No.

IN THE

# Supreme Court of the United States

GOLDMAN, SACHS & CO.,
GOLDMAN SACHS MORTGAGE COMPANY,
GS MORTGAGE SECURITIES CORP., DANIEL L. SPARKS,
MICHELLE GILL, AND KEVIN GASVODA,

*Petitioners,*

*v.*

NECA-IBEW HEALTH & WELFARE FUND,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

*Respondent.*

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Under the federal securities laws, only a person who has purchased or acquired a security may assert claims alleging that the registration statement or prospectus for that security contained false information. *See* 15 U.S.C. §§ 77k, 77*l*(a)(2). A person who has not transacted in a security lacks standing to bring suit asserting such claims. The fact "'[t]hat a suit may be a class action … adds nothing to the question of standing.'" *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996) (citation omitted). The question presented is:

Whether the Second Circuit erred in concluding, in direct conflict with a decision from the First Circuit on the same issue, that a representative plaintiff has standing to assert on behalf of absent class members claims for relief that the representative plaintiff lacks standing to assert on its own behalf.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, the following were defendants in the district court: GSAA Home Equity Trust 2007-3; GSAA Home Equity Trust 2007-4; Gsamp Trust 2007-HE2; Gsamp Trust 2007-FM2; GSAA Home Equity Trust 2007-5; GSAA Home Equity Trust 2007-6; GSAA Home Equity Trust 2007-7; GSAA Home Equity Trust 2007-8; GSR Mortgage Loan Trust 2007-OA1; GSR Mortgage Loan Trust 2007-4F; Gsamp Trust 2007-HSBC1; Gsamp Trust 2007-HEI; Starm Mortgage Loan Trust 2007-4; GSAA Home Equity Trust 2007-10; GSR Mortgage Loan Trust 2007-5F; GSR Mortgage Loan Trust 2007-3F; GSR Mortgage Loan Trust 2007-OA2; and SunTrust Robinson Humphrey, Inc.

Additionally, the Police and Fire Retirement System of the City of Detroit intervened as a plaintiff in the district court.

Pursuant to this Court's Rule 29.6, Goldman, Sachs & Co., Goldman Sachs Mortgage Company, and GS Mortgage Securities Corp. state that they are directly or indirectly wholly owned subsidiaries of The Goldman Sachs Group, Inc., which is a corporation organized under the laws of Delaware and whose shares are publicly traded on the New York Stock Exchange. The Goldman Sachs Group, Inc. has no parent corporation, and to the best of counsel's knowledge, no publicly held company owns 10% or more of its stock.

## TABLE OF CONTENTS


**Page**

OPINIONS BELOW ....................................................1

JURISDICTION .........................................................1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED .........................................................1

STATEMENT .............................................................1

REASONS FOR GRANTING THE PETITION .........9

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS ...........................................10

A. THE DECISION BELOW CONFLICTS DIRECTLY WITH A RULING OF THE FIRST CIRCUIT AND EXACERBATES EXTANT CONFUSION REGARDING CLASS STANDING ....................................................11

B. THE DECISION BELOW CONTRADICTS THIS COURT'S PRECEDENTS ADDRESSING CLASS STANDING ......................18

II. THE CORRECT STANDARD FOR STANDING IN THE CLASS-ACTION SETTING IS CRITICAL TO THE ADMINISTRATION OF THE SECURITIES LAWS AND TO CLASS ACTIONS GENERALLY .........26

III. THE CLASS-STANDING QUESTION IS CLEANLY PRESENTED AND RIPE FOR REVIEW BY THIS COURT .......................................30

CONCLUSION .........................................................35

## TABLE OF APPENDICES

**Page**

APPENDIX A: Opinion of the United States Court of Appeals for the Second Circuit (Sept. 6, 2012) .................... 1a

APPENDIX B: Transcript (Excerpt) of Proceedings Before the United States District Court for the Southern District of New York on Motion to Dismiss Second Amended Complaint (Jan. 28, 2010) .................... 44a

APPENDIX C: Endorsed Order of the United States District Court for the Southern District of New York Granting Motion to Dismiss Second Amended Complaint (Jan. 28, 2010) .................... 50a

APPENDIX D: Transcript (Excerpt) of Proceedings Before the United States District Court for the Southern District of New York on Motion to Dismiss Third Amended Complaint (Sept. 22, 2010) .................... 52a

APPENDIX E: Opinion of the United States District Court for the Southern District of New York Granting in Part Motion to Dismiss Third Amended Complaint (Oct. 14, 2010) .................... 59a

APPENDIX F: Endorsed Order of the United States District Court for the Southern District of New York Granting in Part and Denying in Part Motion to Dismiss Third Amended Complaint (Oct. 14, 2010) .................... 69a

APPENDIX G: Amended Order of the United States District Court for the Southern District of New York Granting Unopposed Motion to Enter Judgment (June 8, 2011) .......... 71a

APPENDIX H: Constitutional, Statutory, and Regulatory Provisions and Federal Rules Involved .......... 73a

U.S. Const. art. III, § 2, cl. 1 .......... 73a

15 U.S.C. § 77k(a) .......... 73a

15 U.S.C. § 77*l* .......... 75a

15 U.S.C. § 77*o* .......... 76a

28 U.S.C. § 2072 .......... 77a

17 C.F.R. § 229.512(a) .......... 77a

17 C.F.R. § 229.1110 .......... 84a

17 C.F.R. § 230.415 .......... 85a

Fed. R. Civ. P. 23 .......... 89a

Fed. R. Civ. P. 82 .......... 96a

## TABLE OF AUTHORITIES

***Page(s)***

**CASES**

*Amchem Prods., Inc.* v. *Windsor*,
521 U.S. 591 (1997) ........................................ 25, 33

*Bailey* v. *Patterson*,
369 U.S. 31 (1962) ................................................ 20

*Blum* v. *Yaretsky*,
457 U.S. 991 (1982) ...................................... *passim*

*Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*,
511 U.S. 164 (1994) .............................................. 28

*DaimlerChrysler Corp.* v. *Cuno*,
547 U.S. 332 (2006) .............................. 2, 18, 19, 22

*E. Tex. Motor Freight Sys., Inc.* v. *Rodriguez*,
431 U.S. 395 (1977) .............................................. 25

*Fallick* v. *Nationwide Mut. Ins. Co.*,
162 F.3d 410 (6th Cir. 1998) ................................ 17

*Fed. Express Corp.* v. *Holowecki*,
552 U.S. 389 (2008) .............................................. 31

*Fed. Power Comm'n* v. *Transcon. Gas Pipe Line Corp.*,
423 U.S. 326 (1976) .............................................. 32

*Fid. Fed. Bank & Trust* v. *Kehoe*,
547 U.S. 1051 (2006) ............................................ 28

*Gen. Tel. Co. of the Sw.* v. *Falcon*,
457 U.S. 147 (1982) .............................................. 25

*Graham Cnty. Soil & Water Conservation Dist.* v. *United States* ex rel. *Wilson*,
130 S. Ct. 1396 (2010) .......................................... 31

*Grasty* v. *Amalgamated Clothing & Textile Workers Union*,
828 F.2d 123 (3d Cir. 1987) ................................ 17

*Gratz* v. *Bollinger*,
539 U.S. 244 (2003) ................................ 2, 8, 23, 24

*Hall* v. *Beals*,
396 U.S. 45 (1969) ............................................... 19

*Hines* v. *Widnall*,
334 F.3d 1253 (11th Cir. 2003) ...................... 16, 17

*In re Direxion Shares ETF Trust*,
279 F.R.D. 221 (S.D.N.Y. 2012) .......................... 29

*Ind. Emp't Sec. Div.* v. *Burney*,
409 U.S. 540 (1973) ............................................. 19

*Lewis* v. *Casey*,
518 U.S. 343 (1996) ..................................... *passim*

*Lierboe* v. *State Farm Mut. Auto. Ins. Co.*,
350 F.3d 1018 (9th Cir. 2003) ........................ 16, 17

*Matrixx Initiatives, Inc.* v. *Siracusano*,
131 S. Ct. 1309 (2011) .......................................... 31

*Me. State Ret. Sys.* v. *Countrywide Fin. Corp.*,
722 F. Supp. 2d 1157 (C.D. Cal. 2010) ................ 26

*O'Shea* v. *Littleton*,
414 U.S. 488 (1974) ............................................. 19

*Ortiz* v. *Fibreboard Corp.*,
527 U.S. 815 (1999) ........................................ 24, 33

*Payton* v. *Cnty. of Kane*,
308 F.3d 673 (7th Cir. 2002) ............................... 17

*Plumbers & Pipefitters' Local No. 562 Supplemental Plan & Trust* v. *J.P. Morgan Acceptance Corp.*,
2012 WL 4053716 (E.D.N.Y. Sept. 14, 2012) ............................... 27

*Plumbers' Union Local No. 12 Pension Fund* v. *Nomura Asset Acceptance Corp.*,
632 F.3d 762 (1st Cir. 2011) ............................... *passim*

*Reed* v. *United Transp. Union*,
488 U.S. 319 (1989) ............................... 17

*Rosario* v. *Rockefeller*,
410 U.S. 752 (1973) ............................... 20

*Schlesinger* v. *Reservists Comm. to Stop the War*,
418 U.S. 208 (1974) ............................... 19, 21, 22

*Sosna* v. *Iowa*,
419 U.S. 393 (1975) ............................... 25

*Steel Co.* v. *Citizens for a Better Env't*,
523 U.S. 83 (1998) ............................... 2, 18, 20, 33

*Summers* v. *Earth Island Inst.*,
555 U.S. 488 (2009) ............................... 18, 20

*Wal-Mart Stores, Inc.* v. *Dukes*,
131 S. Ct. 2541 (2011) ............................... 24

*Warth* v. *Seldin*,
422 U.S. 490 (1975) ............................... 18

**STATUTES**

15 U.S.C. § 77k ....................................................6, 21

15 U.S.C. § 77*l* .....................................................6, 21

15 U.S.C. § 77*o* ....................................................6, 21

28 U.S.C. § 1254 ....................................................1, 32

28 U.S.C. § 2072 .......................................................24

**REGULATIONS**

17 C.F.R. § 229.512 .....................................................4

17 C.F.R. § 229.1110 ...................................................9

17 C.F.R. § 230.415 .....................................................4

17 C.F.R. § 230.430B...................................................4

**FEDERAL RULES**

Fed. R. Civ. P. 23.............................................*passim*

Fed. R. Civ. P. 82.......................................................25

**OTHER AUTHORITIES**

*Bank Settles Securities Case*,
N.Y. Times, Dec. 7, 2011, at B8...........................28

Joshua L. Boehm, *Private Securities Fraud Litigation after* Morrison v. National Australia Bank: *Reconsidering a Reliance-Based Approach to Extraterritoriality*,
53 Harv. Int'l L.J. 249 (2012)...............................32

Stevie D. Conlon & Vincent M. Aquilino, *Principles of Financial Derivatives: U.S. and International Taxation* (2012) ........ 3

Frank J. Fabozzi et al., *Mortgage-Backed Securities: Products, Structuring, and Analytical Techniques* (2007) ........ 3, 5

Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009) ........ 32

H.R. Rep. No. 104-369 (1995) (Conf. Rep.) ........ 28

H.R. Rep. No. 105-803 (1998) (Conf. Rep.) ........ 28

Douglas J. Lucas et al., *Collateralized Debt Obligations: Structures and Analysis* (2d ed. 2006) ........ 3

James P. Pfander & David R. Pekarek Krohn, *Interlocutory Review by Agreement of the Parties: A Preliminary Analysis*, 105 Nw. U. L. Rev. 1043 (2011) ........ 33

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Goldman, Sachs & Co., Goldman Sachs Mortgage Company ("GSMC"), GS Mortgage Securities Corp. ("GS Mortgage"), Daniel L. Sparks, Michelle Gill, and Kevin Gasvoda (collectively, "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 693 F.3d 145. The district court's oral opinion dismissing Respondent's second amended complaint (App. 44a) is unpublished. The district court's oral opinion denying in part Petitioners' motion to dismiss the third amended complaint (App. 52a) is unpublished, and its opinion granting that motion in part (App. 59a) is reported at 743 F. Supp. 2d 288.

## JURISDICTION

The judgment of the court of appeals was entered on September 6, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions and Federal Rules are reproduced in the Petition Appendix at 73a.

## STATEMENT

Article III requires every federal-court plaintiff to demonstrate that it has suffered a concrete injury that is "fairly traceable" to the "complained-of conduct" that gives rise to the plaintiff's claim and is

likely to be redressed by a favorable ruling on that claim. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998). Those requirements are claim-specific; the "plaintiff must demonstrate standing for *each claim* he seeks to press." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006) (emphasis added). That is true whether the plaintiff sues individually or seeks to represent a class; "'[t]hat a suit may be a class action … adds nothing to the question of standing.'" *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996) (citation omitted). A plaintiff that lacks standing on its own to assert legal claims cannot co-opt the claims of absent class members and assert such claims as their representative. *See id.* at 357-58 & n.6; *Blum* v. *Yaretsky*, 457 U.S. 991, 1001-02 (1982).

Here, however, the Second Circuit held—in direct conflict with these principles and a decision of the First Circuit arising in the same context—that a named plaintiff *may* assert, on behalf of a putative class, claims that it lacks standing to assert by itself. Article III, the Second Circuit concluded, permits would-be class representatives to assert not only claims they themselves have standing to bring, but *also* any other claims of absent class members that "raise a sufficiently similar set of concerns." App. 35a; *see also* App. 31a (conduct underlying representatives' and class's claims need only "implicat[e] 'the same set of concerns'" (quoting *Gratz* v. *Bollinger*, 539 U.S. 244, 267 (2003))). That holding, which stems from a misreading of *Gratz* and reflects lower-court confusion concerning so-called "class standing," App. 24a, warrants this Court's review.

The stakes implicated by the Second Circuit's new and expansive standard for class standing are

difficult to overstate. In the context of mortgage-backed securities litigation in which this case arises, the decision will effectively increase by tens of *billions* of dollars the potential liability that financial institutions face in this and similar class actions. Moreover, the new standard threatens to expand the scope of class actions in many other areas of the law. And both in the securities context and beyond, the ruling will in all events impose a tremendous additional burden on lower courts struggling to apply the Second Circuit's amorphous standard by discerning whether different claims in broad-ranging contexts raise "sufficiently similar" concerns—prompting costly litigation and discovery solely to determine whether the court has power to adjudicate particular claims at all. This Court should grant review to resolve the conflict between the decisions of the First and Second Circuits on this recurring issue, and clarify that, in accordance with this Court's precedents, the Constitution and applicable statutes do not permit plaintiffs to assert, by styling their suits as class actions, claims that they lack standing to assert themselves.

1. This case involves certain residential mortgage-backed securities ("RMBS") issued and underwritten by certain Petitioners.[1] Petitioner GSMC acquired mortgages originated by various other

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[1] RMBS represent an interest in the future payments to be made on a pool of mortgage loans. *See* Douglas J. Lucas et al., *Collateralized Debt Obligations: Structures and Analysis* 103 (2d ed. 2006); *see also* Frank J. Fabozzi et al., *Mortgage-Backed Securities: Products, Structuring, and Analytical Techniques* 21-22 (2007); Stevie D. Conlon & Vincent M. Aquilino, *Principles of Financial Derivatives: U.S. and International Taxation* ¶ A1.05(1) (2012).

banks, either in transactions with the originating banks or in the secondary market. App. 5a-6a. GSMC then transferred the mortgages to Petitioner GS Mortgage, which deposited them into separate trusts and issued certificates, in separate offerings, representing interests in each trust's assets. App. 5a-6a & n.2.

As permitted by SEC regulations, GS Mortgage first filed a "shelf registration" statement in 2007 indicating its intent to offer certificates for sale. *See* 17 C.F.R. § 230.415. Shelf registrations include a "base" prospectus providing a high-level overview of the securities an issuer plans to offer, but in the case of RMBS they do not provide information about the actual securities (which do not yet exist) or the specific assets underlying them. *See id.* § 230.430B; App. 7a. Instead, that information—such as the banks originating the loans, the underwriting standards that they applied, and the characteristics of the loans—can only be provided later, when actual pools are created and securities are designed, in prospectus supplements unique to each particular offering. *See* 17 C.F.R. § 229.512(a)(1). The prospectus supplement issued for a security effectively incorporates and amends the shelf registration statement with respect to that security—resulting in a "new registration statement" particular to that security. *Id.* § 229.512(a)(2).

Following these procedures, GS Mortgage deposited the mortgages over time into 17 separate trusts, and issued certificates (underwritten by Petitioner Goldman, Sachs & Co.) representing interests in the trusts' assets in 17 separate offerings—each with its own prospectus supplement. App. 5a-6a & n.2. Each trust was backed by a distinct pool of loans, originat-

ed by a different array of banks at different times. App. 4a-6a. The certificates pertaining to each trust were divided further into separate tranches, each with a different risk profile, interest rate, repayment terms, and degree of subordination—and each purposefully designed to offer a distinct option to investors. App. 6a; *cf.* Fabozzi et al., *supra*, at 28-32. Every certificate is thus from a particular tranche within a specific trust. There is no dispute that, for purposes of federal securities laws, each certificate constitutes a distinct security.

2. Beginning in 2006, the national housing market began an unprecedented and unexpected decline. Consequently, despite typically being rated investment grade at issuance, RMBS lost value throughout the end of the decade. Large, sophisticated institutional investors that had purchased these higher-yielding financial instruments—some of which were directly involved in the mortgage market and interacted extensively with originating banks—suffered significant losses, and turned to litigation. Many have filed suit against the banks that issued or underwrote the securities, claiming that the banks provided false or incomplete information about the securities, in turn causing the investors' losses.

Respondent NECA-IBEW Health & Welfare Fund ("NECA") was one such institutional investor. In 2007 and 2008, it purchased certificates from two of the 17 trusts issued in offerings under the 2007 shelf registration statement described above. It purchased $390,000 of certificates from one tranche of GSAA Home Equity Trust 2007-10 (the "2007-10" trust), and $50,000 of certificates from one tranche of GSAA Home Equity Trust 2007-5 (the "2007-05" trust). App. 6a.

In December 2008, contending that the value of the certificates it purchased had declined, NECA filed this suit. Its complaint asserted claims under Sections 11, 12(a)(2), and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k(a), 77*l*(a)(2), 77*o*. Those provisions establish civil liability against one who makes false or misleading statements or omissions in the registration statement or prospectus concerning a specific security, or one who controls a person who makes such statements or omissions. Each allows recovery only by one who has purchased or acquired the security described by the allegedly misleading registration statement or prospectus.

NECA's second amended complaint alleged that the offering materials for the certificates at issue contained false and misleading information concerning the mortgages backing the trusts. App. 5a, 8a-15a. Although NECA itself had purchased only securities from particular tranches within two of the 17 trusts certain Petitioners had established, it asserted claims concerning all 17 trusts, on behalf of itself and all other purchasers of certificates from those trusts. The complaint alleged that the "shelf registration" statement contained false information regarding, *inter alia*, the underwriting and appraisal standards employed by the banks that originated the loans backing the trusts, and omitted information regarding the banks' lending practices. App. 8a-10a. NECA also alleged that the prospectus supplements for specific trusts—including those for trusts from which NECA purchased no certificates—contained false information regarding the mortgages backing the trusts, such as the underwriting standards applied by banks that originated the underlying loans, and the mortgages' loan-to-value ratio. *See*, *e.g.*, Se-

cond Am. Compl. ¶¶ 31-40, 78-81 (S.D.N.Y. Dkt. #71).

