UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): _____ Caption [use short title] _____

Motion for: _____

Set forth below precise, complete statement of relief sought:

_____

_____

_____

_____

MOVING PARTY: _____ **OPPOSING PARTY:** _____

- ☐ Plaintiff ☐ Defendant
- ☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: _____ **OPPOSING ATTORNEY**: _____

[name of attorney, with firm, address, phone number and e-mail]

_____ _____

_____ _____

_____ _____

_____ _____

Court-Judge/Agency appealed from: _____

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

☐ Yes ☐ No (explain): _____

_____

Opposing counsel's position on motion:

☐ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:

☐ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency: _____

_____

_____

Is oral argument on motion requested? ☐ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☐ No If yes, enter date: _____

Signature of Moving Attorney:

_____ **Date:** _____ Has service been effected? ☐ Yes ☐ No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: _____ By: _____

Form T-1080

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW JERSEY CARPENTERS HEALTH FUND, on Behalf of Itself and All Others Similarly Situated, Plaintiff-Appellant, v. THE ROYAL BANK OF SCOTLAND GROUP, et al., Defendants-Appellees.	No. 12-1707-cv ECF Case Electronically Filed

AFFIRMATION OF DAVID R. STICKNEY IN SUPPORT OF MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

I, DAVID R. STICKNEY, under penalty of perjury, hereby declare as follows:

1. I am an attorney admitted to the bar of the United States Court of Appeals for the Second Circuit, and am a partner with the law firm Bernstein Litowitz Berger & Grossmann LLP, counsel for Amicus Curiae National Association of Shareholder and Consumer Attorneys ("NASCAT"). Our offices are located at 12481 High Bluff Drive, San Diego, CA 92130. I am over 18 years of age and not a party to the above-referenced matter.

2. I submit this declaration in support of NASCAT's Motion for Leave to File an *Amicus Curiae* Brief.

3. The statements in this Declaration are made on my personal knowledge, or on my information and belief after reasonable investigation. As to those matters not within my personal knowledge, I believe them to be true.

4. NASCAT requested consent to file an *Amicus Curiae* brief from all parties in this action. The Plaintiff-Appellant has consented to this filing; Defendants-Appellees RBS Greenwich Capital, Wachovia Capital Markets, and Deutsche Bank Securities oppose this filing. The remaining Defendants-Appellees have not stated their position.

INTERESTS OF AMICUS CURIAE

6. NASCAT is a trade organization and public policy voice for lawyers interested in a strong system of federal and state legal protections for investors and consumers. NASCAT and its members are committed to representing victims of corporate abuse, fraud and white collar criminal activity in cases with the potential to advance the state of the law, educate the public, modify corporate behavior, and improve access to justice and compensation for those who have suffered injury at the hands of corporate wrongdoers. NASCAT has a deeply-rooted interest in one portion of the District Court's holding in this case, as described below.

THE PROPOSED *AMICUS CURIAE* BRIEF IS DESIRABLE AND THE MATTERS ASSERTED THEREIN ARE RELEVANT TO THE DISPOSITION OF THE CASE

7. The District Court held that the named plaintiff lacked "standing" to represent a class composed of investors who purchased securities other than the precise securities purchased by the named plaintiff. NASCAT believes that this interpretation of the "standing" requirements in a class action – which conflated the issues of statutory standing, Article III standing, and Rule 23 requirements – unduly inhibits the maintenance of class actions, and is directly contrary to numerous Supreme Court and Second Circuit precedents. As these precedents make clear, so long as a named plaintiff has standing to bring claims on its own behalf against all of the named defendants, any questions regarding the named plaintiff's ability to represent absent class members should be decided after discovery, on a full record, in the context of a motion for class certification under Rule 23.

8. NASCAT believes that it should be permitted to file the accompanying *amicus curiae* brief because the issue of a named plaintiff's standing to represent absent class members in a class action has broad implications that go well beyond this particular appeal and the interests of the parties. As explained more fully in the proposed amicus brief, the District Court's reasoning,

if adopted by this Court, runs contrary to the reasoning that has been employed in numerous other class action contexts, including well-established precedents under the securities laws as well as other areas of law.

10. Because many NASCAT members have decades of experience advising public and private institutional investors seeking to fulfill the leadership roles ascribed to them by Congress through the PSLRA, NASCAT has a "uniquely positioned" perspective that "could prove helpful to the Court" shedding light on these issues. *Weininger v. Castro*, 418 F. Supp. 2d 553, 555 (S.D.N.Y. 2006) (granting motion to file amicus brief); *see also Neonatology Assocs.*, P.A. v. CI.R., 293 F.3d 12S, 132 (3d Cir. 2002) (noting that it is preferable to err on the side of granting leave to file amicus curiae brief unless it is obvious that the proposed briefs do not meet Fed. R. App. P. 29's "criteria as broadly interpreted.").

11. For the foregoing reasons, NASCAT respectfully seeks this Court's leave to file a brief as *amicus curiae* in support of Plaintiff-Appellant pursuant to Fed. R. App. P. 29.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct. Executed on June 25, 2012.

/s David R. Stickney
DAVID R. STICKNEY
BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP
12481 High Bluff Drive, Suite 300
San Diego, CA 92130
Tel: (858) 793-0070
Fax: (858) 793-0323

EXHIBIT A

12-1707-cv

United States Court of Appeals

for the

Second Circuit

NEW JERSEY CARPENTERS HEALTH FUND,
on Behalf of Itself and All Others Similarly Situated,

Plaintiff-Appellant,

v.

