11-1982-cv

United States Court of Appeals

for the

Second Circuit

IOWA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Plaintiff-Appellant,

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI,

Movant-Appellant,

LOCALS 302 & 612 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS-EMPLOYERS CONSTRUCTION INDUSTRY RETIREMENT TRUST, CITY OF SOUTH SAN FRANCISCO, CITY OF LONG BEACH, COUNTY OF TUOLUMNE, CITY OF FREMONT, NEW JERSEY CARPENTERS HEALTH FUND, BOILMAKERS-BLACKSMITH NATIONAL PENSION TRUST, NEW JERSEY CARPENTERS HEALTH FUND, on behalf of itself and all others similarly situated, MONIQUE FONG MILLER, ALEX E. RINEHART, JO ANNE BUZZO, MARIA DESOUSA, LINDA DEMIZIO,

(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

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AMERICAN NATIONAL INSURANCE COMPANY, AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS, COMPREHENSIVE INVESTMENT SERVICES INC, THE MOODY FOUNDATION, WASHINGTON STATE INVESTMENT BOARD, CHRISTOPHER CORADO, individually and on behalf of all others similarly situated, SYLVIA REMER, ED DAVIS, JUAN TOLOSA, ARTHUR SIMONS, RALPH ROSATO, TRUSTEE J. HARRY PICKLE, ZENITH INSURANCE CO., ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION, AMERICAN EUROPEAN INSURANCE COMPANY, GOVERNMENT OF GUAM RETIREMENT FUND, INTER-LOCAL PENSION FUND GRAPHIC COMMUNICATIONS CONFERENCE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, MARSHA KOSSEFF, NORTHERN IRELAND LOCAL GOVERNMENTAL OFFICERS SUPERANNUATION COMMITTEE, OPERATING ENGINEERS LOCAL 3 TRUST FUND, OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION LOCAL 262 ANNUITY FUND, individually and on behalf of all others similarly situated, POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT, TEAMSTERS ALLIED BENEFIT FUNDS, THE CITY OF EDINBURGH COUNCIL AS ADMINISTERING AUTHORITY OF THE LOTHIAN PENSION FUND, THE PENSION FUND GROUP, BROCKTON CONTRIBUTORY RETIREMENT SYSTEM, RICK FLEISCHMAN, STEPHEN GOTT, ISLAND MEDICAL GROUP, KARIM KANO, MICHAEL KARFUNKEL, ANN LEE, FRANCISCO PEREZ, RONALD PROFILI, SHEA-EDWARDS LIMITED PARTNERSHIP, FRED TELLING, GRACE WANG, ZAHNISER TRUST, ANTHONY PEYSER, On behalf of himself and all others similarly situated, STEPHEN P. GOTT, On behalf of himself, STEPHEN P. GOTT, All others similarly situated, BELMONT HOLDINGS CORP., individually and on behalf of all others similarly situated, KATHY ROONEY, on behalf of themselves and all others similarly situated, JEFFREY STARK, on behalf of themselves and all others similarly situated, STANLEY TOLIN, ENRIQUE AZPIAZU, STUART BREGMAN, ROBERTA CIACCI, ROBERT FEINERMAN, IRWIN INGWER, PHYLLIS INGWER, CHRISTOPHER LEWIS, on behalf of himself and The Entertainment Group, ISLAND MEDICAL GROUP PENSION PLAN, f/b/o Irwin Ingwer, FRANKLIN KASS, AURORA PEREZ, CUAUHTEMOC PEREZ, DIANA PEREZ, TRUSTEE J. HARRY PICKLE, GASTROENTEROLOGY ASSOCIATES PROFIT SHARING TRUST FBO CHARLES M. BROOKS, M.D., ALEJANDRO SILVA, DAVID SOSNA, MORTGAGE TRUST 2007-6, ALASKA ELECTRICAL PENSION FUND, On behalf of itself and all others similarly situated, MADELINE DIMODICA,

