13-1776-cv(L), 13-1777(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND BENEFIT FUND OF THE CITY OF CHICAGO, on Behalf of Itself and Similarly Situated Certificate Holders, WESTMORELAND COUNTY EMPLOYEE RETIREMENT SYSTEM, CITY OF GRAND RAPIDS GENERAL RETIREMENT SYSTEM, CITY OF GRAND RAPIDS POLICE AND FIRE RETIREMENT SYSTEM,

Plaintiffs-Appellants-Cross-Appellees,

- against -

THE BANK OF NEW YORK MELLON, as Trustee Under Various Pooling and Servicing Agreements,

Defendant-Appellee-Cross-Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
CIVIL ACTION NO. 1:11-CV-05459-WHP

AMICUS CURIAE BRIEF OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND THE CLEARING HOUSE ASSOCIATION L.L.C. IN SUPPORT OF DEFENDANT-APPELLEE-CROSS-APPELLANT FOR REVERSAL IN PART AND AFFIRMANCE IN PART

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae Securities Industry and Financial Markets Association hereby certifies that it is a non-profit corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Amicus curiae The Clearing House Association L.L.C. hereby certifies that it is a limited liability company that is exempt from federal income taxation as a business league under section 501(c)(6) of the Internal Revenue Code. It has no parent corporation and no publicly held corporation owns 10% or more of its membership interests.

TABLE OF CONTENTS

PAGE

RULE 26.1 CORPORATE DISCLOSURE STATEMENT..i

TABLE OF AUTHORITIES iv

STATEMENT OF IDENTITY, INTEREST OF *AMICI CURIAE,* AND SUMMARY OF ARGUMENT 1

ARGUMENT 5

POINT I THE ORDER'S APPLICATION OF THE TIA TO MORTGAGE PASS-THROUGH CERTIFICATES IS INCORRECT, CREATES UNCERTAINTY AND MAY IMPAIR THE CAPITAL MARKETS 5

A. The Order Upends Nearly Four Decades Of SEC Guidance And Market Practice 5

B. The Order's Application Of The TIA To The Multi-Hundred Billion Dollar MBS Market Creates Industry Uncertainty And Raises Difficult Interpretive Questions.........14

POINT II THE ORDER PROPERLY DISMISSED APPELLANTS' PUTATIVE CLASS CLAIMS WITH RESPECT TO OFFERINGS IN WHICH THEY WERE NOT INVESTORS...........17

A. Appellants Lack Standing To Pursue Contract, TIA And Fiduciary Claims With Respect To Securities They Did Not Purchase 17

B. This Court's Decision In *NECA-IBEW* Should Be Overturned And Is Inapplicable To Appellants' Claims 23

PAGE

C. Expanding *NECA-IBEW*'s Holding Will Encourage Abusive Class Actions And Damage The Capital Markets......29

CONCLUSION......35

CERTIFICATE OF COMPLIANCE...... xii

TABLE OF AUTHORITIES

PAGE(S)

CASES:

American Fid. Assur. Co. v. Bank of N.Y. Mellon,
2013 WL 6835277 (W.D. Okla. Dec. 26, 2013) 6

Baker v. Carr,
369 U.S. 186 (1962)..23

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975)..32, 34

Blum v. Yaretsky,
457 U.S. 991 (1982)..22

Comcast Corp. v. Behrend,
133 S. Ct. 1426 (2013)..21

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006).. 17-18, 24

Denney v. Deutsche Bank, AG,
443 F.3d 253 (2d Cir. 2006) 17

FDIC v. Countrywide Fin. Corp.,
2012 WL 5900973 (C.D. Cal. Nov. 21, 2012) 19, 24, 29, 30

General Tel. Co. of Sw. v. Falcon,
457 U.S. 147 (1982)..22

Gratz v. Bollinger,
539 U.S. 244 (2003)..28

Hines v. Widnall,
334 F.3d 1253 (11th Cir. 2003) (per curiam) 25

PAGE(S)

In re Boston Sci. Corp. Sec. Litig.,
686 F.3d 21 (1st Cir. 2012)..33

In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.,
934 F. Supp. 2d 1219 (C.D. Cal. 2013)..24

In re Frito-Lay N. Am., Inc. All Natural Litig.,
2013 WL 4647512 (E.D.N.Y. Aug. 29, 2013)...31

In re Harbinger Cap. Partners Funds Inv. Litig.,
2013 WL 5441754 (S.D.N.Y. Sept. 30, 2013)...31

In re IndyMac Mortg.-backed Sec. Litig.,
2013 U.S. Dist. LEXIS 103576
(S.D.N.Y. July 23, 2013)..30

In re Morgan Stanley Mortg. Pass-Through Certificates Litig.,
2013 WL 139556 (S.D.N.Y. Jan. 11, 2013)...30

In re Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995)...31

In re Steen,
506 N.Y.S.2d 640 (Surr. Ct. Nassau Cty. 1986)..19

In re Winstar Commc'ns Sec. Litig.,
290 F.R.D. 437 (S.D.N.Y. 2013)...31

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

Lierboe v. State Farm Mut. Auto. Ins. Co.,
350 F.3d 1018 (9th Cir. 2003)..25

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)...17

PAGE(S)

Mayo v. GMAC Mortg., LLC,
2010 WL 9073441 (W.D. Mo. Mar. 1, 2010) 19

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit,
547 U.S. 71 (2006)..32, 33

NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.,
693 F.3d 145 (2d Cir. 2012), *cert. denied*,
133 S. Ct. 1624 (2013)..*passim*

New Jersey Carpenters Health Fund v. DLJ Mortg. Cap., Inc.,
2013 WL 357615 (S.D.N.Y. Jan. 23, 2013) 30

New Jersey Carpenters Health Fund v. Residential Cap., LLC,
2013 WL 1809767 (S.D.N.Y. Apr. 30, 2013) 30

New Jersey Carpenters Health Fund v. Royal Bank of Scot. Grp., PLC,
709 F.3d 109 (2d Cir. 2013) 25, 26-27

Oklahoma Police Pension & Ret. Sys. v. U.S. Bank Nat'l Ass'n,
291 F.R.D. 47 (S.D.N.Y. 2013)..*passim*

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2012 WL 4053716 (E.D.N.Y. Sept. 14, 2012)..30

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632 F.3d 762 (1st Cir. 2011).. 23, 24-25

Policemen's Annuity & Ben. Fund of Chi. v. Bank of Am., N.A.,
907 F. Supp. 2d 536 (S.D.N.Y. 2012) 6, 19, 28-29

Policemen's Annuity & Ben. Fund of Chi. v. Bank of Am., N.A.,
943 F. Supp. 2d 428 (S.D.N.Y. 2013) 6

PAGE(S)

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SEC v. Tambone, 597 F.3d 436 (lst Cir. 2010)....................34

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008)....................32, 34

Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308 (2007).................... 32-33

Tuper v. Tuper, 824 N.Y.S.2d 857 (App. Div. 4th Dep't 2006) 19

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011)....................18

STATUTES & OTHER AUTHORITIES:

15 U.S.C.:
- § 77eee 8
- § 77jjj 16
- § 77lll 15-16
- § 77mmm(a)....................16
- § 77nnn....................15
- § 77nnn(d)....................16
- § 77ooo(b)....................16