THE ROYAL BANK OF SCOTLAND GROUP, PLC, GREENWICH CAPITAL HOLDINGS, INC., GREENWICH CAPITAL MARKETS, INC., DBA RBS Greenwich Capital, WACHOVIA CAPITAL MARKETS, LLC, sued herein as Wachovia Securities, LLC, DEUTSCHE BANK SECURITIES, INC., NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2006-3, NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2006-4, NOVASTAR MORTGAGE

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS (NASCAT) IN SUPPORT OF APPELLANTS

Of Counsel:
DAVID R. STICKNEY
ANN M. LIPTON

BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP
Attorneys for Amicus Curiae National Association of Shareholder and Consumer Attorneys (NASCAT)
12481 High Bluff Drive, Suite 300
San Diego, California 92130
(858) 793-0070

FUNDING TRUST, SERIES 2006-5, NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2006-6, NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1, NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-2, NOVASTAR MORTGAGE FUNDING CORPORATION, SCOTT F. HARTMAN, GREGORY S. METZ, W. LANCE ANDERSON, MARK A. HERPICH, SCOTT F. HARTMAN, NOVASTAR MORTGAGE INC., NOVASTAR MORTGAGE FUNDING CORPORATION, GREGORY S. METZ, RBS SECURITIES, INC., WELLS FARGO ADVISORS, LLC, FKA WACHOVIA SECURITIES LLC,

Defendants-Appellees,

MOODYS INVESTORS SERVICE, INC,
THE MCGRAW-HILL COMPANIES, INC.,

Defendants.

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INTEREST OF AMICUS CURIAE

The National Association of Shareholder and Consumer Attorneys ("NASCAT") is a trade organization and public policy voice for lawyers interested in a strong system of federal and state legal protections for investors and consumers. NASCAT and its members are committed to representing victims of corporate abuse, fraud and white collar criminal activity in cases with the potential to advance the state of the law, educate the public, modify corporate behavior, and improve access to justice and compensation for those who have suffered injury at the hands of corporate wrongdoers.[1]

NASCAT has a deeply-rooted interest in one of the issues this case presents, namely, the scope of a named plaintiff's "standing" to represent absent investors. Specifically, as discussed further below, the District Court erred by holding that the named plaintiff lacked "standing" to bring claims based on securities it had not personally purchased. This holding improperly conflated the standing requirements for individual claims under Section 11 of the Securities Act of 1933 ("Securities Act"), constitutional standing requirements, and the requirements of Rule 23. If endorsed by this Court, the District Court's holding would disrupt

[1] This brief was not authored in whole or in part by any party nor did any such party or its counsel contribute money that was intended to fund preparing or submitting this brief. There is no person other than the amicus curiae, its members, or its counsel who contributed money that was intended to fund preparing or submitting this brief.

settled precedents and introduce extraordinary uncertainty into the standards for certifying a class under Federal Rule of Civil Procedure 23.

SUMMARY OF ARGUMENT

The District Court held that N.J. Carpenters Health Fund ("NJ Carpenters") did not have "standing" to represent absent class members who had purchased different MBS Certificates than those purchased by NJ Carpenters itself, and that therefore claims based on those Certificates would be dismissed. *See N.J. Carpenters Health Fund v. NovaStar Mortg., Inc.*, 2011 WL 1338195, at *6 (S.D.N.Y. Mar. 31, 2011). In so doing, the District Court erroneously conflated the question of "standing" with the requirements of Rule 23. It is well-settled that in a class action, so long as at least one named plaintiff has standing to advance claims on its own behalf against the defendants, standing is satisfied. Any further inquiry – such as the ability of the plaintiff to represent absent class members – is considered in the context of a motion for class certification under Rule 23. This rule has been recited in countless appellate and district level decisions, including the decisions of this Court. Here, there is no dispute that NJ Carpenters had standing to advance its own claims; thus, the District Court should have considered its ability to represent absent class members solely in the context of a motion for class certification.

ARGUMENT

I. Standing Requirements for Section 11 Plaintiffs

Under Article III of the Constitution, standing consists of three elements. First, the plaintiff must have "suffered an injury in fact - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotations omitted). Second, the injury must be traceable to the defendant's conduct. Third, the injury must be redressable by a favorable judgment. *See id.*

Additionally, particular federal statutes impose "stautory standing" requirements on plaintiffs above those created by Article III. *Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds*, 571 F.3d 672, 677 (7th Cir. 2009).[2] Section 11 of the Securities Act, 15 U.S.C. §77k, provides statutory standing to "any person who purchased a security that was originally registered under [an] allegedly defective registration statement -- so long as the security was indeed issued under *that* registration statement and not another." *DeMaria v. Andersen*, 318 F.3d 170, 176 (2d Cir. 2003) (quotations omitted). The requirement that the plaintiff be able

[2] The Seventh Circuit described the phrase "statutory standing" as "confusing," and explained that it "usually refers to a situation in which, although the plaintiff has been injured and would benefit from a favorable judgment and so has standing in the Article III sense, he is suing under a statute that was not intended to give him a right to sue; he is not within the class intended to be protected by it." 571 F.3d at 677.

to establish that his or her security was issued pursuant to the defective registration statement is known as "traceability," meaning that the plaintiff must be able to "trace" his or her purchases to the defective registration statement. *Id*.

Here, the Defendants-Appellees filed a single registration statement in 2006 and, based on that registration statement, conducted six separate offerings of Certificates in less than a year. NJ Carpenters purchased Certificates in the 2007-2 Offering, and alleged that it suffered economic losses as a result. NJ Carpenters's purchases are traceable to an allegedly defective registration statement. Therefore, NJ Carpenters has standing – under both Article III and Section 11 – to advance its own claims.

