LINKS: 44

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FEDERAL DEPOSIT INSURANCE COROPORATION AS RECEIVER FOR STRATEGIC CAPITAL BANK,

Plaintiff,

v.

COUNTRYWIDE FINANCIAL CORPORATION, *et al.*,

Defendants.

Case No. 2:12-CV-4354 MRP (MANx)

Order Re Motions to Dismiss the Amended Complaint

I. Background

In 2007 and 2008, Strategic Capital Bank ("SCB") purchased four residential mortgage-backed securities, called "certificates," for $62.6 million. Those certificates were issued and underwritten by the defendants, Countrywide Financial Corporation ("CFC,") Countrywide Securities Corporation ("CSC,") CWALT, Inc. ("CWALT,") (these three entities are "Countrywide,") Bank of America Corporation and Citigroup Global Markets Inc. (collectively, "the Defendants"). On May 22, 2009, the Federal Deposit Insurance Corporation ("FDIC") was appointed receiver over SCB as a failed bank. As receiver, the FDIC brought the instant lawsuit on May 18, 2012. The FDIC filed an Amended Complaint ("AC") on August 6, 2012.[1] The AC alleges that the registration statements and prospectuses filed with the Securities and Exchange Commission regarding the four securities included untrue and misleading statements of material fact, and that SCB has suffered a loss on the certificates, in violation of Section 11 of the Securities Act of 1933. AC ¶ 158, 163. According to the AC, CFC violated Section 15 of the Securities Act through its control of CWALT and CSC. AC ¶ 169. Bank of America Corporation is allegedly liable as the legal successor to the Countrywide entities. AC ¶ 173.

The residential mortgage-backed securities ("RMBS") at issue here were produced by securitization of pools of loans. In securitization, the entity that extends the loans is called the "originator," the process of choosing to make certain loans known as "underwriting," and the guidelines the originator follows to ensure that loans are extended to borrowers that can repay them are called "underwriting standards." The originator may choose to hold the loans it issues, receiving payment on the interest and principal of the loan, or may choose to sell the loans through securitization. This process has been detailed in this Court's prior orders.

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[1] The Court refuses to dismiss the AC on grounds that the FDIC failed to inform the Court of its intention to file the amendments.

See, e.g., *Me. State Ret. Sys. v. Countrywide Fin. Corp.*, 722 F. Supp. 2d 1157, 1161–62 (C.D. Cal. 2010) ("*Maine State I*"). That process will not be explained at length here except to state that the pool of loans is sold to a trust which issues certificates entitling the holders to receive cash flows from the pool. These certificates are sold to investors like SCB. The certificates are sold in tiers, called "tranches," portions of the loan pool with different characteristics, like priority of payment, interest rate, or credit protection. In the securitizations at issue here, the most senior class is usually entitled to be paid in full before the next most senior class. Upon issuance, each tranche is assigned a credit rating by the credit rating agencies. Investors can select certificates in the tranches depending on their preferences as to the degree of risk and rate of return.

The certificates that SCB purchased were issued after CWALT filed three registration statements with the SEC on form S-3, which entitled CWALT to issue securities on a later date. Each certificate issued after Countrywide filed a "prospectus supplement." The prospectus supplements explain in detail the characteristics of the certificates. Investors purchased certificates based on all of the documents filed with the SEC, including the S-3 registrations, prospectuses and prospectus supplements (collectively, the "Offering Documents"). According to the AC, SCB purchased four certificates,[2] pursuant to three S-3 registration statements. All of the certificates were senior, and had AAA ratings or its equivalent, from the credit rating agencies.

The FDIC sued the defendants on May 18, 2012 claiming that the Offering Documents included false statements regarding the ratio of the value of the loans to the underlying value of the homes ("LTV ratios,") the appraisal of the homes, the rate of occupancy by the owners of the properties and the underwriting standards, in violation of Section 11 of the Securities Act.

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[2] CWALT 2006-J8 A2; CWALT 2006-J1 1-A-6; CWALT 2007-5CB 1-A-1; CWALT 2007-5CB 1-A-11.

The Defendants move to dismiss on the basis that the complaint was untimely. The statute of limitations for claims under the Securities Act is "one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C. § 77m. The Defendants assert that the Plaintiff discovered or should have discovered any false statements in the materials filed with the SEC by May 22, 2008, one year before the FDIC was appointed receiver, so that the claims had expired. Further, the Defendants argue that the statute of limitations for the claims in the AC was not "tolled."[3]

II. ***SCB Discovered or Should have Discovered the Alleged Misrepresentations Before May 22, 2008***

The statute of limitations runs "one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C. § 77m. The FDIC contends it had at least three years to bring any live claims SCB had on May 22, 2009, when it was appointed receiver. 12 U.S.C. § 1821(d)(14) (extending the statute of limitations for "any action brought by the Corporation as conservator or receiver" by at least three years from "the date of the appointment of the Corporation as conservator or receiver").[4] However, if SCB discovered or should have discovered the misstatements before May 22, 2008,[5] then the claims here were not live when the FDIC was appointed receiver, and are untimely now.

A. *Merck* applies to Securities Act claims.

The parties dispute the legal standard for "discovery" and "reasonable diligence" within Section 77m. This Court has previously defined "discovery" as

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[3] "Tolling" stops or delays the running of a limitations period. *Black's Law Dictionary* (9th ed. 2009).

[4] For purposes of this motion, the Defendants do not challenge the applicability of § 1821(d)(14) to claims under the Securities Act.

[5] The date that begins the period of the statute of limitations is called the date of "accrual."

occurring when the plaintiff is on "inquiry notice," when a reasonably diligent investor should have noticed something was amiss with the security, and began to investigate further. *Mass. Mut. Life Ins. Co. v. Countrywide Fin. Corp.*, No. 2:11-cv-10414-MRP, 2012 WL 1322884, at *3 (C.D. Cal. Apr. 16, 2012); *Stichting Pensioenfonds ABP v. Countrywide Financial Corp.*, 802 F. Supp. 2d 1125, 1140 (C.D. Cal. 2011) (discovery begins when "plaintiff suspected or should have suspected that an injury was caused by wrongdoing") (citation omitted). Both cases, however, were decided under state discovery rules. This case is brought solely on the basis of the Securities Act.