Plaintiffs,

CITY OF EDINBURGH COUNCIL AS ADMINISTERING AUTHORITY OF THE LOTHIAN PENSION FUND,

Petitioner,

JOHN F. AKERS, ABN AMRO HOLDING N.V., ANZ SECURITIES, INC., MICHAEL L. AINSLIE, BBVA SECURITIES INC., BANC OF AMERICA SECURITIES LLC, CIBC WORLD MARKETS CORP., CABRERA CAPITAL MARKETS LLC, CAJA DE AHORROS Y MONTE DE PIEDAD DE MADRID, ERIN CALLAN, CITIGROUP GLOBAL MARKETS INC., THOMAS H. CRUIKSHANK, DAIWA SECURITIES SMBC EUROPE LIMITED, DNB NOR MARKETS, MARSHA EVANS JOHNSON, CHRISTOPHER GENT, JOSEPH M. GREGORY, HVB CAPITAL MARKETS, INC., HARRIS NESBITT CORP., ROLAND A. HERNANDEZ, HENRY KAUFMAN, LEHMANS BROTHERS HOLDINGS, INC., LOOP CAPITAL MARKETS, LLC, IAN LOWITT, JOHN D. MACOMBER, MELLON FINANCIAL MARKETS, LLC, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., MORGAN STANLEY & CO. INC., CHRISTOPHER M. O'MEARA, RBC DAIN RAUSCHER INC., RBS GREENWICH CAPITAL, SG CORPORATE & INVESTMENT BANKING, SANTANDER INVESTMENT SECURITIES INC., SIEBERT CAPITAL MARKETS, SOVEREIGN SECURITIES CORPORATION, LLC, SUNTRUST ROBINSON HUMPHREY, INC., UBS SECURITIES LLC, UTENDAHL CAPITAL PARTNERS, L.P., WACHOVIA CAPITAL MARKETS, LLC, WELLS FARGO SECURITIES, LLC, WILLIAM CAPITAL GROUP, L.P., NABCAPITAL SECURITIES, LLC, BNY MELLON CAPITAL MARKETS, LLC, CALYON SECURITIES (USA) INC., DNB NOR MARKETS, BMO CAPITAL MARKETS CORP., NATIONAL AUSTRALIA BANK LIMITED, RBC CAPITAL MARKETS CORP., SG AMERICAS SECURITIES LLC, WACHOVIA SECURITIES LLC, THE WILLIAMS CAPITAL GROUP, L.P, BNP PARIBAS S.A, CHARLES SCHWAB & CO., INC., COMMERZBANK CAPITAL MARKETS CORP., EDWARD D. JONES & CO., L.P., FIDELITY CAPITAL MARKETS SERVICES, HSBC SECURITIES (USA) INC., INCAPITAL LLC, ING FINANCIAL MARKETS LLC, M.R BEAL & COMPANY, MURIEL SIEBERT & CO. INC., NABCAPITAL SECURITIES, LLC, NATIXIS BLEICHBROEDER INC., RAYMOND JAMES & ASSOCIATES, INC., SCOTIA CAPITAL (USA) INC., TD SECURITIES (USA) LLC, UBS FINANCIAL SERVICES, INC., ABN AMRO INC., B.C. ZIEGLER AND COMPANY, CREDIT SUISSE SECURITIES (USA) LLC, D.A DAVIDSON & CO., DAVENPORT & COMPANY LLC, FERRIS BAKER WATTS & INCORPORATED, FIFTH THIRD SECURITIES, INC., FIXED INCOME SECURITIES, INC., H & R BLOCK FINANCIAL ADVISORS, INC., CAPITAN RONALD HERNANDEZ, JACKSON SECURITIES LLC, JANNEY MONTGOMERY SCOTT LLC, KEEFE, BRUYETTE & WOODS, INC., KEYBANC CAOITAL MARKETS, INC., MAXIM GROUP LLC, MESIROPW FINANCIAL, INC., MORGAN KEEGAN & COMPANY, INC., NATIONAL FINANCIAL SERVICES LLC, OPPENHEIMER & CO., INC., PIPER JAFFRAY & CO., ROBERT W. BAIRD & CO. INCORPORATED, SMH CAPITAL INC., SCOTT & STRINGFELLOW, STIFEL, NICOLSUS & COMPANY INCORPORATED, SONE & YOUNGBERG LLC, TD AMERITRADE HOLDING CORPORATION, VINING SPARKS IBG, LP, ZIONS DIRECT, INC., BNC MORTGAGE LOAN TRUST 2006-1, BNC MORTGAGE LOAN TRUST 2006-2, FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF12, FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF2, FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FFA, FIRST