Without disputing NJ Carpenters's standing to advance claims on its own behalf, the District Court nonetheless concluded that NJ Carpenters did not have "standing" to serve as a representative for a class defined to include investors in the Certificates that NJ Carpenters had not purchased, namely, the 2006-3, 2006-4, 2006-5, 2006-6, and 2007-1 series. In support of this holding, the District Court cited one case addressing the statutory standing requirements for Section 11, *see NovaStar*, 2011 WL 1338195, at *6 (citing *In re Global Crossing, Ltd. Sec. Litig.*, 313 F.Supp. 2d 189, 207 (S.D.N.Y. 2003)), and several cases addressing Article III standing, *see NovaStar*, 2011 WL 1338195, at *6 (citing, inter alia, *New Jersey Carpenters Vacation Fund v. Royal Bank of Scotland Group, PLC*, 720 F. Supp. 2d

254 (S.D.N.Y. 2010); *In re Salomon Smith Barney Mutual Fund Fees Litigation*, 441 F. Supp. 2d 579 (S.D.N.Y. 2006)). However, whether analyzed under Article III or Section 11, the District Court erred by characterizing NJ Carpenters's ability to represent absent class members as a "standing" problem rather than as a question to be addressed within the context of class certification under Federal Rule of Civil Procedure 23.

II. NJ Carpenters Had Constitutional Standing to Represent Absent Class Members who Purchased Different Certificates

A. Constitutional Standing As Applied to Class Actions

Ordinarily, no party has standing to litigate the claims of another. Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982). In a class action, once a plaintiff establishes that she has Article III standing to advance claims on her own behalf, any "standing" requirements concerning her ability to advance the claims of absent class members are determined *not* by reference to Article III, but through satisfaction of the requirements of Federal Rule of Civil Procedure 23. Or, as the Supreme Court explained, in a class action, once the named plaintiff establishes that she has suffered an injury that is "real and immediate, not conjectural or hypothetical," it "shift[s] 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.'" *Sosna v. Iowa*, 419 U.S. 393, 403 (1975) (quoting Rule 23(a)). Thus, as this Court explained, "To 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) (quotations omitted).[3]

In *Cordes & Co. Fin. Serv. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91 (2d Cir. 2007), this Court elaborated on this principle. The Court explained that, under ordinary standing doctrine, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.* at 100 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). In a class action, "[t]his principle requires ... that '[a]n individual litigant seeking to maintain a class action ... meet the prerequisites of numerosity, commonality,

[3] The requirement that for every named defendant there must be a named plaintiff who can assert a claim against that defendant is an outgrowth of the principle that the named plaintiff must show that she personally possesses Article III standing. For a named plaintiff to establish Article III standing on her own behalf, her injuries must be traceable to the defendants' conduct. *See Lujan* 504 U.S. at 560-61. If there are defendants included in the action against whom no named plaintiff can assert a claim, the named plaintiffs cannot demonstrate Article III standing on their own behalf with respect to those defendants. Here, because NJ Carpenters personally has claims against every Defendant-Appellee, there is no dispute that "for every named defendant there [is] at least one named plaintiff who can assert a claim directly against that defendant."

typicality, and adequacy of representation specified in Rule 23(a).'" *Id.* at 101 (quoting *Falcon*, 457 U.S. at 156); *accord In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 307 (3d Cir. 1998) (once a representative plaintiff demonstrates a personal injury-in-fact traceable to the defendant, "there remains no further separate class standing requirement in the constitutional sense ... 'the issue [becomes] one of compliance with the provisions of Rule 23, not one of Article III standing'" (quotations omitted)).

The principle that Article III standing concerns the named plaintiffs' claims relative to the defendants, and issues regarding the named plaintiffs' ability to represent absent class members are examined at class certification, has been reiterated in countless precedents. For example, in *Fallick v. Nationwide Mutual Insurance Co.*, 162 F.3d 410 (6th Cir. 1998), the plaintiff alleged that his ERISA plan administrator had misapplied a coverage exclusion. He sought to represent a class of beneficiaries of other ERISA plans that were administered by the same defendant in a similar manner. The district court concluded that he had no Article III standing to advance claims based on plans in which he had no interest. The Sixth Circuit reversed, calling the district court's analysis "fundamentally flawed":

> [The district court] confuses the issue of a plaintiff's standing under Article III vis-a-vis a defendant with the relationship between a potential class representative and absent class members, which is governed by Rule 23 of the Federal Rules of Civil Procedure. … [O]nce an individual has alleged a distinct and palpable injury to himself he has standing to challenge a practice even if the injury is of a sort shared by a large class of possible litigants. 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 Rule 23 of the Federal Rules of Civil Procedure.

Id. at 422-23 (quotations omitted); *Piazza v. Ebsco Indus.*, 273 F.3d 1341, 1351 (11th Cir. 2001) ("Even though Piazza only has standing to assert this breach of fiduciary duty claim for the period of his participation in the [ERISA] Plan, he may still represent the class [which includes other periods] if his claim has the requisite *typicality*.").[4]

[4] *See also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 592 (8th Cir. 2009) (district court erred by "conflating" Article III with the question whether plaintiff could pursue claims of absent class members; because an ERISA plan participant had Article III standing to assert his own claim, he could assert claims on behalf of other plan participants, even if some of the challenged conduct occurred before the plaintiff became a plan participant); *Arreola v. Godinez*, 546 F.3d 788, 795 (7th Cir. 2008) (Article III standing concerns whether the named plaintiff suffered an injury redressable by a lawsuit; questions regarding the plaintiff's ability to seek relief on behalf of a class are evaluated under Rule 23); *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 122 (3d Cir. 1985) ("[C]ontrary to the defendants' contentions, the issue here is one of compliance with the provisions of Rule 23, not one of Article III standing. Each of the named plaintiffs has presented claims of injury to himself and has alleged facts which present a case or controversy under the Constitution.").