3. The district court dismissed NECA's claims as to all but the specific securities from the 2007-5 and 2007-10 trusts that NECA had purchased. App. 45a-46a, 51a. Joining a swelling tide of district courts in New York and elsewhere, it held that NECA lacked standing to assert on behalf of a class claims based on securities that it did not buy. App. 45a-46a. That holding eliminated NECA's claims regarding the 15 trusts from which it had purchased no certificates. App. 46a. Likewise, the court later clarified that NECA lacked standing to assert claims concerning other tranches of certificates within the 2007-10 and 2007-5 trusts from which NECA purchased no certificates. App. 53a-54a. NECA, in short, could represent only others who purchased "the same certificate," and could not maintain claims based on "other people's purchases." App. 53a.[2]

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[2] NECA filed an amended complaint asserting its claims as to the certificates it did purchase, but all of its remaining claims ultimately were dismissed. The district court dismissed NECA's remaining Section 11 claims, holding that NECA failed to allege cognizable damages. App. 59a-68a. The court initially declined to dismiss NECA's remaining Section 12 claims, seeking rescission of its purchase from the 2007-10 trust, and its derivative claims under Section 15. App. 55a-56a, 70a. NECA's counsel later disclosed, however, that it had sold its 2007-10 certificates, making rescission impossible. App. 19a. NECA moved to amend again to plead claims for damages as to those certificates, but the district court denied NECA's request as "'just too late,'" *ibid.* (citation omitted), and at NECA's request entered final judgment, App. 71a-72a. (NECA did not pursue Section 12 claims of its own as to its 2007-5 certificates because it did not purchase them directly from Petitioners in a public offering. App. 18a.)

4. The Second Circuit vacated in part. It acknowledged that NECA "clearly lacks standing to assert" by itself claims regarding securities NECA never purchased. App. 24a. But in the court of appeals' view, that did not bar NECA from asserting such claims on behalf of a class. *Ibid.* The "class standing analysis is different," it held, and "whether NECA has 'class standing'—that is, standing to assert claims *on behalf of* purchasers of Certificates from other Offerings, or from different tranches of the same Offering—does not turn on whether NECA would have statutory or Article III standing to seek recovery" for itself. *Ibid.*

Eschewing traditional Article III analysis, the Second Circuit "distill[ed]" from several of this Court's cases a "broad standard for class standing." App. 31a. Under that standard, a named "plaintiff has class standing" if (1) it has suffered *some* injury allegedly caused by conduct of the defendant, and (2) that conduct underlying the plaintiff's own claim implicates the "'same set of concerns,'" *ibid.* (citation omitted), or even a "*sufficiently similar set of concerns*," as the conduct underlying the claims of other putative class members. App. 35a (emphasis added). While acknowledging that "constitutional litigation seeking injunctive relief does not map all that neatly onto statutorily based securities litigation seeking monetary damages," the Second Circuit derived its test from this Court's decision in *Gratz*, App. 31a, even though *Gratz* did not purport to establish such a standard, *see* 539 U.S. at 263-66.

Applying its newly created "sufficiently similar set of concerns" standard, the Second Circuit held that NECA had standing to assert some of the claims that its complaint alleged regarding certificates that

it had not purchased. App. 35a-36a. NECA, it held, may bring claims based on certificates it did not buy so long as *one* of the banks that originated "at least *some*" of the loans backing those certificates also originated some of the loans that backed the certificates NECA did purchase. App. 36a (emphasis added). The Second Circuit did not specify how much overlap is necessary—whether, for example, a single loan suffices or some minimum threshold must be met, or whether the loans must be originated during the same time period. But it did not have a high hurdle in mind: Based on the limited data in the record before it—which identified only some of the banks that had originated the underlying loans—the court held that NECA had standing to bring claims concerning five of the 17 trusts, in one case even though only 9% of the loans backing the trust were originated by a lender (GreenPoint) that also originated loans (albeit at different times) backing securities that NECA did purchase. *See* App. 35a.[3] The Second Circuit further held that NECA's standing was not limited to the specific tranches of securities that it purchased within a given trust. App. 36a-37a.[4]

## REASONS FOR GRANTING THE PETITION

The Second Circuit erroneously held that a federal-court plaintiff, simply by styling its suit as a

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[3] The offering documents were required to list only banks that originated at least 10% of the loans backing the certificates offered. *See* 17 C.F.R. § 229.1110(a).

[4] The Second Circuit held that NECA pleaded a statutorily cognizable injury under Section 11 and allowed it to replead claims for damages under Sections 11 and 12(a)(2). App. 38a-43a.

class action, may bypass Article III's irreducible requirement that the plaintiff have standing to assert every claim that it asks a federal court to adjudicate. In the court of appeals' view, a named plaintiff may litigate on behalf of a putative class claims that it could not assert individually, so long as those claims "raise a sufficiently similar set of concerns" as claims the named plaintiff *does* possess. App. 35a.

The Second Circuit's conclusion creates a direct and irreconcilable circuit split with the First Circuit, which has held, in the same legal and factual setting involving RMBS, that representative plaintiffs *cannot* assert claims involving securities that they did not purchase. *See Plumbers' Union Local No. 12 Pension Fund* v. *Nomura Asset Acceptance Corp.*, 632 F.3d 762, 769-71 (1st Cir. 2011). That conflict sharpens longstanding disagreement and confusion among the circuits concerning constitutional standing requirements in class actions. The decision below also contradicts decades of this Court's precedents establishing that class representatives are not exempt from Article III's requirements.

If allowed to stand, the decision below will send class-action litigation in the securities and other contexts into disarray, imposing enormous and immediate burdens on financial markets, investors, and the courts. This Court's review is urgently needed to resolve the circuits' disagreement and clarify Article III's standing requirements.

## I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

The Second Circuit created an irreconcilable conflict with the First Circuit by holding that a named plaintiff may assert on behalf of a putative class

claims that the plaintiff could *not* bring by itself. That conflict exacerbates existing lower-court disagreement and confusion regarding Article III's requirements in the class-action context. The Second Circuit's decision also contravenes several of this Court's precedents elucidating and applying those requirements. Review is warranted to resolve these conflicts and to clarify the controlling standard.

### A. THE DECISION BELOW CONFLICTS DIRECTLY WITH A RULING OF THE FIRST CIRCUIT AND EXACERBATES EXTANT CONFUSION REGARDING CLASS STANDING.

1. In *Nomura*, 632 F.3d 762, the First Circuit confronted the same question that the Second Circuit decided here—whether a putative class representative can bring on behalf of others claims involving RMBS that it lacks standing to assert by itself—but reached the opposite conclusion.

Like NECA here, the named plaintiffs in *Nomura* asserted, on a class basis, federal securities-law claims involving an array of distinct RMBS issued and underwritten by the defendants, including Goldman Sachs. 632 F.3d at 766-67. The securities involved were certificates representing interests in eight separate trusts, each backed by a unique pool of mortgages originated by different (but partially overlapping) groups of banks. *See id.* at 766, 771. Although the certificates for the eight trusts derived from two common shelf-registration statements, the certificates for each trust were issued under a separate prospectus supplement specific to that trust, which described the trust's mortgage assets "in detail." *Id.* at 766.

The named plaintiffs in *Nomura*, collectively, had purchased certificates from only two of the eight

trusts. 632 F.3d at 766. But they asserted claims under Sections 11, 12(a)(2), and 15 of the Securities Act involving *all eight* trusts, on behalf of a putative class of all those who had purchased certificates involving any one of them. 632 F.3d at 766-67. Their claims alleged that the two common shelf registration statements and the trust-specific prospectus supplements contained false information regarding the underlying mortgages—such as the general underwriting and appraisal standards, and delinquency criteria.[5]

The First Circuit held that the named plaintiffs lacked Article III standing to assert claims involving securities that they had not purchased. 632 F.3d at 768-71. It was "clear," the court held, that the named plaintiffs could not assert claims "*on their own behalf* based on trust certificates that they did not buy," as such claims exclusively "belong[ed] to the actual purchasers." *Id.* at 768.

The First Circuit was equally clear in concluding that the named plaintiffs could not assert such claims, concerning certificates they themselves did not acquire, on behalf of a putative class including others who *had* purchased them. *See* 632 F.3d at 769-71. The court acknowledged that no "single recent holding" of this Court "with perfect clarity resolve[d]" the issue. *Id.* at 770. But the core principles established by this Court's decisions, including *Lewis*, 518 U.S. 343, and *Blum*, 457 U.S. 991—and its own precedent—dictated the outcome. Each certificate represented an interest in a different trust,

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[5] *See*, *e.g.*, Am. Compl. ¶¶ 75, 128-51, *Plumbers' Union Local No. 12 Pension Fund* v. *Nomura Asset Acceptance Corp.*, 658 F. Supp. 2d 299 (D. Mass. 2009) (No. 08-cv-10446) (Dkt. #33).

each one "backed by loans from a different mix of banks." 632 F.3d at 771. Having purchased certificates from only two of the eight trusts, the named plaintiffs had no "significant interest in establishing wrongdoing by a particular group of banks" that originated the loans that backed the other six—and thus no interest in proving that the defendants that issued and underwrote the certificates for those trusts had made false or misleading statements regarding those underlying loans or the banks that originated them. *Ibid.*

Accordingly, the First Circuit held—expressly agreeing with the vast majority of district-court decisions addressing the same issue in the RMBS context—that the named plaintiffs lacked standing to assert claims concerning certificates that they had not acquired. 632 F.3d at 770-71.

As the First Circuit correctly recognized, it made no difference that the named plaintiffs had standing to assert other, even similar, claims against some of the same defendants, based on securities that the named plaintiffs *had* purchased. 632 F.3d at 771. Applying this Court's clear teaching, the court explained that "'[a] plaintiff who has been subject to injurious conduct of one kind'" does not "'possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.'" *Ibid.* (quoting *Blum*, 457 U.S. at 999). The named plaintiffs, in short, could not leverage claims that they *did* have into a basis to assert claims that they did *not*.[6]

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[6] In dictum, the First Circuit speculated that an exception might exist allowing named plaintiffs to assert claims on behalf of a class where "the establishment of the named plaintiffs'

[Footnote continued on next page]

2. The Second Circuit, faced with the same question on essentially the same facts as *Nomura*, reached the opposite conclusion here, expressly holding that NECA *can* assert claims, as the purported representative of an as-yet-uncertified class, that it could not pursue individually.

Like the First Circuit in *Nomura*, the Second Circuit began by explicitly acknowledging that NECA "clearly lacks standing to assert" in its own name claims regarding securities that it never purchased. App. 24a. But its agreement with the First Circuit ended there.

On the Second Circuit's view, a named plaintiff *does* have standing to assert on behalf of a class claims that the plaintiff could not assert by itself, so long as it has suffered *some* injury allegedly caused by the defendant, and that conduct underlying the plaintiff's own claim implicates "sufficiently similar … concerns" as the conduct underlying the putative class claims. App. 31a, 35a. Once the plaintiff makes that showing, the standing inquiry ends, and any further analysis of the similarity *vel non* of the named plaintiff's claims to those of absent class

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[Footnote continued from previous page]
claims necessarily establishes those of other class members." 632 F.3d at 770. But it expressly "reserve[d] judgment" as to whether that exception exists, and made clear that the exception would not apply to the facts before it, *ibid.*—where, as here, some of the same banks originated loans that backed certificates that the named plaintiffs did purchase and certificates that they did not, *compare*, *e.g.*, Decl. Supp. Mot. Dismiss Ex. A, at 39, 49, Ex. B, at 68, *Plumbers' Union,* 658 F. Supp. 2d 299 (No. 08-cv-10446) (Dkt. #42), *with*, *e.g.*, *id.*, Ex. C, at 10, 128, Ex. F, at 9, 37, Ex. G, at 11, 53.

members is governed by Federal Rule of Civil Procedure 23. *See* App. 24a-37a.

Applying its new standard, the Second Circuit concluded that NECA has "class standing" to assert some claims involving certificates it did not purchase. App. 35a. NECA, it held, may pursue claims as to offerings from five other trusts that it determined (based on the limited record) were partially backed by mortgages originated by banks that also originated some of the loans that backed the 2007-5 and 2007-10 trusts. App. 35a-36a. The Second Circuit did not address the requisite degree of overlap, including, *e.g.*, how many mortgages backing the trusts needed to be originated by overlapping banks, or whether those loans even needed to be originated during the same time frame.

The Second Circuit's holding conflicts directly with the First Circuit's analysis and conclusion in *Nomura*. NECA has no greater stake than the *Nomura* plaintiffs in proving claims concerning securities it did not buy. It suffered no injury from the misrepresentations allegedly made concerning those securities in separate and distinct offering documents, and it has no "significant interest," 632 F.3d at 771, in showing that *other* investors who did purchase them were harmed as a result. And as *Nomura* recognized, NECA's standing to assert other claims—even against the same defendants—is immaterial. *See ibid.*

Under the First Circuit's controlling precedent, therefore, NECA's claims involving securities it never purchased would be dismissed for lack of standing. But the Second Circuit held that some of those claims can proceed. And the particular types of claims that it allowed were also asserted—but held

barred—in *Nomura*. *See supra* note 6. There is no way around this direct conflict, in the same context, on a critical question of standing. Indeed, despite its awareness of the First Circuit's decision, App. 27a, 36a, the Second Circuit did not attempt to reconcile its contrary reasoning or result.

Given that securities are traded on a nationwide basis, and that securities litigation may be brought in any federal court where venue can be established, it is not tolerable for cases to proceed to disparate outcomes based solely on the locus of suit. Claims that would be dismissed in the First Circuit can proceed in the Second; this Court's review is necessary and appropriate to resolve the conflict.

3. The Second Circuit's disagreement with the First Circuit regarding Article III's application in the specific context of RMBS litigation brings to a head broader existing conflict and confusion among the circuits regarding the requirements of class standing in general, with implications far beyond the securities field. Consistent with this Court's teaching, the Ninth and Eleventh Circuits have held that, before considering whether Rule 23's class-certification requirements are satisfied, a court must first ensure that at least one named plaintiff has Article III standing to pursue each claim asserted on behalf of the putative class. *See Lierboe* v. *State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003); *Hines* v. *Widnall*, 334 F.3d 1253, 1256 (11th Cir. 2003) (per curiam). As the Eleventh Circuit explained, "[a]ny analysis of class certification must begin with the issue of standing," and the court "must determine that at least one named class representative has Article III standing to raise *each class*

*subclaim*." *Hines*, 334 F.3d at 1256 (emphasis added; internal quotation marks omitted).

Likewise, in *Lierboe*, the Ninth Circuit held that unless a named plaintiff herself has standing to assert the class claim, she "cannot represent others who may have such a claim, and her bid to serve as a class representative must fail." 350 F.3d at 1022. That standing inquiry, it underscored, is separate from and precedes the class-certification analysis; unless and until the plaintiff establishes that she can bring such a claim herself, "it is premature to assess the prerequisites of Rule 23(a) or the standards" for certification under Rule 23(b). *Ibid.*

As *Nomura* observed, however, other circuits have taken the opposite view. *See* 632 F.3d at 770 & n.7. The Sixth Circuit has held, for example, that once a named plaintiff establishes its own standing to assert a claim against the defendant, the constitutional analysis of the plaintiff's standing to assert other claims ends, and whether the plaintiff can proceed to represent the class "depends solely on whether he is able to meet the additional criteria encompassed in Rule 23." *Fallick* v. *Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir. 1998); *see also id.* at 424. The Third and Seventh Circuits have endorsed the same approach. *See Grasty* v. *Amalgamated Clothing & Textile Workers Union*, 828 F.2d 123, 130 n.8 (3d Cir. 1987), *abrogated on other grounds by Reed* v. *United Transp. Union*, 488 U.S. 319, 323-34 (1989); *Payton* v. *Cnty. of Kane*, 308 F.3d 673, 677 (7th Cir. 2002).

In short, even before the Second Circuit's ruling here, the circuits already were in disarray and in need of this Court's guidance regarding proper application of Article III's requirements to class actions.

The direct conflict created by the Second Circuit's ruling, contradicting the First Circuit's analysis and conclusion in the same statutory and factual context, makes the need for this Court's intervention inescapably urgent.

### B. THE DECISION BELOW CONTRADICTS THIS COURT'S PRECEDENTS ADDRESSING CLASS STANDING.

This Court's review is equally warranted because the Second Circuit's ruling directly contravenes a long and unbroken line of this Court's decisions establishing that, contrary to the Second Circuit's holding, class-action procedures do not exempt putative class representatives from Article III's requirements.

1. A plaintiff invoking federal-court jurisdiction bears the burden of demonstrating that Article III's case-or-controversy requirement is satisfied. *Steel Co.*, 523 U.S. at 104. Most importantly, the plaintiff must demonstrate that he himself has a "'personal stake … as to warrant *his* invocation of federal-court jurisdiction.'" *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 493 (2009) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)). The plaintiff must allege (and ultimately prove) not only that it has been injured, but also that its injury was caused by the defendant's conduct that gave rise to the asserted legal claim, and that a favorable ruling on that claim will redress the alleged injury. *See ibid.* That showing must be made "for *each claim* [the plaintiff] seeks to press." *Cuno*, 547 U.S. at 352 (emphasis added).

These principles apply with full force in class actions; that a plaintiff styles its suit as a class action "'adds nothing to the question of standing.'" *Lewis*, 518 U.S. at 357 (citation omitted). The plaintiff still cannot assert claims that it lacks standing to assert

in its own right. "To have standing to sue as a class representative," in other words, "it is essential that a plaintiff must be a part of that class." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974). The plaintiff not only must have "suffer[ed] the *same injury*" as the class, but "must possess the *same interest* … shared by all members of the class he represents." *Ibid.* (emphases added). In short, he must have the same claim as the class members. If no named plaintiff has standing to assert the claims alleged on behalf of an as-yet uncertified class, there is no case or controversy, and the case cannot proceed. *See*, *e.g.*, *O'Shea* v. *Littleton*, 414 U.S. 488, 494 & n.3 (1974); *Ind. Emp't Sec. Div.* v. *Burney*, 409 U.S. 540, 541-42 (1973) (per curiam); *Hall* v. *Beals*, 396 U.S. 45, 49 (1969).

Moreover, because standing must be shown for "each claim" asserted, *Cuno*, 547 U.S. at 352, even where named plaintiffs have standing to assert *some* claims, a court cannot adjudicate *other* claims that the named plaintiffs lack standing to assert. *See Lewis*, 518 U.S. at 357-58; *Blum*, 457 U.S. at 1001-02.

In *Blum*, for example, the Court held that the named plaintiffs—state nursing-home residents receiving Medicaid benefits who allegedly were transferred to *lower* levels of care without adequate procedural safeguards—could assert due-process challenges to those transfers to lower-level care, but *lacked* standing to challenge transfers to *higher* levels of care. *See* 457 U.S. at 1001-02. The latter claims involved not only a different alleged injury, but also were legally distinct under the substantive standards the plaintiffs invoked. *See ibid.* (plaintiffs' "constitutional attack" on transfers to lower-level care

"presuppose[d] a *deprivation* of protected property interests," which transfers to higher-level care did not).

Likewise, *Lewis* held that named plaintiffs injured by one alleged "inadequacy" in prison conditions lacked Article III standing to seek—and federal courts thus lacked power to impose—injunctive relief to remedy different alleged "inadequacies" that had not injured the named plaintiffs. 518 U.S. at 357-58 & n.6; *see also Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962) (per curiam) (named plaintiffs, who had standing to assert other claims, could not challenge of behalf of class enforcement of state statutes under which they had not been prosecuted or threatened with prosecution); *Rosario* v. *Rockefeller*, 410 U.S. 752, 757-59 & n.9 (1973) (rejecting certain of class-action plaintiffs' constitutional challenges to state election law on the merits, but holding that plaintiffs lacked standing to raise additional constitutional challenges alleging injuries the plaintiffs had not suffered).

A plaintiff, in short, cannot circumvent Article III's requirements simply by styling its suit as a class action. It must demonstrate not only "that the conduct of which [it] complains" that gives rise to the asserted legal claim "will injure *someone*," *Blum*, 457 U.S. at 999, but further that *it* will be injured by that conduct, and that a favorable ruling on that legal claim will redress its own injury, *see Summers*, 555 U.S. at 493; *Steel Co.*, 523 U.S. at 102-03. A would-be class representative that lacks standing to assert a particular claim in its own right fails that test, and thus cannot assert that claim on behalf of a class.