In 2010, the Supreme Court analyzed the date a plaintiff discovers his or her rights under the Securities Exchange Act. *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784 (2010). Claims under the Exchange Act must be brought within "2 years after the discovery of the facts constituting the violation." 28 U.S.C. § 1658(b)(1). In *Merck*, the Supreme Court concluded that the limitations period cannot begin to run until the "plaintiff did discover or a reasonably diligent plaintiff would have 'discover[ed] the facts constituting the violation.'" *Merck*, 130 S. Ct. at 1798. The majority rejected the proposition that the statute commenced at the earlier "inquiry notice" date. *Id.*

Merck interprets the word "discovery," which is common to both the Exchange and Securities Act statutes of limitation. Therefore, the one year period of limitation begins to run only when the plaintiff did or should have actually discovered that the defendant made an "untrue statement or omission," not when it should have begun investigating. *See, e.g., Fed. Hous. Fin. Agency v. UBS Ams., Inc.*, 858 F. Supp. 2d 306, 319–320 (S.D.N.Y. 2012); *In re Bear Stearns Mortg. Pass-Through Certificates Litig.*, 851 F. Supp. 2d 746, 762–63 (S.D.N.Y. 2012).[6]

[6] Unlike the Exchange Act claims in *Merck*, though, scienter is not an element of a Securities Act claim, so the cause of action accrues whenever the plaintiff discovered or should have discovered the untrue statement or omission.

Plaintiffs are considered to have discovered a fact when a "reasonably diligent plaintiff would have sufficient information about that fact to adequately plead it in a complaint . . . with sufficient detail and particularity to survive a 12(b)(6) motion to dismiss." *City of Pontiac Gen. Emps.' Ret. Sys v. MBIA, Inc.*, 637 F.3d 169, 175 (2d Cir. 2011); *Allstate Ins. Co. v. Countrywide Fin. Corp.*, 824 F. Supp. 2d 1164, 1179 (C.D. Cal. 2011). If SCB could have filed a complaint for violations of Section 11 that would survive a motion to dismiss before May 22, 2008, then the claim accrued before that date.

B. SCB had sufficient public information to allege misstatements in the Offering Documents before May 22, 2008.

Though the burden of showing "what a reasonably prudent investor should have known" is particularly high at the pleading stage, the Court can "take judicial notice of publications introduced to indicate what was in the public realm at the time" that would indicate "no other plausible inference than that a reasonably diligent plaintiff should have discovered facts sufficient to state a claim." *Stichting*, 802 F. Supp. 2d at 1136. The Defendants have submitted ten complaints filed against Countrywide entities before May 22, 2008, along with 15 news and opinion articles, to show public information that could have enabled SCB to state a claim under the Securities Act.

Three complaints filed against Countrywide before May 22, 2008 are particularly relevant. On November 14, 2007, David H. Luther, an investor in Countrywide RMBS, filed a class action in California state court against CWALT, CSC, and Citigroup Global Markets alleging that the Registration Statements in CWALT 2006-J8 and CWALT 2006-J1, among other RMBS, contained misstatements as to loan-to-value ratios, appraisals of properties underlying the mortgages, and deviations from stated underwriting standards. Defs.' Req. for Jud. Notice, ECF No. 44, Ex. 1, Class Action Compl. in *Luther v. Countrywide Home Loans Servicing LP*, No. BC380698 (Cal. Super. Ct.) ("*Luther* Compl.") ¶ 6–8;

46–58. Although this Court has often criticized the *Luther* class action, it is clear that the named plaintiff had no difficulty charging that CWALT's misstatements violated Section 11 of the Securities Act. *Luther* Compl. ¶ 66. The complaint includes detailed allegations about the offering materials for CWALT 2006-J8 and CWALT 2006-J1.

Because Luther remained in state court for more than four years, and was properly removed to federal court only recently, the *Luther* Complaint never faced a motion to dismiss for failure to state a claim under Rule 12(b)(6).[7] However, other complaints involving Countrywide's underwriting standards were filed prior to May 22, 2008, and survived two motions to dismiss. *In re Countrywide Fin. Corp. Derivative Litig.*, 554 F. Supp. 2d 1044 (C.D. Cal. May 14, 2008); *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132 (C.D. Cal. Dec. 1, 2008) (Consolidated Amended Class Action Complaint filed on April 11, 2008). In the first of those lawsuits, stockholders of CFC sued its officers and members of its Board of Directors for, among other claims, breaches of fiduciary duties. The plaintiffs alleged that the defendants had created "woefully inadequate controls over the Company's policies and practices with respect to underwriting and credit risk exposure." Defs.' Req. for Jud. Notice, ECF No. 44, Ex. 27, Consolidated Shareholder Derivative and Class Action Complaint in *In re Countrywide Financial Corporation Derivative Litigation*, No. 07-cv-06923 (C.D. Cal.) (filed Feb. 15, 2008) ("Derivative Complaint") ¶ 492(c). There is no need to speculate as to the sufficiency of the allegations. One week before May 22, 2008, this Court held that the pleading supported "a strong inference of a Company-wide culture

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[7] After amendment, a federal court complaint "identical" to *Luther*, *Me. State Ret. Sys. v. Countrywide Fin. Corp.*, No. 2:10-cv-0302-MRP, met the requirements of Rule 12(b)(6) nearly three years after the relevant time period. *See, e.g.*, *Me. State Ret. Sys. v. Countrywide Fin. Corp.*, No. 2:10-cv-0302-MRP, 2011 WL 4389689 (C.D. Cal. May 5, 2011) ("*Maine State III*"). Defendants in *Luther* filed a state law demurrer akin to a motion to dismiss, but no court has ruled on the demurrer.

that, at every level, emphasized increased loan origination volume in derogation of underwriting standards." *In re Countrywide Fin. Corp. Derivative Litig.*, 554 F. Supp. 2d at 1058.[8]

Other investors in CFC, including holders of equity and unsecured debt, participated in another class action against CFC itself, officers, board members, underwriters and auditors, alleging that their investments were harmed by Countrywide's abandonment of its loan origination and underwriting standards, and that Countrywide inflated appraisal values. Defs.' Req. for Jud. Notice, ECF No. 44, Ex. 29, Consolidated Shareholder Derivative and Class Action Complaint in *In re Countrywide Financial Corporation Securities Litigation*, No. 07-cv-05295 (C.D. Cal.) (filed Apr. 11, 2008) ("Securities Complaint") ¶ 116; 126–207. The complaint included first-hand witness accounts of deviations from underwriting standards and of a CFC cultural shift towards riskier mortgages and inflated appraisals. That complaint also survived a motion to dismiss. *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d at 1145.