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Consolidated-Defendants,

– v. –

LANA FRANKS, EDWARD GRIEB, RICHARD MCKINNEY, KRISTINE SMITH, JAMES J. SULLIVAN, SAMIR TABET, MARK L. ZUSY,

Defendants-Appellees,

RBS GREENWICH CAPITAL,

Defendant-Counter-Claimant,

ERNST & YOUNG LLP, A.G EDWARDS & SONS, INC., MOODY'S CORP., BNY CAPITAL MARKETS, INC., RICHARD S. FULD, JR., ROGER S. BERLIND, BBVA SECURITIES INC., CITIGROUP INC., RBS SECURITIES INC., UBS SECURITIES LLC, DZ FINANCIAL MARKETS LLC, JERRY A.

GROUNDHOFER, WILLIAMS CAPITAL GROUP, L.P, WENDY M. UVINO, ABN AMRO HOLDING N.V, THE MCGRAW-HILL COMPANIES, INC., MOODY'S INVESTORS SERVICE, INCORPORATED, ANZ SECURITIES, INC., BANC OF AMERICA SECURITIES LLC, BBVA SECURITIES INC., M.R. BEAL & COMPANY, BNP PARIBAS S.A, BNY MELLON CAPITAL MARKETS, LLC, CABRERA CAPITAL MARKETS LLC, CHARLES SCHWAB & CO., INC., CIBS WORLD MARKETS CORP., CITIGROUP GLOBAL MARKETS INC., COMMERZBANK CAPITAL MARKETS CORP., DNB NOR MARKETS INC., DZ FINANCIAL MARKETS LLC, FIDELITY CAPITAL MARKETS SERVICES, FORTIS SECURITIES, LLC, BMO CAPITAL MARKETS CORP., HSBC SECURITIES (USA) INC., ING FINANCIAL MARKETS LLC, LOOP CAPITAL MARKETS, LLC, MELLON FINANCIAL MARKETS , LLC, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC, MIZUHO SECURITIES USA, INC., MORGAN STANLEY & CO. INC., MURIEL SIEBERT & CO., INC., NABCAPITAL SECURITIES, LLC, NATIONAL AUSTRALIA BANK LIMITED, NATIXIX BLEICHROEDER INC., RAYMOND JAMES & ASSOCIATES, INC., RBC CAPITAL MARKETS CORP., SANTANDER INVESTMENT SECURITIES INC., SCOTIA CAPITAL (USA) INC., SG AMERICAS SECURITIES LLC, SOVEREIGN SECURITIES CORPORATION LLC, STANDARD CHARTERED BANK, SUNTRUST ROBINSON HUMPHREY, INC., TD SECURITIES (USA) LLC, UBS SECURITIES, LLC, UTENDAHL CAPITAL PARTNERS, L.P., WACHOVIA CAPITAL MARKETS LLC, WACHOVIA SECURITIES, LLC, WELLS FARGO SECURITIES, LLC, THE WILLIAMS CAPITAL GROUP, L.P, ZIONS DIRECT, INC., CALYON SECURITIES (USA) INC., RBS SECURITIES INC, THE MCGRAW HILL COMPANIES, INC, MORGAN STANLEY & CO, INC., RBC CAPITAL MARKETS CORP., WACHOVIA CAPITAL MARKETS, LLC, PIPER JAFFRAY & CO., ABN AMRO INC., J.P MORGAN SECURITIES, INC.,

Defendants,

MIZUHO SECURITIES USA, INC, GREENPOINT MORTGAGE FUNDING TRUST SERIES 2006-HE1,

Counter-Claimants.