District courts also adopt this analysis. *See, e.g.*, *Indergit v. Rite Aid Corp.*, 2009 WL 1269250, at *3-4 (S.D.N.Y. May 4, 2009) ("Once a plaintiff establishes individual standing, Article III's requirements are met ... the issue of whether a named plaintiff can assert claims on behalf of absent class members is determined at the class certification stage of the litigation. Numerous cases illustrate this basic principle."); *Henry v. Circus Circus Casinos, Inc.*, 223 F.R.D. 541, 544 (D. Nev. 2004) ("[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. At that point, Article III standing is satisfied and only then will the inquiry shift to a Rule 23 analysis."); *Vuyanich v. Republic Nat'l Bank of Dallas*, 82 F.R.D. 420, 428 (N.D. Tex. 1979) ("In a class action [] the trial court initially must address whether the named plaintiffs have standing under Article III to assert their individual claims. If that initial test is met, the court must then scrutinize the putative class and its representatives to determine whether the relationship between them is such that under the requirements of Rule 23 the named plaintiffs may represent the class.").[5]

[5] *See also* 7AA Fed. Prac. & Proc. Civ. §1785.1 (3d ed. 2010) ("Representative parties who have a direct and substantial interest have standing; the question whether they may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation."); *id.* ("While a potential class representative must demonstrate individual standing vis-a-vis defendant, once standing has been established, whether he will be able to represent the putative

Because the class representative only needs to establish individual standing, representative plaintiffs may bring claims on behalf of absent class members who have similar, but not identical, injuries. For example, plaintiffs in an employment action may represent absent class members who held different jobs so long as the unlawful employment practice affected all class members similarly.[6] Beneficiaries of one ERISA plan may sue on behalf of beneficiaries of other plans.[7] Plaintiffs who purchase one product may sue on behalf of class members who purchased different products.[8] Plaintiffs who sign one contract may represent persons who signed different contracts.[9] Plaintiffs injured by one set of fraudulent statements

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class, including absent class members, depends solely on whether he is able to meet the additional criteria encompassed in Rule 23.").

[6] *See Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003); *Hartman v. Duffey*, 19 F.3d 1459, 1471-72 (D.C. Cir. 1994); *Indergit*, 2009 WL 1269250, at *4.

[7] *See Fallick*, 162 F.3d at 423; *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993).

[8] *See Daffin v. Ford Motor Co.*, 458 F.3d 549, 551-55 (6th Cir. 2006); *Bruno v. Quten Research Inst., LLC*, 2011 WL 5592880, at *3-4 (C.D. Cal. Nov. 14, 2011); *Brazil v. Dell Inc.*, 2008 WL 4912050, at *5 (N.D. Cal. Nov. 14, 2008); *Benedict v. Altria Grp., Inc.*, 241 F.R.D. 668, 675 (D. Kan. 2007); *Elias v. Ungar's Food Products Inc.*, 252 F.R.D. 233, 244 (D.N.J. 2008); *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 342 (N.D. Ohio 2001).

[9] *See DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174-75 (8th Cir. 1995).

may represent class members injured by different, but similar, fraudulent statements.[10] The list is endless.[11]

Plainly, none of these plaintiffs had "standing" to bring claims based on jobs they did not hold, or products they did not purchase, or ERISA plans for which they were not beneficiaries. Nonetheless, even *without* "standing" to raise such claims on their own behalf, they may still advance them on behalf of absent class members when their own claims – for which they do have standing – have "the same essential characteristics as the claims of the class at large." *Piazza*, 273 F.3d at 1351 (quotations omitted). Indeed, it is a fundamental tenet of Rule 23 jurisprudence that the named plaintiffs' injuries must be similar – but not *identical* to – the injuries of the absent class members. *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999) (the "factual background of each named plaintiff's claim" need not be "identical to that of all class members" so long as the

[10] *Bruno*, 2011 WL 5592880, at *3-4; *In re Connetics Corp. Sec. Litig.*, 542 F. Supp. 2d 996, 1003-04 (N.D. Cal. 2008); *In re VeriSign Inc. Sec. Litig.*, 2005 WL 88969, at *4 (N.D. Cal. Jan. 13, 2005); *Adam v. Silicon Valley Bancshares*, 1994 WL 374314, at *1 (N.D. Cal. Apr. 18, 1994).

[11] Plaintiffs who were injured by one 900-number program may represent absent class members injured by different 900-numbers that the named plaintiffs never dialed. *See Andrews v. AT&T*, 95 F.3d 1014, 1022-23 (11th Cir. 1996). Plaintiffs who worked in one store may represent class members who worked in different stores. *See Doyel v. McDonald's Corp.*, 2009 WL 350627, at *1 (E.D. Mo. Feb. 10, 2009). Plaintiffs covered by one collective bargaining agreement may represent class members covered by different collective bargaining agreements. *Prater v. Ohio Educ. Ass'n*, 2008 WL 2566364, at *6 (S.D. Ohio June 26, 2008).

"disputed issue of law or fact occup[ies] essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class" (quotations omitted)).

To be sure, sometimes plaintiffs' individual claims will differ too greatly from those of absent class members to allow them to serve as representatives. But these determinations are fact-specific and made upon a developed record as part of a motion for class certification, not on a motion to dismiss and prior to discovery. *See, e.g.*, *Sprague v. GMC*, 133 F.3d 388, 398-99 (6th Cir. 1998); *Hartman*, 19 F.3d at 1472-73.

