No. 11-2762

(Docket Number in District Court: 1:08-cv-10783-MGC)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

[Caption continued on following page.]

Appeal from the United States District Court
for the Southern District of New York
The Honorable Miriam Goldman Cedarbaum

PLAINTIFF-APPELLANT'S OPENING BRIEF AND SPECIAL APPENDIX

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vs.

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

GS MORTGAGE SECURITIES CORP., GSAA HOME EQUITY TRUST 2007-3, GSAA HOME EQUITY TRUST 2007-4, GSAMP TRUST 2007-HE2, GSAMP TRUST 2007-FM2, GSAA HOME EQUITY TRUST 2007-5, GSAA HOME EQUITY TRUST 2007-6, GSAA HOME EQUITY TRUST 2007-7, GSAA HOME EQUITY TRUST 2007-8, GSR MORTGAGE LOAN TRUST 2007-4F, GSAMP TRUST 2007-HSBC1, GSAMP TRUST 2007-HEI, STARM MORTGAGE LOAN TRUST 2007-4, GSAA HOME EQUITY TRUST 2007-10, GSR MORTGAGE LOAN TRUST 2007-5F, GSR MORTGAGE LOAN TRUST 2007-3F, GSR MORTGAGE LOAN TRUST 2007-OA2, SUNTRUST ROBINSON HUMPHREY, INC.,
Defendants,

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

NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co., et al.
Second Circuit No. 11-2762

CORPORATE DISCLOSURE STATEMENT

NECA-IBEW Health & Welfare Fund was the lead plaintiff below and is the appellant here. It is not a corporation, and it is not controlled by any publicly traded corporation.

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I. JURISDICTIONAL STATEMENT

This case arises under the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §77a *et seq*. On behalf of an as-yet-uncertified class, court-appointed lead plaintiff NECA-IBEW Health & Welfare Fund ("the Fund") asserted claims under §§11, 12(a)(2), and 15 of the Securities Act. The district court had jurisdiction under Securities Act §22(a) and 28 U.S.C. §1331.

The district court dismissed the Fund's §11 claims with prejudice on October 14, 2010 ("Dismissal Order"), holding that it failed to plead a cognizable injury and any conceivable statutory damages under §11. *See* SPA-7-13.[1] That dismissal left only §§12(a)(2) and 15 claims in the case, as §12(a)(2) provides for outright rescission as an alternative to damages arising from a sale.

Class counsel subsequently discovered, however, that on November 22, 2010 the Fund's investment manager had sold the securities giving rise to its remaining claims. CD129:2. In light of that sale – which eliminated the Fund's ability to tender the Certificates back to defendants but seemingly provided the realized loss the district

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[1] This Brief designates materials reproduced in the appended Special Appendix as "SPA-__," and in the parties' Joint Appendix as "JA-__." Numbered entries in the district court's Civil Docket that are not reproduced in either of the appendices are designated "CD__."

court deemed necessary – the Fund moved for leave to amend its complaint and for relief from the Dismissal Order under Rule 60(b). CD128. The district court denied the motion from the bench. JA-381/6:8-9.[2]

That denial, coupled with the court's prior §11 dismissal, led plaintiff's counsel to conclude that ***all*** of the Fund's claims were now extinguished:

> [A]s I understand the impact of the ruling, I think that extinguishes all the plaintiffs' claims at this point, and assuming that that's the case, because we can't get rescission under Section 12, if you're ruling we can't get damages under Section 11 or 12 at this point, that extinguishes those claims as well.

JA-382/12:3-8. Following colloquy concerning its ruling's impact, the court agreed that a formal motion for entry of judgment seemed warranted. JA-383/16:4-7.

The Fund thereafter moved for clarification of the court's rulings and entry of final judgment. CD144. At a hearing on the motion, the district court directed class counsel to submit a proposed judgment. CD152/2:1-18.

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[2] When citing transcript pages reproduced in the Joint Appendix, the Joint Appendix page number will be followed by a "/," and then the transcript's actual page and line numbers: "JA-__/__:__." Many of the district court's rulings, and much of its reasoning, can only be gleaned from transcript pages.

On June 10, 2011, the court entered an "Amended Order" stating that the "[u]nopposed motion to enter judgment . . . is granted." SPA-18. The Fund timely appealed from that Amended Order on July 6, 2011. JA-385.

This Court has jurisdiction to review the final judgment (as well as all interlocutory orders leading up to it) under 28 U.S.C. §1291.

II. ISSUES PRESENTED

1. Under §11(e) of the Securities Act, recoverable damages available to investors suing upon a §11 violation

> shall represent the ***difference*** between the ***amount paid for the security*** (not exceeding the price at which the security was offered to the public) ***and*** (1) ***the value thereof as of the time such suit was brought***, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if [certain contingencies exist] . . . .

15 U.S.C. §77k(e).[3] In light of that plain statutory text, did the district court err in requiring investors to suffer an out-of-pocket loss in order to adequately plead injury and damages?

[3] Throughout this Brief, ***emphasis*** will be added and internal citations omitted unless noted otherwise.

2. Section 11 confers standing to sue on any person acquiring a security if

> ***any part of the registration statement***, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

15 U.S.C. §77k. In light of that plain statutory text, did the district court err in limiting the Fund's standing to only 2 of the 17 Certificates sued upon, despite each Certificate having been sold pursuant to (i) the ***same*** Registration Statement containing myriad misstatements, and to (ii) Prospectus Supplements containing similar misstatements, and that were issued pursuant to – and expressly incorporated into – that same Registration Statement?

3. Did the district court err in holding that the Complaint failed to state claims under Securities Act §§11 and 12?

III. STANDARDS OF REVIEW

The district court's dismissal on the pleadings pursuant to Fed. R. Civ. P. 12(b)(6) is reviewed *de novo*. *See Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 591 (2d Cir. 2007); *see also id*. at 591-92 ("For the purpose of such a review, this Court must accept as true all allegations in the complaint and draw all reasonable inferences in favor of the non-moving party.").

The district court's interpretation of the Securities Act concerning (i) the Fund's "standing" and (ii) requiring investors to suffer an out-of-pocket loss is reviewed *de* *novo*. *See White v. Shalala*, 7 F.3d 296, 299 (2d Cir. 1993) ("We review *de novo* whether the district court correctly interpreted the statute.").

IV. STATEMENT OF THE CASE

A. Nature of the Case

This is a putative securities class action brought by institutional investor and lead plaintiff NECA-IBEW Health & Welfare Fund on behalf of all persons who acquired the Asset-Backed Certificates ("Certificates") of GS Mortgage Securities Corp. ("GS Mortgage") pursuant and/or traceable to a false and misleading Registration Statement and 17 false and misleading Prospectus Supplements issued during 2007 and 2008 (together, the "Offering Documents"). JA-204:¶1; JA-111:¶12. The Fund and members of the proposed class purchased billions of dollars of Certificates that had been issued pursuant to "Trusts." JA-207:¶12.[4]

The action alleges strict liability and negligence-based claims under §§11, 12(a)(2), and 15 of the Securities Act against various defendants responsible for the Offering Documents' false and misleading contents, including GS Mortgage, Goldman Sachs & Co., Goldman Sachs Mortgage Company ("GSMC"), and three

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[4] The Trusts were New York common-law trusts. The loans within them were purchased from various originators, bundled together, and then securitized into the Certificates offered for sale. JA-207:¶12; JA-210:¶26.

individuals (the "Individual Defendants") who served as officers or directors of GS Mortgage during the relevant time. JA-236-JA-240:¶¶95-117. Plaintiff alleges that the Offering Documents were rife with materially false and misleading statements and omissions concerning the Certificates' true nature, risk, and overall quality. JA-204-JA-205:¶¶3-4.

As the truth about the Certificates' misstatements/omissions and actual level of risk associated with them began to unfold in mid-2008, their value dropped dramatically. JA-205-JA-206:¶6. Despite being offered as "investment grade" mortgage-backed securities, the value of the Certificates at the time of this lawsuit had plunged to mere fractions of the prices paid for them. *Id.*; JA-236:¶93.

As a result, the Certificates' purchasers suffered significant damages that are recoverable under the Securities Act's plain text. JA-235:¶92.

B. Course of Proceedings

The Fund filed this action in December 2008, with an Amended Complaint following on May 15, 2009. JA-6-JA-105. On September 18, 2009, the district court, Hon. Miriam Goldman Cedarbaum presiding, dismissed that complaint with leave to amend; the Fund filed a Second Amended Complaint in November 2009. JA-107-JA-156. After the district court dismissed that complaint with leave to amend in January

2010, the Fund filed a Third Amended Complaint – the operative "Complaint" on this appeal. JA-203-JA-252.

On September 22, 2010, the district court issued an oral ruling denying defendants' motion to dismiss the Complaint as to its §§12 and 15 claims, having found that the Complaint sufficiently alleged the Offering Documents' material misstatements, and that the Fund pleaded a viable §12 rescission claim because it continued to hold its Certificates. JA-309/57:6-8. The court reserved judgment on the §11 claims at that time, however, due to its concerns whether the Fund – which had not sold its Certificates at a loss – had adequately alleged "injury" under §11 without suffering an out-of-pocket loss. JA-309/57:9.

In its Dismissal Order dated October 14, 2010, the district court dismissed the Fund's §11 claims – holding that there was no injury because (a) the Complaint did not allege an actual failure to receive the periodic payments due under the Certificates, and (b) the Fund had not sold its Certificates at a loss. SPA-7-SPA-13; *see also NECA-IBEW Health & Welfare Fund v. Goldman, Sachs & Co.*, 743 F. Supp. 2d 288 (S.D.N.Y. 2010). The court rejected the Fund's argument that, in keeping with §11's plain statutory text, investors who had purchased (and held onto) the Certificates were injured by dint of the Certificates' diminished value. Thus, as of mid-October 2010, it appeared that the Fund's only viable claims were its rescission claims under §12 (and the §15 claims derived from them).

The Fund filed a motion for reconsideration of the §11 dismissal (CD114), which the district court denied. SPA-14-SPA-15. The Fund thereafter moved for a final judgment as to its §11 claims pursuant to Fed. R. Civ. P. 54(b) or, alternatively, certification of the Dismissal Order pursuant to 28 U.S.C. §1292(b). CD120. The district court denied that motion on January 14, 2011. SPA-16.

Following the January 14, 2011 ruling, the Fund moved for leave to file an amended complaint and for relief from the Dismissal Order under Fed. R. Civ. P. 60(b). CD128. That motion explained that the Fund had now sold certain of its Certificates for 68% of their remaining face value, thus realizing a substantial "loss" under the district court's previously announced (albeit erroneous) view of Securities Act damages. CD129:2. In light of those facts, the Fund suggested, both amendment and relief from the Dismissal Order were warranted. CD129:4-7.

At the hearing on the motion, counsel and the court engaged in extensive colloquy concerning the import of the Certificates' sales, and possible amendment. The sale of the Certificates meant, for one thing, that the Fund no longer had a viable rescission claim under §12. JA-381/7:7-10. But because the court refused to allow amendment with a key fact that would have satisfied its previous view of §11 damages

– the Certificates' sales – it appeared the Fund had no claims left to prosecute. *See* JA-382/12:3-8.

