay the certificates—interest and principal payments from the loans. In addition, the same types of misrepresentations were in the prospectus supplements made available to the named plaintiffs in *Luther* and to putative class members. The claims asserted by *Luther* raise the "same set of concerns" as the claims asserted by SCBank here.

Moreover, Countrywide's concern that *NECA-IBEW* identified no limitations on the scope of standing simply misreads the opinion.[73] Assuming that the named plaintiffs have standing to assert their own

[71] *See* Resp. 53.
[72] *FDIC v. Countrywide Fin. Corp.*, No. 2:12-cv-4354 MRP (MANx), 2012 WL 5900973, at *11 (C.D. Cal. Nov. 21, 2012).
[73] Resp. 54 n. 32.

claims, they can represent only putative class members that bought certificates with common originators.[74] Any concerns that a small number of loans were originated by another lender can be addressed during the "typicality" portion of class certification under Rule 23.[75]

Countrywide also attempts to create a non-existent conflict between the First Circuit's decision in *Plumbers' Union Local No. 12 v. Nomura Asset Acceptance Corp.*[76] and *NECA-IBEW*. But *Plumbers' Local* is distinguishable because there—unlike here and *NECA-IBEW*—the lead defendant acquired mortgages *from various banks* and transferred them to numerous trusts.[77] Because the originators differed, the Court concluded that the named plaintiffs lacked standing to litigate the claims of the putative plaintiffs who bought securities from different trusts backed by loans originated by different banks. The First Circuit concluded that "no named plaintiff has a significant interest in establishing wrongdoing by the particular group of banks that financed a trust from which the

[74] *See* 693 F.3d at 162-164.
[75] *See Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982) (explaining that Rule 23(a) requirements "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims").
[76] 632 F.3d 762 (1st Cir. 2011).
[77] *Id.* at 766.

named plaintiffs made no purchases."[78] But, the First Circuit left open the possibility that it would rule differently in a case like this one, where the claims of the named plaintiff in the class action and those of the putative plaintiff in a later lawsuit raised the same set of concerns.[79]

FDIC has not conceded, as Countrywide argues, that the allegations of the plaintiffs in *Luther* did not raise the "same set of concerns" as those raised in the claims of SCBank by stating that a plaintiff must have evidence about the specific loans underlying its certificates to state a viable claim.[80] Rather, as FDIC has made clear, the *Luther* complaint involved the same types of misrepresentations set forth in the FDIC's complaint, and thus, raised a common set of concerns. The fact that FDIC must prove it has suffered harm by relying upon evidence about the specific loans underlying the certificates purchased by SCBank does not change this—the types of

[78] 632 F.3d at 771.

[79] Specifically, the court stated: "The qualification, on which we reserve judgment, is one where the claims of the named plaintiffs necessarily give them—not just their lawyers—essentially the same incentive to litigate the counterpart claims of the class members because the establishment of the named plaintiffs' claims necessarily establishes those of other class members." 632 F.3d at 770.

[80] Resp. 52.

misrepresentations were the same, although the proof that these statements were false and the amount of damages may be different.[81]

Finally, Countrywide raises an argument in support of the District Court's decision that the district court did not address here but did address in several other Countrywide MDL cases.[82] In *Putnam Bank* and *Me. State III*, the District Court held that the *Luther* plaintiffs did not have "statutory standing" to assert claims as to the certificates it did not purchase.[83] The court reasoned that because sections 11 and 12(a)(2) of the Securities Act limit standing to those who have purchased a security, and each tranche of a security is a separate security class, representatives may only represent those who purchased the same security as they did. But this argument adds nothing to the standing argument. As already discussed, under *Gratz,* and the Second Circuit's decision in *NECA-IBEW,* so long as a class

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[81] Countrywide, of course, wants it both ways—it argues that the types of general allegations alleged in *Luther* were sufficient to start the statute of limitations, but are insufficient to toll the statute of limitations for putative class members.

[82] Resp. 55.

[83] 860 F.Supp.2d at 1068; No. 2:10-cv-0302 MRP (MANx), 2011 WL 4389689, at *6 (May 5, 2011).

plaintiff has standing to assert its own claim it may represent others whose claims have the "same set of concerns."[84]

C. The Caselaw Countrywide Cites Does Not Support Its Argument that unless a Class Plaintiff Owns the Same Security as Putative Class Members *American Pipe* Categorically Does Not Apply

As the FDIC argued in its opening brief, the caselaw does not support Countrywide's position that a class plaintiff must have invested in the same certificates as all putative class members in order for *American Pipe* to apply.[85] Although this Court has not addressed this issue, the Third and Eleventh Circuits have concluded that *American Pipe* tolling applies, even where a court subsequently decides that the class representative lacks standing to represent some or all of the putative class members, so long as the policies underlying *American Pipe* are satisfied.