It is important to take stock of what these three complaints and this Court's ruling in the *Derivative Litigation*, all filed before May 22, 2008, necessarily demonstrated to a reasonable investor. The plaintiff class in *Luther* alleged that appraisals of the mortgaged homes "were unreliable due to lack of controls and pressure exerted on appraisers to come back with pre-determined appraisal values." *Luther* Compl. ¶ 50. The *Luther* complaint stated that despite the representation in some of the prospectus supplements that the appraisals conformed to Fannie Mae or Freddie Mac standards, the "appraisals were not in conformity with Fannie Mae or Freddie Mac standards as they were not a reasonable estimate of the actual value of the homes in question." *Id.* ¶ 53(c). Inflated appraisals "caused the loan-to-value ratios to be understated for many mortgages, rendering the Certificates much

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[8] In fact, the decision in the Derivative Litigation allowed the plaintiffs to move forward on charges of fraud, which requires greater detail than Section 11 claims.

riskier than represented," and the loan-to-value ratio guidelines "essentially meaningless." *Id.* The complaint alleged that the prospectus supplement for CWALT 2006-J8 falsely stated that Countrywide Home Loans' underwriting standards were being used to assess whether the borrower's debt-income ratio was within "acceptable limits" and that "exceptions" to the general underwriting standards were being made only when the borrower demonstrated "compensating factors." *Id.* ¶ 55(b). Also included were other allegedly false statements made in the Offering Documents for CWALT 2006-J8 and 2006-J1. *Id.* ¶ 55–57.

The Derivative Complaint included similar allegations about falsified and inflated appraisal values, including citations to witnesses with inside knowledge of the appraisal process. Derivative Complaint ¶ 13, 150. The complaint pointed to the use of non-traditional loans, including taking collateral through a second lien on the borrower's home. *Id.* ¶ 10, 119. Plaintiffs included numerous allegations, from first-hand participants, that Countrywide had deviated from stated underwriting standards in order to make as many loans as possible. *Id.* ¶ 13, 24, 141–174. Those deviations included extending wholesale "exceptions" to the normal standards. *Id.* ¶ 147(e), 188. This Court agreed with plaintiffs that they had sufficiently alleged that "some individuals were given loans based on knowingly inflated home appraisal values." *In re Countrywide Fin. Corp. Derivative Litig.*, 554 F. Supp. 2d at 1058. The Court also concluded that the complaint "paint[ed] a compelling portrait of a dramatic loosening of underwriting standards in Countrywide branch offices across the United States." *Id.*

The Securities Complaint includes further allegations of inflated appraisal values. Securities Complaint ¶ 194–206. More eyewitnesses revealed loosened underwriting standards, reliance on second liens on the borrower's property, and the extent to which Countrywide "routinely approved" exceptions to their normal underwriting standards. *Id.* ¶ 5, 104, 108, 126. Assessing this complaint at a later date, this Court held that plaintiffs had convincingly alleged that "From mid–2003

onward, Countrywide continually loosened its underwriting guidelines to the point of nearly abandoning them by 2006." *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d at 1145.

Each of these allegations are found, at times verbatim, in the FDIC's complaint. The AC points to three types of misstatements allegedly made in the Offering Documents: misstatements as to loan-to-value ratios and appraisals, misstatements as to owner-occupancy rates,[9] and misstatements as to underwriting guidelines. AC ¶ 30–91. The AC states there was "undisclosed upward bias in appraisals of properties that secured mortgage loans and consequent understatement of the LTVs of those loans." AC ¶ 53. The Luther complaint alleged that LTV ratios listed in the Offering Documents were false. *Luther* Compl. ¶ 53(c). All three complaints described in excruciating detail involving statements by eyewitnesses the encouragement from CFC to inflate appraisal values. *Id.* ¶ 50; Derivative Complaint ¶ 150; Securities Complaint ¶ 205. The AC echoes *Luther* in alleging that the Offering Documents misrepresented that the appraisals met the Fannie Mae or Freddie Mac standards. AC ¶ 56; Schedule 1, Item 59; *Luther* Compl. ¶ 53(c). Countrywide's nondisclosure of additional liens on the property is an allegation in the amended complaint here, AC ¶ 46–47, and the Derivative and Securities Complaints. Derivative Complaint ¶ 119; Securities Complaint ¶ 104.

The AC alleges that loans originated by Countrywide were issued according to standards inconsistent with those in the Offering Documents. Specifically, it alleges that Countrywide was disregarding the stated guidelines, making extensive, wholesale exceptions, and extending loans the borrowers could not repay. AC ¶

[9] The prior complaints did not mention misstatements as to owner-occupancy. SCB could still have pled a plausible Section 11 claim without information about owner-occupancy rates. Further, this Court has rejected similar allegations as failing to state a claim. *Mass. Mut. Life Ins. Co. v. Countrywide Fin. Corp.*, No. 2:11-cv-10414-MRP, 2012 WL 3578666, at *2 (C.D. Cal. Aug. 17, 2012).

76. The three complaints filed before May 22, 2008 all make similar allegations. *Luther* Compl. ¶ 55(b); Derivative Complaint ¶ 141, 147(e); Securities Complaint ¶ 108, 174. Both the derivative and securities complaints name the computer system that caused an explosion in the approval of "exception" loans. Derivatives Complaint ¶ 13; Securities Complaint ¶ 5. This Court's opinion in the Derivative Litigation verifies the sufficiency of the assertion of abandonment of underwriting standards. *In re Countrywide Fin. Corp. Derivative Litig.*, 554 F. Supp. 2d 1044.

By May 22, 2008, any purchaser of Countrywide RMBS[10] was fully aware of severe problems in the underwriting and appraisals. This Court had already ruled that allegations that Countrywide abandoned its underwriting standard were plausible under Rule 12(b)(6). Holders of RMBS had begun to file complaints. Even if *Merck* applies, the claim is untimely.

The FDIC responds with three related arguments. First, there was no specific information about the actual loans backing the certificates SCB purchased until well after May 22, 2008. Second, the public information was not tied to the specific securities, or even the type of instrument, that SCB purchased. Third, at the motion to dismiss stage, the Court cannot hold that the accrual date preceded the date that the credit rating agencies downgraded the certificates below investment-grade. Each argument is wrong.

According to the FDIC, a "growing body of law" in RMBS litigation supports the position that a complaint is insufficient if based solely on general allegations of wrongdoing by a defendant, without specific information tied to the certificates plaintiffs purchased and the loan pools that back them. Mem. in Opp. to Mot. to Dismiss, ("Opp.,") at 11. Specific loan level information was only available in early 2010. Opp. at 13. Therefore, a sufficient complaint could not have been pled until years after May 22, 2008.

[10] That includes certificates in offering CWALT 2007-5CB, which was not an alleged part of the *Luther* class action.