In light of that reality, plaintiff's counsel asked the district court to enter judgment. JA-383/15:8-10 ("Your Honor, given your ruling, I would ask you to enter judgment on this case, because we have no claim, if that's the court's ruling."). The court agreed that a formal application for entry of judgment was warranted. JA-383/15:24-25; 16:4-5.

Wanting to be certain that the district court intended that its prior ruling as to §11 damages applied equally to any possible §12 damages in the wake of the Certificates' sales, in early April 2011 the Fund moved alternatively for (a) clarification, or (b) entry of final judgment. CD144. The district court granted the part of the motion seeking a final judgment. *See* CD152/2:17-18 ("Give me a proposed judgment and I will enter it and you can argue" to the Court of Appeals); *see also* CD150 ("Motion granted. For oral opinion, see record of proceedings.").

On June 10, 2011, the district court entered a two-sentence "Amended Order," granting the Fund's unopposed motion to enter judgment. SPA-18. This timely appeal followed.

C. Relevant Dispositions Below

Through a series of oral rulings, short orders incorporating those rulings, and a published opinion, the district court issued dispositive holdings on each of the issues presented by this appeal: *i.e.*, the Fund's standing vis-à-vis other Certificate purchasers, viability of claims under §§11 and 12, and damages under the Securities Act:

1. September 18, 2009 Memo Endorsement Dismissing Amended Complaint with Leave to Amend

In a one-line, handwritten "Memo Endorsed" order dated September 18, 2009, the district court dismissed the Amended Complaint with leave to amend. SPA-1. At oral argument the day before the district court had asked for an amended complaint that was "clearer and more specific." CD67/38:9-10. The court also directed the Fund to "identify whom you bought from" for its §12(a)(2) claim. CD67/40:18-19.

Importantly, the court also ordered the parties to submit separate briefing on whether the Fund could bring claims on behalf of purchasers of the other 15 Certificates – *i.e.*, other than the 2007-5 and 2007-10 Certificates. CD67/39:2-40:2. The parties did so (CD68; CD69), and the Fund filed its Second Amended Complaint on November 18, 2009. JA-107-JA-156.

2. January 28, 2010 Bench Ruling and Memo Endorsement on Standing and Pleading §11 Damages

At the January 28, 2010 hearing on defendants' motion to dismiss the Second Amended Complaint, the district court issued two major rulings while granting leave to amend. It held that the Fund lacked standing to assert claims on behalf of purchasers of Certificates other than the 2007-10 and 2007-5 ones. JA-198/41:17-20. It also held that the Second Amended Complaint's allegations "do not support any conceivable damages" to the Fund. JA-198/41:22-24.

a. The Fund's Standing Vis-à-Vis Other Certificates

In holding that the Fund lacked standing to assert other injured Certificate purchasers' claims, the court considered the explanation that in class actions, plaintiffs who purchase one type of debt security properly represent other plaintiffs who bought other debt securities pursuant to the same offering document. JA-159-JA-160/2:23-3:4. Indeed, the Fund's counsel explained, key to that ability here was the fact that ***all*** Certificate purchasers were subject to the same misrepresentations concerning the same mortgage-backed securities – "all flowing from the same registration statement. And that's why we have standing to represent them all." JA-165/8:9-13; *accord* JA-165/8:23-25 (all proposed class members "bought from a single registration statement").

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Although the district court conceded that a representative plaintiff can pursue classwide relief for securities she did not buy (JA-162-JA-163/5:20-6:3), it felt that axiom was inapplicable where a class was not yet certified. JA-164/7:24-25 ("You are now on an individual basis. There is no class yet."); JA-166/9:15 ("But this is not a class action."). In fact, the court asserted, "I don't care whether you have standing for the entire class. I care only at this point whether you can complain about a series of certificates that you did not buy." JA-166/9:8-10.

The Fund's counsel pointed out that, although the Fund's own, viable claim was a necessary starting point, "the next step is can you represent other people, and how do you do that." JA-166-JA-167/9:23-24. "If they are all subject to the same course of conduct, then you can [represent them], your Honor. That's what we are alleging in this case." JA-166/9:24-10:1.

The court was unmoved, focusing on the fact that the putative class was not yet certified: "I'm not ruling now on whether you can represent a class. I'm ruling on whether . . . the allegations of this complaint state a viable claim for the plaintiff." JA-167/10:2-5; *accord* JA-168/11:1-6 ("And you cannot state a viable claim with respect to anything else. . . . I am very much inclined to give you another opportunity to plead, but you've got to plead your own claim, not anybody else's.").[5]

b. Section 11 Damages

The rationales supporting the district court's holding on §11 damages were numerous and wide-ranging. Among them:

- The Fund seemed to have suffered no damages because it was still receiving monthly payments on the Certificates. JA-168/11:1-12; JA-173/16:1-3.
- The Fund had not attempted to sell its Certificates – presumably at a loss – in a secondary market. JA-170/13:1-10; *accord* JA-183-JA-184/26:25-27:1 ("How can you complain about the sales price if you are not trying to sell?"); JA-184/27:20-22 ("To me that's very important if you are complaining about whether they're salable.").

[5] Given that directive, the Fund did not re-allege the other 15 Certificates in the operative Complaint. *See* JA-203-JA-252. That said, the district court's error in finding no "standing" for those other claims is a live issue on this appeal, and has not been waived. *See, e.g.*, *Parrino v. FHP, Inc.*, 146 F.3d 699, 704 (9th Cir. 1998) (no need to re-allege claims dismissed without leave to amend).

- The Fund had not alleged a "secondary market" where the Certificates could be sold. JA-170/13:23; JA-183/26:14-17; *accord* JA-188/31:3 ("That has to be alleged.").
- The defendants had warned Certificate purchasers that a secondary market might never develop. JA-173/16:22-23 ("[b]ut you were told that you might not have a secondary market").
- When the Fund's counsel pointed out that under the Securities Act neither a secondary market nor actual sales were required to plead diminished value, the court disagreed. The court considered it the Fund's burden to show that "it is not impossible" to show either damages or injury. JA-171/14:1-2; JA-171/14:8-9 ("But you do have to rule out the possibility that you cannot show any injury.").
- The Fund needed to plead more detail concerning the underlying "facts" and "sources" for its allegations. JA-175-176/18:25-19:1; JA-176/19:10-11; JA-177/20:16.
- When the Fund's counsel explained that its retained experts had concluded that there ***was*** a post-offering diminution in the Certificates' value, the court seemed to brush aside that fact in favor of requiring an actual market: "If [your experts] are permitted to just speculate rather

> than point to market – you can't point to any value that you were given in the market. Is that right? That you have not gone to anybody and offered to sell the bonds." JA-184/27:2-8.

Following additional colloquy with defendants' counsel, the district court concluded that "I am going to grant the motion to dismiss with leave to amend." JA-197/40:5-6. Because the Fund had not alleged that it purchased Certificates from the other 15 Trusts, "it lack[ed] standing to bring a suit" complaining about those Certificates. JA-198/41:17-20.

As to the §12(a)(2) claims, the Fund needed to allege that it purchased its Certificates ***in*** a public offering – besides the existing allegation that it purchased its 2007-10 Certificates directly "from" Goldman Sachs with GS Mortgage as the issuer. JA-200/43:7-14.[6] The court also noted that it would be helpful to "tie" the alleged misstatements concerning loan underwriting or appraisal practices to the specific loans "actually underlying" the purchased Certificates. JA-200/43:20-24.

The court's subsequent Memo Endorsed order simply referenced the hearing. SPA-2.

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[6] The Fund had not alleged that it bought the 2007-5 Certificates directly from the defendants, or in the public offering. JA-200/43:10-13.

3. September 22, 2010 Bench Ruling on Defendants' Motion to Dismiss the Third Amended Complaint

Following the court's January 28, 2010 rulings, the Fund filed the operative Complaint containing the allegations described *infra* in §V. *See* JA-202-JA-252.

When defendants moved to dismiss that Complaint under Rules 12(b)(1) (for lack of standing) and 12(b)(6) (for failure to state a claim), the district court partly denied their motion from the bench – holding that the Fund ***had*** satisfactorily alleged its §12(a)(2) claims so that it stated a claim for rescission. "I'm going to deny the motion to dismiss, because I think they have alleged enough theoretically" to get rescission. JA-289/37:12-15; JA-309/57:7-8 (denying dismissal of both §12 and the related §15 control-person claims).

The court reserved decision on the §11 claims. JA-309/57:9.[7]

4. October 14, 2010 Dismissal of §11 Claims

On October 14, 2010, the district revisited the viability of the Fund's §11 claims. SPA-3-SPA-13.

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[7] The parties had submitted, at the court's request, supplemental briefing on the §11 "damages" issue. *See* CD95/39:1-6. At that hearing, the court again repeated its belief that the Fund's damages were merely theoretical because it had not sold its Certificates at a realized loss. CD95/35:23-25.

Quoting Supreme Court authority, the district court acknowledged that the Fund's pleading burden under §11 was minimal: "At the pleading stage, '[if] a plaintiff purchased a security issued pursuant to a registration statement, he need only show a material misstatement or omission to establish his prima facie case.'" SPA-8 (quoting *Herman & Maclean v. Huddleston*, 459 U.S. 375, 382 (1983)). That said, observed the court, if the Fund's allegations "do not support any conceivable statutory damages," its claim would fail. SPA-8. Moreover, if the Fund failed to allege an "injury in fact," it would lack standing. *Id*.

Those two observations figured prominently in the court's follow-on conclusion that the Fund could not allege a viable §11 claim.

First, because the Fund had invested in securities "that it knew might not be liquid," it could not allege an injury based upon what the court called "the hypothetical price of the Certificates on a secondary market at the time of suit." SPA-11. Even assuming a decline in market price, said the court, the Complaint lacked any "factual enhancement of the bare assertion that a secondary market for their Certificates actually exists." *Id.* Citing Complaint ¶93, the court asserted that it "merely alleges" that there had been a secondary market for investments like the Certificates "since at least 2007" – without alleging any facts "regarding the actual market price for the Certificates at the time of suit." *Id.*

(In making this assertion, the court omitted the remainder of ¶93 alleging that the secondary market's trading volume was "at least $1-$1.5 billion during December 2008" when the action was initially filed, and that at that time the Fund and the Class would have netted, "at most, between 35 and 45 cents on the dollar" for their Certificates. JA-236:¶93. Instead, the court again repeated its belief that the Fund "has failed to provide factual enhancement" for its assertion of injury. SPA-12.)

The court was similarly unpersuaded that the risk of diminished cash flow had reduced the Certificates' present value. Section 11, said the court, does not permit recovery for increased risk; rather, the Fund "must allege the actual failure to receive payments due under the Certificates." SPA-12. Despite repeated amendments, the Fund had been unable to do so. *Id*.