CORPORATE DISCLOSURE STATEMENT

No statement pursuant to Rule 26.1 is required.

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INTEREST OF AMICUS CURIAE

The National Association of Shareholder and Consumer Attorneys ("NASCAT") is a nonprofit membership organization founded in 1988. NASCAT's member law firms represent both institutional and individual investors in securities fraud and shareholder derivative cases throughout the United States. 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 advocates the principled interpretation and application of the federal securities laws to protect investors from manipulative and deceptive practices, and to ensure this nation's capital markets operate fairly and efficiently.

Comprised of attorneys whose practice focuses in substantial part on the application of the federal securities laws, NASCAT has a deeply-rooted interest in the central issue this case presents. NASCAT agrees with Plaintiffs-Appellants' arguments and writes separately to highlight the broad implications of the District Court's holdings in this matter.[1] Specifically, as discussed further below, the

[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

District Court's holding that the statute of repose had expired was dependent on its earlier ruling that the named plaintiffs lacked "standing" to bring claims based on securities they had not personally purchased. This holding conflated constitutional standing requirements with the requirements of Rule 23, and, if endorsed by this Court, could threaten the ability of injured investors to bring class actions in the future. In this case, it entirely barred the Intervenors from recovering for their injuries, despite their reasonable expectation that their interests were protected by the named plaintiffs' complaint.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Amicus NASCAT agrees with the Intervenors-Appellants that the District Court erred by refusing to toll Section 11's statute of repose under the rule articulated in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). Amicus submits this brief, however, because Intervenor-Appellants sought to intervene only after the District Court initially dismissed the same claims asserted by the original named plaintiffs, forcing the Intervenors to take steps to protect their claims by entering this Action. Prior to its *American Pipe* ruling, the District Court held that the named plaintiffs did not have "standing" to represent absent class

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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.

members who had purchased different MBS Bonds than those purchased by the named plaintiffs themselves, and that therefore claims based on those MBS Bonds would be dismissed. *See In re Lehman Bros. Sec. & ERISA Litig.*, 684 F. Supp. 2d 485, 491 (S.D.N.Y. 2010). It was for this reason that the Intervenors sought to enter the Action.

While the Court need not decide the standing question to resolve the Intervenors' appeal, Amicus respectfully submits that the District Court erred when it dismissed the claims of the original named plaintiffs for lack of standing. Amicus therefore submits this brief to explain the error and to avoid explicit or implicit appellate endorsement of the District Court's reasoning on this important issue, because such endorsement would have far-reaching consequences for the rights of virtually all absent class members in every class action.

As discussed below, the District Court's holding that the named plaintiffs did not have "standing" to represent absent class members who had purchased different MBS Bonds from the same defendants, 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, Article III 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

Federal Rule of Civil Procedure 23. This rule has been recited in countless appellate and district level decisions, including the decisions of this Court, and has been discussed at length in at least two treatises. Here, there is no dispute that the named plaintiffs had Article III standing to advance their own claims; thus, the District Court should have considered their ability to represent absent class members solely in the context of a motion for class certification. Had the District Court done so, the Intervenors may never have been forced to take action to protect their claims in the first place.

ARGUMENT

I. Standing Requirements for Class Actions

Article III 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.*

Ordinarily, no party has standing to litigate the claims of another. Class actions, however, 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, standing inquiries have a

special character. Once a plaintiff establishes that she personally has Article III standing to advance claims on her own behalf, any "standing" requirements concerning the ability of the named plaintiff 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 succinctly 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) (quoting 1 Conte & Newberg, Newberg on Class Actions § 2:6 n.3 (4th ed. 2002)).[2]

[2] 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, she must demonstrate that her injuries are traceable to the defendants' conduct. *See Easter*

In *Cordes & Co. Fin. Servs. 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, 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 conduct of 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)).