This approach is also consistent with Supreme Court precedent. In *Blum v. Yaretsky*, 457 U.S. 991 (1982), the Supreme Court held that certain named plaintiffs did not have "standing" to represent a subset of absent class members because the subset experienced a different injury than the named plaintiffs. *See id.* at 1001-02. In *Falcon*, the same question was asked and answered under Rule 23. *See* 457 U.S. at 158-60. For this reason, the Supreme Court later acknowledged "tension in our prior cases" regarding the distinction between typicality and standing, *Gratz v. Bollinger*, 539 U.S. 244, 263 n.15 (2003), but concluded that whether characterized as Rule 23 typicality or Article III standing, when considering absent class members, the relevant question is whether the injury suffered by the representative plaintiffs "implicate[s] a significantly different set of

concerns" than the injuries suffered by the rest of the class, *id.* at 265. This inquiry is, essentially, identical to that under Rule 23(a). *See, e.g.*, *Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir. 1993) (Rule 23(a) is satisfied where the defendant is is alleged to have acted "*in the same general fashion* against the class representatives and against other members of the class" (emphasis in original)). The Supreme Court's analysis is thus fully consistent with this Court's recognition that when considering the plaintiff's ability to represent absent class members, "standing" is satisfied via compliance with Rule 23. *See Cordes*, 502 F.3d at 100-01.[12]

B. Securities Cases Follow The Same Principles

The Constitution does not mandate a different rule for securities. Where a single fraudulent scheme results in similar false statements about multiple securities, the plaintiff need not have purchased every security to represent a class of all purchasers. For example, in *In re Prudential Securities Inc. Ltd Partnerships Litigation,* 163 F.R.D. 200 (S.D.N.Y. 1995), the defendants committed fraud in connection with 700 partnerships. Although the named plaintiffs had invested in only a few partnerships, the court, employing an ordinary Rule 23 analysis, held that the named plaintiffs could bring claims on behalf of all partnership investors.

[12] *Blum* and *Bollinger* were decided on a full record, and in *Falcon*, the Supreme Court remanded the case to develop a factual record, holding that it was inappropriate to make this determination on the pleadings. *See* 457 U.S. at 161. This further demonstrates that whether plaintiffs who personally suffered an injury may represent absent class members is a fact-intensive question governed by Rule 23 standards.

See id. at 208. In *Hevesi v. Citigroup, Inc.*, 366 F.3d 70, 82-83 (2d Cir. 2004), this Court cited *Prudential* in support of its holding that a lead plaintiff *need not* have standing to bring all claims in a securities class action, so long as the lead plaintiff can meet requirements for Rule 23 typicality.

In fact, as NJ Carpenters pointed out in its brief, *see* Pltf. Br. at 56-58, courts commonly permit representative plaintiffs to pursue securities fraud claims on behalf of absent class members who purchased different securities, or relied on different registration statements and prospectuses, than those underlying the named plaintiffs' purchases. *See Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912 (3d Cir. 1992); *Eisenberg v. Gagnon*, 766 F.2d 770, 784 (3d Cir. 1985); *Green v. Wolf Corp.*, 406 F.2d 291, 299 (2d Cir. 1968); *Kennedy v. Tallant*, 710 F.2d 711, 714 (11th Cir. 1983); *In re Dynex Capital, Inc. Sec. Litig.*, 2009 WL 3380621, at *18 (S.D.N.Y. Oct. 19, 2009); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 2005 WL 2148919, at *8 (S.D.N.Y. Sept. 6, 2005); *In re Dreyfus Aggressive Growth Mut. Fund Litig.*, 2000 WL 1357509, at *3 (S.D.N.Y. 2000); *cf. Laboy v. Bd. of Trs. of Bldg. Serv. 32 BJ SRSP*, 2012 WL 701397, at *1 n.2 (S.D.N.Y. Mar. 6, 2012) (ERISA plaintiff has standing to advance claims on behalf of 401(k) plan participants who invested in different securities – mutual funds –

than those in which the plaintiff invested).[13] Indeed, it hardly makes sense that named plaintiffs are able to represent absent class members who purchased different, but similar, products, *see* cases cited *supra* n.8, but cannot do so when the product in question happens to be a security.

This was exactly the analysis recently employed in *In re Bear Stearns Mortgage Pass-Through Certificates Litigation*, 2012 WL 1076216 (S.D.N.Y. Mar. 30, 2012). The issuer conducted several offerings of mortgage-backed certificates. Each offering was divided into "tranches," representing payment priority. Investors who purchased certificates from the more senior "tranches" had the first claims to payment, while investors who purchased the more junior "tranches" had lower payment priority. Although at least one named plaintiff had purchased certificates in every offering, the defendants argued that the named plaintiffs did not have Article III standing to represent investors in different *tranches*, because each *tranche* was, technically, a unique security. The court resoundingly rejected the argument, writing:

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[13] Most recently, in *Facciola v. Greenberg Traurig LLP*, 2012 WL 1021071 (D. Ariz. Mar. 20, 2012), the court allowed purchasers of certain mortgage-backed securities to represent purchasers of other mortgage-backed securities in a fraud class action brought under Arizona state law. As the court put it, "Because lead plaintiffs, as well as their proposed class members, suffered the same injury from the same fraudulent scheme, and share a common statutory remedy, we conclude that the lead plaintiffs have standing to assert claims on behalf of the proposed classes regardless of the specific type of security offering they purchased." *Id.* at *2.