Given the foregoing, the court dismissed the Fund's §11 claims. SPA-13.

5. The District Court Denies Reconsideration and Interlocutory Review of Its Ruling

Believing the district court's view of §11 damages to be erroneous, the Fund moved for reconsideration. CD114-115. The Fund pointed out that it had satisfied §11's plain text by alleging a decline in the Certificates' value, and that under this Court's precedent a "well-developed" market for the Certificates was not required. CD115:5n.7. That said, the Fund ***was*** able to allege that the Certificate's market price had dropped to $0.35-$0.45 on the dollar, and offered to amend with additional

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information showing the specific percentage drops associated with the Certificates. CD115:6.

The district court disagreed, asserting that the Fund "has not pointed to any matters or controlling decisions that were not previously considered." SPA-14. The proffer of "new matter" did not sway the court. *Id.*

The Fund then moved alternatively for entry of Rule 54(b) final judgment on the §11 claims, or for permission to immediately appeal the Dismissal Order under §1292(b). CD120. The district court denied both requests on January 14, 2011, referring back to the proceedings held on January 11, 2011. SPA-16.

At that hearing, the district court had admitted that "at first it was tempting . . . to hear the view of the court of appeals now on what is not a much[-]discussed question in the cases that have been decided" (JA-371/13:5-7), but had decided against Rule 54(b) relief because it was not persuaded that judicial efficiency or "greater justice" would result from an immediate appeal. JA-370-JA-371/12:23-13:3. As to §1292(b) certification, the court likewise did not think an immediate appeal would hasten the case's resolution. JA-371-JA-372/13:25-14:3.

6. Despite the Fund's Sale of Its 2007-10 Certificates at a Demonstrated Loss, the District Court Denies Both Leave to Amend and Rule 60(b) Relief from the Dismissal Order

After filing the dual request for Rule 54(b) judgment or §1292(b) certification, class counsel discovered that the Fund's investment manager had sold its 2007-10 Certificates at a loss in November 2010 "in the normal course of its investment activities." CD129:5. That sale prompted the Fund to move for leave to amend and for relief from the Dismissal Order under Rule 60(b), because the proposed pleading now stated a claim for §11 damages "under the Court's prior rationale," in addition to the §§12 and 15 claims already upheld by the district court. CD129:5; *id*. at 6 (having sold the 2007-10 Certificates "at a significant loss," the Fund had realized "the kind of economic loss this Court had previously found lacking").

The district court was not persuaded. It denied the motion to amend "on the ground that it is just too late." JA-381/6:8-9; *id* at JA-382/11:19 ("Well, it's just too late for this lawsuit."); *accord id*. at JA-383/14:24-15:1-7. When the district court expressed irritation at the timing of both the Certificates' sale and the request for amendment, class counsel assured the court that it had been unaware of the sale "until some time at the end of January [2011]." JA-382/12:24-25. Counsel also reassured the court that the Fund had not deliberately sold the Certificates in order to exploit earlier rulings. JA-383/14:6-8 ("The client was not timing its sale based on anything to do with this lawsuit, your Honor. So I just want to make sure that the record is clear on that.”).

Class counsel also pointed out that the court’s latest denial – in combination with its earlier ruling on damages under §§11 and 12 – likely meant that ***all*** of the Fund’s claims were extinguished (JA-382/12:3-8), and so asked the court to enter final judgment. JA-383/15:8-10. The district court agreed with defense counsel’s suggestion that the Fund make a formal application for entry of judgment. JA-383/15:21-16:7.

On June 10, 2011, the court granted the Fund’s motion for final judgment. SPA-18.

V. STATEMENT OF FACTS

A. A Brief Primer on the Certificates and the Parties

1. Certificates Are Backed by “Pools” of Loans Within the 17 Trusts

The Certificates here are securities backed by pools of residential real estate loans. JA-204:¶2. The Certificates provide their holders with an ownership interest in principal and/or interest payments from the pools of loans within the Trusts. JA-

210:¶26.[8] The Trusts were New York common-law trusts, through which the Certificates were issued to investors. JA-207:¶12.

The loans within the Trusts were purchased by GSMC from various loan originators, bundled together by GSMC and co-defendant GS Mortgage, and then securitized and offered to the public for sale. JA-207:¶12; JA-210:¶26. GSMC acquired the loans through two primary channels: (1) the "Goldman Sachs Mortgage Conduit Program" ("Conduit Program"), and (2) bulk acquisitions in the secondary market. JA-211:¶27. Under the Conduit Program, GSMC acquired loans from a variety of sources: banks, savings-and-loans associations, mortgage bankers, *et cetera*. JA-211-JA-212:¶28.

2. The Parties

On October 15, 2007, the Fund purchased its 2007-10 Certificates with a face value of $390,000 directly from Goldman Sachs in a public offering. JA-206:¶9. On May 21, 2008, the Fund purchased its 2007-5 Certificates with a face value of $49,827.56. *Id*. The Fund acquired its Certificates pursuant to and traceable to the Registration Statement and Prospectus Supplements. *Id*.

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[8] All 17 Trusts are listed in the Second Amended Complaint. JA-111:¶12.

Defendant Goldman Sachs was an underwriter of the Certificate Offerings, and helped draft and disseminate the Offering Documents. JA-207:¶10. GSMC is a wholly-owned subsidiary of Goldman Sachs, and purchased the loans underlying the Certificates. *Id.*:¶11. GSMC was the "sponsor" of the Certificate Offerings, and made certain representations concerning the loans within the Trusts. *Id*. GS Mortgage is a wholly-owned subsidiary of GSMC, and securitized the loans at issue here; it also was the "depositor" and issuer of the Certificates. JA-207:¶12.

GS Mortgage issued over one billion dollars worth of Certificates through the following two Trusts, pursuant to both the Registration Statement and Prospectus Supplements: GSAA Home Equity Trust 2007-5, and GSAA Home Equity Trust 2007-10. *Id*. Individual Defendant Daniel Sparks was CEO and director of GS Mortgage during the relevant time period; he signed the Registration Statement. JA-207-JA-208:¶13. Sparks also oversaw Goldman Sach's "credit-default swap" program that bet ***against*** the residential housing market simultaneously with the Certificates' offerings. *Id.*

Defendant Michelle Gill was Vice President and Principal Accounting Officer of GS Mortgage during the relevant time period. JA-208:¶14. Like Sparks, she signed the Registration Statement. *Id*.

Defendant Kevin Gasvoda was a director of GS Mortgage during the relevant time period. JA-208:¶15. Like Sparks and Gill, he also signed the Registration Statement. *Id*.

Each of the three Individual Defendants – Sparks, Gill, and Gasvoda – functioned as directors to the Trusts, and to GS Mortgage. JA-208:¶16.

B. Defendants' False and Misleading Statements and Omissions

Defendants' myriad false and misleading statements appeared in both the Registration Statement and the follow-up Prospectus Supplements – with each of the latter documents specifically incorporated by reference into the sole Registration Statement. JA-204:¶1. The false statements (or the omissions that made them false) comprised six categories:

1. The Offering Documents Falsely Claimed that Underwriting Guidelines Ensured that Borrowers Were Evaluated on Their Ability to Repay the Loans

The Offering Documents repeatedly emphasized that originators of the loans in the Trusts had evaluated the borrowers' abilities to repay their loans. JA-212:¶29.

The Registration Statement, for example, reassured purchasers that for the loans acquired through the Conduit Program, the originating lender had made "a determination about whether the borrower's monthly income (if required to be stated) will be sufficient" for the borrower to meet its monthly obligations on both the loan

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and other expenses related to the property, and the lender, or its agent, supposedly applied "underwriting standards to evaluate the borrower's . . . repayment ability." JA-212:¶29. Nearly identical reassurances appeared in the Prospectus Supplements for the 2007-10 and 2007-5 Certificates. JA-212-JA-213:¶¶30-31.[9]

Those Prospectus Supplements also identified originators for the loans in the Trusts, and set forth their respective lending guidelines. For instance, both Supplements stated that GreenPoint Mortgage Funding's underwriting guidelines "are applied to evaluate the prospective borrower's . . . repayment ability." JA-213:¶32. (GreenPoint had originated nearly 25% of the loans in "Group I" of the 2007-5 Trust, and was a major originator of loans in the 2007-10 Trust. *Id.*) The Supplement for the 2007-5 Trust explained that Countrywide Home Loans – which originated ***over 61%*** of the loans in "Group II" of that Trust – applied underwriting standards "to evaluate the prospective borrower's . . . repayment ability." JA-213:¶34. And Wells Fargo Bank, which originated loans in both the 2007-5 and 2007-10 Trusts, was quoted in the 2007-10 Supplement as similarly applying certain underwriting standards to evaluate the borrower's ability "to repay the loan." JA-213:¶33.

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[9] The Prospectus Supplements for many of the remaining 15 Certificates made identical or nearly identical representations. JA-117:¶¶33, 35; JA-118-JA-119:¶¶38-40.

These statements were false. JA-214:¶35. The loan originators did not carefully evaluate a borrower's repayment ability; rather, the originators ***simply made as many loans as they could***, regardless of the borrowers' ability to repay the loan. *Id*. Neither the defendants (Goldman Sachs, GSMC, and GS Mortgage) nor the loan originators they utilized through the Conduit Program employed standards aimed at determining whether the borrowers were able to meet their loan-repayment obligations. JA-214-JA-215:¶36.

The originators' policies that extended mortgages to borrowers regardless of their ability to repay the loans included:

(a) Coaching borrowers to falsely inflate their income on loan applications to appear to qualify for mortgage loans the borrowers could not afford to repay;

(b) Falsely inflating a prospective borrower's income to qualify the borrower for a loan he or she could not afford to repay;

(c) Steering borrowers to loans that exceeded their borrowing capacity;

(d) Encouraging borrowers to borrow more than they could afford by guiding them to "stated income" loans – loans on which the borrowers could simply make up, or "state," inflated incomes that would not be verified;

(e) Approving borrowers based on "teaser rates" for loans despite knowing that the borrower would not be able to afford the payment when the loan rate adjusted; and

(f) Allowing non-qualifying borrowers to be approved for loans they could not afford under exceptions to the underwriting standards based on so-called "compensating factors" – when such "compensating factors" did not in fact exist or did not justify the loans. JA-215-JA-216:¶38(a)-(f).

While the foregoing satisfactorily explains the "why false" aspect of defendants' statements, the Complaint contains additional evidence bolstering that falsity.