2. The Second Circuit's decision cannot be reconciled with this Court's precedents and deeply un-

dermines Article III's core requirements. In direct contravention of *Lewis*'s holding that styling a suit as a class action "'adds nothing to the question of standing,'" 518 U.S. at 357 (citation omitted), the Second Circuit explicitly held that the "class standing analysis *is* different" and "does *not* turn on whether NECA would have … Article III standing to seek recovery" by itself, App. 24a (emphases added). And contrary to *Schlesinger*'s command that a named plaintiff "must possess the same interest and suffer the same injury shared by all members of the class," 418 U.S. at 216, the Second Circuit held that it was "error" for the district court to "requir[e] … NECA [to] show that its injuries … are the same" as those of the class, App. 31a (internal quotation marks, alterations, and emphasis omitted). Under its "broad" new standard, the class's claims need only implicate "sufficiently similar … concerns" as claims the named plaintiff itself has standing to bring. App. 31a, 35a.

Here there is no question that NECA seeks to assert claims distinct from its own. The statutory provisions under which NECA sued define the claims that they establish by reference to the particular security to which the allegedly misleading registration statement or prospectus pertains. *See* 15 U.S.C. §§ 77k(a), 77*l*(a)(2).[7] Those provisions also permit only one who has purchased or acquired a security to bring suit. NECA necessarily cannot assert the same claims as the class, as it lacks both Article III and statutory standing to assert claims based on alleged

[7] Section 15 provides for liability against one who "controls any person liable under sections [11 or 12]," 15 U.S.C. § 77*o*(a), and therefore claims under Section 15 also are specific to the individual securities involved.

misrepresentations in the offering documents for securities it did not acquire. If the alleged statements or omissions in the separate offering documents for *those* certificates violated the securities laws, NECA undisputedly was not injured by them. And a judicial ruling establishing that such a violation occurred involving those distinct certificates and offering documents could not redress any injury that NECA *has* allegedly suffered.

NECA, in short, not only did not "suffer the same injury" as "all members of the class" who did purchase such certificates, but moreover does not "possess the same interest" in the adjudication of claims concerning those securities. *Schlesinger*, 418 U.S. at 216. Indeed, having disposed of its 2007-10 certificates, NECA no longer has any rescission claim of its own under Section 12 of the Act, even as to those certificates; yet it continues to represent absent class members that do have alleged rescission claims as to those and now other certificates. That NECA has *a* case or controversy with Petitioners is insufficient; it must have standing for "each claim" it asserts, *Cuno*, 547 U.S. at 352, and cannot pursue on behalf of a class any claim it lacks standing to assert by itself.

The Second Circuit, however, held that NECA can do exactly that. It allowed NECA to bypass Article III's barriers by co-opting claims that belong exclusively to others—involving different allegedly misleading offering documents for different securities—because those claims supposedly implicate "sufficiently similar … concerns" as claims NECA itself can bring. App. 35a. That holding contradicts this Court's clear direction, and invites plaintiffs in securities suits and many other contexts to exploit the same strategy.

3. None of the rationales that the Second Circuit offered to support its novel approach justifies its departure from this Court's precedents.

a. The court of appeals purported to derive its "sufficiently similar set of concerns" test, App. 35a, from *Gratz*, *see* App. 3a-4a, 31a, but *Gratz* established no new constitutional test for standing; indeed, the Court explicitly reserved judgment on whether its analysis pertained to Article III or class certification under Rule 23. 539 U.S. at 263. Nor did *Gratz* purport to overrule any of the Court's prior decisions applying Article III's requirements to class actions, but instead underscored that its holding aligned with *Blum*. *See id.* at 264-65.

On its facts, moreover, *Gratz*'s analysis is perfectly consistent with this Court's prior holdings. The plaintiffs' constitutional and statutory claims each broadly "challenged the University's use of race in undergraduate admissions and its asserted justification of promoting 'diversity.'" 539 U.S. at 263 (citation omitted). Those capacious legal claims encompassed the University's use of race in reviewing both freshman and transfer applications—for which the University employed "*identical*" criteria, *id.* at 265, and which the complaint challenged as a single legal wrong, Compl. 7-8, *Gratz* v. *Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998) (No. 97-75231) (Dkt. #1).

This case bears no resemblance to *Gratz*. The claims *Gratz* considered—by virtue of the substantive legal standards that the plaintiffs' claims invoked—encompassed a broad, college-wide, and essentially uniform practice. The substantive law that governs NECA's securities-law claims, in contrast, defines claims by reference to individual securities,

offering documents, and purchasers; as a matter of law, NECA could not assert—like the plaintiffs in *Gratz*—a single claim on behalf of both itself and differently situated absent class members. In practical terms, moreover, there is a stark difference between claims involving multiple applications of "*identical*" admissions criteria, 539 U.S. at 265, and claims alleging losses caused by misrepresentations in different offering documents regarding different securities, backed by distinct pools of assets originated at varying times with unique risk profiles and other characteristics.

b. To the extent the Second Circuit believed that Rule 23 somehow allows otherwise-impermissible claims to proceed, *cf.* App. 25a & n.10, that too contravenes this Court's precedents, and sets Rule 23 on a collision course with its authorizing statute and other provisions of the Federal Rules.

The Rules Enabling Act forbids any Federal Rule from "abridg[ing], enlarg[ing] or modify[ing] any substantive right." 28 U.S.C. § 2072(b). This Court has thus repeatedly cautioned that the Federal Rules, including Rule 23, must be construed wherever possible to avoid overstepping that boundary. *See Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011); *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999). Nothing in Rule 23's text remotely supports an interpretation that would permit named plaintiffs to assert claims that both the Constitution and the Securities Act prohibit. Construing Rule 23 to authorize any plaintiff who has standing to assert *some* claim against a defendant to assert any *other* claim against the same defendant—thus transforming the Securities Act into a vehicle for private-attorney-general actions—would render the Rule *ultra vires*.

That distorted reading of Rule 23 also violates Federal Rule of Civil Procedure 82, which provides that none of the Federal Rules "extend or limit" federal-court jurisdiction. Construing Rule 23 to create an exception to Article III's immutable barriers would do just that, "extend[ing]" federal jurisdiction to cover claims a court otherwise could not entertain. *See also Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 612-13 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints").[8]

As the First Circuit recognized in *Nomura*, Rule 23 should not be read as purporting to supplant the constitutional standing inquiry, but rather as supplementing it. The "Rule 23 criteria," in other words, "can still be used as a required tool for shaping the scope of a class action without abandoning the notion that Article III creates some outer limit" on the claims federal courts can hear. 632 F.3d at 770. Rule 23 thus helps to ensure that, of the class actions

[8] The Second Circuit incorrectly suggested that *Sosna* v. *Iowa*, 419 U.S. 393 (1975), supports the view that once a named plaintiff establishes standing to assert *some* claim against a defendant, the constitutional analysis ends and only Rule 23's criteria limit the scope of claims the plaintiff can pursue. App. 25a. *Sosna* held that the requirement that "[a] litigant must be a member of the class which he or she seeks to represent" is an "elemen[t] of justiciability," and only *after* this and other "criteria" are met does the analysis "shift" to Rule 23. 419 U.S. at 403. Of course, under Rule 23—which "must be interpreted in keeping with Article III constraints," *Amchem*, 521 U.S. at 613—a class should not be certified if the would-be representative does not share the claims of the class. *See Gen. Tel. Co. of the Sw.* v. *Falcon*, 457 U.S. 147, 156-57 (1982); *E. Tex. Motor Freight Sys., Inc.* v. *Rodriguez*, 431 U.S. 395, 403-05 (1977). But as *Sosna* recognized, a court should not decide the class-certification question in the first instance before determining whether case is even "justiciab[le]." 419 U.S. at 403.

federal courts constitutionally *may* entertain, the ones to which they *do* devote their scarce resources are (and remain) manageable.

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The decision below cannot be reconciled either with the First Circuit's holding barring substantially indistinguishable claims or with this Court's longstanding precedents. Only review by this Court can resolve these conflicts.

## II. THE CORRECT STANDARD FOR STANDING IN THE CLASS-ACTION SETTING IS CRITICAL TO THE ADMINISTRATION OF THE SECURITIES LAWS AND TO CLASS ACTIONS GENERALLY.

If allowed to stand, the decision below will severely burden both financial institutions faced with the sweeping claims that the Second Circuit's standard invites and federal courts tasked with applying Article III's requirements. The decision's pernicious effects will be felt most immediately in RMBS litigation, but they will quickly spread beyond it.

A. The stakes of RMBS litigation are already staggering. Financial institutions are facing scores of such lawsuits involving assets worth tens of billions of dollars. In practical terms, their potential liability is limited only by the scope of claims that courts allow purported class representatives to assert. Until now, lower courts have largely adhered to Article III's requirements, confining class plaintiffs to claims involving securities that they actually purchased. *See Nomura*, 632 F.3d at 770-71; *Me. State Ret. Sys.* v. *Countrywide Fin. Corp.*, 722 F. Supp. 2d 1157, 1163 & n.6 (C.D. Cal. 2010) (collecting cases).

The decision below—which will govern the numerous RMBS cases brought in the Second Circuit—obliterates that key limitation, opening the door to class actions of unprecedented size and scope. Because the Second Circuit's standard requires only some minimal overlap in the identity of the banks whose loans back particular trusts (apparently regardless even of the vintage of origination)—a feature endemic to RMBS and other asset-backed securities—it will enable plaintiffs effectively to increase by orders of magnitude the potential liability defendants face. Here, for example, instead of asserting claims concerning the two specific tranches from which it purchased less than $500,000 in securities, NECA's claims now involve securities across seven offerings worth several billions.

The same pattern may be repeated in myriad RMBS cases pending throughout the country. Indeed, only days after the Second Circuit's decision, a district court that previously had restricted the named plaintiff's claims to specific securities that it purchased revived the plaintiff's claims involving an array of distinct securities issued by the defendants, reportedly worth nearly $40 billion. *See Plumbers & Pipefitters' Local No. 562 Supplemental Plan & Trust* v. *J.P. Morgan Acceptance Corp.*, 2012 WL 4053716 (E.D.N.Y. Sept. 14, 2012). Plaintiffs in many other existing suits have already sought or will likely seek to expand their claims to reach securities that they did not purchase. And new suits driven by class counsel asserting similarly broad claims are sure to follow.

That such lawsuits may not prevail on the merits—or even ultimately earn certification—does not eliminate their profound impact. As both Congress

and this Court have recognized, the risk of enormous potential liability—here reaching billions of dollars—and the burdens of litigation and discovery before the class-certification stage, exert tremendous pressure on defendants to settle claims, even those they could defend successfully. *See*, *e.g.*, *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994); H.R. Rep. No. 105-803, at 13 (1998) (Conf. Rep.); H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.). Already, some defendants in RMBS cases are considering settlements for hundreds of millions of dollars.[9] The prospect of even greater potential liability—plus deferring to the class-certification stage serious comparison of the plaintiff's claims to those of the class—may increase many times over the windfalls named plaintiffs can secure at financial institutions' expense. *Cf. Fid. Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of writ of certiorari) ("enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari").

B. Entirely apart from the burdens that financial institutions will face in defending such lawsuits, the Second Circuit's nebulous new standard creates tremendous hardships for federal courts overseeing them. Unlike the straightforward standard that *Nomura* and this Court's precedents establish, the Second Circuit's "sufficiently similar … concerns" test provides lower courts virtually no guidance, and is prone to manipulation by litigants.

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[9] *See*, *e.g.*, *Bank Settles Securities Case*, N.Y. Times, Dec. 7, 2011, at B8.

Even with respect to the RMBS at issue in this case, the court did not explain how much overlap in the banks originating the loans backing distinct securities is enough. Based on the limited information before it, the Second Circuit held that NECA could pursue claims involving one trust even though only 9% of the loans backing it were originated by a bank some of whose loans supported another. *See* App. 35a. But it did not explain why, or indicate whether some minimal degree of overlap is necessary. Instead, it left district courts adrift—forced to guess what percentage of overlap in the source (or vintage) of underlying loans implicates "sufficiently similar" concerns—inviting plaintiffs to argue that *any* overlap suffices (as some have done already). Costly litigation over the application of that artificial standard and burdensome discovery to discern whether it is met are inevitable.

C. Neither the challenges lower courts face nor the burdens on litigants will be confined to mortgage-backed securities cases, but will spill over into other areas, unsettling expectations and potentially reshaping class litigation. Plaintiffs may attempt to export the Second Circuit's standard to other securities, such as mutual funds, where common parties are involved in the creation or management of multiple funds.[10]

Even in areas far removed from securities law, the Second Circuit's invitation to plaintiffs to assert any claims implicating "sufficiently similar" concerns as their own will have a dramatic impact. In prod-

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[10] *Cf. In re Direxion Shares ETF Trust*, 279 F.R.D. 221, 230 (S.D.N.Y. 2012) (plaintiffs' standing limited to "[f]unds in which they purchased shares").

ucts-liability and other consumer class actions, for example, plaintiffs alleging that one product is defective, or that the defendant advertised it in a misleading manner, will expand their claims to include others that in their view raise similar concerns. Likewise, plaintiffs in employment-discrimination class actions who allegedly were subjected to one unlawful practice may seek to enlarge their suits to cover many others.

The difficulty district courts will face translating the Second Circuit's standard to such other areas is substantial. Whether one products-liability or employment-discrimination claim implicates similar concerns as another is in the eye of the beholder. Courts either will be left to guess, or—in contravention of this Court's precedents—will abandon any separate analysis of named plaintiffs' standing and allow every suit to proceed to the class-certification stage.

## III. THE CLASS-STANDING QUESTION IS CLEANLY PRESENTED AND RIPE FOR REVIEW BY THIS COURT.

This case provides an ideal opportunity to address Article III's requirements in class actions and to resolve definitively whether a plaintiff may bring claims on behalf of absent class members that it may not assert individually. The class-standing question was pressed and passed upon below, App. 21a-37a, 45a-46a, and it is dispositive of NECA's ability to assert the claims premised on certificates it did not purchase. The court of appeals explicitly (and correctly) held that NECA "clearly lacks standing to assert" such claims by itself. App. 24a. Such claims are thus foreclosed unless NECA may bring them on a class basis.

The securities-law context in which this case arises, moreover, makes this case an exceptionally suitable vehicle because there is and can be no dispute about the scope of the legal claims NECA asserts. As noted, the provisions of the Securities Act under which NECA sued expressly delimit claims to the specific securities that the plaintiff acquired and to which the allegedly misleading registration or prospectus pertains. The Court therefore can decide here the discrete, isolated issue whether a class representative may assert legal claims on behalf of others that it could not bring itself, without setting forth a definitive test for determining—in contexts less clear than this one—whether claims are the same claim for Article III purposes.

The case's posture would not impede, and indeed will facilitate, the Court's review of the question presented. This Court often grants review where a district court has granted a motion to dismiss and a court of appeals has revived some or all of the plaintiffs' claims. *See*, *e.g.*, *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309 (2011); *Graham Cnty. Soil & Water Conservation Dist.* v. *United States* ex rel. *Wilson*, 130 S. Ct. 1396 (2010); *Fed. Express Corp.* v. *Holowecki*, 552 U.S. 389 (2008). This case should be no exception. When the case reached the court of appeals, the district had entered final judgment as to all of NECA's claims, on standing or other grounds. App. 19a, 71a-72a. The Second Circuit's holding reviving the claims dismissed for lack of standing is properly presented and ripe for review.

That the Second Circuit reinstated NECA's claims as to the certificates it bought—such that the suit may proceed on those claims even after this Court decides the question presented—creates no ob-

stacle to review. That has no bearing on the Court's power to consider the case; indeed, it need not wait for a court of appeals to rule at all, *see* 28 U.S.C. § 1254(1). As a practical matter, by allowing claims that named plaintiffs lack standing to assert to proceed past the pleading stage, the decision below imposes "immediate and irreparable" burdens—including the massive costs of litigating and conducting discovery on those claims, and the distorting effect on negotiations—and thus review "must be immediate to be meaningful." *Fed. Power Comm'n* v. *Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (per curiam). Virtually every case presenting this question at the motion-to-dismiss stage, moreover, will arise in a similar posture. Even under the Second Circuit's standard, a named plaintiff must possess some live, justiciable claim that it can pursue, or else it cannot proceed on behalf of the class at all. *See* App. 25a.

Nor should the Court wait to address the question presented in a case that has reached the class-certification stage. Indeed, doing so may prevent it ever from reaching the issue. Most securities class-actions that survive a motion to dismiss settle,[11] especially once a class is certified,[12] and permission to

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[11] *See* Joshua L. Boehm, *Private Securities Fraud Litigation after* Morrison v. National Australia Bank: *Reconsidering a Reliance-Based Approach to Extraterritoriality*, 53 Harv. Int'l L.J. 249, 283 (2012).

[12] *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623, 1628 (2009).

appeal class-certification rulings under Federal Rule of Civil Procedure 23(f) is rarely granted.[13]

Additionally, as the Court has held, once a lower court has decided the class-certification question, an appellate court reviewing that decision not only *can*, but ordinarily *should*, consider the class-certification question, which "pertain[s] to statutory standing," before addressing the named plaintiff's standing to assert claims on behalf of the class. *Ortiz*, 527 U.S. at 831. Because Rule 23's criteria *narrow* the scope of constitutionally permissible class actions—and indeed "'must be interpreted in keeping with Article III constraints,'" *ibid.* (quoting *Amchem*, 521 U.S. at 613)—a case might never arise where the Court concludes that Rule 23's criteria are met but Article III's demands are not. Here, in contrast, the question of class standing is the only jurisdictional issue presented. That question therefore can—indeed, *must*—be decided before any other issue. *Steel Co.*, 523 U.S. at 88-89, 95-102.[14]

There is, finally, no reason to await further rulings from other courts of appeals. The disagreement between the First and Second Circuits could not be more direct. Additional rulings from other circuits cannot eliminate that conflict, but will only deepen

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[13] *See* James P. Pfander & David R. Pekarek Krohn, *Interlocutory Review by Agreement of the Parties: A Preliminary Analysis*, 105 Nw. U. L. Rev. 1043, 1046 n.17 (2011).

[14] Even if the Court could reach the general question of class standing in a case that has proceeded to the class-certification phase, it might not have occasion to clarify what a plaintiff must allege at the pleading stage, since the plaintiff's burden of demonstrating standing varies with the case's procedural posture. *See Lewis*, 518 U.S. at 357-58.

or complicate it. Until this Court provides definitive guidance, nationwide securities markets will be subject to divergent regional standards and face severe uncertainty. It is intolerable in our national market system that a representative plaintiff who files a securities class action in Boston could assert different claims, on the same set of facts, than a similarly situated plaintiff in New York.

The decision below, meanwhile, will effectively expose financial institutions to billions of dollars of increased potential liability in this and similar class actions. And it will force lower courts and litigants to expend massive resources struggling to apply the Second Circuit's nebulous new standard and litigating the merits of claims that eventually may (and should) be dismissed for lack of standing. Neither the markets nor the judicial system can afford to wait. This Court's intervention is needed now.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 26, 2012

# APPENDIX

## APPENDIX A

## UNITED STATES COURT OF APPEALS
**FOR THE SECOND CIRCUIT**

August Term, 2011

(Argued: February 3, 2012 Decided: September 6, 2012)

Docket No. 11-2762-cv

NECA-IBEW HEALTH & WELFARE FUND, individually and on behalf of all others similarly situated,

*Plaintiff-Appellant,*

v.