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v. Am. W. Fin., 381 F.3d 948, 961 (9th Cir. 2004). If there are defendants included in the action against whom no named plaintiff can assert a claim, the named plaintiffs cannot demonstrate the existence of Article III standing on their own behalf with respect to those defendants. Or, as the Fifth Circuit put it, a representative plaintiff's "standing" is properly examined only when "the standing question would exist whether [the plaintiff] filed her claim alone or as part of a class." *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 n.6 (5th Cir. 2002).

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 particular 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. ...Threshold individual standing is a prerequisite for all actions, including class actions.... [H]owever, once 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*.").[3]

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

[3] *See also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 592 (8th Cir. 2009) (district court erred by "conflating" the Article III inquiry 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.").

only then will the inquiry shift to a Rule 23 analysis."); *Vuyanich v. Republic Nat'l Bank of Dallas*, 82 F.R.D. 420 (N.D. Tex. 1979) ("The proper procedure for determining certifiability of a class is for the court to determine initially whether the named plaintiffs have standing to assert their individual claims and, if so, then to determine whether the relationship between their claims and the claims of a purported class meets the requirements of Rule 23....").

Class action treatises treat the issue similarly. *Newberg on Class Actions* states: "The presence of individual standing is sufficient to confer the right to assert issues that are common to the class, speaking from the perspective of any standing requirements.... [W]hether a plaintiff will be permitted to represent not only individual claims, but also those of parties not directly before the court ... depends on whether the plaintiff is able to meet additional criteria ... encompassed in Rule 23...." 1 Newberg on Class Actions §2:5 (4th ed. 2010); *see id.* §2:7 ("Whether or not the named plaintiff who meets individual standing requirements may assert the rights of absent 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."); *id* at §2.9 ("when a class plaintiff shows individual standing, the court should pass to Rule 23 criteria to determine whether, and to what extent, the plaintiff may serve in a representative capacity on behalf of the class").

According to *Federal Practice and Procedure*, "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." 7AA Fed. Prac. & Proc. Civ. §1785.1 (3d ed. 2010); *see also 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 class, including absent class members, depends solely on whether he is able to meet the additional criteria encompassed in Rule 23.").

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. *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. Beneficiaries of one ERISA plan may sue on behalf of beneficiaries of other plans.[4] Plaintiffs who

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

purchase one product may sue on behalf of class members who purchased different products.[5] Plaintiffs who sign one contract may represent persons who signed different contracts.[6] Plaintiffs injured by one set of fraudulent statements may represent class members injured by different, but similar, fraudulent statements.[7] The list is endless.[8]

Plainly, none of these plaintiffs had "standing" to bring claims based on jobs they did not hold, or products they did not purchase, or contracts they did not sign, or ERISA plans for which they were not beneficiaries. Nonetheless, as the Eleventh Circuit explained, even *without* "standing" to raise such claims on their

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[5] *See Daffin v. Ford Motor Co.*, 458 F.3d 549, 551-55 (6th Cir. 2006), *cited with approval in Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010); *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 Prods. 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).

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

[7] *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).

[8] 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).

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 "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 ultimately 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.[9]

[9] *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.

II. Securities Cases Follow Ordinary Standing 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 small subset of the partnerships, the court, employing an ordinary Rule 23 analysis, held that the named plaintiffs could bring claims on behalf of all partnership investors. *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.

These decisions are not unique. 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, so long as the factual allegations are sufficiently similar. *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 Blech Sec. Litig.*, 2003 WL 1610775, at *17 (S.D.N.Y. Mar. 26, 2003); *Berwecky v. Bear, Stearns & Co.*, 197 F.R.D. 65, 70-71 (S.D.N.Y. 2000); *Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 56-57 (S.D.N.Y. 1993); *Tedesco v. Mishkin*, 689 F. Supp. 1327, 1335-36 (S.D.N.Y. 1988).[10] As one court put it, "class representatives need not have invested in each security so long as the plaintiffs have alleged a single course of wrongful conduct with regard to each security. Courts have not addressed this concern vis a vis the doctrine of standing, but rather have examined such concerns pursuant to Rule 23(a)(3)'s typicality requirement." *In re Dreyfus Aggressive Growth Mut. Fund Litig.*, 2000