For example, former Countrywide employees have admitted that the firm made loans that did not meet its stated underwriting criteria in order to increase the number of loan originations. JA-217:¶42. Its own training guide instructed loan originators "to 'look for ways to make the loan rather than turn it down.'" *Id*. According to one Countrywide manager, "[i]f you had a pulse, [Countrywide] gave you a loan." *Id*. Another manager concedes that the company was "infested" with employees who ignored underwriting standards. JA-217-JA-218:¶43. Countrywide's actions led to its being charged with fraud by numerous state Attorneys General; it eventually paid a stunning ***$8.4 billion*** settlement to some 33 states spanning the nation. JA-218-JA-219:¶47. Nearly all of the loans in the Trusts originated in those states. *Id.*

Defendants, too, had to pony up a large sum of money to settle state charges after being investigated for similar practices. JA-214-JA-215:¶36. Goldman Sachs, GSMC, and GS Mortgage were charged by the Massachusetts Attorney General in 2009 with a plethora of loan-related misdeeds – including failing to ascertain whether loans complied with originators' underwriting guidelines, and failing to keep problem loans out of securitization pools. *Id.*; *see also* JA-244-JA-251. These defendants ended up paying the Commonwealth of Massachusetts some $10 million, and incurred tens of millions of dollars of additional expenses when required to forgive all or some portions of balances on many loans that they had bought and securitized. JA-214-JA-215:¶36.

GreenPoint and Wells Fargo – two more major originators of the loans in the Trusts – also failed to apply their stated underwriting standards to prospective borrowers' repayment ability. JA-219-JA-220:¶¶48-50. GreenPoint instead used guidelines merely meeting Goldman Sachs's minimum standards. JA-219:¶48; *accord* JA-219:¶49 (GreenPoint account executive admits it extended many loans to "people who probably couldn't repay their loans"). Wells Fargo was no better, employing a "production based shop" where underwriters were ***required*** to make a certain number of loans regardless of the borrowers' repayment abilities. JA-220:¶50. Wells Fargo employees who objected were fired. *Id*.

In all, the Fund estimates – after analyzing information from within the 2007-5 Trust and from the borrowers – at least 35%-40% of the loans in that Trust were made with ***no*** determination of the borrower's ability to repay. JA-220:¶51. A similar analysis done of the 2007-10 Trust reveals an estimated 30%-35% of those loans were granted with no determination made of the borrower's ability to repay. *Id*.

These estimates were reached without the benefit of formal discovery; it is likely that the actual percentages are much higher. *Id*.

2. The Offering Documents Contained Misrepresentations Concerning the Underlying Property Appraisals, Appraisers' Compensation, and the Appraisals' Conformation to Standards

The Offering Documents contained numerous misrepresentations relating to the appraisal process; they fall into four areas:

First, the Offering Documents misstated facts having to do with appraiser independence and compensation. The Registration Statement common to all of the Trusts assured investors that each mortgage file contained a property appraisal done by a qualified appraiser whose compensation "is not affected by the approval or disapproval of the mortgage loan." JA-221:¶52. In the Prospectus Supplements, defendant GSMC echoed this claim for loans coming through the Conduit Program. *Id*.

In truth, however, appraisers were ordered by loan originators to give predetermined, inflated appraisals to ensure loan approval. JA-222:¶56. If the appraiser objected, he or she was threatened with being black-balled within the industry. *Id*. Indeed, a 2007 survey found that 90% of the surveyed appraisers reported pressure to inflate property valuations in order to enable the deal to go through – and 75% of them reported "'negative ramifications'" if they did not cooperate. JA-224:¶62. In addition, some 11,000 appraisers nationwide signed a petition submitted to the government agency entrusted with appraisal-related responsibilities, highlighting the "problem facing us on a daily basis": Many lenders had individuals within their ranks "who, as a normal course of business, apply pressure on appraisers to hit or exceed a predetermined value." JA-224-JA-225:¶63. The "pressure" included the withholding of business, and black-listing "honest appraisers in order to use 'rubber stamp' appraisers." *Id*. The Complaint describes several first-person accounts of these practices that occurred at the very loan originators, and in the very states, from which the Trust loans originated. *See, e.g.*, JA-225-JA-226:¶¶64-67.

Second, defendants claimed that appraisals generally would be based upon "a market data analysis of recent sales of comparable properties." JA-221:¶53. That claim was false and misleading, for often the properties were ***not*** comparable. The Complaint details one Florida appraiser who admitted that, in order to stay in business, she gave inflated appraisals even if it required finding purportedly "comparable" sales located 20 miles away from the subject property. JA-226:¶68. During the relevant period, she completed an estimated 100-plus appraisals for Countrywide (and other originators) that she admits were inflated and based on ***in***comparable sales. *Id*. Another appraiser in Southern California stated that Wells Fargo mortgage brokers and Countrywide in-house and outside loan officers demanded inflated numbers from him in Compton and Watts, California, and admitted to doing over 100 inflated appraisals for those two originators alone. JA-225-226:¶67. Hundreds of loans in the two Trusts here were made by Countrywide and Wells Fargo on Southern California homes. *Id*. Other appraisers tell similar horror stories. JA-225:¶66 (admits 300 inflated appraisals done for Countrywide, Wells Fargo, and other originators, at "15% to 25% higher than actual market values").

Analyzing the loans within the two Trusts, the Fund estimates that at least 47% of the loans in the 2007-5 Trust had property-value appraisals inflated by 9% or more, and another 31% of Trust's loans were inflated by less than 9%. JA-226-JA-227:¶69.

Similarly, the Fund estimates that at least 41% of the loans in the 2007-10 Trust had appraisals inflated by 9% or more compared to the property's true value, and an additional 25% of the Trust's loans had appraisals inflated by less than 9%. *Id*. These figures were calculated without the benefit of discovery; should the dismissal be reversed and discovery allowed, the Fund believes that an even-higher percentage of loans in both Trusts will be found to contain inflated appraisals. *Id*.

Third and **Fourth**, the defendants claimed that the property appraisals had conformed to the Uniform Standards of Professional Appraisal Practice ("USPAP") adopted by the Appraisal Standards Board of the Appraisal Foundation, as well as Fannie Mae's and Freddie Mac's appraisal standards. JA-221:¶¶53-55. Although too extensive to repeat within this Brief's confines, USPAP standards generally require that the appraiser be impartial, not report predetermined opinions and conclusions, and refuse any assignment or compensation arrangement that is contingent upon predetermined results. JA-222-JA-223:¶57(a)-(d). Fannie Mae and Freddie Mac, in turn, require that appraisals comply with the USPAP, and that appraisers not be influenced in any manner to provide a particular result. JA-223:¶58.

Yet, contrary to those standards, the appraisers were ordered to produce predetermined, inflated appraisal values. JA-223:¶59. As described immediately *supra*, appraisers were threatened with being blackballed if they did not return the appraisals sought by loan originators – including many of the large originators whose loans filled the Trusts here. As noted *supra*, 90% of surveyed appraisers reported pressure to inflate property valuations in order to enable the deal to go through – and 75% of them reported "'negative ramifications'" if they did not cooperate. JA-224:¶62.

3. The Offering Documents Falsely Claimed that the Underlying Loan Documents Were Not Falsified and Did Not Contain Any Untrue Statements

The Registration Statement claimed that the loan originators had warranted that all documents submitted for loan underwriting were "not falsified and contain no untrue statement of material fact," and all documents executed in connection with the loans "are free of fraud and any misrepresentation." JA-227:¶70. Likewise, in the Prospectus Supplement for the 2007-10 Certificates, GSMC similarly represented (as to the Conduit Program) that "there was no fraud involved in the origination of any Mortgage Loan" by any party involved in the loan's origination – whether borrowers, originators, or appraisers. JA-227:¶71.

These statements were false and misleading. Borrowers and loan originators were in fact systematically falsifying the incomes of the borrowers in order to qualify them for loans they could not otherwise afford. JA-227-JA-228:¶72. Appraisers were routinely inflating property appraisals at the behest of the loan originators. *Id*. Loan docs also contained other misrepresentations understating borrowers' assets and debts, misrepresenting their employment status, and the occupancy of the purchased properties. *Id*. Indeed, based upon its analysis of the actual loans within the Trusts, the Fund estimates that ***at least 90%*** of the loan files were falsified and/or contained misrepresentations. JA-228:¶73.

4. The Offering Documents Misstated the Loan-to-Value Ratios of the Loans Within the Trusts

Loan-to-value (or "LTV") ratios are calculated by dividing the amount of a loan by the property's appraised value. *See, e.g.*, JA-231:¶78 ($90,000 loan for $100,000 house equals 90% LTV ratio). A lower LTV ratio indicates less risk associated with the loans; a higher LTV ratio indicates riskier loans. JA-228-JA-229:¶74. Naturally, such information is important to investors. *Id*.

Information about purported LTV ratios was spread throughout the Offering Documents, as the Prospectus Supplements for each of the Trusts contained detailed information concerning the underlying loans' LTV ratios. JA-228-JA-231:¶¶74-77. The Complaint reproduces many of them in line-item form, and directs the reader to additional examples. JA-228-JA-231:¶¶74, 76.

The LTV ratios in the Offering Documents were inaccurate, false, and misleading. JA-231:¶78. They had been calculated using the false and inflated property appraisals described *supra*. Using such inflated appraisals results in artificially ***low*** LTV ratios. *Id*. The lower LTV ratios (falsely) indicated there was more equity in the properties, which led investors to believe that the loan holder would be protected in the event of default or foreclosure. *Id*. The lower LV ratios also made it appear that the borrowers were unlikely to default on the loans, since they had sufficient equity in the properties.

In sum, the false and misleading LTV ratios made it appear that the Certificates offered were much safer and less risky than they actually were. *Id*.

5. The Offering Documents Contained Inaccurate and False Credit Ratings Assigned to the Certificates, Misleadingly Portraying the Certificates as Much Safer Investments Than They Really Were

The Registration Statement said that the Certificates would receive "investment grade" ratings from rating agencies Standard & Poors ("S&P") or Moody's. JA-232:¶79. Eventually, all of the Certificates in the Trusts were given just that. *Id*. In particular, the 2007-5 Certificates were rated at investment grade AAA to BBB by S&P in the Prospectus Supplement, while each of the 2007-10 Certificates received investment grade ratings from S&P and/or Moody's. *Id*. Defendants voluntarily included these statements in the Registration Statement and Prospectus Supplements. JA-232:¶80.

The ratings were inaccurate, false, and misleading, however, because they were based upon outdated assumptions, relaxed ratings criteria, and inaccurate loan information. JA-232:¶80. The models that Moody's and S&P utilized to produce the ratings were based upon loan performance ***prior*** to the year 2000; they failed to take into account the unprecedented decline and deterioration in mortgage-lending standards that occurred after that year. JA-232:¶81. By the time the agencies bestowed "investment grade" ratings upon the Certificates, their historical data no longer reflected the reality of deteriorating credit quality. *Id*.

Moreover, the two agencies repeatedly lowered their ratings standards in order to capture more market share. JA-233:¶82. The easing of standards was due, in large part, to the fact that the rating agencies were compensated by the very entities to which they provided ratings. *Id*. Those entities, in turn, were free to shop around for the agency that would provide them with the highest ratings. *Id*.

Finally, the ratings were based upon inaccurate information. JA-233:¶83. Ironically, the rating agencies relied in large part on loan data ***that defendants provided to them*** – meaning that they depended upon the defendants to provide them with borrowers' incomes, property appraisal values, and LTV ratios. *Id*. This data was inaccurate (*see supra*), and the agencies did no independent due diligence to verify its accuracy. *Id*.