Fed. R. App. P.:
- 29(a) 1
- 29(c)(5) 1

2d Cir. L. R. 29.1(b)....................1

PAGE(S)

H.R. Rep. No. 76-1016 (1939) 12

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Pub. L. No. 98-440, 98 Stat. 1689 (1984) 8-9

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Pub. L. No. 99-514, 100 Stat. 2085 (1986) 9

Trust Indenture Reform Act of 1990,
Pub. L. No. 101-550, 104 Stat. 2721 (1990) (codified as amended at 15 U.S.C. §§ 77ccc-77eee, 77iii-77rrr and 77vvv) 9

Reigle Cmty. Dev. & Reg. Improvement Act of 1994,
Pub. L. No. 103-325, 108 Stat. 2241 (1994) 10

Dodd-Frank Wall Street Reform and Consumer Protection Act,
Pub. L. No. 111-203, 124 Stat. 1623 (2010) (codified at 12 U.S.C. § 1851(d)(1)) 11-12

Statements on Introduced Bills & Joint Resolutions: S. 2566 (Sen. Proxmire),
134 Cong. Rec. S8561 (daily ed. June 24, 1988) 9

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134 Cong. Rec. S8566 (daily ed. June 24, 1988) 9-10

Bank of Am. Nat'l Trust & Sav. Ass'n,
1977 SEC No-Act. LEXIS 1343 (May 19, 1977) 8

In re Bank of Am. Nat'l Trust & Sav. Ass'n,
Rel. No. 34-14446, 1978 WL 197742 (Feb. 6, 1978) 8

Marion Bass Sec., Inc.,
1984 SEC No-Act. LEXIS 2473 (July 9, 1984) 7

PAGE(S)

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1988 SEC No-Act. LEXIS 1463 (Oct. 31, 1988) 7

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1994 SEC No-Act. LEXIS 525 (May 20, 1994)..10

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Rel. No. 33-6499, 1983 SEC LEXIS 315 (Nov. 17, 1983) 9

Final Rule: Exclusion from the Definition of Investment Co. for Structured Financings,
Rel. No. IC-19105, 1992 SEC LEXIS 3086 (Nov. 19, 1992) 10

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Rel. No. 33-8419, 2004 SEC LEXIS 934 (May 3, 2004)..................................11

Final Rule: Asset-Backed Securities,
Rel. No. 33-8518, 2004 SEC LEXIS 3068 (Dec. 22, 2004)...............................11

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Rel. No. 33-9117, 2010 SEC LEXIS 1493 (May 3, 2010)..........................11, 14

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Rel. No. 33-9176, 2011 SEC LEXIS 234 (Jan. 20, 2011).................................12

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SIFMA, *U.S. Mortgage-Related Issuance & Outstanding* (*Table 2.1*) (last updated Nov. 1, 2013), http://www.sifma.org/uploadedfiles/ research/statistics/statisticsfiles/sf-us-mortgage-related-sifma.xls 14

Brief of the Securities Industry and Financial Markets Association and the Chamber of Commerce of the United States of America as *Amici Curiae* in Support of Petitioners, *Goldman, Sachs & Co. v. NECA-IBEW Health & Welfare Fund*, 2012 WL 6040699 (U.S. Dec. 3, 2012)..4

PAGE(S)

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In re Bank of N.Y. Mellon, No. 651786/2011 (N.Y. Sup. Ct. N.Y. Cty. June 29, 2011)...............................31

In re Residential Cap., LLC, No. 12-12020 (Bankr. S.D.N.Y. Dec. 17, 2013) 31

Maine St. Ret. Sys . v. Countrywide Fin. Corp., No. 2:10-cv-00302-MRP (C.D. Cal. June 25, 2013)...31

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STATEMENT OF IDENTITY, INTEREST OF *AMICI CURIAE*, AND SUMMARY OF ARGUMENT[1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth and trust and confidence in the financial markets. SIFMA is the United States regional member of the Global Financial Markets Association.

The Clearing House Association L.L.C. ("TCH," and together with SIFMA, the "*Amici*") was established in 1853 and is the United States' oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people and hold more than half of all U.S. deposits. TCH is a nonpartisan advocacy organization representing, through regulatory comment letters, *amicus* briefs and white papers, the interests of its owner banks on a variety of systemically important banking

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[1] In accordance with Appellate Rules 29(c)(5) and Local Rule 29.1(b), no party's counsel authored this brief in whole or in part, no party's counsel contributed money that was intended to fund preparing or submitting this brief, and no other individual or entity contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(c)(5); 2d Cir. L. R. 29.1(b). Pursuant to Appellate Rule 29(a), the *Amici* have received the consent of all parties to this action for the filing of this brief. Fed. R. App. P. 29(a).

issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the U.S.

Plaintiffs-Appellants-Cross-Appellees' ("Appellants") appeal (the "Appeal") and Defendant-Appellee-Cross-Appellant The Bank of New York Mellon ("BNYM")'s cross-appeal (the "Cross-Appeal") concern two issues critical to the *Amici*'s members and the capital markets: (1) whether, in contravention to longstanding Securities and Exchange Commission ("SEC") and Congressional guidance and market practice, the Trust Indenture Act of 1939, as amended (15 U.S.C. §§ 77aaa *et seq.*) (the "TIA"), applies to mortgage pass-through certificates; and (2) whether, despite Article III principles and a line of Supreme Court decisions to the contrary, certificateholders may assert contract, TIA and fiduciary claims with respect to securities that they did not themselves purchase. For the reasons set forth below, the *Amici* respectfully submit that the answer to both questions is "no."

First, the members of the *Amici* play a significant role in the mortgage-backed securities ("MBS") market as, among other things, trustees, issuers, servicers, market-makers and investors. Accordingly, the *Amici* bring an

industry-wide perspective distinct from that of the parties with respect to the costs and uncertainties that may be imposed on all market participants by the District Court's April 3, 2012 memorandum and order (the "Order")"[2] applying the TIA to SEC-registered mortgage pass-through certificates issued pursuant to Pooling and Servicing Agreements ("PSAs").[3] The Order retroactively imposes unanticipated duties and liabilities that are contrary to decades of SEC and Congressional guidance, market practice, and the agreements that govern the transactions. The Order also creates substantial uncertainty and potential complexity and costs with respect to future pass-through securitizations.

Second, the Order correctly dismissed contract, TIA and fiduciary claims asserted by Appellants on behalf of purchasers of securities in which Appellants did not themselves invest. Relying heavily on this Court's recent holding in *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1624 (2013), Appellants attempt to unmoor their action from Article III of the Constitution and assert claims in which they have suffered no "injury-in-fact" and have no cognizable interest.

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[2] *Retirement Bd. of Policemen's Annuity & Ben. Fund of Chi. v. Bank of N.Y. Mellon*, 914 F. Supp. 2d 422 (S.D.N.Y. 2012), *reconsideration denied, interlocutory appeal certified*, 2013 WL 593766 (S.D.N.Y. Feb. 14, 2013).

[3] Please note that the views expressed in this memorandum do not necessarily represent those of SIFMA's asset management group, some members of which may hold different or opposing views to those expressed herein.