> Every time a lead plaintiff prosecutes an action on behalf of a class, she brings claims based on injuries she did not personally suffer — in other words, claims she could not have advanced individually. For example, the cancer-stricken lead plaintiff in an asbestos case brings claims based on other peoples' cancers; a lead plaintiff, paralyzed from the waist down due to a car brake malfunction, can bring product liability claims on behalf of other people who were paralyzed from the neck down due to the same faulty brake design. To say, as Defendants do, that named Plaintiffs cannot bring claims on behalf of purchasers of other securities …is analogous to asserting that a driver who suffered injury when her brakes malfunctioned cannot sue on behalf of purchasers of cars with the same defective brake design because a plaintiff cannot claim to have been harmed by a car she never drove.
>
> Defendants' assertion that named Plaintiffs lack standing over tranches they did not purchase because each tranche differs in its particularities is no more convincing. [The argument] is akin to asserting that the hypothetical plaintiff who drove a red two-door model lacks standing to sue on behalf of those who were driving the blue four-door model with the same faulty brake design. They are, in short, legally inconsequential distinctions….
>
> Once, as here, a named plaintiff has established that she suffered the same species of injury as the members of the class, traceable to the same unlawful conduct by a defendant, she has fulfilled the requirements of constitutional standing. Having satisfied Article III's standing criteria, ***the dissimilarities between the tranches is an issue appropriately left to the class certification stage***.

Id. at *24 (emphasis added).

Amicus acknowledges that the First Circuit's decision in *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762 (1st Cir. 2011) employed a different analysis, but respectfully submits that the First Circuit's reasoning was too narrow.

Nomura involved mortgage-backed securities similar to those involved in this action. The defendant Nomura (unlike the defendants here) did not originate mortgages, but instead purchased mortgages from others. The mortgages were then divided among eight trusts, each of which issued a series of mortgage-backed certificates. These eight offerings were underwritten by various underwriters. The named plaintiffs had purchased certificates in two of the eight offerings, and brought Securities Act claims against Nomura and all of the underwriters alleging that the registration statements for each offering falsely characterized the quality of the mortgages. *See id.* at 766-67. Although the named plaintiffs personally had claims against Nomura (who issued both certificates), and the underwriters involved with those certificates, the named plaintiffs did not personally have claims against the underwriters who were only associated with offerings from the remaining six trusts. *See id.* at 769. The District Court, acting on the pleadings, dismissed claims related to the certificates that the named plaintiffs had not purchased on "standing" grounds. *See Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 658 F. Supp. 2d 299, 303-04 (D. Mass. 2009).

On appeal, the First Circuit first relied on its own precedent in *Barry v. St. Paul Fire & Marine Insurance Co.*, 555 F.2d 3 (1st Cir. 1977) to reach the unremarkable conclusion that the named plaintiffs did not have standing to pursue

claims against the underwriters who were only associated with certificates that the named plaintiffs had not purchased. *See* 632 F.3d at 771. In this, the Circuit's holding was in accord with the rule announced in *Central States*, namely, that "for every named defendant there must be at least one named plaintiff who can assert a claim directly against that defendant." 504 F.3d at 241; *see also supra* n.3.

The First Circuit then turned to whether the named plaintiffs could pursue claims on behalf of absent class members against the *common* defendant, Nomura. Apparently relying on the same line of precedent, the Circuit concluded that the named plaintiffs did not have standing to represent absent class members who had purchased different securities. *See* 632 F.3d at 771. The Court allowed that if "the claims of the named plaintiffs necessarily give them − not just their lawyers − essentially the same incentive to litigate the counterpart claims of the class members because the establishment of the named plaintiffs' claims necessarily establishes those of other class members. The matter is one of identity of issues not in the abstract but at a ground floor level." *Id.* at 770. But the court concluded that this test was not satisfied because each trust was backed by a different combination of mortgages from different lenders, and thus proof of the plaintiff's claims in connection with one offering would not necessarily prove claims with respect to a different offering. *See id.* at 771.

However, in so holding, the First Circuit conflated two distinct scenarios: namely, scenarios in which the named plaintiffs do not personally have claims against all *defendants*, and scenarios in which the named plaintiffs *do* have claims against all defendants, but their claims are premised on slightly different facts than those of absent class members. In this, the First Circuit misread the precedents on which it relied, erroneously concluding that *Fallick* represented a "new" line of precedent permitting named plaintiffs to pursue claims even against defendants who had not personally injured them. *See* 632 F.3d at 770 n.7. This was incorrect: *Fallick* involved a defendant insurance company that was alleged to have harmed both the named plaintiff, and all absent class members, and thus was in accord with *Central States* and the other authorities discussed above. *See Popoola v. MD-Individual Practice Ass'n*, 230 F.R.D. 424, 432 (D. Md. 2005) (recognizing that *Fallick* involved a defendant common to the named plaintiff and all class members).

Second, the First Circuit prematurely reached the *factual* conclusion that because different mortgages backed the different certificates, the named plaintiffs did not have an interest in pursuing the claims of class members who had purchased securities other than those they had purchased themselves. 632 F.3d at 771. This is precisely the inquiry Rule 23 is intended to resolve, namely, whether "the same unlawful conduct was directed at or affected both the named plaintiff

and the class sought to be represented," *Robidoux*, 987 F.2d at 936-37, and whether the issues can be established with proof common to the class, *Myers v. Hertz Corp.*, 624 F.3d 537, 549 (2d Cir. 2010). That determination, in turn, can only be made on a developed record as part of a motion for class certification. It may be, for example, that the mortgages were all originated or acquired via similar processes at similar time points, using the same personnel at the same business units, such that proof of the named plaintiffs' claims would significantly advance, if not entirely prove, the claims of absent class members. These issues cannot be resolved on the pleadings alone.

C. NJ Carpenters Had Constitutional Standing to Bring Claims on Behalf of Purchasers in All Six Offerings

It is undisputed that NJ Carpenters has standing to bring individual claims on its own behalf. It was personally injured by its Certificates purchases, its injuries are redressable by a favorable decision, and it can directly assert claims against each Defendant-Appellee. Thus, "standing is satisfied and ... the inquiry shift[s] to a class action analysis." *Cent. States*, 504 F.3d at 241.