In sum, because the rating agencies used both flawed data and flawed models to generate their ratings, the resultant ratings assigned to the Certificates did not accurately reflect their risk. JA-233:¶84. What was touted as "investment grade" was actually junk. *Id.*

6. Defendants Failed to Disclose that at the Same Time They Sold the Certificates to Investors They Were Betting that Borrowers Would Default on the Same Type of Loans Underlying the Certificates

Even as it filed the Registration Statement with the SEC and began selling the Certificates to investors in early 2007, Goldman Sachs simultaneously began betting that borrowers would default on the very type of loans underlying the Certificates. JA-234:¶85. Goldman Sachs made exotic bets against the housing market by engaging in what were known as "credit-default swaps" – placing bets that residential mortgage borrowers would default on their loans. JA-234:¶86. It also bet heavily against the housing market via a year-old subprime index on a private London swap exchange. JA-234:¶87. Defendant Daniel Sparks – then serving as CEO of defendant GS Mortgage – was overseeing the credit-default swaps ***at the same time*** he signed the Certificates' Registration Statement. JA-234:¶88.

The Offering Documents omitted this material information. JA-234-JA-235:¶89. Indeed, defendants did more than merely omit this information; despite ***already*** having placed their bets against the housing market, they affirmatively reassured investors only that they "may" engage in such activities. JA-234-JA-235:¶89. Goldman Sachs Chairman and CEO Lloyd Blankfein subsequently conceded in 2010 Congressional testimony that selling the Certificates while simultaneously purchasing credit-default swaps had been "improper." *Id*.

The impropriety paid off. In addition to its ill-gotten gains realized from foisting the Certificates onto unsuspecting buyers at inflated prices, Goldman Sachs made tens of billions of dollars in additional profits on the undisclosed credit-default swap bets it had made against the underlying loans. JA-236:¶94.

C. As the Truth About the Certificates Began to Emerge, the Certificates' Diminished Values Became Apparent

After the Certificates' issuance, the credit ratings on nearly all of the Certificates within each of the Trusts were downgraded. JA-235:¶90. Downgrades to the Fund's Certificates occurred in 2008, with some purportedly "AAA" Certificates falling to "CCC" – well ***below*** the threshold for "junk" status. *Id*.

The downgrades took place for at least two reasons. First, as described *supra*, the Certificates' original ratings did not accurately reflect the risk associated with the loans underlying the Certificates. JA-235:¶91. Moreover, the delinquency rates of the underlying mortgage loans skyrocketed: For example, as of February 2010, the total percentage of delinquent/foreclosed loans and bank-owned/sold properties in the

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2007-5 Trust exceeded 48% of its total loan pool. *Id.* In the 2007-10 Trust, the percentage exceeded 30% of the total loan pool. *Id.*[10]

The downgrades helped diminish both the Certificates' value, as well as the price at which they could be disposed of in the market. JA-235:¶92. The Complaint states unequivocally that there "is a secondary market for the purchase and sale of the Certificates," and that there has been a resale market since at least 2007. JA-236:¶93; *see also* JA-183/26:12 ("There is a market for these bonds.").[11]

Had the Fund and class members made non-forced sales into the secondary market in December 2008, at most they would have netted between \$0.35 and \$0.45 on the dollar. JA-236:¶93. In other words, on the date that the first lawsuit here was filed, Certificate investors would have realized a loss of at least \$0.55 to \$0.65 on each dollar's worth purchased. *Id.*[12]

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[10] The Second Amended Complaint cataloguing all 17 Certificates alleged that "in more than half of those Trusts," the 60-plus-day delinquency rate "is ***in excess of 33 percent***." JA-138-JA-139:¶95 (emphasis in original).

[11] The trading volume of Certificates like those here was at least \$1-\$1.5 billion during December 2008, when the underlying action was first filed. JA-236:¶93.

[12] On November 22, 2010, while the underlying action was still pending, the Fund sold its 2007-10 Certificates for just 68% of their remaining face value, realizing a substantial loss. CD129:2. The district court refused to allow the Fund to amend its Complaint with this new information. JA-381/6:8-9.

In light of the foregoing diminutions in value and price, the Fund and other putative Class members were damaged. JA-235:¶92; *id.* at JA-236:¶94 ("Plaintiff and the Class . . . have watched their Certificates plummet in value."); JA-184/27:2-4 ("We have engaged experts to value upon [this] and we have concluded that there is a diminution in value of the bonds or the certificates.").

VI. SUMMARY OF ARGUMENT

The district court erred in holding that the Fund had no cognizable injuries because it had failed to allege any out-of-pocket loss while continuing to receive monthly payments via the Certificates.

The Securities Act says nothing about requiring that a plaintiff ***sell*** its security and experience an out-of-pocket loss, or that unrelated, continuing payments received by an investor somehow excuse his security's overall diminution in value.

Indeed, §12(a)(2) recognizes that continuing payments of some sort may have been made to the investor suing – but those payments are simply netted out of the purchase price when he seeks a remedy. *See* 15 U.S.C. §77l(a)(2). Similarly, the text of §11(e) provides that damages available to plaintiffs suing for §11 violations "shall represent[,]" *inter alia*, the ***difference*** between the ***amount paid for the security*** (not exceeding the price at which the security was offered to the public) ***and*** (1) ***the value thereof as of the time such suit was brought***." 15 U.S.C. §77k(e). Given that "plain language," holds this Court, a §11 plaintiff who continues to hold its securities at the time of suit is thus entitled to recover "'the difference between the amount paid for the security . . . and . . . the value thereof as of the time such suit was brought.'" *McMahan & Co. v. Wherehouse Entm't*, 65 F.3d 1044, 1047-48 (2d Cir. 1995); *id*. at 1048 (under §11 a "decline in market value permits plaintiffs to recover damages under the statutory scheme").

The Fund alleged that decline in market value for its Certificates (JA-236:¶93), and that the "diminutions in value and price have caused damages to the [Fund] and the Class." JA-235:¶92. No more is required; the Fund alleged a cognizable injury. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

The district court was equally mistaken in requiring the Fund to have purchased ***each*** of the Certificates offered for sale in order to have "standing" to assert claims for its fellow plaintiffs in this putative class action. Courts have long held that a representative plaintiff may assert claims for other plaintiffs based upon the same allegedly improper conduct. *See, e.g.*, *Green v. Wolf Corp.*, 406 F.2d 291, 299 (2d Cir. 1968). That common misconduct is precisely what the Fund alleges here: Each of the Certificates was issued pursuant to the ***same*** false and misleading Registration Statement containing core misstatements, and each Certificate's Prospectus

Supplement contained either identical or similar misstatements – while expressly incorporating the ***same*** original Registration Statement.

The "standing" issues that concerned the district court were actually class-certification issues. Such concerns are premature at the motion-to-dismiss stage, and are better left for a later Rule 23 inquiry.

VII. ARGUMENT

A. The Complaint States Claims Under §§11, 12, and 15 of the Securities Act

1. Because the Offering Documents Contain Material Falsehoods, the Fund Has Established Its *Prima Facie* Case Under §§11 and 12

Section 11, by its plain terms, imposes liability upon certain enumerated defendants if "***any part*** of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. §77k(a).

It is not a difficult statute to satisfy: "If a plaintiff purchased a security issued pursuant to a registration statement, he need only show a material misstatement or omission to establish his prima facie case." *Herman*, 459 U.S. at 382. Neither defendants' scienter nor plaintiffs' reliance (absent certain exceptions) need be established; in fact, plaintiffs need not even allege damages. By design, §11 "places a relatively minimal burden on a plaintiff." *Id*.

Moreover, under §11 "the issuer of the securities is held ***absolutely liable***," without regard to fault. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 207-08 (1976); *accord Herman*, 459 U.S. at 382. "Liability against the issuer of a security is virtually absolute, even for innocent misstatements." *Id*. Other defendants – signatories to the registration statement, the security's underwriters, and the issuer's directors – may also be held liable, albeit with the opportunity (and burden) of "demonstrating due diligence." *Id*. "The section was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering." *Id*. at 381-82.

Section 12(a)(2)'s liability standard is similarly stringent. It imposes liability on anyone who offers or sells a security "by means of a prospectus or oral communication," that either (1) "includes an untrue statement of a material fact" or (2) "omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading." 15 U.S.C. §77l(a)(2). Like §11, §12(a)(2) "'is a broad anti-fraud measure and imposes liability whether or not the purchaser actually relied on the misstatement,'"[13] and "whether or not scienter or loss causation is shown."[14] To state a *prima facie* claim, "'the buyer need not show any causal connection between the misrepresentation and his damage; indeed, he need not even show that he has been damaged.'"[15]

Because fraud is not an element of §§11 and 12 claims, ordinary notice-pleading principles apply – requiring but "a short and plain statement of the claim showing that the pleader is entitled to relief."[16] This short and plain statement need only "'give the defendant fair notice of what the claim . . . is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true to 'state a claim to relief that is ***plausible on its face***.'" *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949 (2009).

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13 *Metromedia Co. v. Fugazy*, 983 F.2d 350, 361 (2d Cir. 1992).

14 *Wilson v. Saintine Exploration & Drilling Corp.*, 872 F.2d 1124, 1126 (2d Cir. 1989).

15 *Casella v. Webb*, 883 F.2d 805, 808 (9th Cir. 1989).

16 Fed. R. Civ. P. 8(a)(2). Because they are not grounded in fraud, Securities Act claims generally are not subject to Rule 9(b)'s requirement that circumstances constituting fraud be pleaded "'with particularity.'" *See In re NationsMart Corp. Sec. Litig.*, 130 F.3d 309, 314-15 (8th Cir. 1997).

The Complaint satisfies these authorities. As explained *supra* in the Statement of Facts, the Complaint sets forth each of defendants' false and misleading statements appearing in either the Registration Statement or Prospectus. The Complaint cogently explains why each of those statements is false. *See supra*; *see also* JA-205:¶4 (summarizing why the statements are false).

At this stage of the case, then, the Fund has adequately met its "minimal burden" in stating Securities Act claims. *Herman*, 459 U.S. at 382.[17]

2. The District Court's View of "Statutory Damages" and "Injury" Under the Securities Act was Patently Erroneous

a. The Complaint States a Cognizable Claim for Injury Under §§11 and 12(a)(2) by Alleging Diminution in Value Despite the Continued Receipt of Monthly Payments

The Fund alleged that "the value of the Certificates has diminished greatly since their original offering, as has the price" at which the Certificates can be "dispose[d] of . . . in the secondary market for these Certificates." JA-235:¶92. The Fund's Securities Act injury thus is clear: "These diminutions in value and price have caused damages to the [Fund] and the Class." *Id*.

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[17] The district court certainly thought so, for it initially upheld the Fund's §§12 and 15 claims. *See* JA-289/37:12-15; JA-309/57:7-8.

The calculation of damages flowing from the Fund's injury is equally clear: Under §11(e) of the Securities Act, recoverable damages available to investors suing upon a §11 violation

> shall represent the ***difference*** between the ***amount paid for the security*** (not exceeding the price at which the security was offered to the public) ***and*** (1) ***the value thereof as of the time such suit was brought***, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if [certain contingencies exist] . . . .