Appellants' position is contrary to Supreme Court precedent that requires, as a predicate to standing, that putative class representatives suffer injury from the same conduct as the absent class members. The *Amici* respectfully contend that this Court's decision in *NECA-IBEW* is irreconcilable with Supreme Court jurisprudence as well as the law of the First, Ninth and Eleventh Circuits, and ultimately should be reversed by the full Second Circuit or the Supreme Court.[4] Nevertheless, Appellants' reliance on *NECA-IBEW* is misguided because this Court has made clear that *NECA-IBEW* applied strictly to misrepresentation-based securities claims arising from a common offering document. Appellants' contract, TIA and fiduciary claims, unconnected by common injury or conduct, do not implicate the "same set of concerns" and fail to meet the *NECA-IBEW* standard. Extending *NECA-IBEW* to permit the engorgement of class actions with such tangentially connected claims invites the filing of abusive lawsuits, inflates the liability, costs and settlement pressure facing market participants, and impairs the capital markets by raising the costs and risks of capital formation.

These issues are directly relevant to the *Amici*'s mission to serve the public interest by promoting economic growth and the strength of the financial

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[4] In connection with its position that *NECA-IBEW*'s unprecedented expansion of "class standing" is in error, SIFMA submitted *amicus curaie* briefs in *Goldman, Sachs & Co. v. NECA-IBEW Health & Welfare Fund*, 2012 WL 6040699 (U.S. Dec. 3, 2012), and *FDIC v. Countrywide Fin. Corp.*, 2013 WL 6729418 (9th Cir. Dec. 16, 2013).

services industry, including the nation's commercial banks. The positions advocated by Appellants, which threaten to inhibit the effective and efficient functioning of the capital markets and increase dramatically litigation liability and costs, are particularly troubling to the *Amici* given that many of their members serve as trustees (including BNYM and its affiliates). Resolution of the uncertainty created by the Order with respect to the scope of the TIA, and rejection of Appellants' attempt to expand exponentially class action litigation unfettered by long-established Constitutional requirements or precedent, will provide much-needed relief to the members of the *Amici* and the multi-hundred billion dollar market for MBS.

ARGUMENT

POINT I

THE ORDER'S APPLICATION OF THE TIA TO MORTGAGE PASS-THROUGH CERTIFICATES IS INCORRECT, CREATES UNCERTAINTY AND MAY IMPAIR THE CAPITAL MARKETS

A. The Order Upends Nearly Four Decades Of SEC Guidance And Market Practice

In holding that the TIA applies to mortgage pass-through certificates, the District Court disregarded the SEC's longstanding interpretation that pass-through certificates are exempt from the TIA as mere "conclusory statements on the SEC website." 914 F. Supp. 2d at 429. In so doing, the District Court ignored

nearly forty years of SEC and legislative guidance and market practice. Over four decades, both the SEC and Congress have frequently taken steps to craft an appropriate regulatory scheme to govern the MBS market; however, they have never imposed the provisions of the TIA despite ample opportunities to do so. Rather, the SEC has made clear repeatedly that the TIA does not apply to pass-through certificates in the context of its review of hundreds of Securities Act registration statements, in informal administrative interpretations provided by the SEC's staff, including Interpretive Response 202.01 and a predecessor 1997 staff publication, in several "no-action" letters, in its efforts to modernize the TIA, and, implicitly, in its efforts to adopt and revise Regulation AB. Only the Order, and the few cases that have followed its holding,[5] have applied the TIA to pass-through certificates. Indeed, subsequent decisions have reached the opposite-and correct-conclusion. *See, e.g.*, *Oklahoma Police Pension & Ret. Sys. v. U.S. Bank Nat'l Ass'n*, 291 F.R.D. 47, 64-66 (S.D.N.Y. 2013) (dismissing TIA claims on the basis of SEC guidance, legislative history, secondary authority, and the intent of the parties evidenced by the agreements governing the transactions).

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[5] *See Policemen's Annuity & Ben. Fund of Chi. v. Bank of Am., N.A.*, 907 F. Supp. 2d 536, 557 (S.D.N.Y. 2012); *Policemen's Annuity & Ben. Fund of Chi. V. Bank of Am., N.A.*, 943 F. Supp. 2d 428, 438-40 (S.D.N.Y. 2013); *American Fid. Assur. Co. v. Bank of N.Y. Mellon*, 2013 WL 6835277, at *2-3 (W.D. Okla. Dec. 26, 2013).

In SEC Interpretative Response 202.01, the SEC made clear its position that pass-through certificates are exempt from the TIA, stating that "[pass-through certificates] are treated as exempt from the Trust Indenture Act under Section 304(a)(2) thereof." SEC Div. of Corp. Fin., *Trust Indenture Act of 1939-Interpretive Response Section 202.01* (last updated May 3, 2012), http://www.sec.gov/divisions/corpfin/guidance/tiainterp.htm.[6] Interpretative Response 202.01 reiterates Item 11 of the "Telephone Interpretations" under the Trust Indenture Act published in July of 1997, which, in turn, attempted to codify prior SEC staff interpretations. *See* SEC Div. of Corp. Fin., *Manual of Publicly Available Telephone Interpretations (Trust Indenture Act of 1939)*, *No. 11* (July 1997), http://www.sec.gov/interps/telephone/cftelinterps_tia.pdf. Moreover, "no-action" letters issued in 1984 and 1988 are consistent with the position taken in Interpretive Response 202.01 and the predecessor Telephone Interpretation, as the SEC staff recommended that no enforcement action be taken in connection with the proposed offering of pass-through certificates without TIA-qualified indentures. *See Marion Bass Sec., Inc.,* 1984 SEC No-Act. LEXIS 2473 (July 9, 1984); *Harbor Fin., Inc.*, 1988 SEC No-Act. LEXIS 1463 (Oct. 31, 1988).

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6 Although, in May 2012, the SEC supplemented its interpretative response to note that "[t]he staff is considering CDI 202.01 in light of [the Order]," *id.,* twenty months have passed, and to date the SEC has not retracted or amended its guidance.

Indeed, the SEC declined to apply the TIA to pass-through certificates at the very inception of the MBS market in 1977, when the first SEC-registered pass-through certificates were issued by Bank of America. Because mortgage pass-through securities had previously been issued exclusively by Fannie Mae, Freddie Mac and Ginnie Mae, which enjoy special status under the federal securities laws, the entire Commission-not only its staff-considered issues raised by that ground-breaking offering under the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Securities Exchange Act"). *See Bank of Am. Nat'l Trust & Sav. Ass'n*, 1977 SEC No-Act. LEXIS 1343 (May 19, 1977); *In re Bank of Am. Nat'l Trust & Sav. Ass'n*, Rel. No. 34-14446, 1978 WL 197742 (Feb. 6, 1978). Among the issues put to the SEC was whether the offering would be exempt from the TIA. *See* 1977 SEC No-Act. LEXIS 1343. Significantly, the SEC did not issue a TIA-related "stop order" in response to that offering, which is required by TIA Section 305 upon a finding by the SEC that a security lacks a required indenture. 15 U.S.C. § 77eee. Accordingly, the absence of a "stop order" reflected the SEC's determination that the TIA did not apply to mortgage pass-through certificates.