This argument is flawed.[11] This Court has rejected the position that a complaint must include granular loan-level data before it can pass a motion to dismiss. *Maine State III*, 2011 WL 4389689, at *17 ("The Court disagrees that Plaintiffs must identify specific loans that were issued by deviating from the underwriting guidelines"). There is no "growing body of law" to the contrary. *In re Wells Fargo Mortg.–Backed Certificates Litig.*, 712 F. Supp. 2d 958, 971–72 (N.D. Cal. 2010); *Tsereteli v. Res. Asset Securitization Trust 2006–A8*, 692 F. Supp. 2d 387, 392–93 (S.D.N.Y. 2010). A complaint is sufficient under Rule 12(b)(6) when the plaintiff alleges "that the misstatements and omissions were made with respect to all of the loans, and all of the loans were issued by deviating from the underwriting guidelines." *Maine State III*, 2011 WL 4389689, at *17.[12] The Amended Complaint, like many other complaints, alleges universal deviations from underwriting standards, which also applied to the specific loan pools backing the securities SCB purchased. AC ¶ 85–89.[13] A complaint with general allegations that Countrywide was deviating from its underwriting standards would have been sufficient in May 2008 to survive a motion to dismiss.[14]

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[11] The FDIC may be correct that Countrywide has been inconsistent on this argument, Opp. at 11–12, but that is irrelevant for this Court.

[12] This point may seem inconsistent with the Court's conclusion regarding the Second Circuit's decision in *NECA-IBEW*, *infra*. To be clear, general allegations of abandonment are sufficient to plead a misstatement as to specific securities, but pleading those general allegations does not mean plaintiffs have been injured as to all certificates where abandonment has occurred.

[13] Even if the FDIC were correct as a matter of law that a well-pled complaint requires linking information to the specific loan pools, two of the offerings SCB purchased in were specifically mentioned in the *Luther* complaint, along with detailed allegations about misstatements.

[14] This obviates briefing on the subject of whether the automated valuation model run by the plaintiff meets the standard for delaying the statute of limitations. *Allstate Ins. Co. v. Countrywide Fin. Corp.*, 824 F. Supp. 2d 1164, 1180–81 (C.D. Cal. 2011) (such a loan-level analysis must have "(i) generated new facts which had not been previously known, (ii) been essential to surviving a motion to dismiss, and (iii) not been possible until at least [May 22,] 2008"). A complaint filed in May 2008 could have survived 12(b)(6) without the model; the model is therefore not "essential" to survive a motion to dismiss.

1 The FDIC's second argument is that the complaints and news articles
2 offered by Defendants did not give information about RMBS. The Securities and
3 Derivative complaints only allege misstatements as to Countrywide's value as a
4 corporation rather than misstatements affecting RMBS issued by Countrywide
5 related entities. The FDIC highlights a supposed contradiction. This Court has
6 ruled in other contexts that plaintiffs who bought different securities can only
7 represent another when they purchased identical tranches within the security.
8 *Maine State III*, 2011 WL 4389689, at *7. According to the FDIC, an alleged
9 misrepresentation as to stock does not establish a misrepresentation as to any other
10 Countrywide instrument.

11 This assertion is obviously wrong; there is no contradiction. The statute of
12 limitations begins to run when the plaintiff has or should have knowledge
13 sufficient to draft a complaint under Rule 12(b)(6). The source of the knowledge is
14 irrelevant. The complaints in the Countrywide corporate cases are relevant not
15 because of their subject matter, but because a reasonable investor would read them
16 and learn information about statements made in the offering documents for their
17 RMBS. Countrywide's business model made this perfectly clear. "Countrywide
18 had only one business: underwriting mortgages which it either held for its own
19 portfolio or sold into the secondary market. The shareholder, debenture holder,
20 and derivative suits against Countrywide all made the same allegation:
21 Countrywide stock/debt decreased in value when the market realized that
22 Countrywide had been misrepresenting the quality of the loans it was writing. . .
23 In this sense—though the causes of action might be different—Countrywide
24 shareholders and noteholders have been injured in the same way as secondary
25 purchasers." *Stichting*, 802 F. Supp. 2d at 1138–39.

26 The FDIC's argument also ignores the complaint in *Luther*, which was
27 brought on behalf of RMBS purchasers, allegedly including those in two offerings
28 SCB purchased. Despite its obvious flaws, *Luther* does show that plaintiffs who

had bought the same type of securities were well-aware that the alleged abandonment of underwriting standards and other Countrywide corporate behavior undermined assertions made in filings tied to RMBS.[15]

The FDIC finally argues that it is inappropriate to dismiss their claim when the certificates were not downgraded by the credit rating agencies below investment levels until months after May 22, 2008.[16] This reliance on credit ratings is misplaced for reasonable, sophisticated investors like the plaintiff, who purchased $77 million total worth of mortgage-backed securities.

As stated above, the complaints in the Derivatives, Securities and *Luther* class actions were sufficient to alert a reasonable investor that the Offering Documents contained misstatements, regardless of any action of the credit rating agencies. Nothing in Section 13 or the securities laws suggest that the statute does not run until ratings downgrade. Second, the rule offered by the FDIC absolves investors from monitoring the performance and truthfulness of the representations in their investments, and delegates all responsibility for assessing representations to the rating agencies. This result is also unjustified by policy concerns, given the poor performance by the rating agencies in the run-up to the financial crisis. *See* Financial Crisis Inquiry Commission, FINANCIAL CRISIS INQUIRY REPORT at xxv (2011) ("[t]he three credit rating agencies were key enablers of the financial meltdown. The mortgage-related securities at the heart of the crisis could not have

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[15] The FDIC argues in a footnote that the complaint in *Luther* received virtually no attention in the media. Opp. at 17 n.18. Of course, *Luther* itself relied on public media disclosures and statements by the credit rating agencies, facts that were easily discoverable by SCB. *See Luther* Compl. ¶ 59–63. *Luther* shows the particularly deep knowledge available to investors in CWALT 2006-J8, since Countrywide issued another supplement noting increasing "delinquencies and losses" in that trust. *Luther* Compl. ¶ 62.