[10] *See also In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1461 (D. Ariz. 1992); *Mutchka v. Harris*, 373 F. Supp. 2d 1021, 1024 (C.D. Cal. 2005); *In re DDi Corp. Sec. Litig.*, 2005 WL 3090882, at *6 (C.D. Cal. July 21, 2005); *In re Juniper Networks, Inc. Sec. Litig.*, 542 F. Supp. 2d 1037, 1052 (N.D. Cal. 2008); *In re Friedman's, Inc. Sec. Litig.*, 385 F. Supp. 2d 1345, 1372 (N.D. Ga. 2005); *Hicks v. Morgan Stanley & Co.*, 2003 WL 21672085, at *5 (S.D.N.Y. July 16, 2003); *In re MobileMedia Sec. Litig.*, 28 F. Supp. 2d 901, 911 n.7 (D.N.J. 1998); *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 1996 WL 739170, at *2, *4 (W.D. Mich. Sept. 27, 1996); *In re Lord Abbett Mut. Funds Fee Litig.*, 407 F. Supp. 2d 616, 625 (D.N.J. 2005); *In re Franklin Mut. Funds Fee Litig.*, 388 F. Supp. 2d 451, 461-62 (D.N.J. 2005); *In re Mut. Funds Inv. Litig.*, 519 F. Supp. 2d 580, 587 (D. Md. 2007).

WL 1357509, at *3 (S.D.N.Y. 2000). Recently the Sixth Circuit examined a situation where a district court, like the one here, dismissed claims based on certain securities offerings for lack of "standing." Though the Sixth Circuit resolved the appeal on alternative grounds, the court had "grave concerns" about the district court's standing analysis. *J&R Mktg. v. GMC*, 549 F.3d 384, 390 (6th Cir. 2008).

In *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762 (1st Cir. 2011), the First Circuit examined this question in the context of mortgage-backed securities, recognized that named plaintiffs may under certain factual circumstances have standing to assert claims on behalf of purchasers of different securities, but concluded that under the existing facts, the named plaintiffs did not have such standing. *Nomura* should not be applied here.

In *Nomura*, Nomura was the issuer of the securities. Nomura did not originate any loans, but instead purchased mortgages from a variety of lenders. Nomura then created eight trusts, each of which issued a series of mortgage-backed certificates. The offerings were underwritten by a variety of underwriters. The named plaintiffs had purchased only two of the eight certificates, 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 who had underwritten 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 and without benefit of discovery, 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 fully 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.

The First Circuit then turned to the question of 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, however, 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. The court concluded that in *Nomura*, the 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.

Respectfully, the First Circuit's reasoning on this point was flawed. First, the First Circuit appears to have 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 fact patterns 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 on behalf of absent class members 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 beneficiaries of all ERISA plans administered by that company, and thus was entirely 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 securities, 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 very well be, for example, that the mortgages were all acquired via a similar process, or were issued by the same lenders at the same time, such that proof of the named plaintiffs' claims will significantly advance, if not entirely prove, the claims of absent class members. These issues cannot be resolved on a motion to dismiss, as occurred in *Nomura*.

III. The Named Plaintiffs Had Standing to Bring Claims on Behalf of Purchasers in all Ninety-Four Offer

It is undisputed that the named plaintiffs had standing to bring individual claims on their own behalf. They alleged that they were personally injured by their Certificate purchases, that their injuries were redressable by a favorable decision, that their injuries were traceable to the conduct of the Defendants-Appellees, and there was at least one named plaintiff who could 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 the named plaintiffs 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. Citing *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100 (2d Cir. 2008), the District Court held that named plaintiffs may not bring claims based on the injuries "suffered by other, unidentified members of the class." *Lehman*, 684 F. Supp. at 491. But in *Huff* the *named plaintiff itself* had suffered no injury at all; in that context, this Court held 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, the named plaintiffs indisputably did suffer their own injuries; the only remaining question is whether their injuries were sufficiently similar to

those of the class to justify a representative lawsuit. Nor does *Lewis v. Casey*, 518 U.S. 343 (1996), cited by the District Court, support its conclusion. That case, as in *Blum* and *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 alleged 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.[11] 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 Mut. Funds*, 519 F. Supp. 2d at 586-87 (discussing the implications of *Bollinger*, *Lewis*, and *Blum*).[12]