In concluding that NJ Carpenters lacked "standing," the District Court erroneously conflated the issue of whether named plaintiffs have standing to advance claims *on their own* behalf with the issue of whether named plaintiffs may represent absent class members. For example, demonstrating its confusion, the District Court cited *In re Salomon Smith Barney Mut., Fund Fees Litig.*, 441 F.

Supp. 2d 579 (S.D.N.Y. 2006). But that case simply follows the rule of *Central States*, holding that the named plaintiffs cannot bring claims against *defendants* on behalf of absent class members if those defendants have not injured the named plaintiffs. Specifically, the court held that in a derivative-style action, plaintiffs could not name certain mutual funds as defendants if they had not purchased shares in those funds, and could not sue the advisors to those funds to the extent they had no other relationship with the plaintiffs. *See id.* at 608. Here, *all* of the the Defendants-Appellees injured NJ Carpenters, and therefore *Salomon* is not applicable.[14]

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[14] Instead of relying on this Court's precedents such as *Central States*, the District Court relied on other district courts that, similarly, did not cite *Central States*. But these decisions were equally flawed. For example, *In re Lehman Bros. Securities and ERISA Litig.*, 684 F. Supp. 2d 485 (S.D.N.Y. 2010), cited by the District Court, in turn cited *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100 (2d Cir. 2008), for the proposition that named plaintiffs may not bring claims based on the injuries "suffered by other, unidentified members of the class." 684 F. Supp. at 491. But in *Huff* the named plaintiff itself had suffered no injury at all; only in that context did this Court hold that the named plaintiff could not bootstrap the injuries of other class members in order to satisfy Article III with respect to its own claims. *See* 549 F.3d at 107. Here, by contrast, NJ Carpenters indisputably suffered its own injuries and has its own claim. Nor does *Lewis v. Casey*, 518 U.S. 343 (1996), cited by *Lehman*, support its conclusion. That case, which predated *Bollinger*, was decided on a full record, after which the Court concluded that the injuries suffered by the named class members did not result from the same conduct that caused injuries to absent class members. *See* 518 U.S. at 357-58. Thus, the *Lewis* Court employed a standard similar to the one employed in *Blum* and *Bollinger*, and which, as described above, is also similar to the inquiry under Rule 23. Notably, in *Lewis*, the Supreme Court took pains to distinguish between the burden on the pleadings, and the plaintiffs' burden at later stages of litigation. *See id.*; *see also In re Mut. Funds Inv. Litig.*, 519 F. Supp. 2d 580, 586-

Indeed, the District Court's reasoning, taken to its logical conclusion, undermines the fundamental purpose of the class device. The complaints allege that every Certificate contained the same types of misrepresentations and suffered from the same defects. There is no practical reason why the class should have to be represented by as many as six representatives to prove the same facts, when – accepting the allegations as true, prior to discovery –NJ Carpenters has every incentive to establish those facts to prove its claim. Indeed, in *Prudential*, the defendants committed fraud in connection with *700* partnerships. A rule that requires a named plaintiff for every security would do away with the class action.

The District Court's approach also provides perverse incentives for corporations to impede class claims under the federal securities laws. Issuers have complete control over whether they create a single large offering or several smaller, identical offerings. If each security requires a different named plaintiff for class-wide redress, corporations can be expected to divide offerings into very small slices to manipulate their liability.

III. NJ Carpenters Had Statutory Standing to Represent Absent Class Members who Purchased Different Certificates

To the extent the District Court's reasoning was rooted in its interpretation of the *statutory* standing requirements of Section 11, it was equally flawed.

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87 (D. Md. 2007) (discussing the implications of *Bollinger*, *Lewis*, and *Blum*; permitting investors in one mutual fund to represent investors in other funds).

As discussed above, a plaintiff bringing a claim under Section 11 must be able to trace its purchase to the defective registration statement. *DeMaria*, 318 F.3d at 176. NJ Carpenters satisfied this requirement with respect to its own purchases. Nonetheless, the District Court, citing *Global Crossing*, 313 F. Supp. 2d 189, held that NJ Carpenters did not have standing to represent absent class members who had purchased in different offerings because it could not "trace" its purchases to those offerings. *See* 2011 WL 1338195, at *6.

As an initial matter, the District Court conflated the concepts of an "offering" and a "registration statement." Section 11 provides a cause of action based on registration statements, not offerings. *See* 15 U.S.C §77k(a); *see also DeMaria*, 318 F.3d at 176 ("the buyer must have purchased a security issued under the registration statement at issue" (quotations omitted)). Here, all of the Certificates – including the ones that NJ Carpenters did not purchase – were issued pursuant to a single shelf registration statement. Therefore, under any reading of the statute, NJ Carpenters had standing.

More importantly, the District Court was wrong to hold that the statutory standing requirements for an *individual* plaintiff, bringing claims on its *own* behalf, are equally applicable to a named plaintiff seeking to represent a class of absent purchasers. Nothing in *Global Crossing* (or *DeMaria*) imposed such a

requirement: in each case, the court addressed situations in which the named plaintiff did not have statutory standing to bring its *own* claims.

The District Court's holding amounted to an interpretation of Section 11 to permit class actions where the named plaintiff purchased the same security as absent class members, but to forbid class actions where the named plaintiff purchased different securities – even if the named plaintiff can otherwise satisfy the requirements of Rule 23. But there is no justification for reading Section 11 to mandate special class action procedures. Section 11 was enacted five years before the establishment of the Federal Rules of Civil Procedure in 1938, and 33 years before the modern Rule 23 was enacted in 1966. It is highly unlikely that the 1933 Congress harbored *any* intention, one way or another, with respect to the procedures that would govern class claims brought under Section 11, let alone an intention to override the ordinary Rule 23 analysis.