[16] CWALT 2006-J8 A2 was downgraded below investment grade on October 30, 2008. CWALT 2006-J1 1-A-6 was downgraded below investment grade on November 5, 2008. CWALT 2007-5CB 1-A-1 and 1-A-11 were downgraded below investment grade on September 22, 2008.

been marketed and sold without their seal of approval. Investors relied on them, often blindly").[17] Third, such a rule would transform this suit from a claim about misrepresentations in the Offering Documents into a suit over the downgrade itself. Fourth, many Countrywide investors brought lawsuits based on misrepresentations before any downgrade in their securities, because their "injury accrued at the same time the alleged misrepresentations came to light, not at the time the risk actually materialized in the form of defaults or lower market values." *Stichting*, 802 F. Supp. 2d at 1135; *see also In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 392 (9th Cir. 2010) ("the market must learn of and react to those particular practices themselves"). Fifth, this Court has specifically rejected the reliance on ratings downgrades. *Allstate*, 824 F. Supp. 2d at 1181. Finally, though the ratings agencies did not downgrade the specific securities purchased by SCB before May 2008, the agencies began placing CWALT issuances on warning and other negative outlook lists before the relevant date. *Luther* Compl. ¶ 59–60. Indeed, the *Luther* complaint relies on the fact that "By the summer of 2007, the amount of uncollectible mortgage loans underlying the Certificates began to be revealed to the public . . . the Rating Agencies began to put negative watch labels on many Certificate classes, ultimately downgrading many." *Id.* ¶ 9.[18]

The conclusion then is clear. By May 22, 2008, SCB knew that misrepresentations were made in the Offering Documents. The media sources, complaints and judgments created a roadmap for holders of RMBS to sue Countrywide for its inflated appraisals, abandonment of underwriting standards

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[17] The Court takes judicial notice of the Financial Crisis Inquiry Report under Rule 201 of the Federal Rules of Evidence, as it did in *Maine State III*, 2011 WL 4389689, at *1 n.1 and *Putnam Bank v. Countrywide Fin. Corp.*, 860 F. Supp. 2d 1062, 1069 n.9 (C.D. Cal. 2012).

[18] Plaintiff relies on district court decisions that have come to the opposite conclusion. *See, e.g.*, *UBS Ams.*, 858 F. Supp. 2d at 321. Those cases are distinguishable since the only public information available before the relevant date involved general problems with the RMBS market, not abandonment of underwriting standards by the originator of the loans themselves.

1 and false LTVs, in contravention to representations in the Offering Documents.
2 The FDIC cannot rely upon the relative lack of information specific to the
3 securities SCB actually purchased, and cannot hide behind the failure of the credit
4 rating agencies to downgrade those certificates. Barring a reason to delay the
5 running of the statute of limitations, the complaint was time-barred before May 22,
6 2009 when the FDIC took receivership.

7 III. ***SCB Cannot Rely on Tolling Because the* Luther *Named Plaintiff did not***
8 ***Purchase in the same Tranches as SCB, and* Luther *was a State Court***
9 ***Complaint***

10 The FDIC asserts that their claims are still timely because the period was
11 tolled by the filing of the *Luther* class action. *Am. Pipe & Constr. Co. v. Utah*, 414
12 U.S. 538, 554 (1974) ("The commencement of a class action suspends the
13 applicable statute of limitations as to all asserted members of the class who would
14 have been parties had the suit been permitted to continue as a class action"). The
15 complaint in *Luther* was brought on behalf of "all persons or entities" that
16 purchased CWALT certificates "pursuant and/or traceable to false and misleading
17 registration statements issued by CWALT between January 2005 and June 2007."
18 *Luther* Compl. ¶ 1. As mentioned above, the *Luther* complaint specifically
19 describes false statements in the CWALT 2006-J1 and 2006-J8 registration
20 statements.

21 However, this Court has consistently held that *American Pipe* tolling applies
22 only to Countrywide MBS for which the "named plaintiffs in the prior putative
23 class actions had standing to sue, *i.e.*, those tranches that the *Luther* named
24 plaintiffs had actually purchased." *Allstate*, 824 F. Supp. 2d at 1169. The named
25 plaintiffs in *Luther* did not purchase in any of the same offerings as SCB, let alone
26 the tranches of CWALT 2006-J1 1-A-6, CWALT 2006-J8 A2 or CWALT 2007-
27
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5CB 1-A-1 or 1-A-11. Defs.' Req. for Jud. Notice, ECF No. 44, Ex. 3, at 14–16; Defs.' Req. for Jud. Notice, ECF No. 44, Ex. 2.[19]

The FDIC offers two principal arguments against the reasoning of this Court's prior decisions. First, the FDIC challenges the conclusion reached by this Court in *Putnam Bank v. Countrywide Fin. Corp.*, 860 F. Supp. 2d 1062 (C.D. Cal. 2012), that *American Pipe* tolling applies only to those claims the named plaintiff had standing to assert. Second, the FDIC argues that this Court should reconsider its rulings as to standing due to a recent Second Circuit ruling, which granted the named plaintiff "class standing" as to any certificates backed by loans from the same originator that backed the named plaintiff's certificates. *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012). The Court rejects both arguments.

Tolling under *American Pipe* is only appropriate when the named plaintiff had standing to assert the claim. If a class action plaintiff lacked standing to sue on certain claims, then jurisdiction could never attach for those claims. *Walters v. Edgar*, 163 F.3d 430, 432 (7th Cir. 1998). Under Article III, federal courts lack the power to hear the asserted claims, and therefore have no power to modify Congressionally determined statute of limitations. *Palmer v. Stassinos*, 236 F.R.D. 460, 465 n.6 (N.D. Cal. 2006). The Court is aware, as it was when it issued *Putnam Bank*, *Maine State* and its other decisions tying tolling to standing, of considerable disagreement among district courts regarding this holding. *See, e.g.*, *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 810 F. Supp. 2d 650, 669 (S.D.N.Y. 2011); Opp. at 27 n.31 (collecting cases).

[19] Since the Court reaffirms its decisions in cases like *Allstate*, and offers further thoughts rejecting *American Pipe* tolling for state court class actions like *Luther*, there is no need to address the Defendants' separate argument that the FDIC has not alleged sufficient facts to support tolling. Mem. in Supp. of Countrywide Defs.' Mot. to Dismiss at 16.

The Court finds no reason to reconsider its prior rulings. The decisions to the contrary are unpersuasive in relying too heavily on the "policy" behind *American Pipe* tolling. *See, e.g., Morgan Stanley*, 810 F. Supp. 2d at 669 (relying on "the purpose of *American Pipe* tolling"); *Genesee Cty. Emps.' Ret. Sys. v. Thornburg Mortg. Secs. Trust 2006-3*, 825 F. Supp. 2d 1082, 1161 (D.N.M. 2011) (citing to an alleged "functional attitude" in doctrine involving *American Pipe*). This concern with policy sits uneasily with the burgeoning consensus in the federal courts that such tolling is "legal rather than equitable in nature." *Joseph v. Wiles*, 223 F.3d 1155, 1166–77 (10th Cir. 2000), *see also infra*. Further, there is in fact a strong policy reason to tie tolling to standing, since the contrary rule would "encourage filings made merely to extend the period in which to find a class representative." *Maine State I*, 722 F. Supp. 2d at 1167.