GOLDMAN SACHS & CO., GOLDMAN SACHS MORTGAGE COMPANY, DANIEL L. SPARKS, MICHELLE GILL, GS MORTGAGE SECURITIES CORP., KEVIN GASVODA,

*Defendants-Appellees,*

GS MORTGAGE SECURITIES CORP., GSAA HOME EQUITY TRUST 2007-3, GSAA HOME EQUITY TRUST 2007-4, GSAMP TRUST 2007-HE2, GSAMP TRUST 2007-FM2, GSAA HOME EQUITY TRUST 2007-5, GSAA HOME EQUITY TRUST 2007-6, GSAA HOME EQUITY TRUST 2007-7, GSAA HOME EQUITY TRUST 2007-8, GSR MORTGAGE LOAN TRUST 2007-4F, GSAMP TRUST 2007-HSBC1, GSAMP TRUST 2007-HEI, STARM MORTGAGE LOAN TRUST 2007-4, GSAA HOME EQUITY TRUST 2007-10, GSR MORTGAGE LOAN TRUST 2007-5F, GSR MORTGAGE LOAN TRUST 2007-3F, GSR

MORTGAGE LOAN TRUST 2007-OA2, SUNTRUST ROBINSON HUMPHREY, INC.,

*Defendants,*

THE POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT,

*Intervenor.*

Before: B.D. PARKER, RAGGI, and LOHIER, *Circuit Judges*.

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Appeal from a judgment of the United States District Court for the Southern District of New York (Cedarbaum, *J.*) dismissing a putative securities class action brought under §§ 11, 12(a)(2), and 15 of the Securities Act on behalf of all persons who acquired certain mortgage-backed certificates issued under the same allegedly false and misleading shelf registration statement, but sold in 17 separate offerings by 17 unique prospectus supplements. The district court dismissed plaintiff's class action for lack of standing and for failure to allege a cognizable injury under § 11. We hold that plaintiff has class standing to assert the claims of purchasers of certificates backed by mortgages originated by the same lenders that originated the mortgages backing plaintiff's certificates, because such claims implicate "the same set of concerns" as plaintiff's claims. *Gratz v. Bollinger*, 539 U.S. 244, 267 (2003). We further hold that plaintiff need not plead an out-of-pocket loss in order to allege a cognizable diminution in the value of an illiquid security under § 11.

**AFFIRMED** in part, **VACATED** in part, and **REMANDED**.

JOSEPH D. DALEY, Robbins Geller Rudman & Dowd LLP, San Diego, CA (ARTHUR C. LEAHY, Robbins Geller Rudman & Dowd LLP, San Diego, CA, SAMUEL H. RUDMAN, DAVID A. ROSENFELD, CAROLINA C. TORRES, Robbins Geller Rudman & Dowd LLP, Melville, NY, PATRICK J. O'HARA, Cavanagh & O'Hara, Springfield, IL, *on the briefs*), *for Plaintiff-Appellant*.

RICHARD H. KLAPPER, Sullivan & Cromwell LLP, New York, NY (THEODORE EDELMAN, Michael T. Tomaino, Jr., David M.J. Rein, Sullivan & Cromwell LLP, New York, NY, *on the brief*), *for Defendants-Appellees*.

BARRINGTON D. PARKER, *Circuit Judge*:

Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 impose essentially strict liability for material misstatements contained in registered securities offerings. *See* 15 U.S.C. § 77k, *l*(a)(2), o. This appeal requires us to consider a plaintiff's standing to assert claims on behalf of purchasers of securities issued under the same allegedly false and misleading SEC Form S-3 and base prospectus (together, the "Shelf Registration Statement"), but sold in separate offerings by unique prospectus supplements and free writing prospectuses (together, the "Prospectus Supplements") (collectively, the "Offering Documents").

We hold that plaintiff has class standing to assert the claims of purchasers of certificates backed by mortgages originated by the same lenders that originated the mortgages backing plaintiff's certificates,

because such claims implicate "the same set of concerns" as plaintiff's claims. *Gratz v. Bollinger*, 539 U.S. 244, 267 (2003). We further hold that plaintiff need not plead an out-of-pocket loss in order to allege a cognizable diminution in the value of an illiquid security under § 11. Accordingly, we affirm in part and vacate in part the judgment of the district court and remand with instructions to reinstate plaintiff's §§ 11, 12(a)(2), and 15 claims to the extent they are based on similar or identical misrepresentations in the Offering Documents associated with certificates backed by mortgages originated by the same lenders that originated the mortgages backing plaintiff's certificates.

## BACKGROUND[1]

Plaintiff NECA-IBEW Health & Welfare Fund ("NECA" or the "Fund") sued alleging violations of §§ 11, 12(a)(2), and 15 of the Securities Act on behalf of a putative class consisting of all persons who acquired certain mortgage-backed certificates (the "Certificates") underwritten by defendant Goldman Sachs & Co. and issued by defendant GS Mortgage Securities Corp. ("GS Mortgage"). The Certificates were sold in 17 separate Offerings through 17 separate Trusts pursuant to the same Shelf Registration Statement, but using 17 separate Prospectus Sup-

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[1] The following facts, viewed in the light most favorable to plaintiff, are drawn from the Third Amended Complaint (unless otherwise noted), documents incorporated by reference into it, and matters of which we may take judicial notice. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). We assume those facts to be true unless conclusory or contradicted by more specific allegations or documentary evidence. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011).

plements. NECA alleges that the Shelf Registration Statement contained false and misleading statements that were essentially repeated in the Prospectus Supplements. NECA bought Certificates issued from only two of the Offerings, but asserts class claims putatively on behalf of purchasers of Certificates from each tranche of all 17 Offerings.[2]

**The Certificates**

The Certificates are securities backed by pools of residential real estate loans acquired by GSMC through two primary channels: (1) the "Goldman Sachs Mortgage Conduit Program" (the "Conduit Program"), and (2) bulk acquisitions in the secondary market. Under the Conduit Program, GSMC acquired loans from a variety of sources, including banks, savings-and-loans associations, and mortgage brokers. Major originators of the loans in the Trusts included National City Mortgage Co. ("National City") (six Trusts); Countrywide Home Loans ("Countrywide") (five Trusts); GreenPoint Mortgage Funding, Inc. ("GreenPoint") (five Trusts); Wells Fargo

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[2] Defendants include Goldman Sachs, which underwrote the Certificate Offerings and helped draft and disseminate the Offering Documents; Goldman Sachs Mortgage Company ("GSMC"), a wholly-owned subsidiary of Goldman Sachs that purchased the loans underlying the Certificates from various loan originators and other third-parties, and then pooled and conveyed those loans to GS Mortgage; GS Mortgage, a wholly-owned subsidiary of GSMC that securitized the loans and issued the Certificates through the 17 Trusts; and three current or former officers of GS Mortgage. Plaintiff asserts § 11 claims against all defendants; § 12(a)(2) claims against Goldman Sachs as underwriter and GS Mortgage as issuer; and § 15 claims against Goldman Sachs, GSMC, and the three officers as "control persons."

Bank ("Wells Fargo") (four Trusts); SunTrust Mortgage ("SunTrust") (three Trusts); and Washington Mutual Bank ("WaMu") (two trusts).

Each Certificate represents a "tranche" of a particular Offering, providing its holder with an ownership interest in principal and/or interest payments from the pool of loans within the Trust through which it was issued. Each tranche has a different risk profile, paying a different rate of interest depending on the expected time to maturity and the degree of subordination, or protection against the risk of default.

In October 2007, NECA purchased $390,000 of the Class A2A Certificates of the GSAA Home Equity Trust 2007-10 (the "2007-10 Certificates") directly from Goldman Sachs in a public offering. In May 2008, it purchased approximately $50,000 of the Class 1AV1 Certificates from Group 1 of the GSAA Home Equity Trust 2007-5 (the "2007-5 Certificates").[3] The Certificates' Offering Documents contained numerous disclaimers, including one which warned that:

> **Your Investment May Not Be Liquid[.]** The underwriter intends to make a secondary market in the offered certificates, but it will have no obligation to do so. We cannot assure you that such a secondary market will develop or, if it develops, that it will continue. Consequently, you may not be able to sell

[3] The Prospectus Supplement for the 2007-5 Offering offered 42 separate classes of Certificates, divided into "Group 1" and "Group 2," with each group backed by a different loan pool. The Class 1AV1 Certificates purchased by NECA were in Group 1.

> your certificates readily or at prices that will enable you to realize your desired yield.

2007-05 Prospectus Supplement at S-50; 2007-10 Prospectus Supplement at S-35.

**Shelf Registrations**

The shelf registration process enables qualified issuers to offer securities on a continuous basis by first filing a shelf registration statement and then subsequently filing separate prospectus supplements for each offering. *See* 17 C.F.R. § 230.415. The shelf registration statement includes a "base" or "core" prospectus that typically contains general information, including the types of securities to be offered and a description of the risk factors of the offering. *See* 17 C.F.R. § 230.430B; Securities Offering Reform, Securities Act Release No. 33-8591, 70 Fed. Reg. 44,722, 44,770-44,774 (Aug. 3, 2005). It will generally not include transaction-specific details – such as pricing information, or information regarding the specific assets to be included in the vehicle from which the securities are issued – which is contained instead in the prospectus supplements. *See* 17 C.F.R. § 229.512(a)(1).

By regulation, each new issuance requires amending the shelf registration statement, thereby creating a "new registration statement" for each issuance, *id.* § 229.512(a)(2), that is "deemed effective only as to the securities specified therein as proposed to be offered," 15 U.S.C. § 77f(a). "Amendments" to the shelf registration statement include the prospectus supplements unique to each offering. *See* 17 C.F.R. § 229.512(a)(2) ("[E]ach . . . post-effective amendment [to the shelf registration statement, such as a prospectus supplement] shall be deemed to be a new registration statement relating to the securities

offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof."); *Finkel v. Stratton Corp.*, 962 F.2d 169, 174 (2d Cir. 1992) ("[Section] 229.512(a)(2), operating in the context of securities offered pursuant to the post-effective registration, deems the offering date to be the post-effective registration date, not the initial [shelf] registration date."). The representations in the shelf registration statement are simply deemed to be made again at the effective date. Thus, each of the 17 Offerings that NECA seeks to challenge is registered pursuant to a separate registration statement consisting of the same Shelf Registration Statement and a unique Prospectus Supplement.

**The Misrepresentations**

In this suit, commenced in December 2008, NECA alleges that the Offering Documents contained false and misleading information about the underwriting guidelines of the mortgage loan originators, the property appraisals of the loans backing the Trusts, and the risks associated with the Certificates.[4] For example, NECA alleges that the following statements, contained within the Shelf Registra-

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[4] NECA also alleges that the Shelf Registration Statement's assurance that defendants "reasonably believe[] that . . . the [Certificates] will be investment grade securities at the time of sale" was misleading because the ratings – which were based on outdated assumptions, relaxed ratings criteria, and inaccurate loan information – were themselves inaccurate, false, and misleading. It further alleges that defendants should have disclosed that, at the same time they were selling the Certificates as "investment grade" instruments, Goldman Sachs was placing exotic bets via credit-default swaps that residential mortgages similar to those backing the Certificates would default.

tion Statement common to the registration statements of all 17 Trusts' Certificates, were materially misleading:

- That for the mortgage loans generally, "[t]he lender . . . applies the underwriting standards to evaluate the borrower's credit standing and repayment ability" and "makes a determination as to whether the prospective borrower has sufficient monthly income available (as to meet the borrower's monthly obligations on the proposed mortgage loan and other expenses related to the mortgaged property . . .)" and that certain other types of loans "are underwritten on the basis of a judgment that mortgagors or obligors will have the ability to make the monthly payments required initially."
- That for loans purchased through the Conduit Program, "the originating lender makes a determination about whether the borrower's monthly income (if required to be stated) will be sufficient to enable the borrower to meet its monthly obligations on the mortgage loan and other expenses related to the property."
- That loan originators represented to GS Mortgage that the "documents . . . submitted for loan underwriting were not falsified and contain no untrue statement of material fact" and that "[n]o fraud, error, omission, misrepresentation, negligence or similar occurrence with respect to a mortgage loan has taken place on the part of any person."
- That loan originators represented to GS Mortgage that "[each] mortgage file contains an appraisal . . . by a qualified appraiser . . . whose compensation is not affected by the approval or

> disapproval of the mortgage loan" and that "[a]ll appraisals must . . . conform to the Uniform Standards of Professional Appraisal Practice [("USPAP")] adopted by the Appraisal Standards Board of the Appraisal Foundation" and that "[t]he appraisal generally will be based upon a market data analysis of recent sales of comparable properties."

The Prospectus Supplements for many of the individual Offerings contained similar, generic misrepresentations. For example, the Prospectus Supplement for the 2007-10 Trust stated, with respect to the Conduit Program, that "[t]o the best of [GSMC's] knowledge, there was no fraud involved in the origination of any Mortgage Loan by the mortgagee or the mortgagor, any appraiser or any other party involved in the origination of the Mortgage Loan." 2007-10 Prospectus Supplement at S-77.

Contrary to these representations, plaintiff alleges, neither defendants nor the loan originators they used through the Conduit Program employed standards aimed at determining the borrowers' ability to repay their loans. Instead, at the time the loans in the Trusts were originated (2006-2007), "there were wide-spread, systematic problems in the residential lending industry" wherein "loan originators began lending money to nearly anyone – even if they could not afford to repay the loans – ignoring their own stated lending underwriting guidelines . . . as well as those of defendants' Conduit program." J.A. at 214. The statements in the Shelf Registration Statement were rendered misleading, NECA alleges, by the Offering Documents' failure to disclose that the originators of the loans backing the Trusts falsely inflated (or coached borrowers falsely to inflate)

their income; steered borrowers to loans exceeding their borrowing capacity; and approved borrowers based on "teaser rates" knowing they would be unable to afford payments once the rates adjusted. NECA further alleges that the originators allowed non-qualifying borrowers to be approved for loans they could not afford under exceptions to the underwriting standards based on so-called "compensating factors" when such "compensating factors" did not exist or did not justify the loans. Nor, allegedly, did the Offering Documents disclose that appraisers were ordered by loan originators to give predetermined, inflated appraisals to ensure loan approval; that the "comparable properties" used to generate appraisals were not comparable; and that property appraisals did not, in fact, conform to USPAP.[5] As a result of these abusive practices, NECA alleges, approximately 35%-40% of the loans in the 2007-5 Trust and 30-35% of the loans in the 2007-10 Trust were made with no determination of the borrower's ability to repay. And at least 47% of the loans in the 2007-5 Trust, and at least 41% of those in the 2007-10 Trust, were based on property value appraisals that were inflated by 9% or more.

Although NECA's claims are based in part on these general allegations of an industry-wide deterioration in loan origination practices, its most particularized allegations tie the abusive practices outlined above to the 17 Trusts' six major loan originators: National City, Countrywide, GreenPoint, Wells Far-

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[5] Because the loan-to-value ("LTV") ratios reported in the Prospectus Supplements were calculated using these false and inflated property appraisals, plaintiff alleges, the LTV ratios were also inaccurate, false, and misleading.

go, SunTrust, and WaMu. For example, with respect to Countrywide, NECA alleges that former Countrywide employees have admitted that they were incentivized to increase loan origination without concern for whether borrowers were able to repay the loans. Countrywide's Sales Training Facilitator Guide actually instructed originators to "look for ways to make the loan rather than turn it down." *Id.* at 217. According to former managers, Countrywide was "infested" with employees that ignored company underwriting standards, and "[i]f you had a pulse, [Countrywide] gave you a loan." *Id.* at 217-218. In the "few cases" when Countrywide employees actually obtained income documentation demonstrating a borrower's inability to qualify for a loan, Countrywide ignored the documentation and the loan was resubmitted as a stated income loan – with an inflated income number – that the borrower could not afford to repay. *Id.* at 218. The Second Amended Complaint contains similar, if somewhat weaker, allegations with respect to National City's, GreenPoint's, Wells Fargo's, SunTrust's, and WaMu's origination practices.

Notwithstanding its detailed allegations about Countrywide, NECA does not specifically allege Countrywide originated any of the loans backing either of the Certificates it purchased. Instead, NECA alleges that GreenPoint and Wells Fargo did. Indeed, according to the Second Amended Complaint, the originators of the loans backing each of the 17 Trusts – or, in the case of the 2007-5 Trust, the two "Groups" therein – varied dramatically. For example, National City is alleged to have originated a significant number of loans in only six of the Trusts, Countrywide and GreenPoint in only five, Wells Fargo in only four, SunTrust in only three, and WaMu in

just two. For five of the Trusts, none of these originators is alleged to have originated any loans; for one of the Trusts, SunTrust is alleged to have originated them all. As to Group 1 versus Group 2 of the 2007-5 Offering, each was backed by a different loan pool. Countrywide is alleged to have originated over 61% of the loans backing Group 2 of the 2007-5 Trust, but none of the loans backing Group 1. National City is also alleged to have originated loans in Group 2 of the 2007-5 Trust (8%), but none in Group 1. By contrast, as we have seen, GreenPoint originated loans backing Certificates in Group 1 of the 2007-5 Trust – the Group to which NECA's Certificates belong – but, according to the Second Amended Complaint, none in Group 2. It is unclear from the pleadings whether Wells Fargo originated loans in both Groups of the 2007-5 Offering, but the prospectus associated with that Offering estimates that 0.09% of the loans in Group 1, and 1.02% of the loans in Group 2, were originated by Wells Fargo.

Not surprisingly in light of this variation in loan composition among the Trusts, only the Prospectus Supplements unique to each individual Offering identified the originators of the loans in the Trusts and set forth their respective lending guidelines – the descriptions of which, plaintiff alleges, were similarly misleading. For example, the Prospectus Supplements for the 2007-5 and 2007-10 Trusts stated that GreenPoint's underwriting guidelines "are applied to evaluate the prospective borrower's . . . repayment ability" and that "[e]xceptions to the guidelines are permitted where compensating factors are present." 2007-5 Prospectus Supplement at S-61; 2007-10 Prospectus Supplement at S-55; *see also* 2007-10 Prospectus Supplement at S-60 (alleging similar representations by Wells Fargo). The Sup-

plements also stated that GreenPoint's underwriting standards required appraisals to conform to USPAP, appraisals that "generally will have been based on prices obtained on recent sales of comparable properties." 2007-5 Prospectus Supplement at S-63; 2007-10 Prospectus Supplement at S-56. The Second Amended Complaint alleges similar representations in the other Trusts' Prospectus Supplements about Countrywide's, National City's, SunTrust's, and WaMu's underwriting practices.

Plaintiff alleges that the truth about the Certificates' risk came to light in mid-2008.[6] As a result, NECA alleges (in its Second Amended Complaint) that the rating agencies "put negative watch labels on the Certificate[s] . . . and downgraded previously-assigned ratings," J.A. at 110; that "delinquency rates on the underlying mortgage loans . . . skyrocketed," *id.* at 138; that the Certificates were "no longer marketable at prices anywhere near the prices paid by plaintiff and the Class," *id.* at 110; and that "holders would likely receive less absolute cash flow in the future and receive it, if at all, on an untimely basis" given that they were "exposed to much more risk with respect to both the timing and absolute cash flow to be received than the Offering Documents represented," *id.* In short, NECA alleges that "the value of the [C]ertificates ha[d] diminished greatly since their original offering, as ha[d] the price at which members of the Class could dispose of them[,] . . . caus[ing] damages to [NECA] and the Class." *Id.*

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[6] The Second Amended Complaint alleges that "[d]owngrades to the overwhelming majority of Trusts did not occur until 2008." J.A. at 138.

at 139. At the time of its filing of this lawsuit, NECA continued to hold the Certificates.

**Procedural History**

In September 2009 the district court granted defendants' motion to dismiss NECA's First Amended Complaint, with leave to amend. In a January 2010 oral ruling, it granted defendants' motion to dismiss the Second Amended Complaint. The court held, first, that NECA lacked standing to bring claims under §§ 11 and 12(a)(2) on behalf of purchasers of Certificates from any of the 15 other Trusts because it did not purchase Certificates from Trusts other than 2007-10 and 2007-5 Trusts and "has not shown that the injuries it alleges based upon purchases of [Certificates from] those two [T]rusts are the same . . . as those allegedly suffered by purchasers of [Certificates from] outlying [T]rusts backed by distinct sets of loans." *Id.* at 198.