In the three decades that followed, the SEC and Congress took steps to create a regulatory framework that would encourage the growth of the MBS market. For example, in 1984, the Secondary Mortgage Market Enhancement Act

("SMMEA") was enacted to remove impediments to the development of a secondary market for residential mortgage-backed securities. *See* Pub. L. No. 98-440, 98 Stat. 1689 (1984). While SMMEA was under consideration, the SEC amended Rule 415 under the Securities Act to permit "mortgage related securities" (as defined in SMMEA) to be offered on a "shelf-registered" basis. *See Final Rule: Shelf Registration*, Rel. No. 33-6499, 1983 SEC LEXIS 315 (Nov. 17, 1983). Another obstacle to the growth of the market was removed by the Tax Reform Act of 1986 (the "Tax Reform Act"), which created a new tax vehicle, commonly called a REMIC, to facilitate the issuance of multi-class mortgage pass-through certificates by eliminating "double taxation" of those securities. *See* Pub. L. No. 99-514, 100 Stat. 2085 (1986). None of this legislation or rulemaking applied the TIA to pass-through certificates.

The SEC also was the driving force behind the Trust Indenture Reform Act of 1990 (the "TIA Reform Act") (Pub. L. No. 101-550, § 401, 104 Stat. 2721 (1990) (codified as amended at 15 U.S.C. §§ 77ccc-77eee, 77iii-77rrr and 77vvv)), which revised the TIA "to adjust the requirements of the law to contemporary financing instruments and techniques." Statements on Introduced Bills & Joint Resolutions: S. 2566 (Sen. Proxmire), 134 Cong. Rec. S8561 (daily ed. June 24, 1988). Indeed, the original version of that legislation was drafted by the SEC, and an SEC memorandum notes that the SEC sought to expand the

exemptive authority contained in Section 304 of the TIA to, in part, accommodate collateralized mortgage obligations (a type of asset-backed security ("ABS") that is indisputably subject to the TIA). *See* Memorandum of SEC in Support of Trust Indenture Reform Act of 1987, 134 Cong. Rec. S8566 (daily ed. June 24, 1988). Again, the SEC did not apply the TIA to pass-through certificates.

The SEC continued to promote the growth of the ABS market in 1992, when it adopted Rule 3a-7 under the Investment Company Act of 1940 (the "1940 Act") to exclude issuers of most ABS, including MBS, from the provisions of the 1940 Act. *See Final Rule: Exclusion from the Definition of Investment Co. for Structured Financings*, Rel. No. IC-19105, 1992 SEC LEXIS 3086 (Nov. 19, 1992). In 1994, Congress amended the Securities Exchange Act to include commercial mortgages in the definition of "mortgage related security," permitting highly-rated commercial mortgage-backed securities ("CMBS") to obtain the same favored treatment SMMEA afforded to highly-rated residential mortgage-backed securities ("RMBS"). *See* Reigle Cmty. Dev. & Reg. Improvement Act of 1994, Pub. L. No. 103-325, § 347, 108 Stat. 2241 (1994). The SEC also created a specially tailored Securities Act framework to permit the use of "structural term sheets" and "computational materials" to market ABS. *See Mortgage & Asset-Backed Sec.*, 1994 SEC No-Act. LEXIS 525 (May 20, 1994). Once again, neither the SEC nor Congress applied the TIA to pass-through certificates.

In 2004, the SEC proposed Regulation AB and other ABS rules to "address comprehensively the registration, disclosure and reporting requirements for asset-backed securities." *Proposed Rule: Asset-Backed Securities*, Rel. No. 33-8419, 2004 SEC LEXIS 934, at *1 (May 3, 2004). When it considered Regulation AB, the SEC repeatedly emphasized that "the staff has to date addressed the lack of a defined set of regulatory requirements for asset-backed securities through the filing review process and, where necessary, through staff no-action letters or interpretive statements." *Id.* at *32; *see also Final Rule: Asset-Backed Securities*, Rel. No. 33-8518, 2004 SEC LEXIS 3068 (Dec. 22, 2004). Critically, Regulation AB did not apply the TIA to pass-through certificates, which is particularly significant given that, as part of Regulation AB's mandate "comprehensively" to address the ABS market, the SEC considered the structural aspects of ABS transactions, including the functions of PSAs and the disclosure obligations of trustees.

In response to the crisis in the financial markets, the SEC proposed significant amendments to Regulation AB and other ABS-related rules to "improve investor protection and promote more efficient asset-backed markets." *Proposed Rule: Asset-Backed Securities*, Rel. No. 33-9117, 2010 SEC LEXIS 1493, at *12 (May 3, 2010). The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203, § 619(d)(1), 124 Stat. 1623 (2010) (codified at 12 U.S.C.

§ 1851(d)(1))), also contained a number of provisions intended to address perceived shortcomings in the regulatory framework for ABS. The SEC has adopted or proposed various rules in response to this legislation. *See*, *e.g.*, *Final Rule: Issuer Review of Assets in Offerings of Asset-Backed Securities*, Rel. No. 33-9176, 2011 SEC LEXIS 234 (Jan. 20, 2011). Again, neither Congress nor the SEC applied, or proposed to apply, the TIA to pass-through certificates.

In addition, other TIA legislative history, as well as secondary authority, support the conclusion that the TIA is inapplicable to pass-through certificates. Senate and House reports issued contemporaneously with the TIA state that Section 304(a)(2) "would exempt, for example, fixed-trust certificates evidencing an interest in a group of assorted bonds." S. Rep. No. 76-248, at 15 (1939); H.R. Rep. No. 76-1016, at 41 (1939). Moreover, a 1984 article by one of the first securitization practitioners concluded that the SEC's position, from the inception of the SEC-registered market, was that the TIA was inapplicable to mortgage pass through certificates. Walter G. McNeill, "Securities Law Aspects of Mortgage-Backed Securities," 250 PLI/Real 399, 421 (PLI Sept. 24, 1984).

Recently, another district court dismissed TIA claims substantively similar to those asserted by Appellants on the basis of the SEC guidance, legislative history and secondary authority identified above. In *U.S. Bank*, the court held that "certificates are exempt from the TIA pursuant to section 304(a)(2)

because they are certificates of participation in two or more securities with substantially different rights and privileges" and noted that its conclusion was "consistent with the plain text of the TIA, the SEC's interpretation of the TIA, and the legislative history of the TIA." 291 F.R.D. at 65. The plaintiffs in *U.S. Bank*-similar to the District Court below-argued that Interpretive Response 202.01 and the Telephone Interpretation were "not well-reasoned and not persuasive." *Id*. at 64. The court correctly rejected this argument and stated, "[a]lthough the SEC has not provided a detailed analysis for its conclusion that section 304(a)(2) does not cover certificates . . . issued pursuant to a PSA, *the exemption is straightforward and does not require a lengthy explanation*." *Id.* at 64-65 (emphasis added).

In sum, the Order is directed at MBS transactions that were effected during a 37-year period in which the SEC made clear that the TIA is not applicable to pass-through certificates. *See U.S. Bank*, 291 F.R.D. at 64 ("The guidance documents and no-action letters demonstrate that the SEC has interpreted section 304(a)(2) as exempting certificates like those at issue in this case from the TIA"). During that entire time period, only the Order, and its progeny, have concluded that the TIA is applicable to pass-through certificates. Accordingly, the Order contradicts SEC guidance and Congressional intent and should be reversed.