In fact, even those district courts that do not tie tolling to standing acknowledge that "[t]here may be circumstances where the representative so clearly lacks standing that no reasonable class member would have relied." *Morgan Stanley*, 810 F. Supp. 2d at 670.[20] The *Luther* complaint is such a circumstance. *Putnam Bank*, 860 F. Supp. 2d at 1070. The *Luther* class action was asserted on behalf of all claims of every tranche of 427 securities offerings. It was not plausible that David Luther or any other *Luther* plaintiff had purchased in every one of the tranches or offerings which *Luther* claims to encompass. *Luther* was "precisely the type of abusive placeholder lawsuit that has prompted many courts' concern about American Pipe tolling." *Id.*[21]

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[20] This is the flip side of this Court's conclusion that in the case of "*bona fide* dispute" over the named plaintiff's standing, the Court would consider allowing tolling for plaintiffs who reasonably but mistakenly relied on that standing. *Putnam Bank*, 860 F. Supp. 2d at 1069–70. As is made clear, there was no such *bona fide* dispute as to the standing of the *Luther* named plaintiffs.

[21] An abusive placeholder suit was precisely Justice Blackmun's concern in *American Pipe*. *Am. Pipe*, 414 U.S. at 561 (Blackmun, J., concurring) (warning that the decision "must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class

In its argument, the FDIC cites to the Second Circuit's recent ruling that named plaintiffs have standing on behalf of certificate holders even where the named plaintiff did not purchase in the same offering or tranche as those certificate holders. *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012). The court held that a named plaintiff has "class standing" whenever he plausibly alleges "(1) that he personally suffered some actual injury as a result of the putatively illegal conduct of the defendant, and (2) that such conduct implicates the same set of concerns as the conduct alleged to have caused injury to other members of the putative class by the same defendants." *Id.* at 162 (internal citations omitted). In the RMBS context, the "same set of concerns" are implicated by any certificates backed by loans from common originators, specifically rejecting the notion that named plaintiffs only had standing with respect to offerings or tranches they themselves had purchased in. *Id.* at 164; *contra e.g., Maine State III*, 2011 WL 4389689, at *4–8.

The decision in *NECA-IBEW* has thrown the jurisprudence in this area into disarray. *See, e.g.*, Reply in Further Supp. of Countrywide Defs.' Mot. to Dismiss, ("Reply Mem.,") at 16 n.18 (collecting cases holding that named plaintiffs had standing only when they had at least purchased a certificate from the offering they sought to represent). The defendants in the case have filed a petition for a writ of certiorari in the United States Supreme Court. Notice of Pet. For Writ of Cert., ECF No. 59, Ex. A. With respect, the Court is not persuaded by the reasoning of the Second Circuit. *NECA-IBEW* fails to account for the differences between securities cases involving MBS and class actions based on other kinds of securities and injuries.

Plaintiffs only have Article III standing when they suffer an injury-in-fact, traceable to the defendant and redressable by the requested legal relief. *Lujan v.*

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action, intentionally, to attract and save members of the purported class who have slept on their rights").

1 *Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). In the RMBS context, that
2 means at the least that a plaintiff must purchase from within an offering to have
3 suffered constitutional injury through the diminution of the value of their
4 certificate. *See, e.g.*, *Wells Fargo*, 712 F. Supp. 2d at 964; *Plumbers' Union Local*
5 *No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 658 F. Supp. 2d 299, 303
6 (D. Mass. 2009) (a "plaintiff[] [is] incompetent to allege an injury caused by the
7 purchase of Certificates that they themselves never purchased".) The Supreme
8 Court has held that "[t]he standing determination is quite separate from
9 certification of the class." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). "[A]
10 plaintiff must demonstrate standing for each claim he seeks to press."
11 *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352–53 (2006). As a result, the
12 Ninth Circuit has held that the standing inquiry "must be satisfied prior to class
13 certification," and that "certification is not sufficient in itself to bestow standing on
14 individuals or a class who lacked the requisite personal stake at the outset."
15 *LaDuke v. Nelson*, 762 F.2d 1318, 1325 (9th Cir. 1985); *see also Lierboe v. State*
16 *Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) ("if [named
17 plaintiff] has no . . . claim, she cannot represent others who may have such a
18 claim"). That means that for an RMBS case, the named plaintiff must have
19 standing to sue for each of the asserted claims by purchasing in the offerings that
20 are putatively part of the class action.[22] At the beginning of its opinion, the Second
21 Circuit agrees that "NECA clearly lacks standing to assert such claims on its behalf
22 because it did not purchase those Certificates." *NECA-IBEW*, 693 F.3d at 158.
23 However, the Second Circuit holds that the "class standing analysis is
24 different," on the basis of its misguided interpretation of the Supreme Court's
25 decision in *Gratz v. Bollinger*, 539 U.S. 244 (2003). As a result of that
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27 [22] This Court requires a further predicate, that a plaintiff only has standing when it
28 purchases within a specific tranche. The Second Circuit's standing rule is far broader, however, and is not grounded in any of the offering documents.

1 interpretation, the Second Circuit allows a named plaintiff in a class action to
2 vindicate all other plaintiffs with "the same set of concerns." *NECA-IBEW*, 693
3 F.3d at 162. This conclusion combines the distinct stages of standing and class
4 certification, and in so doing, allows Rule 23 to trump Article III of the
5 Constitution. *Henry v. Circus Circus Casinos, Inc.*, 223 F.R.D. 541, 544 (D. Nev.
6 2004) ("Standing is a jurisdictional limitation on this Court's jurisdiction that
7 cannot be expanded by class action principles under Federal Rule of Civil
8 Procedure 23").
9 The *NECA-IBEW* court then makes a discretionary judgment that "we think
10 that differences in the identity of the originators backing the Certificates matters
11 for the purposes of assessing whether those claims raise the same set of concerns."
12 *Id.* at 163. The Second Circuit offers that since the plaintiffs' lawsuit focuses on
13 abandonment of underwriting guidelines, the relevant proof common to all putative
14 class members is that the originator backing its certificates had abandoned the
15 guidelines. *Id.* at 164. In other words, the named plaintiffs have "class standing"
16 over any certificates backed by loans from the mortgage originators that issued the
17 loans behind the specific certificates purchased by the named plaintiffs. According
18 to the court, if the mortgage originator abandoned the underwriting standards as to
19 the named plaintiff's certificates, then all other certificates backed by that
20 originator also contain misstatements.
21 The court includes reasoning that undermines that conclusion. "NECA is
22 not suing [the underwriters] for abandoning their underwriting standards; it is suing
23 the three Goldman Sachs entities that issued, underwrote, and sponsored every
24 Certificate from all 17 Trusts." *Id.* at 162. In issuing, underwriting and sponsoring
25 the certificates, Goldman Sachs filed registration statements, prospectuses and
26 prospectus supplements with the Securities Exchange Commission. The plaintiffs'
27 claims derived from the alleged misstatements included in those documents. The
28 filings were false because of their *content*, which made certain representations

about the underwriting. The actual underwriting standards, and the originator's conformance to them, are irrelevant. What matters for RMBS litigation alleging misstatements, like the instant lawsuit and that in *NECA-IBEW*, is what the defendants said about those standards. The *statements* about underwriting standards are the substance of the class action suits. Named plaintiffs only have the same set of concerns as class members when they have read the same filings with the same statements as the class members.[23]