The court rejected NECA's argument that, because all of the purchasers were subject to the same misrepresentations from the same Shelf Registration Statement with respect to the same types of securities, their injuries were sufficiently similar to confer standing upon NECA to assert claims on behalf of all. While acknowledging that "[i]n a class action, a plaintiff who was injured who was practically identically situated with other people who did exactly what he did can be a class representative," the court concluded that "that is . . . only when th[o]se other people bought the same securities that the plaintiff bought." *Id.* at 162. The court granted NECA leave to amend, but "only with respect to the [C]ertificates that [NECA] purchased," and directed plaintiff to "tie any alleged misstatements that are actionable on these [C]ertificates regarding loan underwriting or

appraisal practices to the loans actually underlying the [C]ertificates from which it purchased."[7] *Id.* at 200. Plaintiff "understood [the district court's] order" to mean that it could still "su[e] on behalf of all purchasers of the [T]rust, all tranches." *Id.* at 259. But as the district court clarified in a subsequent oral ruling, its "understanding of how [it] ruled" was that NECA could "only represent the class of persons or entities that purchased the particular . . . [C]ertificate from the particular tranche from the particular [T]rust" from which NECA purchased its Certificates. *Id.* at 259-60.

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[7] In a subsequent oral ruling, the court also appeared to reject defendants' arguments (1) that none of the six categories of alleged misstatements set forth in NECA's complaint constituted material misrepresentations; and (2) that NECA's claims were time-barred because the Fund was on notice, or inquiry notice, of its claims more than a year before filing suit, *see* 15 U.S.C. § 77m (establishing a one-year statute of limitations for §§ 11 and 12(a)(2) claims which begins to run upon "the discovery of the untrue statement or omission, or after such discovery should have been made by the exercise of reasonable diligence"). *See* J.A. at 291-292 (district court expressing preliminary view that "the only allegation here of any real substance . . . has to do with the standards that were followed and would be followed in valuing the loans, in valuing the mortgages" and that "there is enough here with respect to . . . Countrywide" but indicating that the court "may want [NECA] to replead to allege specifically which allegations [it is] really relying on"); *id.* at 305-306 (rejecting defendants' argument that NECA could, as a matter of law, be deemed to have been on notice of its claims prior to the "reduction in ratings" on the "particular [C]ertificates" it purchased). We decline to reach these potential alternative grounds for affirmance urged by defendants on appeal due to a lack of clarity about whether and how the district court ruled on them.

Second, the district court held that NECA failed to allege "a cognizable loss" under § 11. It reasoned that NECA's allegation that it was exposed to greatly enhanced risk with respect to both the timing and amount of cash flow under the Certificates was insufficient to plead injury because of the Offering Documents' "specific warning . . . about the possibility . . . that the [C]ertificates may not be resalable." *Id.* at 199.

NECA then filed a Third Amended Complaint, adding the following allegations:

> There is a secondary market for the purchase and sale of the Certificates. There has been a market for the resale of investments like the Certificates since at least 2007. The trading volume of Certificates like those at issue was at least $1-$1.5 billion during December 2008, the time at which the first of the actions asserting the claims herein was filed. In a non-forced sale in the secondary market in December 2008, the [Fund] and the Class would have netted, at most, between 35 and 45 cents on the dollar. In other words, a sale on the date the first lawsuit was filed would have resulted in a loss of at least 55 to 65 cents on each dollar amount purchased.

*Id.* at 236.

Defendants again moved to dismiss and, in October 2010, the district court again concluded that the allegations were insufficient to allege injury. The court reasoned that, because the Fund knew the Certificates might not be liquid, it could not allege injury based on the hypothetical price of the Certificates in a secondary market at the time of suit. *NECA-IBEW*

*Health & Welfare Fund v. Goldman, Sachs & Co.*, 743 F. Supp. 2d 288, 292 (S.D.N.Y. 2010). Even assuming a decline in market price could provide factual support for the contention that the Certificates declined in value, the court reasoned, "the complaint lacks any factual enhancement of the bare assertion that a secondary market for their Certificates actually exists" or to "allege any facts regarding the *actual market price* for the Certificates at the time of suit." *Id.* (emphasis added). The court rejected NECA's argument that "the risk of diminished cash flow in the future establishes a present injury cognizable under [§] 11," reasoning that "[§] 11 does not permit recovery for increased risk." *Id.* Observing that asset-backed securities are "'primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period,'" the court held that "NECA must allege the actual failure to receive payments due under the Certificates" in order to "allege an injury cognizable under Section 11." *Id.* (quoting 17 C.F.R. § 229.1101(c)). In an earlier oral ruling, the district court had sustained plaintiff's § 12(a)(2) claims against similar attacks, finding that NECA pleaded a viable claim for rescission (as opposed to damages) because it continued to hold its Certificates. However, because NECA failed to allege that it bought the 2007-5 Certificates directly from Goldman Sachs in a public offering, the Fund subsequently abandoned its claim under § 12(a)(2) as to those Certificates. *See In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010) (explaining that proper defendants in § 12(a)(2) cases are certain "statutory sellers" who, *inter alia*, "successfully solicited the purchase of a security" (quotation marks and brackets omitted)).

Accordingly, all that remained after these rulings was a single claim for rescission under § 12(a)(2) based on NECA's purchase of the 2007-10 Certificates. However, counsel for plaintiff subsequently learned that in November 2010, in the normal course of its investment activities, NECA had sold the 2007-10 Certificates at a 32% loss. Because that sale eliminated NECA's ability to rescind its purchase, but seemingly provided the realized loss the district court deemed necessary to allege injury under § 11, the Fund moved for leave to amend its complaint and for relief from the dismissal order under Rule 60(b). The district court denied the motion as "just too late," J.A. at 381, thereby extinguishing all of NECA's claims. The court entered judgment and NECA appealed. Its main contentions are that the district court erred (1) in dismissing for lack of standing its class claims asserted on behalf of purchasers of Certificates from different tranches and from other Offerings, and (2) in requiring it to plead an out-of-pocket loss in order to allege injury under § 11. We review *de novo* a district court's dismissal for lack of standing and for failure to state a claim. *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009). In so doing, we accept as true all non-conclusory factual allegations in the complaint and draw all reasonable inferences in plaintiff's favor to determine whether the allegations plausibly give rise to an entitlement to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 106 (2d Cir. 2008).

## DISCUSSION

Sections 11 and 12(a)(2) impose liability on certain participants in a registered securities offering

when the registration statement or prospectus associated with that offering contains material misstatements or omissions. 15 U.S.C. § 77k, *l*(a)(2). The provisions are "notable both for the limitations on their scope as well as the *interrorem* nature of the liability they create." *In re Morgan Stanley Info. Fund*, 592 F.3d at 359. Section 11 imposes strict liability on issuers and signatories, and negligence liability on underwriters, "[i]n case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). A claim under § 11 belongs to "any person acquiring such security." *Id.* Section 12(a)(2) imposes liability under similar circumstances against certain "statutory sellers" for misstatements or omissions in a prospectus. *See id.* § 77*l*(a)(2); *In re Morgan Stanley Info. Fund*, 592 F.3d at 359. And § 15 imposes liability on individuals or entities that "control[ ] any person liable" under §§ 11 or 12. 15 U.S.C. § 77o.

Neither scienter, reliance, nor loss causation is an element of § 11 or § 12(a)(2) claims which – unless they are premised on allegations of fraud – need not satisfy the heightened particularity requirements of Rule 9(b).[8] *Panther Partners Inc. v. Ikanos*

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[8] Although §§ 11 and 12(a)(2) make certain due diligence and "reasonable care" defenses available to certain defendants, *see* 15 U.S.C. § 77k(b), *l*(a)(2), and although defendants may avoid liability under both provisions for damages not caused by the alleged misrepresentations or omissions, *see id.* § 77k(e), *l*(b), "defendants bear the burden of demonstrating the applicability of each of these defenses, which are therefore unavailing as a
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*Commc'ns, Inc.*, 681 F.3d 114, 120 (2d Cir. 2012). Nor do the heightened pleading standards of the Private Securities Litigation Reform Act apply to such non-fraud claims. *See* 15 U.S.C. § 78u-4(b)(1)-(2). Thus, the provisions "'place[] a relatively minimal burden on a plaintiff.'" *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 716 (2d Cir.), *cert. denied*, 132 S. Ct. 242 (2011) (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983)); *see also id.* at 715 (observing that §§ 11 and 12(a)(2) claims not premised on allegations of fraud are "ordinary notice pleading case[s], subject only to the 'short and plain statement' requirements of Federal Rule of Civil Procedure 8(a)"); *In re Morgan Stanley Info. Fund*, 592 F.3d at 359, 360 (observing that §§ 11 and 12(a)(2) "apply more narrowly but give rise to liability more readily" than § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 77j(b)).

We first address NECA's argument that the district court erred in holding that it lacked standing to assert class claims with respect to Certificates from the 15 Offerings, and from tranches of the 2007-5 and 2007-10 Offerings, from which it did not purchase Certificates. NECA argues that the single Shelf Registration Statement common to all the purchasers' Certificates was "rife with misstatements," so "there was no reason to require the Fund to buy Certificates from each Trust in order to establish its standing." Appellant's Br. 57-58. As to the allegedly false and misleading Prospectus Supplements unique to each Offering, because each was "expressly incor-

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means of defeating a motion to dismiss pursuant to Rule 12(b)(6)," *In re Morgan Stanley Info. Fund*, 592 F.3d at 359 n.7.

porated" into the same false and misleading Shelf Registration Statement, NECA argues its standing to sue for misrepresentations in all 17 Prospectus Supplements is "secure." *Id.* at 55. In short, according to plaintiff, "the common [Shelf] Registration Statement provides the glue that binds together the absent Class Members' purchases of Certificates, as well as the additionally misleading [Prospectus] Supplements that defendants expressly incorporated into it." *Id.* at 58.

Defendants, on the other hand, contend that the fact that each Offering was issued pursuant to a different "registration statement" under SEC regulations dooms NECA's textual standing argument, because "*the* registration statement" referred to in § 11 is different for each Offering – even if every Offering's registration statement includes the same Shelf Registration Statement. Appellees' Br. 18 (quotation marks omitted). Moreover, defendants observe, the Shelf Registration Statement common to all the Certificates contained no information about the loan originators or mortgage collateral underlying them. That information was instead contained in the Prospectus Supplements unique to each Offering, without which the Certificates could not have been issued – and which contained "unique" representations "focused on the specific loans underlying each offering and the specific underwriting standards and origination practices in effect at the time those specific loans were originated." *Id.* at 19 (quotation marks omitted).

As to tranche-level standing, defendants argue that, despite the fact that the Certificates in every tranche of a given Offering *are* registered pursuant to the same registration statement, NECA lacks

standing to represent Certificate-holders outside the specific tranche from which it purchased because "different [C]ertificates have different investment characteristics and may suffer different harm based on the non- or under-performance of sometimes differing underlying loans." *Id.* at 25. Just as "the downgrade in credit ratings, the particular guidelines used by the mortgage originator for that pool of loans, and the default and delinquency rates all differ based on the particular [O]ffering," defendants argue, "these variances [also] exist at the [tranche] level." *Id.* at 23. The district court, as noted above, essentially agreed with defendants' arguments, concluding that while a class representative may represent people practically identically situated to her, they must have purchased the same securities she purchased.

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 registration statements and associated prospectuses that is (3) redressable through rights of action for damages under §§ 11 and 12(a)(2). *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (holding that a plaintiff must allege (1) an injury in fact (2) fairly traceable to defendants' actions that is (3) redressable by the requested relief to demonstrate Article III standing).

NECA also has statutory standing in its own right, having purchased the 2007-5 and 2007-10 Certificates pursuant to registration statements, parts of which are alleged to have contained materially misleading statements, and having purchased the 2007-

10 Certificates "directly from Goldman Sachs, with GS Mortgage as the Issuer, in a public offering" pursuant to the Offering Documents – with both entities' "solicit[ing] sales of the Certificates for financial gain." J.A. at 238; *see* 15 U.S.C. § 77k(a), *l*(a)(2); *In re Morgan Stanley Info. Fund*, 592 F.3d at 359.

But whether NECA has "class standing" – that is, standing to assert claims *on behalf of* purchasers of Certificates from other Offerings, or from different tranches of the same Offering – does not turn on whether NECA would have statutory or Article III standing to seek recovery for misleading statements in those Certificates' Offering Documents. NECA clearly lacks standing to assert such claims on its behalf because it did not purchase those Certificates. Because the class standing analysis is different, the district court erred in concluding, based on the fact that NECA purchased just two "particular . . . [C]ertificate[s] from . . . particular tranche[s] from . . . particular [T]rust[s]" that it necessarily lacked standing to assert claims *on behalf* of purchasers of Certificates from other Trusts and from other tranches within the 2007-10 and 2007-5 Trusts.[9] J.A. at 260.

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[9] It also erred to the extent it based its conclusion on the (mistaken) assumption that "only when . . . other people bought the same securities that the plaintiff bought" may a "practically identically situated" plaintiff serve as their "class representative." J.A. at 162; *see Hevesi v. Citigroup Inc.*, 366 F.3d 70, 82-83 (2d Cir. 2004) (observing that "a class representative can establish the requisite typicality under Rule 23 if the defendants committed the same wrongful acts in the same manner against all members of the class," even if the class representative lacks standing to sue on every claim asserted by the class). In any event, NECA's standing to assert claims on others' behalf is an inquiry separate from its ability to represent the in-

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According to NECA, "[b]ecause the Fund's purchases of Certificates afforded [it] statutory standing under the Securities Act, and the case presented a genuine 'case or controversy' under Article III, it then became a matter of whether Rule 23 considerations could be satisfied at the proper time – not at this motion-to-dismiss stage." Appellant's Br. 62. Indeed, we have said that, "[t]o establish Article III standing in a class action . . . for every named defendant there must be at least one named plaintiff who can assert a claim directly against that defendant, and at that point standing is satisfied and only then will the inquiry shift to a class action analysis." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 241 (2d Cir. 2007) (quotation marks omitted). There is support for that proposition in earlier decisions of the Supreme Court. *See Sosna v. Iowa*, 419 U.S. 393, 403 (1975) ("Th[e] conclusion [that a named plaintiff has a case or controversy] does not automatically establish that [she] is entitled to litigate the interests of the class she seeks to represent, but it does shift the focus of examination from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.'" (quoting Fed. R. Civ. P. 23(a))).[10]

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terests of absent class members under Fed. R. Civ. P. Rule 23(a). *See* Appellant's Br. 62 ("What the district court thought was a 'standing' issue was in reality a class certification issue." (emphasis omitted)).

[10] *See also Lewis v. Casey*, 518 U.S. 343, 395-96 (1996) (Souter, *J.*, concurring in part, dissenting in part, and concurring in the judgment) ("Whether or not the named plaintiff who meets individual standing requirements may assert the rights of ab-

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sent class members is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions." (quotation marks omitted)); *id.* at 396 (Souter, *J.*, concurring in part, dissenting in part, and concurring in the judgment) ("As long as the representative parties have a direct and substantial interest, they have standing; the question whether they may be allowed to present claims on behalf of others . . . depends not on standing, but on an assessment of typicality and adequacy of representation." (quotation marks omitted); *id.* at 408 n.4 (Stevens, *J.*, dissenting) ("If named class plaintiffs have standing, the standing of the class members is satisfied by the requirements for class certification."); *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 & n.15 (1982) (Mexican-American employee passed over for promotion could not represent class of Mexican-Americans whose applications had been denied because, under Rule 23(a)'s typicality and adequacy requirements – but not as a matter of standing – the promotion-base injuries were too dissimilar from the application-based injuries); *Payton v. Cnty. of Kane*, 308 F.3d 673, 677 (7th Cir. 2002), *cert. denied*, 540 U.S. 812 (2003) (reversing district court's dismissal of putative class action on grounds that plaintiffs-arrestees, allegedly injured by two counties' implementation of a state bond-posting statute, lacked standing to sue on behalf of arrestees from seventeen other counties; "putting to one side the problem inherent in conflating the standing inquiry with the inquiry under Rule 23 about the suitability of a plaintiff to serve as a class representative, the proper remedy for this shortcoming is not dismissal of the entire action, but rather an order denying class certification and permitting the case to continue as an individual suit"); *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 422-23 (6th Cir. 1998) ("Once his standing has been established, whether a plaintiff will be able to represent the putative class, including absent class members, depends solely on whether he is able to meet the additional criteria encompassed in [Fed. R. Civ. P. 23(a)]."); *Gratsy v. Amalgamated Clothing & Textile Workers Union*, 828 F.2d 123, 130 n.8 (3d Cir. 1987), *abrogated on other grounds by Reed v. United Transp. Union*, 488 U.S. 319 (1989) (because named plaintiffs alleged personal injury, defendants'
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However, as the Supreme Court has acknowledged, there is some "tension" in its case law as to whether "variation" between (1) a named plaintiff's claims and (2) the claims of putative class members "is a matter of Article III standing . . . or whether it goes to the propriety of class certification pursuant to [Fed. R. Civ. P. 23(a)]." *Gratz v. Bollinger*, 539 U.S. 244, 263 & n.15 (2003) (citing *Gen. Tel. Co.*, 457 U.S. at 149 and *Blum v. Yaretsky*, 457 U.S. 991 (1982)); *see also Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 768 (1st Cir. 2011) ("The issue looks straightforward and one would expect it to be well settled; neither assumption is entirely true."). For example, in *Blum v. Yaretsky*, where the Court found class standing to be lacking, two New York state nursing home residents challenged decisions by the nursing home's utilization review committee to transfer them, without adequate notice or a hearing, to lower levels of care. After certifying a class, the district court expanded it to include patients transferred to *higher* levels of care without adequate procedural safeguards. The Supreme Court held that the district court "exceeded its authority in adjudicating the procedures governing transfers to higher levels of care" because the threat of such transfers lacked "sufficient immediacy and reality" for plaintiffs, who therefore lacked "standing to seek an adjudication of the procedures attending such transfers." 457 U.S. at 1001-02 (quotation marks omitted). As the Court explained, "a plaintiff who has been subject to injurious conduct of

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contentions that they "do not have standing to raise the claims of the class . . . confuse standing and the typicality requirement of Rule 23(a)(3).").

one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Id.* at 999. Because the conditions under which transfers to higher versus lower levels of care occurred were "sufficiently different," and because plaintiffs' attack "presuppose[d] a *deprivation* of protected property interests" – in contrast to the *increase* in Medicaid benefits attendant upon transfers to *higher* levels of care – any judicial assessment of the procedural adequacy of the latter "would be wholly gratuitous and advisory." *Id.* at 1001-02.

The Court also found class standing lacking in *Lewis v. Casey*, where 22 inmates of various prisons operated by the Arizona Department of Corrections ("ADOC") filed a class action "on behalf of all adult prisoners who are or will be incarcerated by [ADOC]" alleging that the ADOC was depriving them of their rights of access to the courts and counsel. 518 U.S. at 346 (quotation marks omitted). The district court found actual injury on the part of only one named plaintiff, who was illiterate. *Id.* at 358. Nevertheless, it issued a 25-page injunction mandating sweeping changes to the ADOC system. *Id.* at 346-47. The Supreme Court "eliminate[d] from the proper scope of th[e] injunction provisions directed" at inadequacies not "found to have harmed any plaintiff in this lawsuit." *Id.* at 358. The Court explained that a plaintiff's demonstration of "harm from one particular inadequacy in government administration" does not authorize a court "to remedy *all* inadequacies in that administration." *Id.* at 357. Rather "[t]he remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Id.* The majority expressly rejected Justice Stevens's suggestion that its holding amounted to "a

conclusion that the class was improper," asserting that "[t]he standing determination is quite separate from certification of the class." *Id.* at 358 n.6 (pointing to the Court's failure to "disturb the class definition" in *Blum* while simultaneously holding that plaintiffs lacked standing to challenge transfers to higher levels of care).