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[84] Similarly, Countrywide's reliance upon *Public Employees' Retirement System of Mississippi v. Merrill Lynch & Co., Inc.*, 714 F.Supp.2d 475 (S.D.N.Y. 2010) (Resp. 45 n. 28) is misplaced because the court relied upon the Supreme Court's decision in *Lewis v. Casey*. But, the court failed to discuss the Supreme Court's later decision in *Gratz* and analyze whether the named plaintiff's claims raised the "same set of concerns" within the meaning of *Gratz* as those of the putative plaintiffs.

[85] *See* FDIC Br. 53-60.

In *Haas v. Pittsburgh National Bank*,[86] the Third Circuit concluded that *American Pipe* tolling applied, even though the class representative lacked standing, because she provided the defendants with timely notice of the "substantial nature of the claims against which they would be required to defend" and "the number and generic identities of the potential plaintiffs." Because the named plaintiff satisfied the policies underlying *American Pipe*, the court held that "the commencement of the original class action by Haas tolled the statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."[87]

The Eleventh Circuit reached the same conclusion in *Griffin v. Singletary*.[88] There the district court found that *American Pipe* tolling did not apply because the class representatives lacked standing.[89] The court of appeals reversed, finding that because the plaintiffs had satisfied the policy considerations underlying *American Pipe*, "[i]nsofar as the individual claims are concerned, putative class members should

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[86] 526 F.2d 1083, 1097 (3d Cir. 1975).
[87] *Id.* at 1098.
[88] 17 F.3d 356 (11th Cir. 1994).
[89] *Id.* at 360.

be entitled to rely on a class action as long as it is pending."[90] The court held that to conclude otherwise would encourage a flood of litigation "that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid."[91]

Countrywide attempts to distinguish *Haas* and *Griffin* arguing that in those cases the classes were certified and then decertified because of a change in law.[92] But that is not a material distinction. The decisions turned solely upon *American Pipe* and the policies underlying that decision—fair notice to the defendants of the identity of claimants and magnitude of the potential liability within the limitations period. As the Eleventh Circuit recognized in *Griffin,* when the law is unclear, *American Pipe* allows putative plaintiffs to rely upon the filing of a putative class action instead of clogging the courts with unnecessary, separate law suits in order to protect their claims.

The other cases Countrywide cites do not support affirmance of the District Court's *American Pipe* tolling analysis in this case. In some of the cases the courts refused to allow putative class members to

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[90] *Id.* at 360.
[91] *Id.* at 360 (quoting *Crown, Cork & Seal*, 462 U.S. at 351).
[92] Resp. 44-45 n.27.

intervene in class actions, or refused to hold that a prior class action tolled an individual plaintiff's claims in a later filed lawsuit, because, unlike the *Luther* plaintiffs, the putative class representatives did not have standing to assert their own claims.[93] In others, the courts held that the claims of individual plaintiffs were not tolled by class action complaints that did not purport to represent the individual plaintiffs' claims.[94] But here the *Luther* plaintiffs had standing to assert their

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[93] In *Walters v. Edgar*, 163 F.3d 430,437 (7th Cir. 1998)(Resp. 42-43), without even citing *American Pipe*, the court refused to let other putative class members substitute as the class representatives because the original named plaintiffs *lacked standing to assert their own claims.* Similarly, the court in *In re Elscint, Ltd. Securities Litigation*, 674 F.Supp. 374, 379 (D. Mass. 1987)(Resp. 43, 46) denied a motion to intervene (by applicants that had standing) because the original class representatives failed to demonstrate that they had *standing to assert their own claims*. In so holding, the Court observed that *American Pipe* tolling has been applied to toll the individual claims of putative plaintiffs where putative class representatives had standing to assert their own claims, but lacked standing to assert the claims of the putative class members.

[94] *In re Direxion Shares ETF Trust*, 279 F.R.D. 221, 237-238 (S.D.N.Y. 2012)(Resp. 45 n.28), the court rejected a putative intervenor's argument that his claims were tolled under *American Pipe* by the filing of a class complaint because the class representatives did not purport to represent purchasers of the particular securities in which he invested. The court explained that applying *American Pipe* tolling in that instance would "ignore *American Pipe*'s requirement that defendants be apprised 'of the essential information necessary to determine both the subject matter and size of the prospective litigation' '[w]ithin the period set by the statute of limitations,'"stressing that the putative intervenor

own claims and purported to represent the claims of other investors, including those like SCBank's. *Luther* gave Countrywide fair notice of claims now asserted by SCBank.

Countrywide cites other cases arising in different factual scenarios, whose holdings are either inapposite or support the FDIC's position. For example, the court in *Kruse v. Wells Fargo Home Mortgage, Inc.*,[95] held that *American Pipe* cannot be used by a putative intervenor to revive a previously decertified class-action. But this case is inapposite because SCBank is not attempting to revive *Luther*.