B. The Order's Application Of The TIA To The Multi-Hundred Billion Dollar MBS Market Creates Industry Uncertainty And Raises Difficult Interpretive Questions

The Order is currently reverberating in a market that is enormous and crucial to the economic well-being of our country. Collectively, the non-agency RMBS and CMBS markets included outstanding securities of $1.169 trillion as of November of 2013. *See* SIFMA, *U.S. Mortgage-Related Issuance & Outstanding* (*Table 2.1*) (last updated Nov. 1, 2013), http://www.sifma.org/uploadedfiles/research/statistics/statisticsfiles/sf-us-mortgage-related-sifma.xls. According to the SEC, "[s]ecuritization can provide liquidity to nearly all major sectors of the economy including the residential and commercial real estate industry . . ." and the drastic decrease in new issuances of ABS following the financial crisis "has negatively impacted the availability of credit." 2010 SEC LEXIS 1493, at *13, 15.

In light of the size and economic significance of the market, the *Amici* are concerned that the Order will have far-reaching ramifications. Thousands of transactions totaling hundreds of billions of dollars were executed on the well-founded belief, based on decades of SEC guidance, settled market expectations and the advice of legal counsel, that the TIA did not apply. These transactions are subject to vast uncertainty as a result of the Order. Retroactive application of the TIA will subject transaction parties to potential obligations and liabilities that were neither expected nor bargained for and for which trustees, in particular, were never

compensated. *See U.S. Bank*, 291 F.R.D. at 65 (noting that "the parties [relied] on long-standing SEC guidance to structure their transaction in a way that Congress expressly exempted from the TIA"). Trustees and other transaction parties already have been forced to defend numerous lawsuits while simultaneously attempting to assess their potential TIA obligations in thousands of existing securitizations. Parties that are contemplating SEC-registered pass-through transactions face increased costs and uncertainty as they evaluate the potential TIA obligations of prospective offerings. Accordingly, the Order may delay the recovery of the RMBS markets, suppress the availability of mortgage credit, inhibit the recovery of home prices, and impair the U.S. economy.

The retroactive application to settled transactions may also raise questions regarding the manner in which certain TIA provisions should be construed in the mortgage pass-through context. For example, the TIA references "obligors" and "default." However, in the pass-through certificate context, the identity of the "obligor" is unclear and "events of default" typically do not relate to credit events with respect to the securities themselves, but rather to the underlying collateral. Ambiguity regarding the identity of the "obligor" raises questions regarding the applicability of: (1) TIA Section 314, which imposes reporting requirements on "obligors," 15 U.S.C. § 77nnn; (2) TIA Section 312, which requires each "obligor" to furnish the trustee with the names and addresses of

securities holders, *id*. § 77lll; and (3) TIA Section 314(d), which imposes appraisal requirements upon an "obligor" if an indenture "is to be secured by the mortgage or pledge of property or securities" *id*. § 77nnn(d).

The definition of "default" also creates uncertainty because pass-through trustees may be compelled to consider whether they have a "conflict of interest" under TIA Section 310, which requires a trustee to eliminate the conflict, resign, or seek a "stay" order from the SEC. *Id.* § 77jjj. This requirement could be particularly problematic if Section 310 were deemed to require a separate trustee, following a "default," for each of the multiple classes of MBS issued in a particular offering. Trustees also may be compelled to determine whether they must provide security holders with the notice of default required by TIA Section 315(b) and whether the heightened duties to which they are subject in certain circumstances derive only from the applicable PSAs or also from the TIA. *Id.* § 77ooo(b). Even if no "default" has occurred, trustees may need to consider whether any events have occurred that might require them to provide security holders and the SEC a report pursuant to Section 313(a). *Id.* § 77mmm(a).

POINT II

THE ORDER PROPERLY DISMISSED APPELLANTS' PUTATIVE CLASS CLAIMS WITH RESPECT TO OFFERINGS IN WHICH THEY WERE NOT INVESTORS

A. Appellants Lack Standing To Pursue Contract, TIA And Fiduciary Claims With Respect To Securities They Did Not Purchase

The District Court held properly that Appellants lacked standing to bring contract, TIA and fiduciary claims against BNYM in connection with approximately 500 trusts in which Appellants did not invest because Appellants could not demonstrate "'injury in fact' that is 'distinct and palpable' [and] 'fairly traceable to the challenged action.'" 914 F. Supp. 2d at 426 (*quoting Denney v. Deutsche Bank, AG*, 443 F.3d 253, 263 (2d Cir. 2006)). The Order is consistent with a long line of Supreme Court decisions that reject the dispensation of standing "in gross" for claims based on different injuries, conduct and proof. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996).

To satisfy Article III of the U.S. Constitution, "a plaintiff must have suffered an 'injury in fact' that is 'distinct and palpable'; the injury must be fairly traceable to the challenged action; and the injury must be likely redressable by a favorable decision." *Denney*, 443 F.3d at 263 (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Article III requires that a plaintiff "must

demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). The Supreme Court has made clear that Article III's requirements do not decrease for a class action: "'*That a suit may be a class action adds nothing to the question of standing*, for even named plaintiffs who represent a class "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."'" *Lewis*, 518 U.S. at 357 (emphasis added; citations omitted). The class action is "'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (citation omitted). "In order to justify a departure from that rule, 'a class representative must be part of the class and "possess the *same* interest and suffer the *same* injury" as the class members.'" *Id.* (emphasis added; citations omitted).

Appellants assert contract, TIA and fiduciary claims with respect to more than 500 trusts in which they did not invest. These claims are based on more than 500 sets of agreements, including Pooling & Servicing Agreements, Indentures, and Sale and Servicing Agreements (together, the "Governing Agreements"), that were entered into at different times, in connection with different shelf registration statements, between different parties (not including

Appellants, or any fiduciary to Appellants),[7] with respect to different loans, and that set forth different rights and obligations for BNYM in its capacity as Trustee. Appellants' contract, TIA and fiduciary claims do not implicate a common injury or a single course of conduct on the part of BNYM but rather concern questions of proof that require a contract-by-contract and loan-by-loan examination with respect to each of the 500 Trusts and the hundreds of thousands of loans therein.[8]

For example, with respect to *each particular loan* that Appellants contend that BNYM should have submitted to Countrywide for repurchase,

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[7] Appellants' claims against BNYM, in its capacity as trustee to each of the more than 500 trusts, are not brought against BNYM in the same representative capacity. Under New York law, trustees stand in a separate and distinct legal capacity with respect to each trust that they administer. *See Tuper v. Tuper*, 824 N.Y.S.2d 857, 858-59 (App. Div. 4th Dep't 2006) ("'[P]ersons suing or being sued in their official or representative capacity are . . . distinct persons, and strangers to any right or liability as an individual'") (citation omitted); *In re Steen*, 506 N.Y.S.2d 640, 642 (Surr. Ct. Nassau Cty. 1986) ("[T]he coincidence of naming the same bank as trustee of both trusts cannot be construed as a continuance or merger of the second trust into the first"); *Mayo v. GMAC Mortg., LLC*, 2010 WL 9073441, at *4 (W.D. Mo. Mar. 1, 2010) (holding that plaintiff did not have standing to sue trustee in its capacity as trustee for other trusts in which plaintiff did not invest).

[8] *See Policemen's Annuity,* 907 F. Supp. 2d at 547 ("That each Trust has a unique loan composition (and is administered under a unique (even if similar) PSA) convinces the Court that the 'same set of concerns' is not implicated across all 41 trusts"); *FDIC v. Countrywide Fin. Corp.*, 2012 WL 5900973, at *11 (C.D. Cal. Nov. 21, 2012) ("Unlike mass tort or simple securities cases, where each plaintiff in the class complains of the same behavior by the defendant, the issuer of RMBS acts differently towards purchasers of different offerings, through entirely different documents and loan pools").