By contrast, the Court in *Gratz v. Bollinger* found the claims of the designated class representative, Hamacher, sufficiently similar to those of the class to support class standing. Hamacher, a white male, alleged that the University of Michgan's use of race in undergraduate admissions denied him the opportunity to compete for admission on an equal basis. 539 U.S. at 262. After being denied admission and enrolling at another school, Hamacher demonstrated that he was "able and ready" to apply as a transfer student should the University cease to use race in undergraduate admissions. *Id.* (quotation marks omitted). In a dissenting opinion, Justice Stevens argued that, because Hamacher had enrolled at another institution, he lacked standing to represent class members challenging the University's use of race in undergraduate *freshman* admissions (as opposed to *transfer* admissions). *Id.* at 286 (Stevens, J., dissenting). The criteria used to evaluate transfer applications at Michigan "differ[ed] significantly from the criteria used to evaluate freshman undergraduate applications," Justice Stevens concluded. *Id.* at 286. For example, the University's 2000 freshman admissions policy provided for 20 points to be added to the selection index scores of minority applicants, whereas the University did not use points in its transfer policy. *Id.* Citing *Lewis* and *Blum*, Justice Stevens concluded that "Hamacher cannot base his right to complain about the *freshman* ad-

missions policy on his hypothetical injury under a wholly separate *transfer* policy." *Id.* "At bottom," he concluded,

> [Hamacher's] interest in obtaining an injunction for the benefit of younger third parties is comparable to . . . that of the Medicaid patients transferred to less intensive care who had no standing to litigate on behalf of patients objecting to transfers to more intensive care facilities in *Blum*[], 457 U.S.[] at 1001[]. To have standing, it is elementary that [Hamacher's] own interests must be implicated. Because [he] has [no] personal stake in this suit for prospective relief, [he lacks] standing.

*Id.* at 289.

But a majority of the Court rejected Justice Stevens's view, finding 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." *Id.* at 265 (emphasis added). "[T]he *only* difference between the University's use of race in considering freshman and transfer applicants," the majority observed, was that all underrepresented minority freshman applicants received 20 points and "virtually" all who were minimally qualified were admitted, while "generally" all minimally qualified minority transfer applicants were admitted outright. *Id.* at 266. "While this difference might be relevant to a narrow tailoring analysis," the majority observed, "it clearly has no effect on [Hamacher's] standing to challenge the University's use of race in undergraduate admissions and [the University's] assertion that diversity [was] a compelling state inter-

est that justifies its consideration of the race of its undergraduate applicants." *Id.* Whereas in *Blum* "transfers to lower levels of care involved a *number of fundamentally different concerns* than did transfers to higher ones," in *Gratz* "*the same set of concerns* is implicated by the University's use of race in evaluating all undergraduate admissions applications under the guidelines." *Id.* at 264, 267 (emphases added).

Admittedly, constitutional litigation seeking injunctive relief does not map all that neatly onto statutorily based securities litigation seeking monetary damages. But distilling these cases down to a broad standard for class standing, we believe they stand collectively for the proposition that, in a putative class action, a plaintiff has class standing if he plausibly alleges (1) that he "personally has suffered some actual . . . injury as a result of the putatively illegal conduct of the defendant," *Blum*, 457 U.S. at 999 (quotation marks omitted), and (2) that such conduct implicates "the same set of concerns" as the conduct alleged to have caused injury to other members of the putative class by the same defendants, *Gratz*, 539 U.S. at 267. Therefore, the district court's requirement that NECA "show[] that [its] injuries . . . are *the same* . . . as those allegedly suffered by purchasers of [Certificates from] outlying [T]rusts backed by distinct sets of loans" was error. J.A. at 198 (emphasis added). We note that, in the context of claims alleging injury based on misrepresentations, the misconduct alleged will almost always be the same: the making of a false or misleading statement. Whether that conduct implicates the same set of concerns for distinct sets of plaintiffs, however, will depend on the nature and content of the specific misrepresentation alleged.

We have already held that NECA personally suffered injury as a result of defendants' inclusion of allegedly misleading statements in the Offering Documents associated with the Certificates it purchased. But whether that conduct by defendants implicates the same set of concerns as their inclusion of similar if not identical statements in the Offering Documents associated with other Certificates – whether from different Offerings or from different tranches of the same Offering – is much harder to answer. Here, it bears emphasizing that NECA is not suing GreenPoint and Wells Fargo for abandoning their underwriting standards; it is suing the three Goldman Sachs entities that issued, underwrote, and sponsored every Certificate from all 17 Trusts. Moreover, the same three defendants are alleged to have inserted nearly identical misrepresentations into the Offering Documents associated with *all* of the Certificates, whose purchasers plaintiff seeks to represent. For example, the Shelf Registration Statement common to every Certificate's registration statement represents that, for loans purchased under the Conduit Program, "the originating lender makes a determination about whether the borrower's monthly income . . . will be sufficient to enable the borrower to meet its monthly obligations on the mortgage loan and other expenses related to the property." It similarly represented that, for mortgage loans generally, "[t]he lender . . . applies the underwriting standards to evaluate the borrower's credit standing and repayment ability" and "makes a determination as to whether the prospective borrower has sufficient monthly income available (as to meet the borrower's monthly obligations . . . )." The fact that those representations appeared in separate Offering Documents (a point emphasized heavily by defendants) does not

by itself raise "a number of fundamentally different concerns," *Gratz*, 539 U.S. at 264, because the location of the representations has no effect on a given purchaser's assertion that the representation was misleading (the source of the injury) – just as the difference in the University of Michigan's transfer and freshman admissions policies had no effect on the University's assertion that diversity was a compelling state interest. Indeed, one could imagine a series of corporate debt offerings, issued over the course of a year, all of which contained an identical misrepresentation about the issuing company's impending insolvency. Sections 11 and 12(a)(2) claims brought by a purchaser of debt from one offering would raise a "set of concerns" nearly identical to that of a purchaser from another offering: the misrepresentation would infect the debt issued from every offering in like manner, given that all of it is backed by the same company whose solvency has been called into question. In that case, the inappropriateness of denying class standing on the happenstance of the misrepresentation's location in one offering versus another seems patent.

But that is not this case. The putative class members here did not all purchase debt backed by a single company through offering documents tainted by a single misstatement about that company. They bought Certificates issued through 17 separate Offerings, each backed by a distinct set of loans issued by a distinct set of originators. For at least one of those Offerings – the 2007-5 Offering – the Certificates were divided further into two separate Groups, each of which was backed by a distinct set of loans issued in large part by a distinct set of originators. And within each Offering (and within the two Groups of the 2007-5 Offering), the Certificates were divided

further into separate tranches offering various priorities of entitlement to the cash flows from the loans backing them. In the context of §§ 11 and 12(a)(2) claims alleging misstatements about *origination guidelines*, we think that differences in the identity of the originators backing the Certificates matters for the purposes of assessing whether those claims raise the same set of concerns. That is because, to the extent the representations in the Offering Documents were misleading with respect to one Certificate, they were not necessarily misleading with respect to others. Thus, while the alleged injury suffered by each Offering's Certificate-holder may "flow from" the same Shelf Registration Statement or from nearly identical misstatements contained in distinct Prospectus Supplements, each of those alleged injuries has the potential to be very different – and could turn on very different proof. 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.

The Second and Third Amended Complaints' emphasis on the abandonment by specific loan originators of their stated underwriting guidelines reinforces this principle. The originator-specific allegations provide the necessary link between (1) the Offering Documents' representations in a vacuum and (2) the *falsity* of those representations. Indeed, after the district court dismissed for lack of standing plaintiff's claims on behalf of purchasers of Certificates from other Offerings, NECA eliminated from its complaint any discussion of the allegedly abusive underwriting practices of National City, SunTrust, and WaMu, none of whose loans are alleged to have

backed *plaintiff's* Certificates.[11] Thus, while NECA and purchasers of Certificates from National City-, SunTrust-, and WaMu-backed Offerings may both have suffered injuries, those suffered due to misstatements in the latter group of Offerings were sufficiently different in character and origin, as NECA itself appears, based on its pleadings, to appreciate.

However, to the extent certain Offerings were backed by loans originated by originators common to those backing the 2007-5 and 2007-10 Offerings, NECA's claims raise a sufficiently similar set of concerns to permit it to purport to represent Certificate-holders from those Offerings. Therefore, under the Second Amended Complaint, plaintiff has class standing to assert the claims of purchasers of Certificates from the 5 additional Trusts containing loans originated by GreenPoint, Wells Fargo, or both. Based on the allegations in that complaint, those Trusts include the GSAA Home Equity Trust 2007-3 (29% GreenPoint-originated loans), 2007-4 (36% GreenPoint-originated loans), 2007-6 (9% Green-Point-originated loans), and 2007-7 (23% Green-Point-originated and 67% Wells Fargo-originated

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[11] However, notwithstanding that Countrywide loans back neither the 2007-10 nor 2007-5 Group 1 Certificates, the Third Amended Complaint retains extensive allegations concerning that originator's abandonment of its stated underwriting guidelines. Perhaps that is because, plaintiff reasoned, Countrywide loans *did* back the 2007-5 Group 2 Certificates, which were registered and offered pursuant to identical Offering Documents as the 2007-5 Group 1 Certificates. Or perhaps it is because the allegations pertaining to Countrywide were the ones the district court specifically found "enough" of to prevent it from "throw[ing] . . . out" the complaint. J.A. at 291. Either way, for the reasons that follow, we do not see the relevance of those allegations to the claims plaintiff has standing to assert.

loans) and the GSR Mortgage Loan Trust 2007-3F (47% Wells Fargo-originated loans). Plaintiff also has standing to assert claims on behalf of purchasers of Certificates from Group 2 of the 2007-5 Trust because, according to the 2007-5 prospectus, those Certificates contained at least some loans originated by Wells Fargo. However, plaintiff lacks standing to assert claims on behalf of purchasers of Certificates from the other 10 Trusts.[12]

Turning to the question of tranche-level standing, we do not believe the Certificates' varying levels of payment priority raise such a "fundamentally different set of concerns" as to defeat class standing. *Gratz*, 539 U.S. at 264. Within any given Offering (or within any given Group of a particular Offering), some Certificates may be entitled to cash flows from the loans backing them earlier than others. But that does not alter the fact that all of the Certificate-holders' cash flows within any such Offering or Group derive from loans originated by some of the same originators. Regardless of their level of subordination, each Certificate-holder within an Offering or Group backed by loans originated by similar lenders has the same "necessary stake in litigating" whether those lenders in fact abandoned their underwriting guidelines. *Blum*, 457 U.S. at 999; *see also Nomura Asset*, 632 F.3d at 770 (reserving decision on future case where "the claims of the named plaintiffs necessarily give them – not just their lawyers – essentially the same incentive to litigate the coun-

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[12] Those Trusts are the GSAA Home Equity Trust 2007-8; the GSAMP Trust 2007-FM2, 2007-HEI, 2007-HE2, and 2007-HSBC1; the GSR Mortgage Loan Trust 2007-OA1, 2007-OA2, 2007-4F, and 2007-5F; and the STARM Mortgage Loan Trust 2007-4.

terpart claims of the class members because the establishment of the named plaintiffs' claims necessarily establishes those of other class members"). Their ultimate damages will of course vary depending on their level of subordination, but "it is well-established that the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification" under Rule 23(a), let alone class standing. *Seijas v. Republic of Argentina*, 606 F.3d 53, 58 (2d Cir. 2010). We emphasize that it is by no means a foregone conclusion that, because plaintiff has standing to assert §§ 11 and 12(a)(2) claims on behalf of Certificate-holders from different tranches of Offerings (or within Offerings) backed by loans originated by the same originators, a putative class comprised of such Certificate-holders should be certified. The district court, after reviewing all of the Rule 23 factors, retains broad discretion to make that determination.[13]

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[13] *Compare N.J. Carpenters Health Fund v. Rali Series 2006-QO1 Trust*, Nos. 11-1683-cv, 11-1684-cv, 2012 WL 1481519, at *4 (2d Cir. Apr. 30, 2012) (summary order) (finding no abuse of discretion in district court's denial of class certification in §§ 11 and 12(a)(2) MBS action on grounds that, although separate tranches did not defeat adequacy or typicality, individual, not common, issues relating to defendants' knowledge defenses would predominate and class adjudication would not be superior to individual actions), *with Pub. Emps.' Ret. Sys. of Miss. v. Goldman Sachs Grp., Inc.*, 280 F.R.D. 130, 134 (S.D.N.Y. 2012) ("The invocation of tranches as a means to defeat class certification has failed in similar cases and fails here."), and *Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co.*, 277 F.R.D. 97, 108 (S.D.N.Y. 2011) (concluding that, because "the representations in each Offering apply equally to all tranches within that Offering," any variation in tranches' repayment rights did not "present a fundamental conflict within the class" (quotation marks omitted)).

We turn now to NECA's contention that the district erred in concluding that it failed to allege cognizable damages under § 11. While a plaintiff need not plead damages under § 11, it must satisfy the court that it has suffered a cognizable injury under the statute. Section 11 permits a successful plaintiff to recover "the difference between the amount paid for the security" and either

> (1) *the value thereof as of the time such suit was brought*, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than [the measure of damages defined in subsection (1)].

15 U.S.C. § 77k(e) (emphasis added).[14] In *McMahan & Co. v. Wherehouse Entertainment, Inc.*, 65 F.3d 1044 (2d Cir. 1995), this Court provided guidance on the meaning of "value" in § 11(e): First, "the term . . . was intended to mean the security's true value after the alleged misrepresentations are made public." *Id.* at 1048. Second, although "in a market economy, when market value is available and reliable, market value will always be the primary gauge of a[ security's] worth,"

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[14] A plaintiff asserting a claim under § 12(a)(2) may sue for rescission or, if she no longer owns the security, for "damages." *Id.* § 77 *l*(a)(2). Because the district court denied NECA leave to amend its complaint to seek damages rather than rescission following its sale of the 2007-10 Certificates, it did not consider whether plaintiff alleged a cognizable injury under § 12(a)(2), and we have no occasion to do so here.

> the value of a security may not be equivalent to its market price. Congress' use of the term "value," as distinguished from the terms "amount paid" and "price" indicates that, under certain circumstances, the market price may not adequately reflect the security's value.

*Id.* at 1048-49 (quotation marks omitted). However, "even where market price is not completely reliable, it serves as a good starting point in determining value." *Id.* at 1049. Thus, under § 11, the key is not, as the district court concluded and as defendants contend, market price; the key is value.

NECA, as it was required to do, plausibly pled a cognizable injury – a decline in value – under § 11. NECA alleged that "the value of the [C]ertificates ha[d] diminished greatly since their original offering, as ha[d] the price at which members of the Class could dispose of them[,] . . . caus[ing] damages to the plaintiff and the Class." J.A. at 139. It supported this assertion of injury with the following well-pleaded facts: that the rating agencies "put negative watch labels on the Certificate[s] . . . and downgraded previously-assigned ratings" and that holders were "exposed to much more risk with respect to both the timing and absolute cash flow to be received than the Offering Documents represented." *Id.* at 110. The latter allegation was rendered plausible by the complaint's extensive allegations regarding loan originators' failure to determine, in a significant number of cases and contrary to their underwriting guidelines, "whether the borrower's monthly income . . . will be sufficient to enable the borrower to meet its monthly obligations on the mortgage loan and other expenses related to the property." J.A. at 116, 212.

Drawing the requisite inferences in plaintiff's favor, it is not just plausible – but obvious – that mortgage-backed securities like the Certificates would suffer a decline in value as a result of (1) ratings downgrades and (2) less certain future cash flows. Thus, NECA plausibly alleged a "difference between the amount paid for the [Certificates]" and "the value thereof as of the time [its] suit was brought." 15 U.S.C. § 77k(e).

Defendants argue, and the district court reasoned, that plaintiff suffered no loss because the Complaint did not allege any missed payment from the Trusts and the Fund admitted that no payments had been missed. Appellees' Br. 30; *NECA-IBEW*, 743 F. Supp. 2d at 292. But basic securities valuation principles – discounting future cash flows to their present value using a rate of interest reflecting the cash flows' risk – belie the proposition that a fixed income investor must miss an interest payment before his securities can be said to have declined in "value." The reasonable inference from NECA's allegations is that, because the loans backing the Certificates were riskier than defendants represented, the future cash flows to which NECA was entitled under the Certificates required a higher discount rate once the Offering Documents' falsity was revealed, resulting in a lower present value. Put differently, the revelation that borrowers on loans backing the Certificates were less creditworthy than the Offering Documents represented affected the Certificates' "value" immediately, because it increased the Certificates' credit risk profile. In this analysis, whether Certificate-holders actually missed a scheduled coupon payment is not determinative. *See also Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171, 183 (2d Cir. 2007) ("[I]n securities cases there is a

presumption that shares are purchased for the purpose of investment and their true value to the investor is the price at which they may later be sold.").

Neither is the existence or liquidity of a secondary market. The district court determined that, because plaintiff "knew [the Certificates] might not be liquid, it [could] not allege an injury based upon the hypothetical price of the Certificates on a secondary market at the time of suit." *NECA-IBEW*, 743 F. Supp. 2d at 292. We have three problems with this conclusion. First, NECA alleged the existence of a secondary market. J.A. at 236. Second, the district court's analysis conflates liquidity risk and credit risk. While plaintiff may have assumed liquidity risk when it purchased the Certificates, it did not assume the heightened credit risk associated with mortgage collateral allegedly far riskier than the Offering Documents represented. Both risks may tend to depress a security's price, but that does not prevent a damages expert from isolating their respective contributions to a given price decline. And NECA was not required to prove the precise amount of any damages at the pleading stage. Indeed, § 11 works the other way: It presumes that any diminution in value is attributable to the alleged misrepresentations, and places the burden on defendants to *disprove* causation. *See* 15 U.S.C. § 77k(e) ("[I]f the defendant proves that any portion or all of [plaintiff's] damages represents other than the depreciation in value of such security resulting from such part of the registration statement[] with respect to which [defendant's] liability is asserted, . . . such portion of or

all such damages shall not be recoverable."); *In re Morgan Stanley Info. Fund*, 592 F.3d at 359 n.7.[15]

Third, the district court also conflated the price of a security and its "value." The absence of an "actual market price for [a security] at the time of suit" does not defeat an investor's plausible claim of injury from misleading statements contained in that security's offering documents. *NECA-IBEW*, 743 F. Supp. 2d at 292. The value of a security is not unascertainable simply because it trades in an illiquid market and therefore has no "actual market price." Indeed, valuing illiquid assets is an important (and routine) activity for asset managers, an activity typically guided by Statement 157 of the Financial Accounting Standards Board ("FAS 157").[16] Moreover, the fact that financial valuation may be difficult or "involve[] the exercise of judgment" – as defendants observe to be the case with the "complex asset-

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[15] It may well be that, ultimately, the Fund will recover nothing because defendants will prove that any diminution in value is attributable to, *e.g.*, (1) illiquidity, (2) the global financial crisis, or (3) a widening of credit spreads rather than defendants' misrepresentations. But that is irrelevant to whether plaintiff has alleged, at the pleading stage, a cognizable injury under the statute.

[16] Under the "fair value hierarchy" established by FAS 157, the highest priority "input" for valuing assets and liabilities is quoted prices in active markets for identical assets or liabilities. FAS 157 at 12. If such "Level 1" inputs are not available, "Level 2" inputs, such as quoted prices for similar assets or liabilities in active markets, should be used. *Id.* at 12-15. And if "Level 2" inputs are not available – such as when there is "little, if any, market activity for the asset or liability at the measurement date" – "unobservable" "Level 3" inputs, such as model assumptions that take market participant assumptions into account, should be used. *Id.* at 15.

backed instruments at issue here" – does not render plaintiff's allegations of loss of value fatally conclusory. *See* Appellees' Br. 32 (quotation marks omitted).