Indeed, the District Court's reasoning, taken to its logical conclusion, undermines the fundamental purpose of the class device. A class action, by

[11] Additionally, at least part of the Court's concern in *Lewis* was that the plaintiffs had offered no proof that the absent class members had suffered *any* cognizable injuries at all under Article III, 518 U.S. at 354-55 – an issue not in dispute here.

[12] *In re Salomon Smith Barney Mut., Fund Fees Litig.*, 441 F. Supp. 2d 579 (S.D.N.Y. 2006), also cited by the District Court, similarly does not support its conclusion. Instead, 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 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.

definition, involves a representative plaintiff who suffered an injury and purports to represent, by proxy, class members who also suffered their own distinct injuries, unique to themselves, but similar to the injury suffered by the representative. All class action representatives thus, in some sense, sue for injuries they themselves did not suffer; they may do so because of the similarity of their injuries to those of absent class members. This is why the Supreme Court described class actions as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Falcon*, 457 U.S. at 155.[13] Though the Constitution may place outer limits as to how different the injuries may be – the representative's claim must not "implicate a significantly different set of concerns" than the class claims, *Bollinger*, 539 U.S. at 265 – but this determination is not susceptible to a bright-line rule requiring identical securities purchases, and cannot be decided on the pleadings.

[13] Or, to put it another way, even if the named plaintiffs and absent class members purchased the same type of security (say, common stock), they did not literally purchase the *same* security. The representative's holdings are her own; the absent class members hold title to *different*, though perhaps interchangeable, shares. The injuries suffered by the representative are caused by her own distinct stock purchases, not the stock purchases of other unnamed class members. Yet there is no dispute that a named plaintiff who purchased shares of common stock may represent a class of persons who purchased other shares of common stock so long as the defendants' conduct harmed all class members similarly.

Nor can there be any argument that Section 11 requires a different approach to class action litigation. Rule 23 applies in the same manner to *all* claims, regardless of the cause of action. As the Supreme Court recently put it:

> 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.").[14]

Here, the complaints allege that every MBS Bond contained the same types of misrepresentations and suffered from the same defects. There is no practical

[14] The Court pointed out that when Congress intends a particular cause of action to be exempt from Rule 23, it says so. *See Shady Grove*, 130 S. Ct. at 1438. For securities claims, 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. *Cf. 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.").

reason why the class should have to be represented by as many as 94 named plaintiffs to prove the same facts, when – accepting the allegations as true, prior to discovery – the named plaintiffs have every incentive to establish those facts to prove their individual claims. Indeed, in *Prudential*, the defendants had 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 for relief 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 in order to manipulate their liability.[15]

[15] Just such mischief could result from the decision in *In re Bank of Am. Corp. Sec., Derivative, & Emp. Ret. Income Sec. Act (ERISA) Litig.*, 2011 WL 3211472 (S.D.N.Y. July 29, 2011). There, the plaintiffs alleged that a large, publicly traded corporation made false statements that inflated the prices of its securities. *See id.* at *2-3. The court held that under Article III, the class could only included investors who had purchased the same securities that had been purchased by the named plaintiffs. This meant that the class included persons who had purchased options in January 2011, but not persons who had purchased options in any other month, *see id.* at *14, and included persons who purchased securities with particular CUSIP numbers, but not other securities, no matter how similar. *See id.* It is absurd to think that the Constitution draws CUSIP-based distinctions for investors who are otherwise injured by the same false statements in the same way.

CONCLUSION

For the foregoing reasons, should this Court reach the question, this Court should hold that the named plaintiffs had standing to represent purchasers of MBS Bonds other than those purchased by the named plaintiffs in this Action.

Dated: September 1, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

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 6,540 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.

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