Appellants will need to prove that (i) Countrywide's inclusion of *that particular loan* in the respective offering breached the representations and warranties made by Countrywide in the Governing Agreements *for that offering*, (ii) BNYM had a duty under the Governing Agreements *for that offering* to submit loans in breach of the representations and warranties to Countrywide for repurchase, (iii) BNYM's alleged duty to submit the loan for repurchase was in fact triggered by the factual circumstances for *that particular loan* (*i.e.*, BNYM had knowledge that the loan was in breach of the applicable representations and warranties), and (iv) BNYM failed to meet its alleged contractual and fiduciary obligations with respect to *that particular loan* under the Governing Agreement *for that offering*. Accordingly, Appellants do not "possess the *same* interest" and did not "suffer the *same* injury" as the putative class members that purchased certificates in offerings in which the Appellants did not invest.

Appellants contend that they may prove their claims for all 500 trusts through a "common 2000 mortgage loan sample drawn from the Plaintiff's Trusts." Appellants' Br. at 38 n.9. A sample-based approach fails because it does not, in any way, evaluate *the conduct of BNYM*.[9] BNYM, an MBS trustee, did not

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[9] In addition, Appellants' proposed sample of loans is inadequate because it ignores the differences in underwriting guidelines applicable to each loan and representations and warranties applicable to each trust. The composition of the proposed sample, which is based entirely on loans drawn from the few trusts in

originate or securitize the loans. Thus, any conclusions that may be drawn from a reunderwriting of a sample of loans cannot establish any alleged knowledge of specific loans that were in breach, let alone wrongdoing on the part of BNYM or a measurement of damages. To the contrary, Appellants' claims require hundreds of mini-trials involving individualized proofs and damages determinations. Accordingly, Appellants' claims with respect to trusts in which they did not invest must be dismissed because they are not susceptible to proof or measurement of damages on a class-wide basis and therefore could not be certified as a class action. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433-35 (2013).

The Supreme Court has repeatedly rejected "system-wide" class actions of the nature brought by Appellants that are based on different injuries resulting from different conduct. For example, in *Lewis*, 518 U.S. 343, prison inmates brought a class action seeking system-wide changes to the Arizona prison system, including with respect to special services and facilities for the illiterate, for non-English speakers, for prisoners "in lockdown," and for the inmate population at large. *Id*. at 346-47. The Supreme Court struck the trial court's broad injunction because actual injury was found with respect to only the failure to provide illiteracy-based services. In this regard, the court held:

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which Appellants invested, reinforces Appellants' lack of a cognizable interest in proving claims with respect to the remaining 500 trusts.

> [S]tanding is not dispensed in gross. If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law.

Id. at 358 n.6 (emphasis in original). Similarly, in *Blum v. Yaretsky*, 457 U.S. 991 (1982), the Supreme Court denied standing to Medicaid beneficiaries who faced a transfer to a lower level of care to also challenge transfers to a higher standard of care. *Id.* at 999. Though the plaintiffs alleged that any transfer imposed similar psychological trauma, the court clarified that "a plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Id*. According to the court, the plaintiffs lacked standing because the transfers implicated different concerns. *Id*. at 1001-02 ("[T]ransfers to more intensive care typically result in an *increase* in Medicaid benefits to match the increased cost of medically necessary care") (emphasis in original).[10]

Moreover, without commonality of injury or conduct, Appellants do not have a significant interest in establishing contractual and fiduciary breaches

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[10] *See also General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 (1982) (denying standing to bring employment discrimination claims on behalf of employees passed over for promotion and applicants that were not hired because the "evidentiary approaches to the individual and class claims were entirely different").

under the Governing Agreements, as well as TIA violations, with respect to Trusts in which Appellants did not invest. *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Accept. Corp.*, 632 F.3d 762, 771 (1st Cir. 2011) ("[I]n [cases] involving mortgage-backed securities, the necessary identity of issues and alignment of incentives is not present so far as the claims involve sales of certificates in [different] trusts"). "A personal stake in the outcome of the controversy" is critical to demonstrate "concrete adverseness." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Accordingly, Appellants have no cognizable claim to injury with respect to trusts in which they did not invest and lack Constitutional standing.

In sum, much like the cobbled-together class actions denied by the Supreme Court in *Lewis* and *Blum*, Appellants' overbroad claims do not implicate the "same interest and the same injury" because such claims are predicated on different loans, contracts, conduct and injury. Accordingly, the *Amici* respectfully submit that the Order should be affirmed.

B. This Court's Decision In *NECA-IBEW* Should Be Overturned And Is Inapplicable To Appellants' Claims

Appellants argue that the "class standing" test set forth in *NECA-IBEW* applies to their contract, TIA and fiduciary claims against BNYM and contend that the District Court erred by not finding that the "set of concerns" were

"sufficiently similar" for Appellants to sue BNYM on behalf of investors in trusts that Appellants themselves did not invest in.

As an initial matter, the *Amici* respectfully contend that *NECA-IBEW,* which is inconsistent with the Supreme Court precedent discussed above, is in error and should be reversed.[11] The premise of *NECA-IBEW*, that "class standing analysis is different," and that a putative class representative is somehow absolved from the Article III requirement that a plaintiff suffer "injury-in-fact" with respect to each claim that he seeks to assert, finds no support under Article III or Supreme Court precedent. To the contrary, the Supreme Court repeatedly has held "'[t]hat a suit may be a class action adds nothing to the question of standing,'" *Lewis*, 518 U.S. at 357 (citation omitted), and has confirmed that "a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler*, 547 U.S. at 352. *NECA-IBEW* is also contrary to the law of the First, Ninth and Eleventh Circuits, including the First Circuit's decision in *Nomura*, which held, on the same legal and factual circumstances present in *NECA-IBEW*, that a class action plaintiff may sue

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[11] Recent decisions in district courts outside this Circuit agree that *NECA-IBEW* is inconsistent with the law of the Supreme Court. *See, e.g., In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 934 F. Supp. 2d 1219, 1229 (C.D. Cal. 2013) ("[*NECA-IBEW*] is inconsistent with Supreme Court precedent . . . [and] with prior rulings of every federal court to consider similar questions in the RMBS context, including the First Circuit Court of Appeal and numerous district courts, both in and outside the Second Circuit"); *Countrywide*, 2012 WL 5900973, at *10-12.

only with respect to the specific securities it purchased. 632 F.3d at 771; *see also Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) ("[I]f [the plaintiff] has no stacking claim, she cannot represent others who may have such a claim, and her bid to serve as a class representative must fail"); *Hines v. Widnall*, 334 F.3d 1253, 1256 (11th Cir. 2003) (per curiam) ("'[A]t least one named class representative [must have] Article III standing to raise each class subclaim'") (citation omitted).

Moreover, Appellants' reliance on *NECA-IBEW* is misplaced because this Court made clear that *NECA-IBEW* concerned standing to assert securities claims based on offering documents that contained "'nearly identical misrepresentations'" against "an issuer [that] had issued multiple securities under the same shelf registration statement." *New Jersey Carpenters Health Fund v. Royal Bank of Scot. Grp., PLC*, 709 F.3d 109, 128 (2d Cir. 2013) (*quoting NECA-IBEW*, 693 F.3d at 162). Here, in contrast, Appellants' claims turn on atomized proof that hundreds of trustees failed to fulfill contractual and fiduciary duties under hundreds of different governing documents in a multitude of factually diverse circumstances.