To the contrary, as the Supreme Court has made clear, Rule 23 applies in the same manner to *all* claims, regardless of the cause of action:

> There is no reason … to read Rule 23 as addressing only whether claims made eligible for class treatment by some *other* law should be certified as class actions.... [A plaintiff] may bring his claim in a class action if he wishes. And like the rest of the Federal Rules of Civil Procedure, Rule 23 *automatically* applies "in all civil actions and proceedings in the United States district courts."

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1438 (2010); *see also id.* at 1442 ("Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met."). When Congress intends a particular cause of action to be exempt from Rule 23, it says so explicitly. *See id.* at 1438.

Nothing in Section 11 explicitly imposes different procedural requirements for class actions than those mandated by Rule 23. If anything, Congress has *reaffirmed* that ordinary class certification principles apply. The Securities Litigation Uniform Standards Act, 15 U.S.C. §77p, requires that securities class actions be brought in federal court under federal law. Nothing in that statute hints that Section 11 should be treated differently than any other cause of action with respect to class certification. Similarly, the Private Securities Litigation Reform Act of 1995 ("PSLRA") assumes that Rule 23 will apply in an ordinary fashion to securities claims. *In re Cavanaugh*, 306 F.3d 726, 738-39 (9th Cir. 2002) ("Although Congress made several important changes in the [PSLRA], it pointedly did not change the requirements of Rule 23. Indeed, it incorporated Rule 23 explicitly in one portion of the statute, and enacted language that is identical to Rule 23's typicality and adequacy requirements in a nearby provision. Given the many other changes Congress did make, we must infer that its decision to leave the standards of Rule 23 intact was deliberate.").

For this reason, it was error for the District Court to read Section 11 to impose additional requirements for class actions, above and beyond the requirements of Rule 23. If, after discovery and a class certification motion, NJ Carpenters is able to satisfy the Rule 23 requirements for class representatives, it should be permitted to represent *all* purchasers of the Certificates involved in this litigation, regardless of whether it happened to purchase the exact same Certificate.

In re Principal United States Prop. Account ERISA Litig., 274 F.R.D. 649 (S.D. Iowa 2011), which involved claims under ERISA, is instructive. In that action, the defendants argued that the text of the ERISA statute, which refers to plaintiffs bringing claims for "such plan[s]" as caused them injury, should be read to forbid class representatives from bringing claims based on plans in which they had not personally enrolled. *See id.* at 652-53. The court emphatically rejected the argument that the ERISA text should be read to impose different, narrower requirements for class actions procedures than the ordinary rules applicable under Rule 23, citing, inter alia, *Shady Grove*. *See id.* at 652-57.

CONCLUSION

This Court should hold that NJ Carpenters had standing to represent purchasers of all of the Certificates included in this action.

Dated: June 25, 2012

Respectfully submitted,

BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP

/s David R. Stickney
DAVID R. STICKNEY

DAVID R. STICKNEY
12481 High Bluff Drive, Suite 300
San Diego, CA 92130
Tel: (858) 793-0070
Fax: (858) 793-0323
-and-
ANN M. LIPTON
1285 Avenue of the Americas, 38th Floor
New York, NY 10019
Tel: (212) 554-1400
Fax: (212) 554-1444

Attorneys for Amicus Curiae NASCAT

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I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the attached brief is proportionally spaced, has a typeface (New Times Roman) of 14 points, and contains 6,835 words (excluding, as permitted by Fed. R. App. P. 32(a)(7)(B), the corporate disclosure statement, table of contents, table of authorities, and certificate of compliance), as counted by the Microsoft Word processing system used to produce this brief.

Dated: June 25, 2012

/s Ann M. Lipton

Ann M. Lipton
Attorney for Amicus Curiae NASCAT

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) ss.: **AFFIDAVIT OF**
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I, Kersuze Morancy, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

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s/Maria Maisonet
MARIA MAISONET
Notary Public State of New York
No. 01MA6204360
Qualified in Bronx County
Commission Expires Apr. 20, 2013

s/Kersuze Morancy
Kersuze Morancy

Job # 242369

SERVICE LIST:

MICHAEL EISENKRAFT
JOEL PAUL LAITMAN
CHRISTOPHER LOMETTI
COHEN MILSTEIN SELLERS & TOLL, PLLC
Attorneys for Plaintiff-Appellant New Jersey Carpenters Health Fund, on Behalf of Itself and All Others Similarly Situated
88 Pine Street, 14th Floor
New York, New York 10005
(212) 838-7797

William F. Alderman
Steven J. Fink
Orrick, Herrington & Sutcliffe LLP
Attorneys for Defendants-Appellees NovaStar Mortgage Funding Trust, Series 2006-3, NovaStar Mortgage Funding Trust, Series 2006-4, NovaStar Mortage Funding Trust, Series 2006-5, NovaStar Mortgage Funding Trust, Series 2006-6, NovaStar Mortgage Funding Trust, Series 2007-1, NovaStar Mortgage Funding Trust, Series 2007-2, NovaStar Mortgage Funding Trust Corporation, Scott F. Hartman, Gregory S. Metz, W. Lance Anderson, Mark A. Herpich, Scott F. Hartman and NovaStar Mortgage Inc.
51 West 52nd Street
New York, New York 10019
(212) 506-5000

Alan C. Turner
Thomas C. rice
Simpson Thacher & Bartlett LLP
Attorneys for Defendants-Appellees The Royal Bank of Scotland Group, PLC, Greenwich Capital Holdings, Inc., Greenwich Capital Markets, Inc., DBA RBS Greenwich Capital, Wachovia Capital Markets, LLC, sued herein as Wachovia Securities, LLC, Deutsche Bank Securities, Inc., RBS Securities, Inc. and Wells Fargo Advisors, LLC, FKA Wachovia Securities LLC
425 Lexington Avenue
New York, New York 10017
(212) 455-2000