For these reasons, the judgment of the district court dismissing plaintiff's § 11 claims is vacated and the claims are reinstated. On remand, the court should afford plaintiff leave to replead, *inter alia*, "the price at which [the 2007-10 Class 1AV1 Certificates] shall have been disposed of after suit but before judgment," 15 U.S.C. § 77k(e)(3), and to seek damages rather than rescission for its § 12(a)(2) claim with respect to those Certificates, *see id.* § 77*l*(a)(2).

## CONCLUSION

As stated above, the district court erred to the extent it held plaintiffs lacked class standing to assert the claims of purchasers of certificates backed by mortgages originated by the same lenders that originated the mortgages backing plaintiff's certificates. The district court further erred in requiring plaintiff to plead an out-of-pocket loss in order to allege a cognizable diminution in the value of an illiquid security under § 11. Accordingly, we affirm in part and vacate in part the judgment of the district court dismissing plaintiff's claims and remand with instructions to reinstate plaintiff's §§ 11, 12(a)(2), and 15 claims in respect of the GSAA Home Equity Trust 2007-3, 2007-4, 2007-5, 2007-6, 2007-7, and 2007-10 Offerings, and the GSR Mortgage Loan Trust 2007-3F Offering.

## APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

------------------------------------X

NECA-IBEW HEALTH &
WELFARE FUND, et al.,

Plaintiff,

v. 08 CV 10783 (MGC)

GOLDMAN SACHS & CO.,
et al.,

Defendants.

------------------------------------X

New York, N.Y.
January 28, 2010
10:15 a.m.

Before:

HON. MIRIAM GOLDMAN CEDARBAUM,

District Judge

APPEARANCES

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By: ARTHUR C. LEAHY

SULLIVAN & CROMWELL
Attorneys for Defendant
By: RICHARD H. KLAPPER
MICHAEL T. TOMAINO, JR.
HARSH N. TRIVEDI

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**[Page 40]**

* * *

THE COURT: I am going to grant the motion to dismiss with leave to amend. I think I have made clear during oral argument my view that the Securities Act of 1933 permits claims to be brought only by purchasers of the securities sued on. And Section 11 limits claims based on misstatements in a registration statement to "any person acquiring such security." Similarly, Section 12(a)(2) limits claims based on sellers' misstatements in the sale of a security to the person purchasing such security.

Plaintiff alleges that it purchased mortgage backed certificates from GSAA Home Equity Trust 2007-10 and GSAA Home Equity Trust 2007-5. But does not allege that it purchased certificates from any of the 15 other trusts named in the complaint.

Plaintiff argues that if it establishes standing to sue with respect to the certificates it purchased, nothing more is required. And plaintiff relies on a California decision in the Countrywide case. That is a decision of the District Court in California, In re Countrywide Fin. Corp. Sec. Litigation, 588 F. Supp. 2d 1132. For that essentially deviation from the usual rule of standing. I'm not persuaded that this is such a **[Page 41]** case.

The Act only grants standing for claims by purchasers. Plaintiffs did not purchase certificates from the 15 trusts other than 2007-10 and 2007-5. And plaintiff has not shown that the injuries it alleges based upon purchases of those two trusts are the same injury as those allegedly suffered by purchasers of outlying trusts backed by distinct sets of loans. Other district courts addressing this issue have reached the same conclusion. I refer specifically to Plumbers' Union Local Number 12 Pension Fund v. Nomura Asset Acceptance Corp., 2009 WL 3149775 at *3 and footnote 3, which was decided by Judge Stearns of the Massachusetts District Court on September 30, 2009.

The same conclusion was reached by Judge Crotty of this district in In re Salomon Smith Barney Mutual Fund Fees Litigation, 441 F. Supp. 2d 579, 607. That was decided by Judge Crotty in 2006. Because plaintiff does not allege that it purchased certificates from the 15 other trusts, it lacks standing to bring a suit complaining about the certificates issued by those trusts.

Although plaintiff need not plead damages under Sections 11 and 12(a)(2), the complaint fails to state a claim if the allegations of the complaint do not support any conceivable damages. And here I refer to two Southern District cases, In re Initial Public Offering Sec. Litigation, 544 F. **[Page 42]** Supp. 2d 277, 299, in which Judge Scheindlin of this court said "If a plaintiff has no conceivable damages under Section 11, she cannot state a claim upon which relief can be granted and her Section 11 claims must be dismissed." In a much earlier case, the late Judge Pollack held that "Where it is apparent from the face of the complaint that the plaintiff cannot recover her

alleged losses, dismissal of the complaint pursuant to 12(b)(6) is proper."

Here, plaintiff alleges that "the certificates are no longer marketable at prices anywhere near the prices paid by plaintiff." And that appears in the complaint at paragraph six. It is unclear that that allegation in the face of a specific warning in the offering documents about the possibility in any event that the certificates may not be resalable raises question about whether the plaintiff has suffered any injury. Plaintiff alleges that it is "exposed to much more risk with respect to both the timing and absolute cash flow paid under the certificates that it purchased." But, perhaps this establishes a risk, but a risk is not itself injury. The current complaint does not appear to allege facts permitting an inference that the plaintiff suffered a cognizable loss. And I am giving permission to replead to include facts sufficient to permit such an inference, that is with respect to Section 11.

With respect to Section 12(a)(2), plaintiff must **[Page 43]** allege that it purchased the certificates at issue in a public offering, and may only maintain such an action against statutory sellers from whom it directly purchased the security. Accordingly, courts require plaintiffs to plainly allege the purchase of the securities at issue in a public offering from a statutory seller.

Plaintiff has alleged that it purchased the certificates at issue and that it purchased the certificates for trust 2007-10 directly from Goldman Sachs with GS Mortgage as the issuer. Plaintiff does not allege that it bought any certificates in the public offerings, and also does not allege that it purchased the certificates from trust 2007-5 from Goldman Sachs. Ac-

cordingly, plaintiff in its amended complaint should provide that essential information.

For the foregoing reasons, defendant's motion to dismiss is granted, as I have said, with leave to amend the complaint to allege violations of Sections 11 and 12(a)(2) and 15 only with respect to the certificates that it purchased and consistent with this opinion.

It would be very helpful to the Court if the plaintiff could also tie any alleged misstatements that are actionable on these certificates regarding loan underwriting or appraisal practices to the loans actually underlying the certificates from which it purchased.

How much time do you need?

**[Page 44]**

MR. LEAHY: Your Honor, may we have 60 days?

THE COURT: Yes, of course.

MR. LEAHY: Thank you.

MR. KLAPPER: Your Honor, we would ask that the plaintiff, when it repleads, also submit a new certification from their client as to what they purchased. I believe it's required, and in the prior certification doesn't make clear some of the points that your Honor made clear today as to who they purchased it from, at what price, and from whom and what particular certificate they purchased.

THE COURT: The complaint is not on knowledge?

MR. KLAPPER: Well, there is a certification.

THE COURT: As to that information.

MR. LEAHY: To the extent he is trying to get what particular tranche we bought under, to the extent I can get that information, I would be happy to put it in.

THE COURT: Good. Clearly it is important whom the purchase was made from. And the certifications don't identify the particular certificates?

MR. KLAPPER: No. The original certification just identifies date, amount, and the particular offering in which the certificate was issued. So it just says GSAA 2007-5. The certain amount, face amount, certain date. That's it.

THE COURT: I see. Then what is missing is whom they purchased from and in which offering, or if it was in the **[Page 45]** public offering.

MR. KLAPPER: Well, yes. If it was in the offering as well as what certificate they purchased. Because just saying it is 2007-5 doesn't say whether it was the A1 certificate or the triple B certificate or something like that.

THE COURT: Very well. I will direct that.

MR. LEAHY: No problem, your Honor.

THE COURT: Excellent. Good luck to everybody.

MR. KLAPPER: Thank you, your Honor.

MR. LEAHY: Thank you.

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | | |
|---|---|---|
| ------------------------------------ | X | **MEMO ENDORSED** |
| | : | |
| NECA-IBEW HEALTH & WELFARE FUND, Individually and on Behalf of All Others Similarly Situated, | : | Case No. 08-CV-10783 (MGC) |
| | : | **DEFENDANTS' NOTICE OF MOTION TO DISMISS THE SECOND AMENDED COMPLAINT** |
| Plaintiff, | : | |
| v. | : | |
| GOLDMAN, SACHS & CO., *et al.*, | : | **(ORAL ARGUMENT REQUESTED)** |
| Defendants. | : | |
| | : | |
| ------------------------------------ | X | |

PLEASE TAKE NOTICE that upon the accompanying memorandum of law, dated December 11, 2009, and the accompanying Declaration of Harsh N. Trivedi, dated December 11, 2009, with attached exhibits, defendants Goldman, Sachs & Co., Goldman Sachs Mortgage Company, GS Mortgage Securities Corp., Kevin Gasvoda, Michelle Gill and Daniel L. Sparks, (collectively, "Defendants") will move this Court, before the Honorable Miriam Goldman Cedarbaum, on January 21, 2010 at 9:30 a.m., or at such other time as the Court may order, in Court-

room 14A of the United States Courthouse at 500 Pearl Street, New York, New York 10007, for an Order dismissing the Second Amended Complaint in this action, with prejudice, pursuant to Federal Rules of Civil Procedure 12(b)(1), for lack of standing, and 12(b)(6), for failure to state a claim and as barred by the statute of limitations.

*Motion granted with leave to serve and file a third amended complaint by March 31, 2010.*

*For oral opinion, see record of proceedings.*

*So ordered.*

*January 28, 2010*

S/____________________________
*United States District Judge*

## APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

------------------------------------------X

NECA-IBEW HEALTH &
WELFARE FUND, et ano,

Plaintiffs,

v.

08 CV 10783
(MGC)

GOLDMAN SACHS & CO., ET
AL.,

Defendants.

------------------------------------------X

New York, N.Y.
September 22, 2010
10:40 a.m.

Before:

HON. MIRIAM GOLDMAN CEDARBAUM,

District Judge

APPEARANCES

ROBBINS GELLER RODMAN & DOWD
Attorneys for Plaintiff
By: ARTHUR C. LEAHY

SULLIVAN & CROMWELL
Attorneys for Defendant

By: RICHARD H. KLAPPER
HARSH N. TRIVEDI
MAYA KRUGMAN

* * *

**[Page 7]**

* * *

THE COURT: All right. And is there any expiration date? No, they continue to receive monthly payments under this certificate, as long as they hold the certificate or until the certificate matures.

MR. LEAHY: Or until enough loans default where the payments cannot be made to that particular tranche.

THE COURT: But those are all – none of those has yet happened.

MR. LEAHY: Not to the particular tranche that my client –

THE COURT: That's what we are talking about; that's all you can sue for, your own, not someone else's.

MR. LEAHY: Actually, your Honor, we're suing on behalf of all purchasers of the trust, all tranches at this particular point.

THE COURT: But I have ruled against you on that already. I have held that you must – you may only represent the same certificate, not other people's purchases.

MR. LEAHY: That's not how we understand your Honor's order.

THE COURT: Well, that was my understanding of how I ruled.

**[Page 8]**

MR. LEAHY: Your Honor –

THE COURT: To be a class representative, you can only represent the class of persons or entities that purchased the particular – the certificate from the particular tranche from the particular trust that you purchased.

MR. LEAHY: Your Honor, actually, your earlier ruling was a little bit bigger than that. You basically said you can only sue on behalf of trusts that you purchased in. So we're only suing on behalf all purchasers in the two trusts that my client bought in.

THE COURT: Right. But it must be the same tranche as yours.

MR. LEAHY: That's not what your Honor held.

THE COURT: Well, how many are there in that tranche?

MR. LEAHY: I believe there's probably 10 to 15 different tranches within the trust.

THE COURT: No, no, I understand all of that. But the effects are very different in different tranches.

MR. LEAHY: This is true, your Honor.

THE COURT: And that's why in a class action the class has to be in the same position, basically.

MR. LEAHY: They are, your Honor. They are all told the same misrepresentations, we allege. And what we are getting into now is an issue of how much damages each particular tranche has. And damages are not a bar of the class **[Page 9]** certification. They are all suing on the same misrepresenta-

tions. They didn't have a separate prospectus supplement for each tranche.

THE COURT: Now, wait just a moment.

Damages are not a bar when we are just talking about how long you've held something. Damages are not calculable in the same way for people who have never sold and people who have sold. And they are not calculable in the same way for people in different tranches. Isn't that right?

MR. LEAHY: That's right.

THE COURT: So let's stay for a moment with this plaintiff's situation. Because this plaintiff is claiming to be essentially situated in the same way as those he wants to represent. Isn't that right?

MR. LEAHY: That's correct, your Honor.

THE COURT: OK. And I'd like to focus just on that group of putative plaintiff – class action plaintiffs, the ones who purchased in the first tranche from that particular trust and have not sold.

Did anybody in this class buy before your client, before the plaintiff?

MR. LEAHY: We do not know that.

THE COURT: You don't know. OK. OK.

MR. LEAHY: I imagine so.

* * *

**[Page 57]**

* * *

THE COURT: OK.

I deny the motion to dismiss the allegation under 12 and 15, which is just a subsidiary of 12.

I am going to reserve decision on 11.

But there's no reason not to proceed with discovery.

And at this point, I need a case management plan, because this case has to proceed. And if, indeed, there are fewer than 100 people who bought what the plaintiff bought, there may not be a class action here. But the complaint is all I'm talking about, the plaintiff. I have not certified a class yet, and nobody has asked me to.

I do not think that the plaintiff can sue, as I've told you before, except on the particular certificates that he's talking about – or that it's not "he," it is talking about.

MR. LEAHY: Your Honor, if I may.

We believe we can sue on all tranches of the trust. May we file our motion for class certification? Because that is –

THE COURT: I never prohibit anybody from making any **[Page 58]** motion that the rules permit.

MR. LEAHY: Thank you.

THE COURT: But you should go forward with discovery on this plaintiff.

MR. LEAHY: Certainly. Thank you.

THE COURT: You do not need my permission for that. But what the outcome will be, we will see.

I am raising my own tentative view that fewer than 100 people bought each of these certificates in any particular tranche. We really do not have a viable class. I do not know how many cases have addressed that particular issue.

MR. LEAHY: I suspect none at this point, your Honor.

THE COURT: Time will tell. You will do as you are advised, and the defendants will do as they are advised. But in the meantime, I want the case to move forward.

MR. LEAHY: Yes, your Honor.

MR. KLAPPER: Understood.

THE COURT: Very well. Good luck to everybody.

MR. KLAPPER: Thank you, your Honor.

THE COURT: And I will try to resolve the viability of the complaint under Section 11 as soon as possible.

MR. LEAHY: Your Honor, would you want –

THE COURT: But, in the meantime, because it's viable under 12, that shouldn't interfere with ongoing discovery.

MR. LEAHY: Sure.

**[Page 59]**

Your Honor, defense counsel raised this issue about a well-developed efficient market being prerequisite for damages under Section 11.

If it would be helpful to the Court, we'd like to submit a memorandum on that, because it is our understanding of law that there is no need for an efficient market or a well-developed market to sustain damages.

THE COURT: I would be very interested in seeing whatever you have on that subject.

MR. LEAHY: Thank you.

THE COURT: Very well.

MR. KLAPPER: Thank you.

## APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--------------------------------------X

NECA-IBEW HEALTH &
WELFARE FUND, Individually
and On Behalf of All Others
Similarly Situated,

Plaintiff, OPINION

-against- 08 Civ. 10783 (MGC)

GOLDMAN, SACHS & CO.,
et al.,

Defendants.

--------------------------------------X

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**Cedarbaum, J.**

NECA-IBEW Health & Welfare Fund ("NECA") sues Goldman, Sachs & Co., Goldman Sachs Mortgage Co. ("GSMC"), GS Mortgage, and three individuals (collectively, "Defendants") for violations of Sections 11, 12(a) (2), and 15 of the Securities Act of 1933 (the "1933 Act"), in connection with the sale of mortgage-backed certificates pursuant to offering

documents containing allegedly misleading information.

Defendants have moved to dismiss the Third Amended Complaint in its entirety pursuant to Federal Rules of Civil Procedure 12(b)(1) for lack of standing and 12(b)(6) for failure to state a claim. I denied the motion with respect to the claims brought under Sections 12(a)(2) and 15 of the 1933 Act in open court on September 22, 2010, and reserved decision on whether the claim for violation of Section 11 should be dismissed for failure to allege a cognizable injury. For the reasons that follow, Defendants' motion to dismiss the claim for violation of Section 11 is granted.

## THE COMPLAINT

The following facts are alleged in the complaint or are incorporated by reference.

On October 15, 2007, NECA purchased GSAA Home Equity Trust 2007-10 Asset-Backed Certificates, Class A2A, with a face value of $390,000, directly from Goldman Sachs in the initial public offering. NECA later purchased GSAA Home Equity Trust 2007-5 Asset-Backed Certificates, Class 1AV1, with a face value of $49,827.56 (together, with the Class A2A GSAA Home Equity Trust 2007-10 Asset-Backed Certificates, the "Certificates").

Goldman Sachs was an underwriter in the sale of these certificates. GSMC purchased and pooled the mortgage loans underlying the certificates from various originators and was the sponsor of the offerings. GS Mortgage securitized the loans, depositing them in New York common law trusts and issuing asset-backed certificates through those trusts.

The Certificates entitle the holder to monthly distributions of interest, principal, or both. The Prospectus Supplements to the Registration Statement warn investors that the Certificates may not be liquid:

> Your Investment May Not Be Liquid. The underwriter intends to make a secondary market in the offered certificates, but it will have no obligation to do so. We cannot assure you that such a secondary market will develop or, if it develops, that it will continue. Consequently, you may not be able to sell your certificates readily or at prices that will enable you to realize your desired yield.

(2007-10 Prospectus Supplement at S-35; 2007-5 Prospectus Supplement at S-50.)

NECA continues to hold the Certificates it purchased. According to the complaint, "[t]here has been a market for the resale of investments *like* the Certificates since at least 2007," and NECA "would have netted, at most, between 35 and 45 cents on the dollar" in a hypothetical sale on the secondary market at the time of suit. (Complaint ¶ 93, emphasis added.) The complaint does not allege that NECA has failed to receive any monthly distributions due under the Certificates, but rather that "the holders of the Certificates are exposed to much more risk than the Offering Documents represented with respect to both the timing and absolute cash flow to be received." (Complaint ¶ 6.)

## DISCUSSION

### I. Standard on a Motion to Dismiss

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the dis-

trict court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). The plaintiff bears the burden of establishing subject matter jurisdiction, and a court may consider evidence outside the pleadings in evaluating a motion to dismiss brought under Rule 12(b)(1). *Id.*

By contrast, a court adjudicating a motion to dismiss under Rule 12(b)(6) must accept the allegations of the complaint as true and draw all reasonable inferences in favor of the plaintiff. *See Gryl ex rel. Shire Pharm. Grp. PLC v. Shire Pharm. Grp. PLC*, 298 F.3d 136, 140 (2d Cir. 2002). Nonetheless, to survive a motion to dismiss, the complaint must contain factual allegations "rais[ing] a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. E. 2d 929 (2007). A complaint may not simply offer "'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. E. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 557). Instead, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). In considering whether the plaintiff has made a plausible claim for relief, a court may consider as part of the complaint any statement or documents incorporated in it by reference, as well as documents "integral" to it. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d. Cir. 2002).