NECA-IBEW is reflective of confusion about the differences between RMBS litigation and other types of class actions. The court analogizes to that of "corporate debt" litigation to reject a test derived from documents filed with the SEC. *NECA-IBEW*, 693 F.3d at 163. For corporate debt, though, each security is backed by the same entity – the corporation. Each certificate in an RMBS is backed by different loan pools, described in the offering documents, and the representations made in the prospectus supplements about each certificate are therefore unique. *Maine State I*, 722 F. Supp. 2d at 1164. Unlike mass tort or simple securities cases, where each plaintiff in the class complains of the same behavior by the defendant, the issuer of RMBS acts differently towards purchasers of different offerings, through entirely different documents and loan pools.

Finally, *NECA-IBEW* does not mention any limitation on its origination rule. The named plaintiff can represent all originated loans, even if that is many times the loans held by named plaintiffs. The named plaintiffs in *NECA-IBEW* itself were able to transform $500,000 in securities holdings into a class action worth billions of dollars. Notice of Pet. For Writ of Cert., ECF No. 59, Ex. A, at 27.

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[23] This conclusion demonstrates that the Second Circuit's rule runs afoul of both the Article III injury-in-fact and traceability requirements. A plaintiff has standing only if its injury is "fairly traceable to the defendant's allegedly unlawful conduct." *Lujan*, 504 U.S. at 590. The defendant's alleged conduct was not the common abandonment of underwriting standards by the mortgage originator. It was the inclusion of misstatements in the specific documents filed with the SEC, pursuant to which the plaintiffs bought the certificates.

Given the pressure on defendants to settle class actions, the Second Circuit's rule could force securities defendants to settle class actions where the plaintiff had no power to represent most of the class. This result may be more expedient, but it is manifestly less fair.

This Court, consistent with the majority of federal courts outside the Second Circuit, therefore does not find the court's decision in *NECA-IBEW* persuasive. *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 770 (1st Cir. 2011) ("Although Nomura Asset is a common defendant with respect to all eight of the trusts, claims against it as well fail so far as they are based on the six trusts whose certificates were purchased by no named plaintiff"); *see also* Reply Mem. at 16 n.18 (collecting cases). There is no reason to deviate from this Court's prior decisions. The *Luther* named plaintiffs did not purchase in any of the tranches SCB bought, so the *Luther* class did not include SCB. Therefore, SCB's claim was not tolled by *American Pipe*.

The FDIC's complaint is time-barred, since SCB's claims had expired when the FDIC was appointed receiver, and the claims are not subject to tolling. However, the Court will take this opportunity to rule in the alternative on a previously settled issue in the Countrywide MBS MDL. In *Maine State I*, the Court concluded that *American Pipe* tolling does not apply "only when the first putative class action lawsuit is filed in federal court." *Maine State I*, 722 F. Supp. 2d at 1166. *American Pipe* tolling applies, the Court ruled, even when the initial class action was filed in state court. In so doing, the Court promised further analysis at a later date, but has not provided it.

Upon closer review, the Court is no longer convinced that this conclusion was correct. This discussion is not case-determinative, so the reasoning is presented here in the alternative. However, it represents a change in the Court's analysis of existing case law and is appropriate for inclusion.

The *American Pipe* tolling rule extends the statute of limitation for members of a federal class action seeking to file individual federal claims. *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 347, 350 (1983) (explaining that the class action was filed "in the United States District Court for the District of Maryland" on the basis of violations of "Title VII of the Act, 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq." and holding that "[t]he filing of a class action tolls the statute of limitations as to all asserted members of the class") (citation omitted). The source for that decision has been the subject of scholarly and judicial inquiry. Rhonda Wasserman, *Tolling: the* American Pipe *Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 824 (2006) ("The Court did not squarely address whether Rule 23 itself supplies the tolling rule announced in *American Pipe* or whether the tolling rule is a federal common law rule"); *Footbridge Ltd. Trust v. Countrywide Fin. Corp.*, 770 F. Supp. 2d 618, 625–26 (S.D.N.Y. 2011) ("Some courts have concluded that *American Pipe* tolling is a species of legal or statutory tolling, rather than equitable tolling . . . This Court concludes that American Pipe tolling is not a form of legal or statutory tolling, but is a form of equitable tolling").

Federal courts have limited power, and can only act when authorized by the Constitution or statute. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Article III judges have two other forms of highly limited powers not grounded in positive law, equity and common law. When federal courts exert the powers of equity, they can only do so when consistent with the "equitable powers conferred by the Judiciary Act of 1789." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund*, 527 U.S. 308, 332 (1999). Federal common law was famously cabined in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and is considered "limited" to this day. *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 329 (1981).

Those limited powers lead many judges to conclude that *American Pipe* is a form of "legal tolling." Federal judges do not have the power to arbitrarily amend

clearly worded Congressional statutes of limitation, but the Federal Rules of Civil Procedure can modify those limitations, and a line of cases interprets Rule 23 as doing just that.[24] *See, e.g., Joseph v. Wiles*, 223 F.3d 1155, 1166–68 (10th Cir. 2000) ("Tolling the limitations period for class members while class certification is pending serves the purposes of Rule 23 of the Federal Rules of Civil Procedure governing class actions"); *Maine State I*, 722 F. Supp. 2d at 1166; *Morgan Stanley*, 810 F. Supp. 2d at 667 ("the Court finds more persuasive the view of a majority of the lower courts, which holds that American Pipe tolling is a species of legal tolling, in that it is derived from a statutory source, in this case Rule 23") (citations omitted).[25]

That conclusion is evidence that *American Pipe* tolling cannot apply to a class action filed in state court, even if the claims in the state class action are federal. The complaint in *Luther* expressly did not seek to meet the requirements of Rule 23. The class action could continue if it complied with California procedural rules. *Luther* Compl. ¶ 38 ("Plaintiff brings this action as a class action pursuant to California Code of Civil Procedure § 382"). If *American Pipe* tolling is a form of legal tolling, Rule 23 delays Section 13 of the Securities Act. But a state law like the California procedural rules can never alter federal law. U.S. CONST. art. VI. "[T]here is no suggestion in *American Pipe*, or in *Crown, Cork*, that these decisions construing Federal Rule of Civil Procedure 23 have any direct application to parallel state procedures." *In re Copper Antitrust Litig.*, 436 F.3d

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[24] The interpretation of Rule 23 as modifying a Congressional statute may be inconsistent with the Rules Enabling Act, since "[General rules of practice and procedure] shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see Footbridge*, 770 F. Supp. 2d at 626. However, this Court agrees now, as it did in *Maine State I*, with the majority of federal courts that *American Pipe* tolling is legal tolling.