In *NECA-IBEW*, investors in two RMBS trusts asserted securities claims on behalf of purchasers of securities with respect to additional trusts that they did not purchase on the basis of alleged false and misleading statements in the

common shelf registration statement. 693 F.3d at 149-54. This Court held that plaintiffs had "class standing" to bring claims with respect to securities that they did not purchase under a novel standard requiring a plaintiff to show (1) injury incurred as a result of the defendant's conduct, and that (2) "such conduct implicates 'the same set of concerns' as the conduct alleged to have caused injury to other members of the putative class by the same defendant." *Id*. at 162. In finding that the plaintiffs' securities claims implicated "the same set of concerns," this Court noted that the defendants were "alleged to have inserted nearly identical misrepresentations into the Offering Documents associated with all of the Certificates," including "the Shelf Registration Statement common to every Certificate's registration statement," and that the plaintiffs alleged a single course of misconduct-the defendant's alleged insertion of misrepresentations. *Id*. (original emphasis omitted).

First, this Court made clear that *NECA-IBEW* considered the issue of "whether the representative for a proposed class could bring claims under the '33 Act based on securities in which it had not invested." *Royal Bank*, 709 F.3d at 128. This Court clarified that its holding was limited to the circumstance in which a plaintiff, as the representative of a putative class, asserted securities claims based on offering documents that contained "'nearly identical misrepresentations'" against "an issuer [that] had issued multiple securities under the same shelf

registration statement." *Id.* (*quoting NECA-IBEW*, 693 F.3d at 162). This is a different case, involving a different defendant (a MBS trustee), different claims (contract, TIA and fiduciary claims) and different conduct (the alleged breach of contractual and fiduciary duties). Accordingly, *NECA-IBEW* is inapplicable.

Second, assuming, *arguendo*, that *NECA-IBEW* may apply outside the context of misrepresentation claims under the securities laws, Appellants' claims fail to satisfy this Court's "class standing" test. As an initial matter, the misconduct at issue in *NECA-IBEW* concerned misstated origination *practices* while the misconduct at issue here concerns an alleged failure to submit defective *loans* for repurchase. That the originator of the loans is the same is plainly insufficient-Appellants' claims are based on different loans, contracts, conduct and trusts and require individualized proof at each step of the way. Without any ostensible "glue"-such as "substantively identical misrepresentations" made in a single shelf registration statement-binding together the contract, TIA and fiduciary claims of the putative class, Appellants cannot demonstrate that their claims constitute the "same set of concerns" as the claims of the absent class members that purchased certificates issued by different trusts governed by different agreements and collateralized by different loans with different characteristics. Thus, Appellants must establish their claims by different and unique proof on a

loan-by-loan, contract-by-contract and trust-by-trust basis, defeating the commonality of interests required by *NECA-IBEW* for "class standing."[12]

A recent district court decision involving contract and TIA claims is instructive. In *Policemen's Annuity*, the court held that the plaintiff lacked standing to represent purchasers of certificates in which it did not invest with respect to claims against a trustee. 907 F. Supp. 2d at 547. The plaintiffs, like Appellants, sought to expand this Court's holding in *NECA-IBEW* to salvage their contract and TIA claims. In rejecting the plaintiffs' argument, the court held that the contract and TIA claims against a trustee, unlike the misrepresentation claims at issue in *NECA-IBEW*, did not implicate a single course of conduct or harm. *Id*. According to the court, "to the extent that the Trustee breached its duties, and such breach can be found to have caused a diminution of the value of a trust's MBS,

[12] Appellant's position also finds no support in *Gratz v. Bollinger*, 539 U.S. 244 (2003), on which this Court relied heavily in *NECA-IBEW*. In *Gratz*, the plaintiffs, potential transfers, challenged the use of racial preferences in the undergraduate transfer and freshman admissions policies of the University of Michigan. The court held that the "same set of concerns is implicated by the University's use of race in evaluating all undergraduate admissions applications under the guidelines" because, among other things, the university used the *same* guidelines to evaluate transfer and freshman applicants, the admissions guidelines for all applicants were set forth in a *single document*, and *identical criteria* were used to evaluate the diversity contribution for potential freshman and transfer applicants. *Id*. at 265-67.

there is no indication that the alleged breach would 'infect' the value of MBS from any other Trust and vice-versa." *Id.*[13] So, too, here.

C. Expanding *NECA-IBEW*'s Holding Will Encourage Abusive Class Actions And Damage The Capital Markets

The consequences of supersizing *NECA-IBEW*'s application to all MBS litigation cannot be overstated.[14] Already, members of the *Amici* face complex and costly MBS litigations concerning billions of dollars of loans. Allowing Appellants and plaintiffs' lawyers to completely unmoor their claims from Article III's requirements will open the gates to class actions of staggering scope and liability in contravention to the Supreme Court's rejection of "system-wide" class actions and mandate that class actions be limited to cases susceptible of class-wide damage measurements. Plaintiffs may assert class actions against MBS participants-including issuers, underwriters, servicers and trustees-with

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[13] In another recent decision, a district court held that plaintiffs have standing to bring contract and TIA claims against a trustee on behalf of purchasers of certificates in which they did not invest. *U.S. Bank*, 291 F.R.D. at 60. While the *Amici* respectfully submit that the decision in *U.S. Bank* is incorrect for all of the reasons stated here, the conflicting opinions in the district courts highlight the need for clarification from this Court that purchasers of certificates of one trust do not share the "same set of concerns" as purchasers of certificates of a different trust in which plaintiffs did not invest with respect to contract, TIA and fiduciary claims.

[14] This court's decision in *NECA-IBEW* already has greatly affected the securities industry as market participants struggle to assess their potential liability under the "class standing" standard. *Countrywide*, 2012 WL 5900973, at *10 (noting that *NECA-IBEW* has "thrown the jurisprudence in this area into disarray").

respect to *all* MBS trusts that the actor had issued, underwritten, serviced or administered, regardless of whether plaintiffs had purchased securities in those offerings and subject only to the applicable statutes of limitations.

Already, plaintiffs have used *NECA-IBEW* to resurrect dismissed claims and transform relatively modest actions into multi-billion dollar juggernauts.[15] An expansion of *NECA-IBEW* will exacerbate the revival of dismissed claims and supersizing of new actions in the context of MBS litigation that "has recently gotten a second wind and has expanded." *Mortgage-related cases may cost US banks up to $105 bln more: S&P*, Reuters.com, Nov. 26, 2013, http://www.reuters.com/article/2013/11/27/usbanks-litigation-sandp-idUSL4N0JC0P720131127.