## II. Cognizable Injury Under Section 11

Section 11 authorizes a claim by purchasers of registered securities against issuers and other enumerated parties when false or misleading infor-

mation is included in a registration statement. *See* 15 U.S.C. § 77k (2006); *Huddleston v. Herman & MacLean*, 459 U.S. 375, 381, 103 S. Ct. 683, 74 L. E. 2d 548 (1983). At the pleading stage, "[i]f a plaintiff purchased a security issued pursuant to a registration statement, he need only show a material misstatement or omission to establish his *prima facie* case." *Id.* at 382. Although NECA is not required to plead damages under Section 11, it fails to state a claim if the allegations of the complaint do not support any conceivable statutory damages. *See, e.g., In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 351 (S.D.N.Y. 2003) (Scheindlin, J.) (dismissing claims of sellers who sold securities above the offering price for failure to allege cognizable damages). Moreover, NECA lacks standing to sue if it fails to allege an injury in fact. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

Section 11(e) establishes the following measure of damages for plaintiffs:

> The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages [as calculated under subsection (1).]

15 U.S.C. § 77k(e). Section 11(e) makes the absence of loss causation an affirmative defense. *Id.*

NECA contends that it has alleged an injury and damages cognizable under the statute by claiming that "the value of the Certificates has diminished greatly since their original offering, as has the price at which members of the class can dispose of them in the secondary market for these Certificates." (Complaint ¶ 92.) NECA alleges that there has been a secondary market for "investments *like* the Certificates since at least 2007," and that NECA "would have netted, at most, between 35 and 45 cents on the dollar" in a hypothetical sale at the time of suit. (Complaint ¶ 93, emphasis added.) NECA further claims that the value of the Certificates has declined because holders are exposed to greater risk regarding future cash flow.

Defendants argue that insofar as NECA does not allege a termination of monthly distributions due under the Certificates that it purchased, NECA has not suffered an injury cognizable under Section 11. Defendants contend that NECA may not rely on any problem in the secondary market to allege an injury because it was expressly warned in the Prospectus Supplements that it could not rely on the salability of these Certificates. Defendants argue that the allegations regarding the diminution in the "value" of the Certificates misconceive the nature of mortgage-backed securities because investors only suffer loss when they do not receive the "pass-through" cash flow payments to which they are entitled. Because NECA continues to receive those payments, it has suffered no injury cognizable under Section 11 according to Defendants, and NECA's claim is premature.

NECA responds that Section 11(e) permits recovery based upon the decline in "value" of a security, and that its assertion that it could sell only at a loss supports its allegation that the value of the Certificates has declined, notwithstanding the warning regarding the potential illiquidity of the Certificates. NECA relies on *New Jersey Carpenters Health Fund v. DLJ Mortgage Capital, Inc.*, No. 08 Civ. 5653 (PAC), 2010 WL 1473288 (S.D.N.Y. Mar. 29, 2010), in support of its argument that the continuing receipt of distributions under the Certificates does not render its claim premature. In *DLJ Mortgage*, Judge Crotty permitted a Section 11 claim to proceed despite the plaintiff's continued receipt of periodic payments due under mortgage-backed certificates. In that case, the plaintiff alleged a loss of market value and the "[p]laintiff may have purchased the Certificates expecting to resell them, making market value the critical valuation marker for Plaintiff." *Id.* at *5. NECA contends that this reasoning applies with equal force to its own allegations regarding value.

In this case, however, the Certificates were issued with the express warning that they might not be resalable. This is unsurprising given the structure of asset-backed securities, which are "primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period." 17 C.F.R. § 229.1101(c). Because NECA made an investment that it knew might not be liquid, it may not allege an injury based upon the hypothetical price of the Certificates on a secondary market at the time of suit.

Even assuming, *arguendo*, that a decline in market price could provide factual support for the contention that the Certificates have declined in value, the complaint lacks any factual enhancement of the bare assertion that a secondary market for their Certificates actually exists. The complaint merely alleges that there has been a secondary market for "investments *like* the Certificates since at least 2007." (Complaint ¶ 93, emphasis added.) The complaint also fails in turn to allege any facts regarding the actual market price for the Certificates at the time of suit. Thus, even if NECA could raise a cognizable injury by claiming a decline in market price, it has failed to provide factual enhancement of that assertion.[1]

NECA next argues that the "value" of the Certificates has declined based upon their expected cash flow. The complaint alleges that "the holders of the Certificates are exposed to much more risk than the Offering Documents represented with respect to both the timing and absolute cash flow to be received." (Complaint ¶ 6.) NECA argues that the risk of diminished cash flow in the future establishes a present injury cognizable under Section 11. But Section 11 does not permit recovery for increased risk. Instead, to allege an injury cognizable under Section 11, NECA must allege the actual failure to receive payments due under the Certificates. Although

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[1] Moreover, assuming further that NECA provided factual enhancement supporting the allegation of a decline in market price, it would not ultimately be able to recover for the decline attributable to principal payments it has already received. Under Section 11(e), however, the burden would be on Defendants to make that showing.

NECA has had three opportunities to amend its complaint, it has never made that allegation.

## CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the claim for violation of Section 11 is granted.

SO ORDERED.

Date: New York, New York
October 14, 2010

S/___________________________________
MIRIAM GOLDMAN CEDARBAUM
United States District Judge

## APPENDIX F

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | | |
|---|---|---|
| NECA-IBEW HEALTH & WELFARE FUND, Individually and on Behalf of All Others Similarly Situated,<br>Plaintiff,<br>v.<br>GOLDMAN, SACHS & CO., *et al.*,<br>Defendants. | : | **MEMO ENDORSED**<br>Case No. 08-CV-10783 (MGC)<br>**DEFENDANTS' NOTICE OF MOTION TO DISMISS THE THIRD AMENDED COMPLAINT**<br>**(ORAL ARGUMENT REQUESTED)** |

PLEASE TAKE NOTICE that upon the accompanying memorandum of law, dated June 22, 2010, and the accompanying Declaration of Harsh N. Trivedi, dated June 22, 2010, with attached exhibits, defendants Goldman, Sachs & Co., Goldman Sachs Mortgage Company, GS Mortgage Securities Corp., Kevin Gasvoda, Michelle Gill and Daniel L. Sparks, (collectively, "Defendants") will move this Court, before the Honorable Miriam Goldman Cedarbaum, on August 19, 2010 at 9:30 a.m., or at such other time as the Court may order, in Courtroom 14A of the

United States Courthouse at 500 Pearl Street, New York, New York 10007, for an Order dismissing the Third Amended Complaint in this action, with prejudice, pursuant to Federal Rules of Civil Procedure 12(b)(1), for lack of standing, and 12(b)(6), for failure to state a claim and as barred by the statute of limitations.

*Motion denied in part. For oral opinion, see record of proceedings of September 22, 2010. Motion granted in part. See written opinion dated October 14, 2010.*

*So ordered.*

*October 14, 2010*

S/____________________________
*United States District Judge*

## APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-------------------------------------X

NECA-IBEW HEALTH &
WELFARE FUND,
Individually and On Behalf
of All Others Similarly
Situated,

Plaintiffs,

-against-

GOLDMAN, SACHS & CO.,
et al.,

Defendants.

-------------------------------------X

AMENDED ORDER

08 Civ. 10783 (MGC)

CEDARBAUM, J.

Unopposed motion to enter judgment pursuant to Fed. R. Civ. P. Rule 58(d) is granted. For oral opinion, see record of proceedings of May 5, 2011.

SO ORDERED.

Dated: New York, New York
June 8, 2011

S/________________________________
MIRIAM GOLDMAN CEDARBAUM
United States District Judge

## APPENDIX H

The Constitution of the United States, Article III, Section 2 provides in relevant part:

**Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

*   *   *

15 U.S.C. § 77k provides in relevant part:

**§ 77k. Civil liabilities on account of false registration statement**

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such

untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not

knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

*  *  *

15 U.S.C. § 77*l* provides:

**§ 77*l*. Civil liabilities arising in connection with prospectuses and communications**

(a) In general

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraphs (2) and (14) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b) of this section, to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon,

less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) Loss causation

In an action described in subsection (a)(2) of this section, if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) of this section represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

15 U.S.C. § 77*o* provides:

**§ *77o*. Liability of controlling persons**

(a) Controlling persons

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77*l* of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

(b) Prosecution of persons who aid and abet violations

For purposes of any action brought by the Commission under subparagraph (b) or (d) of section 77t of this title, any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this subchapter, or of any rule or regulation issued under this subchapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.

28 U.S.C. § 2072 provides:

**§ 2072. Rules of procedure and evidence; power to prescribe**

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

17 C.F.R. § 229.512 provides in relevant part:

**§ 229.512 (Item 512) Undertakings.**

Include each of the following undertakings that is

applicable to the offering being registered.

(a) Rule 415 Offering.[1] Include the following if the securities are registered pursuant to Rule 415 under the Securities Act (§ 230.415 of this chapter):

The undersigned registrant hereby undertakes:

(1) To file, during any period in which offers or sales are being made, a post-effective amendment to this registration statement:

(i) To include any prospectus required by section 10(a)(3) of the Securities Act of 1933;

(ii) To reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent posteffective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) (§ 230.424(b) of this chapter) if, in the aggregate, the changes in volume and price represent no more than 20% change in the maximum aggregate offering price set forth in the "Calculation of Registration Fee" table in the effective registration statement.

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[1] Paragraph (a) reflects proposals made in Securities Act Release No. 6334 (Aug. 6, 1981).

(iii) To include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement;

*Provided, however*, That:

(A) Paragraphs (a)(1)(i) and (a)(1)(ii) of this section do not apply if the registration statement is on Form S-8 (§ 239.16b of this chapter), and the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the registrant pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) that are incorporated by reference in the registration statement; and

(B) Paragraphs (a)(1)(i), (a)(1)(ii) and (a)(1)(iii) of this section do not apply if the registration statement is on Form S-3 (§ 239.13 of this chapter) or Form F-3 (§ 239.33 of this chapter) and the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the registrant pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in the registration statement, or is contained in a form of prospectus filed pursuant to Rule 424(b) (§ 230.424(b) of this chapter) that is part of the registration statement.

(C) *Provided further, however*, that paragraphs (a)(1)(i) and (a)(1)(ii) do not apply if the registration statement is for an offering of asset-backed securities on Form S-1 (§ 239.11 of this chapter) or Form S-3 (§ 239.13 of this chapter), and the information required to be included in a post-effective amendment is provided pursuant to Item 1100(c) of Regulation AB (§ 229.1100(c)).

(2) That, for the purpose of determining any liability under the Securities Act of 1933, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(3) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

(4) If the registrant is a foreign private issuer, to file a post-effective amendment to the registration statement to include any financial statements required by "Item 8.A. of Form 20-F (17 CFR 249.220f)" at the start of any delayed offering or throughout a continuous offering. Financial statements and information otherwise required by Section 10(a)(3) of the Act need not be furnished, provided that the registrant includes in the prospectus, by means of a post-effective amendment, financial statements required pursuant to this paragraph (a)(4) and other information necessary to ensure that all other information in the prospectus is at least as current as the date of those financial statements. Notwithstanding

the foregoing, with respect to registration statements on Form F-3 (§ 239.33 of this chapter), a post-effective amendment need not be filed to include financial statements and information required by Section 10(a)(3) of the Act or § 210.3-19 of this chapter if such financial statements and information are contained in periodic reports filed with or furnished to the Commission by the registrant pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in the Form F-3.

(5) That, for the purpose of determining liability under the Securities Act of 1933 to any purchaser:

(i) If the registrant is relying on Rule 430B (§ 230.430B of this chapter):

(A) Each prospectus filed by the registrant pursuant to Rule 424(b)(3) (§ 230.424(b)(3) of this chapter) shall be deemed to be part of the registration statement as of the date the filed prospectus was deemed part of and included in the registration statement; and

(B) Each prospectus required to be filed pursuant to Rule 424(b)(2), (b)(5), or (b)(7) (§ 230.424(b)(2), (b)(5), or (b)(7) of this chapter) as part of a registration statement in reliance on Rule 430B relating to an offering made pursuant to Rule 415(a)(1)(i), (vii), or (x) (§ 230.415(a)(1)(i), (vii), or (x) of this chapter) for the purpose of providing the information required by section 10(a) of the Securities Act of 1933 shall be deemed to be part of and included in the registration statement as of the earlier of the date such form of prospectus is first used after effectiveness or the date of the first contract of sale of securities

in the offering described in the prospectus. As provided in Rule 430B, for liability purposes of the issuer and any person that is at that date an underwriter, such date shall be deemed to be a new effective date of the registration statement relating to the securities in the registration statement to which that prospectus relates, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof. *Provided, however*, that no statement made in a registration statement or prospectus that is part of the registration statement or made in a document incorporated or deemed incorporated by reference into the registration statement or prospectus that is part of the registration statement will, as to a purchaser with a time of contract of sale prior to such effective date, supersede or modify any statement that was made in the registration statement or prospectus that was part of the registration statement or made in any such document immediately prior to such effective date; or

(ii) If the registrant is subject to Rule 430C (§ 230.430C of this chapter), each prospectus filed pursuant to Rule 424(b) as part of a registration statement relating to an offering, other than registration statements relying on Rule 430B or other than prospectuses filed in reliance on Rule 430A (§ 230.430A of this chapter), shall be deemed to be part of and included in the registration statement as of the date it is first used after effectiveness. *Provided, however*, that no statement made in a registration statement or prospectus that is part of the registration state-

ment or made in a document incorporated or deemed incorporated by reference into the registration statement or prospectus that is part of the registration statement will, as to a purchaser with a time of contract of sale prior to such first use, supersede or modify any statement that was made in the registration statement or prospectus that was part of the registration statement or made in any such document immediately prior to such date of first use.

(6) That, for the purpose of determining liability of the registrant under the Securities Act of 1933 to any purchaser in the initial distribution of the securities:

The undersigned registrant undertakes that in a primary offering of securities of the undersigned registrant pursuant to this registration statement, regardless of the underwriting method used to sell the securities to the purchaser, if the securities are offered or sold to such purchaser by means of any of the following communications, the undersigned registrant will be a seller to the purchaser and will be considered to offer or sell such securities to such purchaser:

(i) Any preliminary prospectus or prospectus of the undersigned registrant relating to the offering required to be filed pursuant to Rule 424 (§ 230.424 of this chapter);

(ii) Any free writing prospectus relating to the offering prepared by or on behalf of the undersigned registrant or used or referred to by the undersigned registrant;

(iii) The portion of any other free writing prospectus relating to the offering containing mate-

rial information about the undersigned registrant or its securities provided by or on behalf of the undersigned registrant; and

(iv) Any other communication that is an offer in the offering made by the undersigned registrant to the purchaser.

* * *

17 C.F.R. § 229.1110 provides:

§ **229.1110 (Item 1110) Originators.**

(a) Identify any originator or group of affiliated originators, apart from the sponsor or its affiliates, that originated, or is expected to originate, 10% or more of the pool assets.

(b) Provide the following information for any originator or group of affiliated originators, apart from the sponsor or its affiliates, that originated, or is expected to originate, 20% or more of the pool assets:

(1) The originator's form of organization.

(2) To the extent material, a description of the originator's origination program and how long the originator has been engaged in originating assets. The description must include a discussion of the originator's experience in originating assets of the type included in the current transaction. In providing the description, include, if material, information regarding the size and composition of the originator's origination portfolio as well as information material to an analysis of the performance of the pool assets, such as the originator's credit-granting or underwriting criteria for the asset types being securitized.

17 C.F.R. § 230.415 provides:

**§ 230.415 Delayed or continuous offering and sale of securities.**

(a) Securities may be registered for an offering to be made on a continuous or delayed basis in the future, *Provided*, That:

(1) The registration statement pertains only to:

(i) Securities which are to be offered or sold solely by or on behalf of a person or persons other than the registrant, a subsidiary of the registrant or a person of which the registrant is a subsidiary;

(ii) Securities which are to be offered and sold pursuant to a dividend or interest reinvestment plan or an employee benefit plan of the registrant;

(iii) Securities which are to be issued upon the exercise of outstanding options, warrants or rights;

(iv) Securities which are to be issued upon conversion of other outstanding securities;

(v) Securities which are pledged as collateral;

(vi) Securities which are registered on Form F-6 (§ 239.36 of this chapter);

(vii) Mortgage related securities, including such securities as mortgage backed debt and mortgage participation or pass through certificates;

(viii) Securities which are to be issued in connection with business combination transactions;

(ix) Securities the offering of which will be commenced promptly, will be made on a continuous

basis and may continue for a period in excess of 30 days from the date of initial effectiveness;

(x) Securities registered (or qualified to be registered) on Form S-3 or Form F-3 (§ 239.13 or § 239.33 of this chapter) which are to be offered and sold on an immediate, continuous or delayed basis by or on behalf of the registrant, a majority-owned subsidiary of the registrant or a person of which the registrant is a majority-owned subsidiary; or

(xi) Shares of common stock which are to be offered and sold on a delayed or continuous basis by or on behalf of a registered closed-end management investment company or business development company that makes periodic repurchase offers pursuant to § 270.23c-3 of this chapter.

(2) Securities in paragraph (a)(1)(viii) of this section and securities in paragraph (a)(1)(ix) of this section that are not registered on Form S-3 or Form F-3 (§ 239.13 or § 239.33 of this chapter) may only be registered in an amount which, at the time the registration statement becomes effective, is reasonably expected to be offered and sold within two years from the initial effective date of the registration.

(3) The registrant furnishes the undertakings required by Item 512(a) of Regulation S-K (§ 229.512(a) of this chapter), except that a registrant that is an investment company filing on Form N-2 must furnish the undertakings required by Item 34.4 of Form N-2 (§ 239.14 and § 274.11a-1 of this chapter).

(4) In the case of a registration statement pertaining to an at the market offering of equity securities by or on behalf of the registrant, the offering must come within paragraph (a)(1)(x) of this section.

As used in this paragraph, the term “at the market offering” means an offering of equity securities into an existing trading market for outstanding shares of the same class at other than a fixed price.

(5) Securities registered on an automatic shelf registration statement and securities described in paragraphs (a)(1)(vii), (ix), and (x) of this section may be offered and sold only if not more than three years have elapsed since the initial effective date of the registration statement under which they are being offered and sold, *provided, however*, that if a new registration statement has been filed pursuant to paragraph (a)(6) of this section:

(i) If the new registration statement is an automatic shelf registration statement, it shall be immediately effective pursuant to Rule 462(e) (§ 230.462(e)); or

(ii) If the new registration statement is not an automatic shelf registration statement:

(A) Securities covered by the prior registration statement may continue to be offered and sold until the earlier of the effective date of the new registration statement or 180 days after the third anniversary of the initial effective date of the prior registration statement; and

(B) A continuous offering of securities covered by the prior registration statement that commenced within three years of the initial effective date may continue until the effective date of the new registration statement if such offering is permitted under the new registration statement.

(6) Prior to the end of the three-year period described in paragraph (a)(5) of this section, an issuer may file a new registration statement covering securities described in such paragraph (a)(5) of this section, which may, if permitted, be an automatic shelf registration statement. The new registration statement and prospectus included therein must include all the information that would be required at that time in a prospectus relating to all offering(s) that it covers. Prior to the effective date of the new registration statement (including at the time of filing in the case of an automatic shelf registration statement), the issuer may include on such new registration statement any unsold securities covered by the earlier registration statement by identifying on the bottom of the facing page of the new registration statement or latest amendment thereto the amount of such unsold securities being included and any filing fee paid in connection with such unsold securities, which will continue to be applied to such unsold securities. The offering of securities on the earlier registration statement will be deemed terminated as of the date of effectiveness of the new registration statement.

(b) This section shall not apply to any registration statement pertaining to securities issued by a face-amount certificate company or redeemable securities issued by an open-end management company or unit investment trust under the Investment Company Act of 1940 or any registration statement filed by any foreign government or political subdivision thereof.

Federal Rule of Civil Procedure 23 provides:

**Rule 23. Class Actions**

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding

declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class

claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and pre-

sent claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who

had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney' Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for mo-

tions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Federal Rule of Civil Procedure 82 provides:

**Rule 82. Jurisdiction and Venue Unaffected**

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391-1392.