[25] These cases address whether a federal class action tolls the statute of repose in Section 13, which designates that "[i]n no event" shall an action under Sections 11 or 12 be brought more than three years after the offer or sale of the security.

782, 793–94 (7th Cir. 2006) (Cudahy, J., for the panel and concurring in Part II) (citations omitted).

Further, one of the policy justifications for *American Pipe* is that the rule ensures fairness to defendants since the "named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants . . . of the substantive claims being brought against them . . . Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation." *American Pipe*, 414 U.S. at 555–56. Class actions in state court need not provide any of that essential information to the defendant. California's class action rule happens to somewhat parallel Rule 23. Cal. Code Civ. Pro. § 382 ("when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all"). However, there is no guarantee that the state follows federal judicial precedents interpreting that rule, and the state is not required to parallel or follow the federal rules or their interpretation. The state could adopt a far more liberal class action standard, which would offer the defendant none of the "essential information" necessary. "[H]owever similar the purposes of federal and state litigation, they must still be maintained by filing complaints and pursuing remedies in different courts. This fact may be decisive for procedural issues like the one here." *In re Copper*, 436 F.3d at 794 (Cudahy, J., for the panel and concurring in Part II).

More recent developments in securities law highlight this incongruity as to state court securities class actions. In 1995, Congress passed the Private Securities Litigation Reform Act, which implemented a number of changes to the securities laws of the United States. One change to 1933 Securities Act class actions required that the named plaintiff "provide a sworn certification . . . that sets forth all of the transactions of the plaintiff in the security that is the subject of the

complaint during the class period specified in the complaint." 15 U.S.C. § 77z-1(a)(2)(A)(iv). That certification requirement further serves to notify the defendant of the type and details of the claims brought by the plaintiff. California has not adopted the PSLRA's certification requirement. As a result, the *Luther* plaintiffs themselves have not yet been required to detail their securities transactions.[26] The PSLRA provides a further reason to believe that *American Pipe* tolling extends to state court class actions that need not comply with the heightened standard.

A rule restricting *American Pipe* tolling effect to class actions filed in federal court is also more consistent with the practices of the states themselves. Very few states toll the claims of individuals based on a class action filed in another jurisdiction (called "cross-jurisdictional tolling"). *See, e.g., Wade v. Danek Medical Inc.*, 182 F.3d 281, 287 (4th Cir. 1999) (collecting cases). The reasoning of those courts that reject cross-jurisdictional tolling is equally applicable to the situation here. The federal government "simply has no interest, except perhaps out of comity, in furthering the efficiency and economy of the class action procedures of another jurisdiction." *Id.* Extending *American Pipe* could burden the federal courts with "a flood of subsequent filings once a class action in [a state] forum is dismissed, as forum-shopping plaintiffs from across the country rush into the [federal] courts to take advantage of its cross-jurisdictional tolling rule." *Id.*[27] "[I]f [the federal government] were to allow cross-jurisdictional tolling, it would render the . . . limitations period effectively dependent on the resolution of claims in other jurisdictions, with the length of the limitations period

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[26] The plaintiffs in the related *Maine State* case ultimately did, in April 2010, two and a half years after the filing of *Luther* in state court. Defs.' Req. for Jud. Notice, ECF No. 44, Ex. 3; Defs.' Req. for Jud. Notice, ECF No. 44, Ex. 2.

[27] Federal courts are courts of limited jurisdiction, and are particularly concerned with the size of their docket. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005) (predicating federal subject matter jurisdiction on whether "a federal forum may entertain [the lawsuit] without disturbing any congressionally approved balance of federal and state judicial responsibilities").

varying depending on the efficiency (or inefficiency) of courts in those jurisdictions." *Id.*

However, there is contrary authority. There is a decision holding that state court complaints should receive *American Pipe* tolling effect in the federal courts. *Sawyer v. Atlas Heating and Sheet Metal Works, Inc.*, 642 F.3d 560, 562–63 (7th Cir. 2011) (citing and distinguishing *In re Copper*) ("Federal law determines the tolling effect of a suit governed by a federal statute of limitations. *American Pipe* establishes that federal rule"). There are complex *Erie*[28] and Rules Enabling Act questions here. Since California does recognize *American Pipe* tolling for its own class actions, *Bangert v. Narmco Materials, Inc.*, 209 Cal. Rptr. 438 (Ct. App. 1984), must a California federal court do the same? If the state of California recognized cross-jurisdictional tolling,[29] would a California federal court be required to follow? Does Rule 23 function like other rules of civil procedure that specifically carve out a role for state law? *See* Fed. R. Civ. P. 4(e)(1) ("an individual . . . may be served in a judicial district of the United States by: (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made"). Could a federal common law rule require cross-jurisdictional tolling? *Cf. Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001). The Court rules in the alternative on the broader application of *American Pipe* to state class actions, but will return to some of these questions in future cases.

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[28] Unlike *Erie*, this is a federal question case, but some portions of the *Erie* doctrine likely apply in such cases as well. Adam N. Steinman, *What is the* Erie *Doctrine? (And What Does it Mean for the Contemporary Politics of Judicial Federalism)*, 84 NOTRE DAME L. REV. 245, 311–12 (2008).

[29] California has not yet ruled on this issue. The Ninth Circuit has counseled "not to import the doctrine of cross-jurisdictional tolling into California law." *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008).

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IV. Conclusion

The FDIC's claim is time-barred. Public media sources, complaints and judicial decisions gave SCB sufficient information to survive a motion to dismiss before May 22, 2008. The FDIC cannot rely on *American Pipe* tolling, since the named plaintiff in the class action cited to in the AC did not purchase any of the same tranches that SCB purchased. As a result, the FDIC's claims had expired when it took receivership on May 22, 2009, and tolling does not render its claims timely.

The motions to dismiss filed by the Defendants are granted.

IT IS SO ORDERED.

DATED: November 21, 2012

MARIANA R. PFAELZER

Hon. Mariana R. Pfaelzer
United States District Judge