15 U.S.C. §77k(e). That section, recognizes this Court, "specifically provides the measure of damages" for private suits brought pursuant to §11. *McMahan*, 65 F.3d at 1047.[18]

Despite that clear statutory text, and this Court's clear directive in *McMahon*, the district court decided that §11 injury and damages were something else altogether. Because the Fund was still receiving monthly payments due under the Certificates, held the district court, it had suffered no §11 injury despite alleging diminished value. *See* SPA-12 (Fund "must allege the actual failure to receive payments due under the

[18] Section 12 "prescribes the remedy of rescission except where the plaintiff no longer owns the security"; in the latter case, "the plaintiff is entitled to a return of the consideration paid, reduced by the amount realized when he sold the security and by any 'income received' on the security." *Randall v. Loftsgaarden*, 478 U.S. 647, 655-56 (1986).

Certificates"); *accord* JA-173/16:1-3. The Dismissal Order's rationales echoed the district court's earlier comments on the case, when it asserted that the Fund had to have attempted ***to sell*** the Certificates in order to indisputably show it suffered an injury vis-à-vis diminished value. *See* JA-183-JA-184/26:25-27:1 ("How can you complain about the sales price if you're not trying to sell?"); JA-184/27:6-8 ("you can't point to any value that you were given in the market. Is that right? That you have not gone to anybody and offered to sell the bonds."); JA-184/27:20-22 ("To me [attempting to sell the Certificates] is very important if you are complaining about whether they're salable.").

Without "any conceivable statutory damages" in the court's eyes, then, the Fund's claims could be dismissed under both Rule 12(b)(6) and Rule 12(b)(1). SPA-8; *id*. at 12 ("to allege an injury cognizable under Section 11, [the Fund] must allege the actual failure to receive payments due under the Certificates"); *accord id*. at 8 (Fund will lack standing to sue "if it fails to allege an injury in fact") (citing *Lujan*, 504 U.S. at 560-61). Plainly, the district court thought the only "conceivable statutory injury" or requisite "injury in fact" could come from either the Fund's not having received its monthly payments on the Certificates, or a realized loss upon a sale.

The district court erred in requiring those specific types of injury. It brushed aside allegations that (a) the Certificates' values had "diminished greatly" since the offerings, and (b) that the "diminutions in value and price have caused damages to the [Fund] and the Class." JA-235:¶92. The district court also overlooked that the Certificates' values have declined even though monthly payments continue to be made – in large part because the astronomical numbers of delinquent, foreclosed, and bank-owned/sold loans clogging the Trusts ensures that the current level of pass-through payments is unsustainable. *See* JA-235:¶91 (reporting "skyrocket[ing]" delinquency rates exceeding 48% of the total loan pool for the 2007-5 Trust and 30% of the total loan pool for the 2007-10 Trust).

These allegations suffice to allege the Fund's injury in fact at this, the pleading stage. *Cf. Lujan*, 504 U.S. at 561 ("At the pleading stage, ***general factual allegations of injury*** resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'"); *accord In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1168 (C.D. Cal. 2008) ("The 'type of injury' [§11] contemplates is a decline in investment value due to materially false or misleading information in the registration statement."); *N.J. Carpenters Health Fund v. DLJ Mortg. Capital, Inc.*, No. 08 Civ. 5653 (PAC), 2010 U.S. Dist. LEXIS 47512, at *12 (S.D.N.Y. Mar. 29, 2010) (in mortgage-backed-securities context, a plaintiff's "alleged injury is the loss of market value").

But the district court compounded its error beyond substituting its own version of injury-in-fact for the Fund's well-pleaded one. It also ignored that "[t]he plain language of section 11(e) prescribes the method of calculating damages," as well as this Court's mandate that "***the court must apply that method in every case***." *McMahan*, 65 F.3d at 1048. Section 11(e)'s statutory text focuses on the value of the security itself, and makes no reference to a plaintiff's subjective expectations regarding the salability of its securities, or to the receipt (or non-receipt) of any periodic payments due. Thus, the district court ignored a cardinal canon of statutory interpretation: "It is axiomatic that '[the] starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985); *McMahan*, 65 F.3d at 1048.

Interpreting §11(e)'s plain language, courts routinely hold that plaintiffs who retain possession of their securities at the time of suit – like the Fund here – need only allege a decline in value in order to state a cognizable claim for injury under §11. *See, e.g.*, *McMahan*, 65 F.3d at 1048 (under §11 a "***decline in market value*** permits plaintiffs to recover damages under the statutory scheme"); *Alpern v. UtiliCorp United*, 84 F.3d 1525, 1541-42 (8th Cir. 1996) ("Since [plaintiff] still possesses his stock, he can recover damages under §11(e)(1) only if his purchase price was higher than the security's value 'as of the time such suit was brought.'"); *In re Initial Pub.*

Offering Sec. Litig., 241 F. Supp. 2d 281, 347, 351 n.80 (S.D.N.Y. 2003) ("Section 11(e) sets the measure of damages for a plaintiff still holding her securities at the 'value' of those securities at the time of suit."). Whether the Fund continued to received monthly payments from the Certificates is beside the point.[19]

A recent opinion is instructive. In *DLJ Mortgage Capital*, the district court was confronted with similar facts: A plaintiff asserting Securities Act claims on behalf of purchasers of mortgage-backed securities that dropped in value, and the defendants' insistence that the plaintiff suffered no "cognizable injury" because it hadn't failed to receive any principal or interest payments due under the certificates. 2010 U.S. Dist. LEXIS 47512, at *13.

The *DLJ Mortgage Capital* court disagreed with defendants' argument, rejecting it as "too cramped a reading of damages." *Id*. at *14. "Many fixed-income debt securities, such as corporate bonds[,] do not trade on national exchanges and yet

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[19] Indeed, §12(a)(2) recognizes that continuing ***payments*** of some sort may have been made to the investor suing – but those payments are simply netted out of the purchase price when he seeks a remedy. *See* 15 U.S.C. §77l(a)(2) (plaintiff "may sue . . . to recover the consideration paid for such security with interest thereon, ***less the amount of any income received thereon***, upon the tender of such security, or for damages if he no longer owns the security"); *see also Randall*, 478 U.S. at 656 (if plaintiff has already sold the security, he "is entitled to a return of the consideration paid, ***reduced by*** the amount realized when he sold the security and by ***any 'income received' on the security***").

institutional investors routinely purchase corporate bonds hoping to realize a profit through resale." *Id*. The plaintiff had plainly alleged "loss of market value. Plaintiff points to the fact that the value of its Certificates plummeted by 79% since the Offering . . . ." *Id*. at *12-*13. Those allegations were sufficient under §11(e). *Id*. at *14 ("At this stage all that may be said is Plaintiff's market value allegations are sufficient."). Similar allegations abound here.

At bottom, just as in the *DLJ Mortgage Capital* matter, "[t]his is a securities claim, ***not a breach of contract case***." *Id*. The district court's focus on what are really "benefit-of-the-bargain" damages is misplaced. *Cf*. *McMahan*, 65 F.3d at 1048 (rejecting "benefit-of-the-bargain" damages under §11 in light of §11(e)'s "plain language").

b. Defendants' Cautions Concerning the Potential Lack of a Future, Secondary Market Are Irrelevant to the Fact that Such a Market *Did* Exist and Helped to Show the Certificates' Diminution in Value

The district court thought, as part of its overall analysis of the Fund's alleged injury, that the defendants were insulated from liability because they had cautioned investors that a secondary market for the Certificates might never develop. JA-173/16:22-23. The court also believed that the Fund "merely allege[d]" a secondary market for the Certificates, without alleging facts concerning the Certificates' "actual market price." SPA-11.

The court was wrong on both counts.

First, defendants' boilerplate warnings of the ***possibility*** of a future secondary market's non-development are simply irrelevant to the Fund's well-pleaded allegations of the ***actual*** secondary market's existence and their Certificates' ***actual*** diminution in value. The district court's comments betrayed its mistaken belief that the Fund was complaining that the market had never developed, or even if one had, that it had not turned out to be as liquid as the Fund was led to believe. But those are not the Fund's allegations at all; rather, the Fund alleges that it has been injured by the Certificates' dramatic decline in value – and the secondary market helps provide a gauge for that diminution.

Second, in brushing off the Fund's "mere[]" allegations of a secondary market that helped illustrate the Certificates' dropped value, the district court erred by disbelieving the Complaint's allegation of the secondary market's existence "since at least 2007" (JA-236:¶93) – failing to accept it as true. *Cf. In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 91 (2d Cir. 2007) ("we must take the facts alleged in the complaint as true, drawing all reasonable inferences in Lead Plaintiffs' favor"); *accord Gorman*, 488 F.3d at 591-92 ("this Court must accept as true all allegations in the complaint and draw all reasonable inferences in favor of the non-moving party"). The district court further erred in disregarding allegations that the secondary market's trading volume was "at least \$1-\$1.5 billion during December 2008" when the action was initially filed, and that at that time the Fund and the Class would have netted, "at most, between 35 and 45 cents on the dollar" for their Certificates. JA-236:¶93.[20]

Finally, this Court recognizes that an efficient secondary market need not even exist in order to demonstrate decreased "value" under §11. *McMahan*, 65 F.3d at 1049 (value may still be determined under §11 "even where market price is not completely reliable"); *id*. at 1048-49 (Congress's use of term "value" in §11(e) "as distinguished from the terms 'amount paid' and 'price' indicates that, under certain circumstances, the market price may not adequately reflect the security's value").

B. The District Court Erred When it Ruled that the Court-Appointed Lead Plaintiff Lacked Standing to Proceed on Behalf of a Class of Similarly Injured Investors Who Purchased Certificates Pursuant to Misleading Offering Documents

At the hearing on defendants' motion to dismiss the Second Amended Complaint, the district court held that the Fund lacked "standing" to assert Securities

[20] Indeed, the Fund's late-2010 sale of some Certificates for just 68% of their remaining face value (CD129:2) simply proves up the Complaint's allegations.

Act claims on behalf of purchasers of Certificates from any other Trusts beyond the 2007-5 and 2007-10 ones. JA-197-JA-198/40:5-41:20. The court rejected the Fund's argument that because all of the Certificates flowed from the same Registration Statement, what concerned the court was actually a class certification issue. *See, e.g.*, JA-164/7:24-25 ("You are now on an individual basis. There is no class yet.").

As explained below, the district court was twice wrong.