Moreover, the consequences of Appellants' interpretation of *NECA-IBEW* extend well beyond MBS litigation. A few district courts have begun the

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[15] *See, e.g., New Jersey Carpenters Health Fund v. DLJ Mortg. Cap., Inc.*, 2013 WL 357615, at *8-9 (S.D.N.Y. Jan. 23, 2013) (doubling size of action); *New Jersey Carpenters Health Fund v. Residential Cap., LLC*, 8781, 2013 WL 1809767, at *3-5 (S.D.N.Y. Apr. 30, 2013) (reinstating securities from 49 offerings); *In re IndyMac Mortg.-backed Sec. Litig.*, 2013 U.S. Dist. LEXIS 103576, at *7-10 (S.D.N.Y. July 23, 2013) (reinstating securities from 42 offerings); *Plumbers' & Pipefitters' Local No. 562 Supp. Plan & Trust v. J.P. Morgan Accept. Corp. I*, 2012 WL 4053716, at *1 (E.D.N.Y. Sept. 14, 2012) (expanding action from 8 trusts to 30 trusts); *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 2013 WL 139556, at *2-3 (S.D.N.Y. Jan. 11, 2013) (expanding action from one trust to 14 trusts). The revived claims in *NECA-IBEW* transformed an action concerning "$500,000 in securities holdings into a class action worth billions of dollars." *Countrywide*, 2012 WL 5900973, at *12.

pernicious expansion of *NECA-IBEW* outside the context of misrepresentation-based securities claims and allowed dubiously constructed class actions to proceed with respect to contract, fiduciary duty and products liability claims.[16]

An increased scope and potential liability associated with MBS and other litigations may force defendants into "blackmail settlements" that are "induced by a small probability of an immense judgment." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). MBS settlements to date have been measured in the hundreds of millions and billions of dollars.[17] In the context

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[16] *See, e.g., U.S. Bank*, 291 F.R.D at 60-61 (allowing investors to assert contract and TIA claims against a trustee with respect to securities they did not purchase); *In re Harbinger Cap. Partners Funds Inv. Litig*., 2013 WL 5441754, at *7 (S.D.N.Y. Sept. 30, 2013) (allowing investors in hedge funds to assert derivative claims on behalf of funds in which they did not invest); *In re Frito-Lay N. Am., Inc. All Natural Litig*., 2013 WL 4647512, at *12 (E.D.N.Y. Aug. 29, 2013) (foregoing a "class standing" analysis altogether and allowing plaintiffs to bring product liability claims with respect to products they did not purchase); *see also In re Winstar Commc'ns Sec. Litig*., 290 F.R.D. 437, 450-52 (S.D.N.Y. 2013) (certifying class of stockholders and bondholders even though no plaintiffs had purchased bonds).

[17] *See, e.g., In re Bank of N.Y. Mellon*, No. 651786/2011 (N.Y. Sup. Ct. N.Y. Cty. June 29, 2011) ($8.5 billion); *In re Residential Cap., LLC*, No. 12-12020 (Bankr. S.D.N.Y. Dec. 17, 2013) ($2.1 billion); *Maine St. Ret. Sys. v. Countrywide Fin. Corp*., No. 2:10-cv-00302-MRP (C.D. Cal. June 25, 2013) ($500 million); Credit Suisse Group AG, SEC Form 6-K (Mar. 14 2013), http://www.sec.gov/Archives/edgar/data/1053092/000137036813000012/a130314-6k.htm (disclosing $400 million settlement of MBS litigation). Defendants also have entered into large settlements with governmental entities. *See, e.g*., Fed. Hous. Fin. Auth., *News Release: FHFA Announces $1.9 Billion Settlement with Deutsche Bank*, Dec. 20, 2013, http://www.fhfa.gov/webfiles/25898/

of a multi-billion dollar action involving dozens, if not hundreds, of MBS offerings, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial. . . . " *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975). Once a plaintiff survives a motion to dismiss, settlement leverage increases exponentially. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008) ("[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit could allow plaintiffs with weak claims to extort settlements from innocent companies").

Expanding *NECA-IBEW* also undermines legislative policy intended to diminish lawyer-driven litigation. For example, Congress enacted the Private Securities Litigation Reform Act ("PSLRA") as a mechanism to reduce "abuses of the class-action vehicle in litigation involving . . . securities," *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006), by "curb[ing] . . . lawyer driven litigation." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308,

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FHFADeutscheBankSettlementAgreement122013.pdf; Kurt Orzeck, Law360, *Wells Fargo Pays $335M To Settle Fannie, Freddie MBS Claims*, Nov. 6, 2013, http://www.law360.com/articles/486844/wells-fargo-pays-335m-to-settle-fannie-freddie-mbs-claims; Fed. Hous. Fin. Auth., *News Release: FHFA Announces $5.1 Billion in Settlements with J.P. Morgan Chase & Co.*, Oct. 25, 2013, http://www.fhfa.gov/webfiles/25649/FHFAJPMorganSettlementAgreement.pdf; UBS AG, SEC Form 6-K (July 22, 2013), http://www.sec.gov/Archives/edgar/data/1114446/000119312513308531/d572522d6k.htm (disclosing $885 million FHFA settlement).

320-22 (2007). The PSLRA also attempted to ease the pressure on defendants to "settle even unlikely or frivolous claims" in light of the "the cost of defending, coupled with potentially enormous liability" associated with class actions. *In re Boston Sci. Corp. Sec. Litig.*, 686 F.3d 21, 30 (1st Cir. 2012).

The application of the *NECA-IBEW* "class standing" doctrine to contract, TIA and fiduciary claims, and beyond, will further empower plaintiffs' attorneys, rather than interested investors, to seize control of MBS litigations and wield loosely connected class claims associated with staggering liability. Plaintiffs' lawyers will be incentivized to draft extremely broad complaints to assert the largest possible class undeterred by the relatively small interest held by named plaintiffs. Thus, lawyer-driven class actions, fueled by *NECA-IBEW* and unfettered by interested plaintiffs, may cause an explosion of the very abuses that prompted the PSLRA. *See Dabit*, 547 U.S. at 81 (documenting abuses including "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent'") (citation omitted).

The increased costs and liabilities imposed by an expanded *NECA-IBEW* may also diminish the participation of issuers, underwriters, trustees and servicers in MBS transactions, limiting the availability of services essential to the functioning of the capital markets and hindering the provision of mortgage credit.

These costs will be borne by the American economy at large as the "cost, initially borne by those who raise capital . . . gets passed along to the public." *SEC v. Tambone*, 597 F.3d 436, 452-53 (lst Cir. 2010) (Boudin, J., concurring) ("No one sophisticated about markets believes that multiplying liability is free of cost"). In this regard, the Supreme Court quoted this Court in its observation that "the possibility that unduly expansive imposition of civil liability 'will lead to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers. . . .'" *Blue Chips Stamps*, 421 U.S. at 739.

In addition, the costs of increased litigation may encourage firms and investors to exit the U.S. capital markets, stifling economic growth. *See, e.g., Stoneridge*, 552 U.S. at 164 (noting that U.S. litigation risk may drive foreign firms away from domestic capital markets); Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* 101 (2007), http://www.nyc.gov/html/om/pdf/ny_report_final.pdf ("foreign companies [are] staying away from US capital markets for fear that the potential costs of litigation will more than outweigh any incremental benefits of cheaper capital").

CONCLUSION

For the foregoing reasons, this Court should (i) grant the Cross-Appeal and reverse the portion of the Order applying the TIA to SEC-registered pass-through certificates, and (ii) deny the Appeal and affirm the portion of the Order denying standing to Appellants to bring claims with respect to securities that they did not purchase.

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New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) and 29(d) because it contains 8,222 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), half the allowed 16,500 words of the principal brief, pursuant to Fed. R. App. P. 28.1(e)(2)(B).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

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