In *In re Wells Fargo Mortgage-Backed Certificates Litigation*,[96] the court dismissed claims based upon thirty-seven offerings because

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"could [not] have believed that the yet-to-be 'asserted' class would protect his interest because . . . there was no indication that the class members were anything but" purchasers of different securities from the ones on which he sought to bring claims. Similarly, in *Massachusetts Bricklayers and Masons Funds v. Deutsche Shares Alt—A Securities*, 273 F.R.D. 363, 366 (E.D.N.Y. 2011)(Resp. 45 n. 28), the district court held that the intervenor-bank's claim was untimely not because *American Pipe* did not apply but because the class was described as all those who purchased RMBSs from defendants between May 2006 and May 2007, and the intervenor-bank did not purchase its certificates until December 2007.

[95] No. 02-cv-3089(ILG), 2006 WL 1212512, at *4 (E.D.N.Y. 2006) (Resp. 45 n.28).

[96] No. 09-cv-01376-LHK, 2010 WL 4117477 (N.D. Cal. Oct. 19, 2010) (Resp. 46).

the named plaintiffs had not invested in them and therefore lacked standing.[97] However, the court expressly distinguished its facts from those here, where the *Luther* class plaintiff seeks to represent all those, including SCBank, who purchased certificates under a "common registration."[98] *Joseph v. Wiles*,[99] supports the FDIC's tolling argument. It holds that plaintiff's individual claim, filed in August 1990 based upon his purchase of a debenture, was tolled under *American Pipe* as a result of a class action filed in October 1989 on behalf of both purchasers of stock and debentures of the defendant—even though, as in *Luther,* the class as to the debenture holders was never certified.[100]

Other than the decisions of the *Countrywide* MDL District Court, Countrywide[101] cites only one case with facts similar to those here—*Boilermakers National Annuity Trust Fund v. WaMu Mortgage Pass Through Certificates, Series AR1.*[102] But that case cannot bear the weight Countrywide puts on it because it relied heavily on case law

[97] *Id.* at *2.
[98] *Id.*
[99] 223 F.3d 1155, 1161, 1166-68 (10th Cir. 2000) (Resp. 45n.28).
[100] *Id.* at 1157, 1166-68.
[101] Resp. 42-47.
[102] 748 F.Supp.2d 1246 (W.D. Wash. 2010) (Resp. 46).

involving putative class plaintiffs who, unlike the *Luther* plaintiffs, lacked standing to assert *their own claims*.[103]

In sum, the *Luther* class action satisfied the policies of *American Pipe*—it gave fair notice to Countrywide, within the federal limitations period, about the nature of the putative plaintiffs' claims, the potential number of plaintiffs, and the magnitude of potential liability. Therefore, *American Pipe* applies and *Luther* tolled SCBanks' claims.

D. Under These Circumstances, It Was Not Unreasonable for a Putative Class Member to Rely upon *Luther*

The District Court itself earlier concluded 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."[104] The court, however, later concluded that the *Luther* class action was "abusive" and, therefore, no reasonable class member would have relied" upon it.[105] The District Court had it right the first time. The Second Circuit's 2012 decision in *NECA-IBEW* applying the *Gratz*

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[103] *Id.* at 1253.
[104] 860 F.Supp.2d 1062, 1069-70 (C.D. Cal. 2012).
[105] *FDIC v. Countrywide Fin. Corp.*, No. 2:12-cv-4354 MRP (MANx), 2012 WL 5900973, at *9 (C.D. Cal. Nov. 21, 2012).

holding, vindicates SCBank's reasonable reliance upon the filing of the *Luther* class action. In addition, the District Court itself approved a settlement of the *Luther* class action. The court required all putative class members—including SCBank—to opt out or be bound by that settlement. In this circumstance, it makes no sense to characterize SCBank's reliance on *Luther* as unreasonable or the *Luther* class action as abusive. Not only was it reasonable for SCBank to rely upon *Luther,* but doing so fulfilled the policies underlying the Supreme Court's decision in *American Pipe*.

Conclusion

For all of the foregoing reasons and those in our opening brief, the FDIC respectfully requests that the Order of the District Court dismissing FDIC's Amended Complaint as time barred be reversed and the case be remanded to the District Court.

Respectfully submitted,

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Certificate of Compliance with Fed. R. App. P. 32(a)(7)(C)

This brief was prepared using Century proportionally spaced face in 14 point font size. The brief contains 8,563 words. Pursuant to Circuit Rule 32-2, FDIC has filed herewith a Motion for leave to exceed the 7,000 word limit.

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Certificate of Service

I, Jerome A. Madden, hereby certify that on January 27, 2014, a true and correct copy of the foregoing Reply 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.

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