1. The Fund Has Standing to Pursue Securities Act Claims on Behalf of All Purchasers of the 17 Certificates Issued Pursuant to the Misleading Offering Documents

Section 11 confers standing on any person acquiring a security where "***any part of the registration statement***, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. §77k. Thus, as a threshold proposition, because the Fund purchased Certificates pursuant and/or traceable to the Registration Statement and two Prospectus Supplements expressly incorporated into that Registration Statement (JA-204:¶1), it undeniably has standing to assert §11 claims based on the false and misleading statements contained in those Offering Documents. *In re Marsh & McLennan Cos. Sec. Litig.*, 501 F. Supp. 2d 452, 491 (S.D.N.Y. 2006) ("The pleading requirement for Section 11 standing is satisfied by 'general allegations that plaintiff purchased "pursuant to" or traceable to [a] false registration statement.'").[21]

But the Fund also has standing to represent purchasers of Certificates from the 15 other Trusts via Prospectus Supplements, because each of those false and misleading supplements were issued pursuant to the ***same*** false and misleading Registration Statement. JA-108:¶1; JA-111: ¶12. Indeed, defendants had designed them so that each Supplemental Prospectus was "expressly incorporated" into the same Registration Statement – rendering ***all*** of the Offering Documents similarly false and misleading. That incorporation of a common Registration Statement means that the Fund's standing to assert claims on behalf of all Certificate purchasers is secure. *See, e.g.*, *In re Citigroup Bond Litig.*, 723 F. Supp. 2d 568, 584-85 (S.D.N.Y. 2010) (although representative plaintiff purchased in only 19 of 48 offerings, it had standing to represent purchasers of ***all*** the offerings because they were "incorporated into each of the three shelf registration statements from which all forty eight offerings identified in the complaint derive"); *In re Am. Int'l Group, Inc.*, 741 F. Supp. 2d 511, 538 (S.D.N.Y. 2010) (standing for plaintiffs who purchased only a fraction of 101 separate

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[21] The Fund's Article III standing should not be in dispute: It has alleged (i) an injury in fact (ii) that is fairly traceable to the defendants' actions, and (iii) is redressable by a favorable court decision. *Cf. Lujan*, 504 U.S. at 560-61.

offerings – albeit pursuant to one of three shelf registration statements that incorporated the same misstatements: "Plaintiffs therefore can trace the injury of the purchasers in each of the 101 offerings to the same underlying conduct on the part of the defendants."); *see also Countrywide*, 588 F. Supp. 2d at 1165 (§11 standing for all offerings made pursuant to an "initial shelf registration statement contain[ing] an actionable statement or omission that is common to more than one issuance"); *accord In re MobileMedia Sec. Litig.*, 28 F. Supp. 2d 901, 911 n.7 (D.N.J. 1998) (§11 standing for stock purchasers to represent note purchasers where both types of securities issued pursuant to the same registration statement).[22]

Notably, even putting aside the false and misleading Supplemental Prospectuses, the single Registration Statement common to ***all*** the purchasers'

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[22] *See also In re Juniper Networks Sec. Litig.*, 264 F.R.D. 584, 594 (N.D. Cal. 2009) (representative plaintiffs who admittedly did not purchase their stock pursuant to a registration statement nonetheless have standing to represent note purchasers because both groups of class members complain about underlying false financial statements – "the same allegedly improper conduct"); *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2004 U.S. Dist. LEXIS 4240, at *19-*21 (S.D.N.Y. Mar. 19, 2004) (named plaintiffs who bought "U.S. dollar notes" in offering pursuant to a "single registration statement" also had standing to represent purchasers of "Foreign Notes" from that same offering); *In re Fleming Cos. Sec. & Derivative Litig.*, No. 5-03-MD-1530 (TJW), 2004 U.S. Dist. LEXIS 26488, at *153 (E.D. Tex. June 10, 2004) ("purchasers of one type of security have standing to sue on behalf of purchasers of other types of security issued pursuant to a single registration statement") (court's emphasis).

Certificates was rife with misstatements. The Fund alleged in both its Second Amended Complaint and the operative Complaint that the defendants made a series of misrepresentations and omissions in the Registration Statement itself:

- for loans purchased under the Conduit Program, "the originating lender makes a determination about whether the borrower's monthly income (if required to be stated) will be sufficient to enable the borrower to meet its monthly obligations on the mortgage loan and other expenses related to the property." (JA-116:¶29; JA-212:¶29); *see also* JA-116:¶30; JA-212:¶29 (Registration Statement asserts borrower's repayment ability is evaluated);
- each mortgage file contained an appraisal by an appraiser "whose compensation is not affected by the approval or disapproval of the mortgage loan" (JA-127:¶57; JA-221:¶52);
- the "documents . . . submitted for loan underwriting were not falsified and contain no untrue statement" and "are free of fraud and any misrepresentation" (JA-132:¶76; JA-227:¶70);
- all Certificates would receive "investment grade" ratings from the Rating Agencies (JA-136:¶82; JA-232:¶79); and

- omitted that Goldman Sachs was betting that mortgages like those in the Trusts would be defaulted on, at the same time defendants were selling the Certificates as "investment grade" instruments (JA-137-JA-138:¶¶89-93; JA-234-JA-235:¶¶85-89).[23]

Thus, given that these misrepresentations and omissions in the Registration Statement were common to ***every*** Trust – and to ***every*** Certificate issued – there was no reason to require the Fund to buy Certificates from each Trust in order to establish its standing. Put differently, the common Registration Statement provides the glue that binds together the absent Class Members' purchases of Certificates, as well as the additionally misleading Supplements that defendants expressly incorporated into it.[24]

The *Countrywide* decision out of the Central District of California contains an especially apt analysis of the "standing" question presented when a representative

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23 The defendants' cautions that they "may" or might engage in such activities were themselves misleading. JA-234-JA-235:¶89. *Rubinstein v. Collins*, 20 F.3d 160, 171 (5th Cir. 1994) ("'To warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit.'").

24 The Fund also has standing to assert its §12(a)(2) claims, having alleged that it purchased its 2007-10 Certificates "directly from Goldman Sachs, with GS Mortgage as the Issuer, in a public offering" pursuant to the Offering Documents – with both entities "solicit[ing] sales of the Certificates for financial gain." JA-238:¶108.

plaintiff seeks to represent the §11 claims of other class plaintiffs who purchased different securities issued under the same original "shelf" registration statement. There, although the lead plaintiffs "NY Funds" had purchased various "debt instruments" issued under a shelf registration, the NY Funds had not – nor any other named plaintiff, for that matter – purchased any "2011 Notes," or "2- or 3-Year Notes" issued under that same shelf registration statement. 588 F. Supp. 2d at 1164-65. Despite that fact, the district court held that the NY Funds had standing to bring §11 claims on behalf of those Notes purchasers. *Id*. at 1166 ("So long as (1) the securities are traceable to the same initial shelf registration and (2) the registration statements share common 'parts' that (3) were false and misleading at each effective date, there is § 11 standing.").

Before reaching that conclusion, the *Countrywide* court's starting point was – as it should be here – with §11's plain text: The statute states that "if '***any part*** of the registration statement, ***when such part became effective***, contained an untrue statement of a material fact or omitted to state a material fact,' then any person acquiring 'such security' pursuant to the registration statement has standing to sue a variety of participants in the security's issuance." *Countrywide*, 588 F. Supp. 2d at 1164 (quoting 15 U.S.C. §77k(a)). Add to that text the fact that in a "shelf registration," in addition to the initial registration form, "the prospectus, prospectus supplement, and SEC filings (and other documents incorporated by reference) ***constitute the 'registration statement'*** for each subsequent offering." *Id*. (quoting 15 U.S.C. §77b(a)(8)). The question then becomes, said the *Countrywide* court

> do continuous or serial offerings ***under the same initial registration form and base prospectus***, resulting in multiple issuances having "registration statements" that speak as of different dates and incorporate different documents qualify as a registration statement for §11 standing purposes ***if those registrations have in common misrepresentations or omissions that were actionable on the effective date of both registrations?***

Id. at 1165. The answer was "Yes" – and it depended (again) on an unvarnished reading of §11's clear text:

> The statute contemplates the possibility that the "registration statement" in the first clause of §11 is not the same in every respect as the "registration statement" for a particular security because "parts" of the "registration statement" may "bec[o]me effective" at different times. 15 U.S.C. §77k(a) ("[A]ny part of the registration statement, ***when such part became effective*** . . . ."). To require that "registration statement" of §11's first clause be absolutely identical for each security traceable to the same initial registration and prospectus would rewrite "such part" to read "registration statement."

Id. Thus, §11 "grants standing to anyone who buys 'such security' – one traceable to a defective registration statement." *Id*. Following that axiom to its logical conclusion, "[i]f the initial shelf registration statement contained an actionable statement or omission that is common to more than one issuance under the shelf registration, then purchasers in those issuances may be able to trace the same injury to

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the same 'registration statement.'" *Id*. at 1165-66. So long as several straightforward criteria are satisfied, then, §11 standing exists. *Id*. at 1166 ("So long as (1) the securities are traceable to the same initial shelf registration and (2) the registration statements share common 'parts' that (3) were false and misleading at each effective date, there is § 11 standing.").

Those criteria are satisfied here. The Fund – ***and*** the investors who purchased Certificates from the other 15 Trusts – each purchased Certificates pursuant and/or traceable to the only false and misleading Registration Statement alleged in this case. The statements in that Registration Statement were common to ***each*** subsequent "offering," providing the Fund standing to represent each subsequent purchaser.[25]

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[25] A recent First Circuit decision does not alter this conclusion. *See Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762 (1st Cir. 2011). Although the *Plumbers' Union* panel held that the plaintiffs lacked standing to pursue claims on behalf of mortgage-backed securities purchasers from other offerings and other trusts, the panel conceded that the issue was unsettled and "not so simple," with even the Supreme Court offering contradictory guidance. *Id*. at 768-70. It also felt that its hands were tied by a 33-year-old First Circuit case. *Id*. at 770. This Court is not bound by *Plumbers' Union* or by a debatable out-of-circuit decision from 33 years ago.

2. The District Court's "Standing" Concerns Are Actually Class Certification Issues, Which Are Premature at this Stage of the Litigation

What the district court thought was a "standing" issue was in reality a ***class certification*** issue: Because the Fund's purchase of Certificates afforded them statutory standing under the Securities Act, and the case presented a genuine "case or controversy" under Article III, it then became a matter of whether Rule 23 considerations could be satisfied at the proper time – not at this motion-to-dismiss stage. *See, e.g.*, *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 241 (2d Cir. 2007) ("'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.'"); *Comer v. Cisneros*, 37 F.3d 775, 797 (2d Cir. 1994) (assessing named plaintiffs' individual constitutional and statutory standing before moving on to class representation concerns); *Grasty v. Amalgamated Clothing & Textile Workers Union, etc.*, 828 F.2d 123, 130 n.8 (3d Cir. 1987) (because named plaintiffs have alleged injury to themselves, defendants' contentions that they "do not have standing to raise the claims of the class . . . confuse[s] standing and the typicality requirement of Rule

23(a)(3)").[26] The Fund argued as much to the district court: *See, e.g.*, JA-166/9:23-25 (after establishing the Fund's own viable claim, "[t]hen the next step is can you represent other people, and how do you do that. If they are all subject to the same course of conduct, then you can").

This approach makes eminent sense in the securities context, where the case law establishes that class representatives need not have invested in each security at issue so long as they have alleged a single course of wrongful conduct with regard to each security. *See, e.g.*, *Green*, 406 F.2d at 299 (allowing investor who purchased securities pursuant to a third prospectus to represent a class that included investors who purchased securities pursuant to an earlier prospectus because the same

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[26] *See also In re Salomon Smith Barney Mut. Fund Fees Litig.*, 441 F. Supp. 2d 579, 605 (S.D.N.Y. 2006) ("Under established standing jurisprudence involving typical class actions, courts undertake a ***two-step analysis***. First, the court determines whether the representative plaintiff has standing vis-a-vis the defendant: *i.e.*, can the plaintiff demonstrate injury by that defendant so as to have a sufficiently direct and substantial interest. If so, then the court determines whether the moving party can satisfy the class certification requirements under Rule 23."); *MobileMedia*, 28 F. Supp. 2d at 911 ("Concerns over whether stock purchasers should represent notes purchasers are ***better addressed at the time of class certification***."); *accord* 7AA Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §1785.1, at 388-89 (2d ed. 2005) ("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.").

misstatements were present in both); *In re XM Satellite Radio Holdings Sec. Litig.*, 237 F.R.D. 13, 20 (D.D.C. 2006) ("'that plaintiffs might have different types of securities does not require a separate class or co-lead plaintiffs because lead plaintiffs need not satisfy all elements of standing with respect to the entire lawsuit under the PSLRA'"); *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 445 (S.D. Tex. 2002) ("[C]ourts have repeatedly concluded that stock purchasers can represent purchasers of debt instruments and vice versa in the same action.").

That the wrongful conduct here emanated from a single Registration Statement makes that truism all the more apt. *See Citigroup Bond Litig.*, 723 F. Supp. 2d at 585 (where "at least one named plaintiff purchased securities pursuant to each of those allegedly actionable shelf registration statements" that "is sufficient, at this stage, to establish plaintiffs' standing to raise claims on behalf of all those who purchased pursuant to those shelf registration statements and thus to challenge all forty eight offerings"); *Countrywide*, 588 F. Supp. 2d at 1165 (finding §11 standing for all offerings made pursuant to an "initial shelf registration statement contain[ing] an actionable statement or omission that is common to more than one issuance").

The complaints here – both the Second Amended Complaint containing the claims arising out of all 17 Trusts, as well as the operative Complaint – alleged that the putative class members' claims are based upon the same wrongful course of conduct by the same defendants. As such, the Fund's standing to represent ***all*** such purchasers is adequately pleaded at this stage of the litigation.

VIII. CONCLUSION

For the foregoing reasons, the district court's dismissal should be reversed.[27]

DATED: August 24, 2011

Respectfully submitted,

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[27] To the extent this Court reinstates the Fund's §§11 and 12(a)(2) claims, it should reinstate the §15 control-person claims as well. *See, e.g.*, *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 170-71 (2d Cir. 2000) ("Because we remand the [underlying] claims, we also vacate the dismissal of the §20(a) cause of action and remand to the district court for further consideration.").

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RULE 32(a)(7)(C) CERTIFICATE

The undersigned counsel certified that Plaintiff-Appellant's Opening Brief uses a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief comprises 13,957 words according to the word count provided by Microsoft Word 2003 word processing software.

s/ Joseph D. Daley
JOSEPH D. DALEY
Counsel for Plaintiff-Appellant

SPECIAL APPENDIX

MEMO ENDORSED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

PLEASE TAKE NOTICE that upon the accompanying memorandum of law, dated August 19, 2009, and the accompanying Declaration of Patrice A. Rouse, dated August 19, 2009, with attached exhibits, defendants Goldman, Sachs & Co., Goldman Sachs Mortgage Company, GS Mortgage Securities Corp., Kevin Gasvoda, Michelle Gill and Daniel L. Sparks (collectively, "Defendants") will move this Court, before the Honorable Miriam G. Cedarbaum, on September 17, 2009 at 9:30 a.m., or at such other time as the Court may order, in Courtroom 14A of the United States Courthouse at 500 Pearl Street, New York, New York 10007, for an Order dismissing the Amended Complaint in this action, with prejudice, pursuant to Federal Rules of Civil Procedure 12(b)(1), for lack of standing, and 12(b)(6), for failure to state a claim and as barred by the statute of limitations.

Motions to dismiss granted with leave to plaintiff to file and serve an amended complaint by no later than November 9, 2009.

So ordered.
September 18, 2009 S/ United States District Judge

Close Motion

MEMO ENDORSED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

PLEASE TAKE NOTICE that upon the accompanying memorandum of law, dated December 11, 2009, and the accompanying Declaration of Harsh N. Trivedi, dated December 11, 2009, with attached exhibits, defendants Goldman, Sachs & Co., Goldman Sachs Mortgage Company, GS Mortgage Securities Corp., Kevin Gasvoda, Michelle Gill and Daniel L. Sparks, (collectively, "Defendants") will move this Court, before the Honorable Miriam Goldman Cedarbaum, on January 21, 2010 at 9:30 a.m., or at such other time as the Court may order, in Courtroom 14A of the United States Courthouse at 500 Pearl Street, New York, New York 10007, for an Order dismissing the Second Amended Complaint in this action, with prejudice, pursuant to Federal Rules of Civil Procedure 12(b)(1), for lack of standing, and 12(b)(6), for failure to state a claim and as barred by the statute of limitations.

Motion granted with leave to serve and file a third amended complaint by March 31, 2010. For oral opinion, see record of proceedings.
So ordered.
January 28, 2010

S/ United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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NECA-IBEW HEALTH & WELFARE FUND,
Individually and On Behalf of All
Others Similarly Situated,

Plaintiff, **OPINION**

-against- 08 Civ. 10783 (MGC)

GOLDMAN, SACHS & CO., et al.,

Defendants.

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Cedarbaum, J.

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

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

THE COMPLAINT

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

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

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

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

> Your Investment May Not Be Liquid. The underwriter intends to make a secondary market in the offered certificates, but it will have no obligation to do so.

> We cannot assure you that such a secondary market will develop or, if it develops, that it will continue. Consequently, you may not be able to sell your certificates readily or at prices that will enable you to realize your desired yield.

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

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

DISCUSSION

I. Standard on a Motion to Dismiss

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." <u>Makarova v. United States</u>, 201 F.3d 110, 113 (2d Cir. 2000). The plaintiff bears the burden of establishing subject matter jurisdiction, and a court may consider evidence outside the pleadings in evaluating a motion to dismiss brought under Rule 12(b)(1). Id.

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

II. Cognizable Injury Under Section 11

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

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

> The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been

> disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages [as calculated under subsection (1).]

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

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

Defendants argue that insofar as NECA does not allege a termination of monthly distributions due under the Certificates that it purchased, NECA has not suffered an injury cognizable under Section 11. Defendants contend that NECA may not rely on any problem in the secondary market to allege an injury because it was expressly warned in the Prospectus Supplements that it could not rely on the salability of these Certificates.

Defendants argue that the allegations regarding the diminution in the "value" of the Certificates misconceive the nature of mortgage-backed securities because investors only suffer loss when they do not receive the "pass-through" cash flow payments to which they are entitled. Because NECA continues to receive those payments, it has suffered no injury cognizable under Section 11 according to Defendants, and NECA's claim is premature.

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

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

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

NECA next argues that the "value" of the Certificates has declined based upon their expected cash flow. The complaint alleges that "the holders of the Certificates are exposed to much more risk than the Offering Documents represented with respect to both the timing and absolute cash flow to be received." (Complaint ¶ 6.) NECA argues that the risk of diminished cash flow in the future establishes a present injury cognizable under Section 11. But Section 11 does not permit recovery for increased risk. Instead, to allege an injury cognizable under Section 11, NECA must allege the actual failure to receive payments due under the Certificates. Although NECA has had three opportunities to amend its complaint, it has never made that allegation.

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

CONCLUSION

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

SO ORDERED.

Date: New York, New York
October 14, 2010

S/________________________
MIRIAM GOLDMAN CEDARBAUM
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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NECA-IBEW HEALTH & WELFARE FUND,
Individually and On Behalf of All
Others Similarly Situated,

Plaintiff, MEMORANDUM OF ORDER

-against- 08 Civ. 10783 (MGC)

GOLDMAN, SACHS & CO., et al.,

Defendants.

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Cedarbaum, J.

NECA-IBEW Health & Welfare Fund ("NECA") moves for reconsideration of my October 14, 2010 opinion granting defendants' motion to dismiss NECA's claim of violation of Section 11 of the Securities Act of 1933. Local Rule 6.3 requires that those who seek reconsideration demonstrate that the court has "overlooked matters or controlling decisions which, had they been considered, might reasonably have altered the result." Donahue v. Pendleton Woolen Mills, Inc., 719 F. Supp. 149, 151 (S.D.N.Y. 1988) (citations and internal quotation marks omitted). NECA has not pointed to any matters or controlling decisions that were not previously considered. In addition to rearguing what already has been considered, NECA proffers new matter which it has not previously mentioned. Accordingly, NECA has not satisfied the standard for reconsideration and its motion is denied.

SO ORDERED.

Dated: New York, New York
November 16, 2010

S/______________________________
MIRIAM GOLDMAN CEDARBAUM
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NECA-IBEW HEALTH & WELFARE FUND, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. GOLDMAN, SACHS & CO., et al., Defendants.	Civil Action No. 1:08-cv-10783-MGC "ECF Case" <u>CLASS ACTION</u> NOTICE OF MOTION AND NECA-IBEW HEALTH & WELFARE FUND'S MOTION FOR ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(b) OR, ALTERNATIVELY, CERTIFICATION OF AN INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. §1292(b)

MEMO ENDORSED

Motion denied. For oral opinion, see record of proceedings.
So ordered.
January 11, 2011

/s/ United States District Judge

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DATE FILED: 3/3/11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEMO ENDORSED

NECA-IBEW HEALTH & WELFARE FUND, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. GOLDMAN, SACHS & CO., et al., Defendants.	Civil Action No. 1:08-cv-10783-MGC "ECF Case" <u>CLASS ACTION</u> PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT AND FOR RELIEF PURSUANT TO FED. R. CIV. P. RULE 60(b)

Motion denied. For oral opinion, see record of proceedings.
So ordered.

S/ United States District Judge
March 3, 2011

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

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

Plaintiffs,

- against -

GOLDMAN, SACHS & CO., et al.,

Defendants.

- -X

AMENDED ORDER

08 Civ. 10783 (MGC)

CEDARBAUM, J.

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

SO ORDERED.

Dated: New York, New York
June 8 , 2011

S/

MIRIAM GOLDMAN CEDARBAUM
United States District Judge

DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 W. Broadway, Suite 1900, San Diego, California 92101.

2. I hereby certify that on August 24, 2011, I electronically filed the foregoing document: PLAINTIFF-APPELLANT'S OPENING BRIEF AND SPECIAL APPENDIX with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

3. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 24, 2011, at San Diego, California.

s/ Jana P. Kusy
JANA P. KUSY